THE

# LAW OF TRADE MARKS

AND THEIR

REGISTRATION AND MATTERS CONNECTED THEREWITH,

INCLUDING A CHAPTER ON GOODWILL,

THE

PATENTS, DESIGNS AND TRADE MARKS ACTS, 1883-8,

AND THE TRADE MARKS RULES AND INSTRUCTIONS THEREUNDER;

WITH

FORMS AND PRECEDENTS.

THE MERCHANDISE MARKS ACTS, 1887-94,

AND OTHER STATUTORY ENACTMENTS;

THE UNITED STATES STATUTES, 1870-82,

AND THE RULES AND FORMS THEREUNDER;

*AND THE TREATY WITH THE UNITED STATES*, 1877.

BY

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THE FOURTH EDITION

BY

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TO

The Memory of

# THE RIGHT HON. SIR GEORGE JESSEL,

*MASTER OF THE ROLLS,*

TO WHOM,

BY HIS KIND PERMISSION,

THE FIRST EDITION OF

This Work

WAS MOST RESPECTFULLY DEDICATED.

# PREFACE

TO

## THE FOURTH EDITION.

SINCE the third edition of this book was published many new decisions have been given with reference to matters relating to the registration of trade marks and also in actions for infringement and passing off. One of the most notable developments of the last few years has been the increase in the number of actions brought to enforce traders' common law rights, the reason, no doubt, being that persons who desire to engage in an unfair competition are usually sufficiently wary to avoid a direct imitation of registered trade marks, while yet contriving in other ways to divert to themselves custom not intended for them. The decisions in the "Yorkshire Relish" and "Camel Hair Belting" cases have greatly helped to give an impetus to this development, though it is necessary to read these decisions in the light of the more recent "Cellular Clothing" case.

The most important recent decisions relating to registration are probably the pronouncements as to the "person aggrieved" by a wrongful registration, which are to be found in the "Apollinaris" and "Yorkshire Relish" cases, and the statements by the House of Lords in the "Solio" case as to the meaning of the term "invented word." In view of the use made in that case by some of their Lordships of the Report of Lord Herschell's Committee, it has been thought useful to print in an Appendix the more important parts of that Report. Another addition which has for the first time been made in this edition, and which it is hoped may be of use, is a Table of Decisions under sect. 92 as to the alteration of registered marks. A large proportion of such decisions have never been reported, but are published in the Trade Marks Journal, with sufficient details to enable the marks altered to be identified.

As in the third edition, the Trade Marks Registration Acts, 1875-7, are reprinted; since, though they are repealed, the validity of trade marks registered under them still depends upon the terms of the Acts in force at the date of registration, and a reference to those Acts is frequently necessary in order to correctly appreciate the bearing of the earlier decisions.

In this edition, as in former editions, a large number of American and colonial decisions are cited, both because of the sale which this book has obtained in the United States and the Colonies, and also because of the increasing extent to which such decisions are cited in this country. "Although," as Cockburn, C. J., said (*a*), "the decisions of the American Courts are, of course, not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respect and confidence on our part." These decisions are, it is admitted, "intrinsically entitled to the highest respect" (*b*), having been delivered by acute and practised judges, after full consideration of English as well as American authorities; and it may reasonably be anticipated that English judges will in similar circumstances arrive at similar conclusions.

In order to avoid rendering the book unduly thick the size of the page has been enlarged, with the result that, notwithstanding the great increase in the matter dealt with, the handiness of the book remains practically unaltered.

The author desires to offer his grateful thanks to his coadjutor, Mr. Hemming, who has devoted great pains and attention to the preparation of this edition; also to Mr. W. H. Draper, of Lincoln's Inn, who has given much valuable help; to Mr. Ralph Griffin, Registrar of Trade Marks; to Sir W. Murton, of the Board of Trade, and others, for kind assistance.

L. B. S.

13, New Square, Lincoln's Inn,
*June*, 1899.

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(*a*) *Scaramanga* v. *Stamp*, 5 C. P. D. 295—303.
(*b*) See *per* Patteson, J., in *Beverley* v. *Lincoln Gas Light and Coke Co.*, 6 Ad. & Ell. 829-37, and Bacon, V.-C., in *Dawson* v. *Bank of Whitehaven*, 4 Ch. D. 639-48.

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Carron—Smith *v.*
Carter—R. *v.*
Case—Morrison *v.*
Cassin—Burke *v.*
Caswell—Hazard *v.*
Cathery—Farina *v.*
Cellonite Manufacturing Co.—Celluloid Manufacturing Co. *v.*
Central City Soap Co.—O'Rourke *v.*
Central Lard Co.—Fairbank (N. K.) Co. *v.*
Chadsey—Genin *v.*
Chadwick—Coats *v.*
Chadwick—Covell *v.*
Chandler—Cocks *v.*
Chaney—Hoxie *v.*
Chapman—Bullock *v.*
Chapman—Simpson *v.*
Chappell—Franke *v.*
Charbonnel—Robineau *v.*
Chatto & Windus—Poulett *v.*
Cheltenham Railway Co.—Gordon *v.*
Chemists' Co-operative Society, Ld.—Liebig's Extract of Meat Co. *v.*
Child—Filley *v.*
Chilworth Gunpowder Co.—Starey *v.*
Chooneeloll Mullick—Orr-Ewing *v.*
Christie—Christie *v.*
Clark—Canal Co. *v.*
Clark—Clark *v.*
Clark—Fennessy *v.*
Clarke—Anheuser Busch Brewing Association *v.*
Clarke—Rawlinson *v.*
Clarke—Spottiswoode *v.*
Clarke—Tipping *v.*
Clarke—Wylam *v.*
Cleave—McNair *v.*
Clements—Shipwright *v.*
Cleveland Stone Co.—Pike Manufacturing Co. *v.*
Closs—R. *v.*
Clybouw—Moet *v.*
Clyde—Winsor *v.*
Cocks—Brooks *v.*
Cohen—Choynski *v.*
Cohen—R. *v.*
Coker—Hitchcock *v.*
Cole—Popham *v.*
Cole—R. *v.*
Coleman—Radway *v.*
Collender—Phelan *v.*
Colley—Hart *v.*
Collicott—Hart *v.*
Collingridge—Cook *v.*
Collins—Crawshay *v.*
Colt's Patent Fire Arms Manufacturing Co.—Gally *v.*
Commander—Handy *v.*

Commerce—Miller Tobacco Manufactory *v.*
Commissioners of Inland Revenue—Potter *v.*
Comptroller-General—R. *v.*
Condy—Sanitas Co., Limited *v.*
Conhaim—Cigar Makers' Protective Union *v.*
Connecticut Mutual Life Insurance Co.—Barker *v.*
Connell—Bayer *v.*
Connolly—Baxter *v.*
Conservative Newspaper Co., Limited—Marks *v.*
Cooke—British Tea & Trading Association, Limited *v.*
Cooko Brewing Co.—Beadleston & Woerz *v.*
Cooper—Hennessy *v.*
Cooper & Co.—Ginesi *v.*
Cope—Dakin *v.*
Copeman's Patent Seat Raft and Marine Life-Saving Association, Limited—Roper's Patent Seat-Raft and Marine Life-Saving Apparatus Co. *v.*
Coplay—New York & Rosendale Cement Co. *v.*
Corcoran—Witt *v.*
Cordingley—Lyric Theatre, Limited *v.*
Cornwell—Morse *v.*
Coulson & Co.—Coulson & Sons *v.*
Courtenay—Mogford *v.*
Couston—Moet *v.*
Covell—Chadwick *v.*
Covert—Hutchinson *v.*
Cowen—Collins Co. *v.*
Cowie—Newton *v.*
Crabb—Blackwell *v.*
Crampton—R. *v.*
Craven—Moore *v.*
Crichton—Russell *v.*
Crowley—Thornton *v.*
Crowley—Walton *v.*
Crump—Colman *v.*
Cumston—Hallett *v.*
Curling—England *v.*
Currey—Robinson *v.*
Currey—Upmann *v.*
Currie—Wotherspoon *v.*
Cuthbert—Somervell Bros. *v.*
Cutter—Hardy *v.*

D'Albuquerque—Nunn *v.*
Daily—Thomson & Co. *v.*
Dalton—Oakey & Sons *v.*
Daly—Corwen *v.*
Daly—Isaacs *v.*
Daly—Wagner *v.*
Dano—Ottoman Cahvey Co. *v.*
Daniel—Rutter *v.*
Daniell & Sons' Breweries, Limited—Paine *v.*
Dannenhoffer—Huwer *v.*
Dark—R. *v.*
Darley—Hagg *v.*
Darling—Barsalou *v.*
Dart—Milliken *v.*
Davidson—Chappell *v.*
Davies—Dawes *v.*
Davis—Caswell *v.*
Davis—Davis *v.*
Davis—Mallan *v.*
Davis—Royal Baking Powder Co. *v.*
Davol Mills—Ferguson *v.*
Dawber—Bass *v.*
Dawson—Labouchere *v.*
Day—Clayton *v.*
Day—Croft *v.*
Day—Day *v.*
Day—Emperor of Austria *v.*
Day—Fennessy *v.*
Day—Goodyear Rubber Co. *v.*
Deakin—Lea *v.*
Dean—Civil Service Supply Association *v.*
Decker—Decker *v.*
De Conto—Stephens *v.*
Deere & Co.—Candee, Swan & Co. *v.*
De Lee—American Fibre Chamois Co. *v.*
De Long Hook & Eye Co.—De Long *v.*
Denham—Hirst *v.*
Denicke—Reeves *v.*
Dennis—Edwards *v.*
Depatie—Boudier *v.*
De Tasted—Brown *v.*
Devlin—Devlin *v.*
Dewes—Chissum *v.*
Dey—Swift *v.*
Diamond Steel Co.—Pittsburgh Crushed Steel Co. *v.*
Diaper—Orr *v.*
Dibrell—Blackwell *v.*
Dicey—Sayer *v.*
Dick—Mauger *v.*
Dickens—Bradbury *v.*
Dickerman—Manitowoc Manufacturing Co. *v.*
Dicks—Weldon *v.*
Dobell—Newling *v.*
Dobinson—Investor Publishing Co. of Massachusetts *v.*
Donald & Co.—Montgomerie & Co. *v.*
Dorflinger—Consolidated Fruit Jar Co. *v.*
Dorr—Iowa Seed Co. *v.*

Douglas—Churton *v.*
Douglas—Hammond *v.*
Downman—Motley *v.*
Downs—England *v.*
Drat—Ward *v.*
Dreyfus—Funke *v.*
Dubbins—Patching *v.*
Du Boulay—Du Boulay *v.*
Duncan—Hoffman *v.*
Duncans—Lipton Limited *v.*
Dundas—R. *v.*
Dunlop Lubricant Co., Limited—Dunlop Pneumatic Tyre Co. *v.*
Dunlop-Truffault Cycle & Tube Manufacturing Co.—Dunlop Pneumatic Tyre Co. *v.*
Dunn—Eno *v.*
Dunn—Thompson *v.*
D'Utassey—Faber *v.*

EAGLE—Pillsbury-Washburn Flour Mills Co. *v.*
Easterbrook—Saxby *v.*
Edelsten—Edelsten *v.*
Eddy—Hubinger (J. C.) Bros. Co. *v.*
Edgington—Edgington *v.*
Edgington (J.) & Co.—Edgington (B.), Limited *v.*
Edmonton—Clegg *v.*
Edwards—Apollinaris Co. *v.*
Ehlers—Siegert *v.*
Ehrhart—Lee *v.*
Eichele—Peltz *v.*
Einstein—Stewart *v.*
Electrolibation Co.—Sanche *v.*
Eli Pettijohn Cereal Co.—American Cereal Co. *v.*
Elkan—Edwards *v.*
Elkan—Upmann *v.*
Ellinger & Co.—Twentsche Stoom Bleekery Goor *v.*
Elliott—Whitstable (Free Fishers and Dredgers of) *v.*
Elsworth—R. *v.*
Elvery—De la Branchardière *v.*
Emery—Mickle *v.*
Emmott—Jaffray *v.*
Emmott—Walter *v.*
Employers' Liability Insurance Co.—Employers' Liability Assurance Corporation *v.*
Era Omnibus Association—London Road Car Co. *v.*
Erhard—Zimmerman *v.*
Ertheiler—Carroll *v.*
Escobal—Lacroix *v.*
Estcourt Hop Essence Co.—Estcourt *v.*
Esterbrook—Gillott *v.*
Eureka Chemical, &c. Co.—Sterling Remedy Co. *v.*
Evans—Brook *v.*
Evans—Cope *v.*
Evans—Lamb *v.*
Evans—Ratcliffe *v.*
Evans—Rose *v.*
Evans—Turner *v.*
*Evening Post*, Limited—Borthwick *v.*
Everett—Smith *v.*
Everitt—Price's Patent Candle Co. *v.*

FABER—Faber *v.*
Fadettes—Messer *v.*
Fair—Smith *v.*
Famous Shoe & Clothing Co.—Merriam *v.*
Farlow—Bozon *v.*
Farren—New Haven Patent Rolling Spring Bed Co. *v.*
Farrow & Co.—Colman (J. J.), Limited *v.*
Fassett—Filley *v.*
Fawcus—Dixon *v.*
Feder—Benkert *v.*
Fehr—Reiners Von Laer & Co. *v.*
Fellows—Dover Stamping Co. *v.*
Feltham & Co.—Slazenger & Sons *v.*
Felton—London General Omnibus Co., Limited *v.*
Fenwick—Featherstonhaugh *v.*
Field—Bonner *v.*
Field—Schauer *v.*
Finch—Day *v.*
Findlater—Raggett *v.*
Findlater—Siegert *v.*
Finlay—Battle & Co. *v.*
Finlay—Robinson *v.*
Finzer—Liggett & Myers Tobacco Co. *v.*
Fisher—People *v.*
Fisher—Seeley *v.*
Fitzgerald—R. *v.*
Flanagan—Matsell *v.*
Fleece Hygienic Underwear Co.—Jaros Hygienic Underwear Co. *v.*
Fleischmann—Fleischmann *v.*
Fleming—McLean *v.*
Fleming—Ralli *v.*
Flint—Leidersdorf *v.*
Floyd—Bowman *v.*
Folgham—Green *v.*
Footman—Blank *v.*
Footman, Pretty & Co.—Symington & Co. *v.*
Forester—Upmann *v.*
Foster—Burrows *v.*
Foster—Ford *v.*

Foster—R. *v.*
Foster Brewing Co., Limited—Christie *v.*
Fox—Millington *v.*
Français—Hobbs *v.*
Franks—Pierce *v.*
Frash—Von Mumm *v.*
Frazer Lubricator Co.—Frazer *v.*
Freeman—Browne *v.*
Freeman—Clark *v.*
Fries—Hostetter *v.*
Fullwood—Fullwood *v.*

Gallon—Edge & Sons, Limited *v.*
Gallus—Little *v.*
Game, Harrison & Larner, Limited—Hanson *v.*
Ganton—Lemoine *v.*
Gardner—Harrison *v.*
Garlick—R. *v.*
Garner—Amoskeag Manufacturing Co. *v.*
Garner—Merrimack Manufacturing Co. *v.*
Garnhart—McCartney *v.*
Garrett (T. H.) & Co.—Garrett *v.*
Gartner—Giron *v.*
Gateley—Reveliere *v.*
Gato—El Modello Cigar Manufacturing Co. *v.*
Gaubert—Ansell *v.*
Gebhardt—Farina *v.*
Geisendorf—Sohl *v.*
General Electric Co.—Wedekind *v.*
General Newspaper Co.—Dale *v.*
General Reversionary Co., Limited—Bumsted *v.*
German Mutual Fire Insurance Co.—Clark *v.*
Gertcken—Cory *v.*
Gibbings—Lee *v.*
Gibbons' Frame—Wilcox & Gibbs' Sewing Machine Co. *v.*
Gibbs—Missouri (State of) *v.*
Gibbon—Banks *v.*
Gillard—Cotton *v.*
Gillespie—Parsons *v.*
Gillet—Kenny *v.*
Gillies—Taylor *v.*
Gladstone—Steuart *v.*
Glenn—Dunbar *v.*
Glover—Leahy *v.*
Gobindram—Barlow *v.*
Godts—Nichol *v.*
Goetze—Carter *v.*
Gomm—Barrett *v.*
Goodall—Pirie *v.*
Goodbody—Lewis's *v.*
Goodrich Co.—Keller *v.*
Goodwin—Lever *v.*
Goodyear India Rubber Glove Manufacturing Co.—Goodyear Rubber Co. *v.*
Goss—Carey *v.*
Goss—R. *v.*
Goulard—Wolfe *v.*
Gould—Corbin *v.*
Graef—Saxlehner *v.*
Graham—Ransome *v.*
Grand Junction Railway Co.—Pickford *v.*
Grant, Smith & Co.—Orr-Ewing *v.*
Gratz—Hohner *v.*
Graves—Smale *v.*
Gray—Bullock, Lade & Co. *v.*
Gray—Wotherspoon *v.*
Gray & Gosling—R. *v.*
Great Northern Railway Co.—North London Railway Co. *v.*
Green—Duke *v.*
Greene—Symonds *v.*
Grieb—Gessler *v.*
Griffith—Chappell *v.*
Griffiths—Chubb *v.*
Griffiths—Corns *v.*
Griffiths—Wilkinson *v.*
Griffiths Cycle Corporation, Limited—Eastman Photographic Materials Co., Limited *v.*
Grocer Publishing Co.—American Grocer Publishing Association *v.*
Grosvenor—Seabury *v.*
Grosvenor Gallery Co.—Hoby *v.*
Guardian and General Assurance Co., Limited—Guardian Fire and Life Assurance Co. *v.*
Guénin—Grillon *v.*
Guest—American Tobacco Co. *v.*
Guggenheim—Dixon Crucible Co. *v.*
Guggenheimer—Parlett *v.*
Guittard—Pierce *v.*
Gullian—Dadirrian *v.*
Guy—Bunn *v.*

Haish—Washburn and Moen Manufacturing Co. *v.*
Haley—Lee *v.*
Hall—Gillis *v.*
Hall—Glen & Hall Manufacturing Co. *v.*
Hall—Hall *v.*
Hall—Haslam *v.*
Hall—Morse *v.*
Hall—R. *v.*
Hall & Co.—Perks *v.*
Hallam—Vernon *v.*
Halworth—Jones *v.*
Hamblin—Lehigh Valley Coal Co. *v.*

Hamel—Sarazin *v.*
Hamilton—Cooper *v.*
Hamilton—Dwight *v.*
Hampshire and North Wilts Bank—London and County Banking Co. *v.*
Hanbury—Liebig's Extract of Meat Co. *v.*
Hand—Worral *v.*
Harbord—Perry Davis & Son *v.*
Harper—Blackwell *v.*
Harper—Sparks *v.*
Harris—Godillot *v.*
Harris—Keene *v.*
Harris—Palmer *v.*
Harris—Smith *v.*
Harrison—Edge *v.*
Harrison—Flavel *v.*
Hart—Colley *v.*
Hart—Low *v.*
Hart—Wolfe *v.*
Hart-Davis—Hill *v.*
Hately—Burgess *v.*
Hawkins—Parkland Hills Blue Lick Waters Co. *v.*
Hawkins—Marshall *v.*
Hawley—Fielding *v.*
Hawxhurst—Walker *v.*
Hayward—Parsons *v.*
Hayward & Sons—Hayward & Co. *v.*
Hazard—Caswell *v.*
Hazard—Electro-Silicon Co. *v.*
Hazard—Godillot *v.*
Head—Walter *v.*
Heap—Guinness *v.*
Hecht—Klotz *v.*
Hegeman—Hegeman & Co. *v.*
Heinsfurter—Centaur Co. *v.*
Heisel—Adams *v.*
Helleley—Johnson *v.*
Helmbold Manufacturing Co.—Helmbold *v.*
Helsby—Coventry Machinists Co., Limited *v.*
Hemmons—Weston *v.*
Hendrickx—Laferme (Compagnie) *v.*
Henley—Rose *v.*
Henriques—Howard *v.*
Henry—Alexander & Co. *v.*
Henry—Mitchell *v.*
Henshaw—Ihlee *v.*
Henshaw—Steinway & Sons *v.*
Herbert—Cowie *v.*
Herbert & Co.—Upper Assam Tea Co. *v.*
Herrfeldt—Apollinaris Co. *v.*
Hertz—Salomon *v.*
Heyde—Bryant & May *v.*
Hickling—Whitney *v.*
Higgins Soap Co.—Charles S. Higgins Co. *v.*
High Rocks Congress Spring Co.—Congress and Empire Spring Co. *v.*
Highmoor—Caruncho *v.*
Hill—Batty *v.*
Hill—Blanchard *v.*
Hill—Thorneloe *v.*
Hills—Burgess *v.*
Hine—Portal *v.*
Hink—Eggers *v.*
Hinks—Rollins *v.*
Hirsch & Co.—Hirsch *v.*
Hirschfeld—Leather Cloth Co. *v.*
Hitchcock—Hopkins *v.*
Hockstaeder—Hiram Walker & Sons *v.*
Hodgart's Trustees—Donald *v.*
Hodge & Co.—Williams *v.*
Hodgson—Davies *v.*
Hodgson—Matthews *v.*
Hoffman—Sanders *v.*
Hogan—Hennessy *v.*
Hoge—Moorman *v.*
Hogg—Clowes *v.*
Hogg—Harrison *v.*
Hogg—Maxwell *v.*
Holbrook—Coats *v.*
Holden—Dixon *v.*
Hollender—Luyties *v.*
Hollins—Campbell *v.*
Holloway—Holloway *v.*
Holloway Publishing Co.—Merriam *v.*
Holmes, Booth & Atwood Manufacturing Co.—Holmes, Booth & Haydens *v.*
Holt—Aubin *v.*
Holt—Ryder *v.*
Home and Colonial Assurance Co.—Colonial Life Assurance Co. *v.*
Hood—Converse *v.*
Hood—Cooper *v.*
Hooper—Kelly *v.*
Hooper—Lavergne *v.*
Hoopes—Merry *v.*
Hoosier Drill Co.—Julian *v.*
Horn—Sawyer *v.*
Horowitz—Van Wyck *v.*
Horton Manufacturing Co.—Horton Manufacturing Co. *v.*
Houghton—Rowley *v.*
How—Pidding *v.*
How—Southern *v.*
Howard—Social Register Association *v.*
Howe—Whittaker *v.*
Howe Machine Co.—Howe *v.*
Hoxie—Chaney *v.*
Hoyt—Hoyt *v.*
Hubbard—Sawyer Crystal Blue Co. *v.*

Hughes—Bewlay & Co. *v.*
Hughes—Evans *v.*
Hulme—Heathcote *v.*
Hulton—Cowen *v.*
Humphrey—Peterson *v.*
Hunkele—Enoch Morgan's Sons' Co. *v.*
Hunnowell—Gilman *v.*
Hunt—Richards *v.*
Hunt—Trego *v.*
Hunter—R. *v.*
Huntington—Rudderow *v.*
Hutton—Kelly *v.*
Hygeia Sparkling Distilled Water Co.—Waukesha Hygeia and Mineral Springs Co. *v.*
Hynes—Liggett & Myers' Tobacco Co. *v.*

Imperial French Dye Cleaning and Dyeing Co., Limited—Thompson *v.*
Improved Fig Syrup Co.—California Fig Syrup Co. *v.*
Imus—Smith *v.*
Ingels—Hoosier Drill Co. *v.*
International Guide Syndicate &c.—Reuter's Telegram Co., Limited *v.*
International Loan & Trust Co.—International Trust Co. *v.*
Isaacson—Chatteris *v.*

Jackson—Dicks *v.*
Jackson—Dixon *v.*
Jacob Henkell Co.—Cuervo *v.*
Jacobus—Fairbanks *v.*
James—James *v.*
James—Newbery *v.*
James—Oldham *v.*
James—Spicer *v.*
Jamieson—Jamieson & Co. *v.*
Jaques—Jollie *v.*
Jarrett—Booth *v.*
Jay—Attenborough *v.*
Jebsen & Co.—Vulcan Match Manufacturing Co. *v.*
Jeffery—Spratt *v.*
Jenkins—Wade *v.*
Jennings—Jennings *v.*
Johnson—Edge *v.*
Johnson—Kidd *v.*
Johnson—Sohier *v.*
Johnson—Williams *v.*
Johnson & Co.—Ascough *v.*
Johnson & Co.—Barlow & Jones, Limited *v.*
Johnston—Byron (Lord) *v.*
Johnston—Wheeler *v.*
Johnston & Co.—Orr-Ewing & Co. *v.*
Jonas—Hirsch *v.*
Jones—Canham *v.*
Jones—R. *v.*
Jones—Symonds *v.*
Jones Brothers & Co.—Young *v.*
Joress—Henderson *v.*
Joseph R. Peebles' Sons' Co.—Krauss *v.*
Joseph Uhrig Brewing Co.—Conrad *v.*
Joshua—Mitchell & Co. *v.*
Judges—Talbot *v.*
June—Singer Manufacturing Co. *v.*
Junior Army and Navy Stores, Limited—Army and Navy Co-operative Society, Limited *v.*

Kahn—Cohn *v.*
Kalamazoo Buggy Co.—Myers *v.*
Kass—Hawloetz *v.*
Kaufmann—Hazzopulo *v.*
Keating—Stevens *v.*
Keen—Mellersh *v.*
Kellogg—Sawyer *v.*
Kendall—Davis *v.*
Kennedy—Davis *v.*
Kennett—Hennessy *v.*
Kerr, Dods & Co.—Graham & Co. *v.*
Ketcham—Weston *v.*
Kettle—Gillott *v.*
Kiechele—Buck's Stove and Range Co. *v.*
Kilburn & Co.—Balfour & Co. *v.*
Kimball—Singer Manufacturing Co. *v.*
Kimpton—Nicholls *v.*
Kinahan—Kinahan *v.*
King & Co.—Strachan & Co. *v.*
King & Co.—Wallace & Co. *v.*
Kinney—Hornbostel *v.*
Kinney Tobacco Co.—Ginter *v.*
Kirby—Hogg *v.*
Kirk—Copley *v.*
Klapproth—Lewis *v.*
Kleinhaus—Armstrong *v.*
Knight—Barrows *v.*
Knight, Stocks & Co.—Berliner Brauerei Gesellschaft Tivoli *v.*
Knos & Co.—Vulcan Match Manufacturing Co. *v.*
Knott—Prudential Assurance Co. *v.*
Knott—Welch *v.*
Knowles—Primrose Press Agency *v.*
Koch—Gray *v.*
Kraft, Meyer & Co.—Curtis, Harvey & Co. *v.*

Kutnow—Carlsbad *v.*
Kynoch, Ld.—Hodgson *v.*

La Belle Wagon Works—Fish Bros. Wagon Co. *v.*
Labrot—Pepper *v.*
Ladler—Jay *v.*
Laidlaw—Bass, Ratcliff & Gretton, Limited *v.*
Laight—Shrimpton *v.*
Lamar—Brewer *v.*
Lamb—Deiz *v.*
Lambert—Wood *v.*
Landauer—Cuervo *v.*
Landgraff—Stokes *v.*
Landon—Watkins *v.*
Landreth—Landreth & Sons *v.*
Lang & Co.—Wolfe *v.*
Langdon—Lewis *v.*
Langford & Co.—Great Tower Street Tea Co. *v.*
Larned — Lowell Manufacturing Co. *v.*
Larsen—Singer Manufacturing Co. *v.*
Lart—Hine *v.*
Latham & Co.—Blakey & Sons *v.*
Latimer—Carmichel *v.*
Lawes Chemical Manure Co.—Western Counties Manure Co. *v.*
Lawrence—Siegert *v.*
Lazar—Woodward *v.*
Lazarus—Rock *v.*
Lazenby—Lazenby *v.*
Lea—Foot *v.*
Leach—Clark *v.*
Le Barron—Magee Furnace Co. *v.*
Le Boutilliere—Jaeger's Sanitary Woollen System Co. *v.*
Lee—Kennedy *v.*
Lee—R. *v.*
Lennox—Crawford's Trustees *v.*
Le Page—Russia Cement Co. *v.*
Leslie—Estes *v.*
Leuchars—Barnett *v.*
Levine & Wood—R. *v.*
Levinstein—Renard *v.*
Levy—Electro-Silicon Co. *v.*
Levy—Fenton *v.*
Lewis—Field *v.*
Lewis—Larrabee *v.*
Lewis—Lewis's *v.*
Lewis—R. *v.*
Libby—Harrington *v.*
Libby—Hilsen *v.*
Liebig's Extract of Meat Co.—Anderson *v.*
Lincoln Gas Light and Coke Co.—Beverley *v.*
Lindner—Pneumatic Rubber Stamp Co., Limited *v.*
Linotype Co., Limited—Empire Type-Setting Machine Co. of New York *v.*
Lipton—R. *v.*
Liverpool Vinegar Co., Limited—Birmingham Vinegar Brewery Co., Limited *v.*
Lloyd—Hovenden *v.*
Lloyd—R. *v.*
Locke—Bell *v.*
Lockett—Lockett *v.*
Lockwood—Hill *v.*
Loftus—Rose *v.*
London and Provincial Joint Stock Life Assurance Co.—London and Provincial Law Assurance Society *v.*
London and Provincial Provident Association, Limited—Provident Association of London, Limited *v.*
London and Westminster Assurance Corporation—London Assurance *v.*
Loog—Singer Manufacturing Co. *v.*
Lopes & Co.—Jacoby & Co. *v.*
Lorsont—Leather Cloth Co. *v.*
Loveless—Whitfield *v.*
Lovett, J. T., & Co.—Hoyt *v.*
Low—Benbow *v.*
Lowell—Lawrence Manufacturing Co. *v.*
Lucas—Budd *v.*
Lucy—Falkinburg *v.*
Ludemann—Glen Cove Manufacturing Co. *v.*
Luke—Hop Bitters Manufacturing Co. *v.*
Lumphinnans Iron Co.—Lochgelly Co., Limited *v.*
Lund—Axmann *v.*
Lye—Cruttwell *v.*

McAdam—Morgan *v.*
McArthur—Lohmann *v.*
McBride—Smith *v.*
McCubbin—McCormick *v.*
McCulloch—Wilkie *v.*
McDonald—Hildreth *v.*
McGowan — McGowan Brothers' Pump and Machine Co. *v.*
McKernan—Howe *v.*
McKinley—Bennett *v.*
McMaster & Co.—Dickson *v.*
McNish—Cochrane *v.*
McNulty—Powell *v.*
McPherson—Potter *v.*
Macarthy—Allen *v.*

Mack—Shaw Stocking Co. *v.*
Mackinnon—Thompson *v.*
Mackintosh—Scott *v.*
Maclaughlin & Co.—Kirby *v.*
Macrae—Young *v.*
Maddick—Clement *v.*
Mahalaxmi Spinning and Weaving Co., Limited — Manockji Petit Manufacturing Co. *v.*
Maison Pinet—Pinet *v.*
Major—Turner *v.*
Malcolm, Brunker & Co.—Hammond *v.*
Malings—Slazenger *v.*
Maller—Kinney Tobacco Co. *v.*
Maneckji Shapurji Kabrak — Badische Anilin & Soda Fabrik *v.*
Manico—Barber *v.*
Maniere—Hunt *v.*
Mann — Great North of Scotland Railway Co. *v.*
Manoukion—R. *v.*
Marble—United States *v.*
Marks—Weinstock Lubina Co. *v.*
Marlborough Awl and Needle Co — New England Awl and Needle Co. *v.*
Marsh—Post *v.*
Marshall—Collard *v.*
Marshall—Gillespie & Co. *v.*
Marshall—Knott *v.*
Marshall—Marshall *v.*
Martien — Martha Washington Creamery Buttered Flour Co. *v.*
Martin—Morse *v.*
Mason—Denco *v.*
Mason—Mossop *v.*
Mason—Smith *v.*
Massam — Thorley's Cattle Food Co. *v.*
Masury — Brooklyn White Lead Co. *v.*
Mathie—Boswell *v.*
Maxfield—Wilson *v.*
Maxton & Murray—Cellular Clothing Co., Limited *v.*
Maxwell—Hogg *v.*
May—Cartier *v.*
May—Lacroix *v.*
Mayer—Del Valle *v.*
Mayo—Chase *v.*
Mège—Hatchard *v.*
Megevand—Foster *v.*
Meikle—Avery *v.*
Melachrino Egyptian Cigarette Co.—Melachrino (M.) & Co. *v.*
Melachrino (R.) & Co.—Melachrino (M.) & Co. *v.*
Mellis—Lichtenstein *v.*
Menck—Partridge *v.*
Meneely—Meneely *v.*
Menendez—Holt *v.*
Mercer—Brown *v.*
Merchant—Fetridge *v.*
Merchants' Joint Stock Bank, Limited—Merchant Banking Co. of London *v.*
Meriden Britannia Co. — Boardman *v.*
Meriden Britannia Co.—Goodman *v.*
Merkel—St. Louis Piano Manufacturing Co. *v.*
Merrick Thread Co.—Coats *v.*
Merrill—American Order of Scottish Clans *v.*
Messler—Curtiss *v.*
Metcalf — Anglo-Swiss Condensed Milk Co. *v.*
Metcalf—Cassidy *v.*
Metropolitan Board of Works—Cooper *v.*
Metropolitan Collar Co.— Union Paper Collar Co. *v.*
Meyer—Brown Chemical Co. *v.*
Meyer—India Rubber Comb Co. *v.*
Micalovitch, Fletcher & Co.—Société Anonyme de la Distillerie de la Bénédictine *v.*
Middleton—Vogeler Co. *v.*
Midland Railway Co.—King *v.*
Mihalovitch—Gilka *v.*
Mikolas—Hiram Walker & Sons *v.*
Milbourn—Bond *v.*
Millar—Lea *v.*
Miller—Cowan *v.*
Miller—Potter Drug and Chemical Co. *v.*
Miller—Scheuer *v.*
Miller—Thompson *v.*
Miller—White, G. G., Co. *v.*
Miller & Co.—Hurricane Patent Lantern Co. *v.*
Mills—Tweed *v.*
Mills, Johnson & Co.—Kidd & Co. *v.*
Mitchell—Condy *v.*
Mitchell—Garde *v.*
Mitchell—Rammelsberg *v.*
Mitchell—Rowland *v.*
Moat—Morison *v.*
Moffatt & Paige—Besant *v.*
Monne—Portuondo *v.*
Montague—Hendriks *v.*
Montgomery—Thompson *v.*
Moonelis—Strasser *v.*
Moore—Coppen *v.*
Moore—Hothersall *v.*
Moore—Merryweather *v.*
Moore—Montague *v.*
Moore—Tallcott *v.*
Morgan—Knott *v.*

Morgan—R. *v.*
Morley—Houlston *v.*
Morris—R. *v.*
Morris—United States *v.*
Morse—Alexander *v.*
Morson—Carnrick *v.*
Mortimer—Prowett *v.*
Moss—Boon *v.*
Moss—Morris *v.*
Mottram—Walker *v.*
Mowling—Neva Stearine Co. *v.*
Mudie—Avanzo *v.*
Mulligan—Littlejohn & Son *v.*
Munn's Patent Maizena & Starch Co.—National Starch Manufacturing Co. *v.*
Munro—Bain *v.*
Munsford & Gorman—Porter *v.*
Murphy—Christy *v.*
Myer—Brown Chemical Co. *v.*
Myers—Cave *v.*
Myers—Pennsylvania Salt Manufacturing Co. *v.*
Myers—Taendsticksfabriks Aktiebolaget Vulcan *v.*

Nairn — Linoleum Manufacturing Co. *v.*
Napper—Jackson & Co. *v.*
Nashawannuck Manufacturing Co. Bailly *v.*
National Folding Box Co., Limited—National Folding Box & Paper Co. *v.*
Neale—Day *v.*
New Incandescent Gas Lighting Co., Limited—Incandescent Gas Light Co., Limited *v.*
New York Publishing Co.—England *v.*
Newton—Fleming *v.*
Nine—Nebraska Loan & Trust Co. *v.*
Noah—Snowden *v.*
Norfolk—Peabody *v.*
Norman—Radde *v.*
Norris—Rivero *v.*
Norrish—Apollinaris Co. *v.*
North Cheshire & Manchester Brewery Co.—Manchester Brewery Co. *v.*
North Eastern News Association—South Hetton Colliery Co. *v.*
Norton—Bradley *v.*
Norton—Geary *v.*
Nowill—Rodgers *v.*

Oakes—Skinner *v.*
O'Brien—R. *v.*
O'Byrne—Hegeman & Co. *v.*
O'Connor—Woimershausen *v.*
Ogden—Phillips *v.*
Ogden—R. *v.*
Ogg—Harris *v.*
O'Hanlon—Watt *v.*
Ohio Coffee & Spice Co.—Lown *v.*
O'Meara—Reed *v.*
Oppenheim—Wittman *v.*
Oregon Central Railway Co.—Newby *v.*
Orr-Ewing & Co.—Johnston & Co. *v.*
Osborne—Hudson *v.*
Osborne—Williams *v.*
Osgerby—Hudson *v.*
Otard de Montebello Cognac Co., Limited—Otard, Dupuy & Co. *v.*
Owens—Bodega Co., Limited *v.*
Owl Cigar Co.—Cuervo *v.*

Paarl Berg Wine & Spirit Co.—Martell *v.*
Paine—Stevens *v.*
Pape—Curtis, Harvey & Co. *v.*
Parker—Meriden Britannia Co. *v.*
Parry—James *v.*
Parton, Son & Co.—Osborne, Garrett & Co. *v.*
Pastor Kneip Medicine Co.—Kathreiner's Malz Kaffee Fabriken, &c. *v.*
Payne—Blofeld *v.*
Peacock—Richardson *v.*
Peake—Boulnois *v.*
Pearce—Farr *v.*
Pearson—Harper *v.*
Pearson—Pearson *v.*
Peck—Jarvis *v.*
Peck—McCardel *v.*
Peck Bros. & Co.—Adee *v.*
Peek—Derry *v.*
Peel—Stephens *v.*
Pelsall Coal & Iron Co.—Barrows *v.*
Pemberton—R. *v.*
People—Cohn *v.*
Percival—Bassett *v.*
Perhamus—Morgan *v.*
Peters—Swift *v.*
Peterson—Weed *v.*
Peto—Ponsardin *v.*
Petter—Crookes *v.*
Petter—Mack *v.*
Phalon—Burnett *v.*
Philp—Rodgers *v.*
Philp's Executor—Philp's Executor *v.*
Photographic Co.—Pollard *v.*
Pickering—Moet *v.*
Piggott, Cockson & Co. — Anglo-Swiss Condensed Milk Co. *v.*

Piggott, Cockson & Co.—Schnitzer *v.*
Pigott—Slazenger *v.*
Pile—Pile *v.*
Pillow—Barnard *v.*
Pillsbury-Washburn Flour Mills Co. —Pillsbury *v.*
Pinkham—Marshall *v.*
Pinto—Newman *v.*
Pinto-Leite—Carver *v.*
Piper—Aikins *v.*
Pirie & Sons, Limited — Towgood Bros. *v.*
Piza — Anheuser Busch Brewing Association *v.*
Plant—Hipkins *v.*
Plate—Derringer *v.*
Plate—Graham *v.*
Pollard, Graham & Co. — Derby Photographic Dry Plate Co. *v.*
Ponce—Stachelberg *v.*
Pond—Stimpson *v.*
Pope—Frankau *v.*
Porter—Hecht *v.*
Pottage—Hookham *v.*
Potter—Heywood *v.*
Powell—Seltzer *v.*
Pozo—Solis Cigar Co. *v.*
Premier Tube Co., Limited—Premier Cycle Co., Limited *v.*
Prescott—Van Beil *v.*
Price—Henry *v.*
Pride—Lorillard *v.*
Priestley—R. *v.*
Prince—Goodfellow *v.*
Prince Manufacturing Co.—Prince Metallic Paint Co. *v.*
Prince Metallic Paint Co.—Prince Manufacturing Co. *v.*
Pritchard—Gee *v.*
Provezende—Seixo *v.*
Pullar—Pullar *v.*
Putnam — Californian Fig Syrup Co. *v.*

QUEEN—Mason *v.*
Quiddington—Robertson *v.*

RABBITS & SON—Fennessy *v.*
Radam—Alff *v.*
Ragg—R. *v.*
Randall (H. E.) Limited—Gamage (A. W.) Limited *v.*
Ratcliff—Woollam *v.*
Rawson—Baker *v.*
Ray—Leager *v.*
Raylton—Johnson *v.*
Raymond—Royal Baking Powder Co. *v.*
Read—Celluloid Manufacturing Co., Limited *v.*
Read—Giblett *v.*
Read—Mitchell *v.*
Reading Biscuit Co.—Huntley & Palmer *v.*
Reed—Connell *v.*
Reed—Milner *v.*
Reeves—Collins Co. *v.*
Reeves—Peru (Republic of) *v.*
Registrar of Trade Marks—Orr-Ewing *v.*
Rehder & Co.—Compania General de Tabacos *v.*
Reid—Davis *v.*
Reid Tobacco Co.—Liggett & Myers Tobacco Co. *v.*
Rendle & Co.—Rendle *v.*
Reynolds—Richter *v.*
Reynolds—Rosenthal *v.*
Reynolds—Smith *v.*
Reynolds—Southorn *v.*
Richards—Allen *v.*
Richardson—McDonald *v.*
Richardson & Co.—Read Bros. *v.*
Ridgway—R. *v.*
Riley—Cellular Clothing Co. Ld. *v.*
Riley—Singer Manufacturing Co. *v.*
Riley—Springhead Spinning Co. *v.*
Rindskopf—Frost *v.*
Roberts—Briton Life Association, Limited *v.*
Roberts—R. *v.*
Robertson—Thompson & Co. *v.*
Robinson—Atlantic Milling Co. *v.*
Robinson—Ward *v.*
Roche—United States *v.*
Rockwood—Osgood *v.*
Rodgers—Rodgers *v.*
Roebuck—R. *v.*
Roffey—Nixey *v.*
Rogers—Davis *v.*
Rogers—Morgan *v.*
Rogers—Rogers *v.*
Rogers & Spurr Manufacturing Co. —William Rogers Manufacturing Co. *v.*
Rogers (R. W.) Co.—William Rogers Manufacturing Co. *v.*
Rohmann, Osborne & Co.—Hennessy *v.*
Rolfe—Rolfe *v.*
Rollason—Heath *v.*
Rooke—Green *v.*
Rorke—Société des Huiles d'Olive *v.*
Ross—Cook & Bernheimer Co. *v.*
Ross—Marshall *v.*
Rottgen—Rodgers & Sons, Limited *v.*

Rouch—Burfield *v.*
Rouss—Philadelphia & Novelty Manufacturing Co. *v.*
Rowland—Atlantic Milling Co. *v.*
Rowland—Scott *v.*
Royden—Clover *v.*
Rubber Comb and Jewelry Co.—India Rubber Comb Co. *v.*
Ruffner—Dausman and Drummond Tobacco Co. *v.*
Rugby & Newbold Portland Cement Co.—Rugby Portland Cement Co., Limited *v.*
Rushton—Ayer *v.*
Russell—Londonderry (Marquis of) *v.*
Russia Cement Co.—Le Page *v.*
Rutherford—Llewellyn *v.*
Ruthin Soda Water Co.—Ellis & Sons *v.*
Rylands—Davenport *v.*

Salem Flouring Mills—Oliphant *v.*
Salmon—Morison *v.*
Salmon & Gluckstein—Kirshenboim *v.*
Samson—Steinthal *v.*
Sanders—Koehler *v.*
Sands—Woods *v.*
Sanitary Engineering and Ventilation Co.—Weaver *v.*
Sargood, Ewen & Co.—Moses *v.*
Saunders—Correspondent Newspaper Co. *v.*
Saunders—Walter Baker & Co. *v.*
Savournin—Tetlow *v.*
Schapp—Clotworthy *v.*
Schembri—Somerville *v.*
Scherer—Apollinaris Co. *v.*
Schlecht—White *v.*
Schmidt—Vonderbank *v.*
Schmincke—Schove *v.*
Schuckmann—Fleischmann *v.*
Schultz—Cady *v.*
Schultz—Carlsbad *v.*
Schultz—République Française *v.*
Schultz & Co.—Lautz Brothers *v.*
Schuyler—Morgan *v.*
Schwachhofer—Enoch Morgan's Sons' Co. *v.*
Schwenke—Schumacher & Ettlinger *v.*
Scott—Insurance Oil Tank Co. *v.*
Scott—Scott *v.*
Scott—Scott Stamp Coin Co. *v.*
Scottish Val de Travers Paving Co., Limited—Stuart & Co. *v.*
Searing—Howe *v.*
Sellers—Fulton *v.*
Senate—Sedon *v.*
Sewage Manure Co.—Native Guano Co., Limited *v.*
Seymour—South Carolina *v.*
Shakespear — Wheeler & Wilson Manufacturing Co. *v.*
Sharp—Clark *v.*
Sharpe Bros. Co.—Freeman Bros. *v.*
Shaver—Shaver *v.*
Shaw—Delondre *v.*
Shaw—Farina *v.*
Sheard—Chappell *v.*
Sheard—Hutchings *v.*
Sheffield Gas Consumers' Co.—Attorney-General *v.*
Sheldon—Roberts *v.*
Shepherd—Green *v.*
Sheppard—Chance *v.*
Sherrill — Royal Baking Powder Co. *v.*
Sherwood—R. *v.*
Shipman—Waterman *v.*
Shove—Thynne *v.*
Shuttleworth — McSymons' Stores, Limited *v.*
Shuttock—Crawford *v.*
Sibbald—Reid *v.*
Silver—Shendy *v.*
Silverlock—Farina *v.*
Silversides—R. *v.*
Simmons—Simmons Medicine Co. *v.*
Simms—Colburn *v.*
Simons—Jaros Hygienic Underwear Co. *v.*
Simpson—William Rogers Manufacturing Co. *v.*
Simpson—Wright *v.*
Sims—Coles *v.*
Sinclair—Hodgson *v.*
Singer Manufacturing Co.—Brill *v.*
Singer Manufacturing Co.—Nähmaschinen Fabrik, &c. *v.*
Singer Manufacturing Co.—Wilson *v.*
Sixbury—Smith *v.*
Slack—Ellen *v.*
Slade—Jeudwine *v.*
Sleep—R. *v.*
Sleeper—Frank *v.*
Sloan—American Grocery Co. *v.*
Smaggasgale—Davis *v.*
Smith—Burt *v.*
Smith—Dale *v.*
Smith—Evans *v.*
Smith—George *v.*
Smith—Glenny *v.*
Smith—Gray *v.*
Smith—Great Tower Street Tea Co. *v.*
Smith—Hargreaves *v.*
Smith—Helmore *v.*

Smith—Holt *v.*
Smith—Liverpool Household Stores Association *v.*
Smith—McMurdo *v.*
Smith—Munro *v.*
Smith—R. *v.*
Smith—Russell & Sons, Limited *v.*
Smith—Smith *v.*
Smith—Wedgwood *v.*
Smithson—Dale *v.*
Smithson—Stewart *v.*
Snook—Apollinaris Co. *v.*
Soares—Beazley *v.*
Société des Huiles d'Olive—Rorke *v.*
Sœurs de l'Asile de la Providence—Kerry *v.*
Somborn—Actien Gesellschaft Apollinaris Brunnen *v.*
Souvazoglu—Harter *v.*
Spalding—Reinhardt *v.*
Spear — Amoskeag Manufacturing Co. *v.*
Spear—Fowle *v.*
Spence—Singer Manufacturing Co. *v.*
Spence—Williams *v.*
Stanage — Singer Manufacturing Co. *v.*
Starkey—Fleischmann *v.*
Starkweather—Cook *v.*
Stearns—Californian Fig Syrup Co. *v.*
Steffens—United States *v.*
Stephens—Eno *v.*
Stephenson—Caruncho *v.*
Stephenson—Gamble *v.*
Stetson—Town *v.*
Stevens—Hunt *v.*
Stevens—R. *v.*
Stewart (F. G.) Co.—Stuart *v.*
Stiff—Ingram *v.*
Stiff & Sons—Weaver *v.*
Stitt—Gebbie *v.*
Stock—Blair *v.*
Stoddart—Champlin *v.*
Stonebraker—Stonebraker *v.*
Strange—Albert (Prince) *v.*
Stratton—Burton *v.*
Stribolt & Co.—Davis & Co. *v.*
Stuart & Peterson—Sheppard & Co. *v.*
Stucky—Harris Drug Co. *v.*
Sturgess & Co.—Packham & Co., Limited *v.*
Such—Clement *v.*
Sullivan—Byass *v.*
Sullivan, Powell & Co.—Benedictus *v.*
Sun Life Assurance Co. of Canada—Saunders *v.*
Sunley—R. *v.*
Suter & Coulson—R. *v.*
Sweet—Archbold *v.*
Swezey & Dart—Josselyn *v.*
Swinborne—Gridley *v.*
Swiss Condensed Milk Co.—Anglo-Swiss Condensed Milk Co. *v.*
Sykes—Sykes *v.*
Symonds—Thompson *v.*

Taintor—Rogers *v.*
Tandem Smelting Co.—Magnolia Metal Co. *v.*
Taper Sleeve Pulley Works—Gray *v.*
Tapper—Tetlow *v.*
Tarrant & Co.—Hoff *v.*
Tate—Burnett *v.*
Taylor—Backus *v.*
Taylor—Harrison *v.*
Taylor—Taylor *v.*
Taylor & Co.—Condy & Mitchell *v.*
Taylor Drug Co.—Californian Fig Syrup Co. *v.*
Taylor Drug Co.—Humphries *v.*
Teede—India & China Tea Co. *v.*
Temperley—Jarrahdale Timber Co., Limited *v.*
Tennessee Manufacturing Co.—Lawrence Manufacturing Co. *v.*
Texas Siftings Publishing Co.—Merriam *v.*
Thackeray—Carlsbad *v.*
Thalheimer—Sternberger *v.*
Thayer — Airbrush Manufacturing Co. *v.*
Theal—McCall *v.*
Thedford—Chattanooga Medicine Co. *v.*
Theodorian—Dadirrian *v.*
Thomas—Chinn *v.*
Thomas—Colton *v.*
Thomas—Wilmer *v.*
Thompson—Carbolic Soap Co. *v.*
Thompson—Crawshay *v.*
Thompson—Isaacson *v.*
Thompson—Mackinnon *v.*
Thomson—Batchelor *v.*
Thorley's Cattle-Food Co.—Massam *v.*
Tibbetts—Carlsbad *v.*
Till—Coslake *v.*
Todd—Partlo *v.*
Toland—Scoville *v.*
Toler—Bischop *v.*
Tonsey—Munro *v.*
Tonsmierre—Oakes *v.*
Toupin—Kerry *v.*
Townsend—Page *v.*
Trades & Labour Unions (Shipping, &c.) Federation—Pink *v.*
Trainer—Amoskeag Manufacturing Co. *v.*
Trask—Electro-Silicon Co. *v.*

Trester—Labbatt *v.*
Tripp—Longman *v.*
Triticine, Limited—Meaby & Co. *v.*
Trott—Pinto *v.*
Troxell—Enoch Morgan's Sons' Co. *v.*
Truefitt—Perry *v.*
Trust—Gouraud *v.*
Trustees of Port of Bombay—Shepherd *v.*
Tudor—Tudor *v.*
Tuerk—Tuerk Hydraulic Power Co. *v.*
Turnbull—Gravel Roofers' Exchange *v.*
Turner—Beard *v.*
Turpin—Dent *v.*
Turton—Turton & Sons, Limited *v.*
Tussaud—Tussaud *v.*
Tylor—Davis *v.*
Tynberg—Messerole *v.*

Uhler—Glendon Iron Co. *v.*
Ullmer—Guinness *v.*
Union Bank of Spain and England—Street *v.*
Union Playing Card Co.—New York Consolidated Card Co. *v.*
United States, Woodman *v.*
Ury—Carson *v.*

Valencia Cigar Factory—McVeagh *v.*
Valentine—Valentine *v.*
Van Dulken—De Kuyper *v.*
Van Nostrand—Dougherty *v.*
Van Schaick—Marten *v.*
Van Vorst—Hostetter Co. *v.*
Venning—Goodwin *v.*
Vick—Edelsten *v.*
Vining—Nuthall *v.*
Virasami—Taylor *v.*
Von Laer—Evans *v.*

Wackerbarth—Gail *v.*
Wadsworth—Hiram Holt Co. *v.*
Wagner—Lumley v.
Waitt—Levy *v.*
Walker—Allsopp v.
Walker—Cheavin *v.*
Walker—Collins Co. *v.*
Walker—Levy *v.*
Walker—Reynolds & Son *v.*
Wallace—Cleveland Stone Co. *v.*
Wallis—R. *v.*
Wallis—Wallis *v.*
Walls—Day *v.*
Walmsley—Ainsworth *v.*
Walter—Polhill *v.*
Ward—Colnaghi *v.*
Ward—Idris & Co. *v.*
Ward—Mulkern *v.*
Ward—Tonge *v.*
Ward & Co.—Spratt's Patent *v.*
Ware Tobacco Works—Wellman & Dwire Tobacco Co. *v.*
Waring—Wason *v.*
Warner—Warner *v.*
Warren Thread Co.—Warren *v.*
Waters—Buckingham *v.*
Watson—Cooper *v.*
Watson—Marshall *v.*
Wattles—Binninger *v.*
Way—Goodman *v.*
Weaver—Franks *v.*
Webber—Angier *v.*
Webley—Talbot *v.*
Webster—Lucke *v.*
Webster—Routh *v.*
Webster—Webster *v.*
Wedderburn—Wedderburn *v.*
Weeks—Lafean *v.*
Weild—Wren *v.*
Welch—Vickery *v.*
Weller—Fradella *v.*
Wells—Fetridge *v.*
Wells & Co.—Leonard & Ellis *v.*
Welsh—Sorg *v.*
Wendover—Enoch Morgan's Sons' Co. *v.*
Wenz—Humphreys' Specific Homœopathic Medicine Co. *v.*
Westcott—Hanford *v.*
Western Distilling Co.—Société Anonyme *v.*
Western Distilling Co.—Société Anonyme de la Distillerie de la Liqueur Bénédictine, &c. *v.*
Western Electric Co.—Leclanche Battery Co. *v.*
Westhead—Cartier *v.*
Westlake—Watson *v.*
Wharton—Hop Bitters Manufacturing Co. *v.*
Wheatcroft—Allsopp *v.*
Wheeler—Hennessy *v.*
Wheeler—Lauferty *v.*
Whelan—Goldstein *v.*
Whitaker—Darbey *v.*
White—Barrett *v.*
White—Comstock *v.*
White—Hennessy *v.*
White—Lazenby *v.*
White—Mellin *v.*
White—R. *v.*
White's Golden Lubricator Co.—Leonard & Ellis *v.*
Whitehead—Bryson *v.*

Whitehouse—Daniel *v.*
Whiteman—Degraves *v.*
Whitmore—Jacoby *v.*
Whitwell—Standish *v.*
Wight—Lorillard *v.*
Wilcox—Popham *v.*
Wilder—Laird *v.*
Wilder—Wilder *v.*
Wilkes—Dayton *v.*
Wilkes—Roworth *v.*
Wilkinson—Goodall *v.*
Wilkinson, Heywood & Clark, Limited—Hubbuck & Sons, Limited *v.*
William Dobbin & Co.—Wright, Crossley & Co. *v.*
William Listman Milling Co.—Listman Mill Co. *v.*
William Rogers Manufacturing Co.—Rogers *v.*
Williams—Elsas *v.*
Williams—Estes *v.*
Williams—McCord *v.*
Williams—Schneider *v.*
Williams—Thomas *v.*
Williams—Williams *v.*
Williams Manufacturing Co.—Noera *v.*
Williamson—Richards *v.*
Willis—R. *v.*
Willmott—R. *v.*
Wilson—Apollinaris Co. *v.*
Wilson—Singer Manufacturing Co. *v.*
Wilson—Williams *v.*
Winchester—Graveley *v.*
Winchester—Longman *v.*
Winchester—Thomson *v.*
Winkup—Showell *v.*
Winsor—Stetson *v.*
Winyard—Youatt *v.*
Witteman—De Kuyper *v.*
Wittemann—Von Mumm *v.*
Wittkowski—Heyde *v.*
Wolmershausen, G. S., & Co., Limited—Wolmershausen *v.*
Wood—Manhattan Medicine Co. *v.*
Wood—Metzler *v.*
Woodhouse—Green *v.*
Woodruff—Smith *v.*
Woodside—Alleghany Fertiliser Co. *v.*
Woodward—Stoughton *v.*
Woolf—Lea *v.*
Woolf—Woolf *v.*
Worden, E., & Co.—Californian Fig Syrup Co. *v.*
Worrell—Morse *v.*
Worth—Pierce *v.*
Worthington—Estes *v.*
Wright—Blackwell *v.*
Wright—Heath *v.*
Wright—Martin *v.*
Wright—Phalon *v.*
Wright—Simpson *v.*
Wright & Butler Lamp Manufacturing Co., Limited—John Harper & Co., Limited *v.*
Wright, Crossley & Co.—Royal Baking Powder Co. *v.*

Yacubian—Dadirrian *v.*
Yale—Yale Cigar Manufacturing Co. *v.*
Yates—Dicks *v.*
Young—Dreydoppel *v.*
Young & Sons—Dunnachie *v.*

Zeilen & Co.—Ellis *v.*
Ziemer—Grezier *v.*

# TABLE OF ABBREVIATIONS.

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|---|---|
| A. C. (preceded by 1891, or as the year may be). | Law Reports, Appeal Cases (current series). |
| A. J. ..... | Australian Jurist. |
| A. L. T. ..... | Albany (Australia) Law Times. |
| Abb. N. C. ..... | Abbott's New Cases (New York). |
| Abb. P. R. ..... | 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. |
| Am. St. Rep. ..... | American State Reports. |
| Amer. Dec. ..... | American Decisions. |
| Amer. Rep. ..... | American Reports. |
| App. Cas. ..... | Appeal Cases. |
| App. Div. N. Y. ..... | Appeal Division (New York) Reports. |
| 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). |
| Barnard. ..... | Barnardiston. |
| Beav. ..... | Beavan. |
| Bell ..... | Bell's Crown Cases. |
| Beng. L. R. App. ..... | Bengal Law Reports, Appendix. |
| Bing. ..... | Bingham. |
| Biss. ..... | Bissell (U. S. Circuit Court). |
| Bl. C. C. ..... | Blatchford (U. S. Circuit Court). |
| Bomb. ..... | Bombay. |
| Bond ..... | Bond (U. S. Circuit Court). |
| Bos. ..... | Boswell (New Cases). |
| Bos. & P. N. R. ..... | Bosanquet and Puller's New Reports. |
| Brews. ..... | Brewster (Pennsylvania). |
| Browne ..... | Browne (Massachusetts). |
| Bush ..... | Bush (Kentucky). |
| C. A. ..... | Court of Appeal. |
| 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. & M. ..... | Carrington and Marshman. |

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| C. & P. ..... | Carrington and Payne. |
| C. L. Rep. ..... | Common Law Reports. |
| C. P. ..... | Common Pleas. |
| C. P. Coop. ..... | C. P. Cooper. |
| C. P. D. ..... | Common Pleas Division. |
| Cab. & Ell..... | Cababé and Ellis (Nisi Prius). |
| Cal. ..... | California Reports. |
| Calc. ..... | Calcutta. |
| Camp. ..... | Campbell. |
| Can. ..... | Canada. |
| Can. Leg. News ..... | Canada Legal News. |
| Cass. Dig. ..... | Cassell's Canadian Digest. |
| Ch. (preceded by 1891, or as the year may be). | Law Reports, Chancery Division (current series). |
| Ch. D..... | Chancery Division. |
| Chitty Gen. Pr..... | Chitty's General Practice. |
| Cinc. ..... | Cincinnati Reports. |
| Cinc. L. B..... | Cincinnati Legal Bulletin. |
| Cl. & Fin. ..... | Clark and Finnelly. |
| Codd. Dig. ..... | Coddington's American Digest of Trade Mark Cases. |
| Col. ..... | Colorado Reports. |
| Comm. ..... | Commissioner. |
| Comm. of App. ..... ..... | Commission of Appeals (New York). |
| Conn. ..... | Connecticut Reports. |
| Coop. ..... | Cooper. |
| Cor..... | Coryton (Bengal). |
| Cox ..... | Cox's Criminal Cases. |
| R. Cox ..... | R. Cox's American Trade Mark Cases. |
| Cro..... | Croke. |
| Cro. Jac..... | Croke's King's Bench Reports temp. James I. |
| Ct. of App..... | Court of Appeal. |
| Ct. of Cl. ..... | Court of Claims (U. S.). |
| Ct. of Sess. Cas. ..... | Court of Session Cases (Scotch). |
| Curtis ..... | Curtis (U. S. Circuit Court). |
| 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. |
| Den. ..... | Denison, Crown Cases. |
| Dig..... | Sebastian's Digest of Cases of Trade Mark, &c. |
| Dill. ..... | Dillon (U. S. Circuit Court). |
| Dorion ..... | Quebec Q. B. Reports. |
| Doug. ..... | Douglas. |
| Dr. ..... | Drewry. |
| Dr. & Sm. ..... | Drewry and Smale. |
| Duer ..... | Duer (New York). |
| E. & B. ..... | Ellis and Blackburn. |
| East P. C. ..... | East's Pleas of the Crown. |
| Ell. & Ell. ..... | Ellis and Ellis. |
| Eq. Rep..... ..... | Equity Reports. |
| Esp. N. P. C..... | Espinasse, Nisi Prius Cases. |
| Ex. ..... | Exchequer. |
| F. & F. ..... | Foster and Finlason. |

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| Fed. Rep. | Federal Reporter (U. S.). |
| Fla. | Florida Reports. |
| Foster Cr. Cas. | Foster, Crown Cases. |
| Ga. | Georgia Reports. |
| Giff. | Giffard. |
| Grant, Up. Can. Ch. | Grant, Upper Canada, Chancery. |
| Green | Green, New Jersey. |
| H. & M. | Hemming and Miller. |
| H. & N. | Hurlstone and Norman. |
| H. & Tw. | Hall and Twells. |
| H. & W. | Harrison and Wollaston. |
| H. L. | House of Lords. |
| H. L. C. | House of Lords Cases. |
| 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). |
| Hyde | Hyde (Bengal). |
| Ill. | Illinois. |
| Ind. | Indiana Reports. |
| Ind. L. R. | Indian Law Reports. |
| Iowa | Iowa State Reports. |
| I. R. (preceded by 1894, or as the year may be). | Irish Reports (current series). |
| Ir. Ch. | Irish Chancery. |
| Ir. Eq. | Irish Equity. |
| Ir. Jur. | Irish Jurist. |
| J. & H. | Johnson and Hemming. |
| J. & S. | Jones and Spencer (New York). |
| J. P. | Justice of the Peace. |
| 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 Reports. |
| Kyshe | Straits Settlements Reports. |
| L. C. | Lord Chancellor. |
| L. JJ. | Lords Justices. |
| 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, Magistrate's Cases. |
| L. J. N. of C. | 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. Ex. | Law Reports, Exchequer. |

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| L. R. H. L. ..... | Law Reports, House of Lords (English and Irish). |
| L. R. Ir..... | Irish Law Reports. |
| L. R. P. C..... | Law Reports, Privy Council. |
| L. R. Q. B. ..... | Law Reports, Queen's Bench. |
| L. T. ..... | Law Times Reports. |
| L. T. (Journal)..... | Law Times Notes of Unreported Cases. |
| L. & C. ..... | Leigh and Cave, Crown Cases. |
| La. Ann. ..... | Louisiana Annual Reports. |
| Lans. ..... | Lansing (New York). |
| Lath. ..... | Lathrop (Massachusetts). |
| Leach ..... | Leach, Crown Cases. |
| Leg. Obs. ..... | Legal Observer. |
| M. M. A. ..... | Merchandise Marks Act, 1887. |
| M. R. ..... | Master of the Rolls. |
| M. & Rob. ..... | Moody and Robinson. |
| M. & W..... | Meeson and Welsby. |
| Mac. & G. ..... | Macnaghten and Gordon. |
| McCrary..... | McCrary (U. S. Circuit Court). |
| McLean ..... | McLean (U. S. Circuit Court). |
| Mad. ..... | Madras. |
| Madd. ..... | Maddock. |
| Man. & G. ..... | Manning and Granger. |
| Mass. ..... | Massachusetts Reports. |
| Md. ..... | Maryland. |
| Me. ..... | Maine. |
| Mer. ..... | Merivale. |
| Mich. ..... | Michigan Reports. |
| Mich. C. C..... | Michigan Circuit Court. |
| Mich. N. P. ..... | Michigan Nisi Prius Reports. |
| Minn. ..... | Minnesota Reports. |
| Mo. ..... | Missouri Reports. |
| Mo. App. ..... | Missouri Appeals Reports. |
| Mod. ..... | Modern Reports. |
| Mont. D. & De G..... | Montague, Deacon and De Gex. |
| Monthly L. R. ..... | Monthly Law Reports (Boston). |
| Moo. P. C..... | Moore's Privy Council Cases. |
| My. & Cr. ..... | Mylne and Craig. |
| N. C. *or* N. Car. ..... | North Carolina Reports. |
| N. J. (*Eq.*)..... | New Jersey (Equity). |
| N. P. ..... | Nisi Prius. |
| N. R. ..... | New Reports. |
| N. S. ..... | New Series. |
| N. S. W. Rep. (E.) ..... | New South Wales Reports, Equity. |
| N. Y. ..... | New York Court of Appeals Reports. |
| N. Y. Sup. Ct. ... ..... | New York Supreme Court Reports. |
| N. Y. Super. Ct. ..... | New York Superior Court Reports. |
| N. Z. ..... | New Zealand Reports. |
| N. & M..... | Neville and Manning. |
| N. & P. ..... | Neville and Perry. |
| Neb. ..... | Nebraska Reports. |
| O. S. ..... | Old Series. |
| Ohio St. ..... | Ohio State Reports. |
| Ont..... | Ontario Reports. |
| Oreg. ..... | Oregon Reports. |
| P. R. ..... | Patent Office Reports. |
| Pa. *or* Penn. St. ..... | Pennsylvania State Reports. |
| Pac. C. L. J..... | Pacific Coast Law Journal. |
| Paige ..... | Paige (New York). |

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| Peake | Peake, Nisi Prius Cases. |
| Pemb. | Pemberton on Judgments. |
| Penn. L. J. | Pennsylvania Law Journal. |
| Ph. | Phillips. |
| Phila. | Philadelphia Reports. |
| Pick. | Pickering (Massachusetts). |
| Post | Post (Missouri). |
| Q. B. | Queen's Bench. |
| Q. B. (preceded by 1891, or as the year may be). | Law Reports, Queen's Bench Division (current series). |
| Q. B. D. | Queen's Bench Division. |
| Queens. L. J. Rep. | Queensland Law Journal Reports. |
| R. I. | Rhode Island Reports. |
| R. & M. | Russell and Mylne. |
| Robertson | Robertson (New York). |
| Russ. | Russell. |
| Ry. Cass. | Railway Cases. |
| S. & S. | Simons and Stuart. |
| Sandf. Ch. | Sandford's Chancery Reports (New York). |
| Sandf. S. C. | Sandford's Supreme Court Reports (New York). |
| Sawy. | Sawyer (U. S. Circuit Court). |
| Scot. L. Rep. | Scottish Law Reporter. |
| Scott, N. R. | Scott's New Reports. |
| Seton | Seton on Decrees. |
| Sickels | Sickels (New York). |
| Sim. | Simons. |
| E. D. Smith | E. D. Smith (New York). |
| Sol. J. | Solicitor's Journal. |
| St. Dig. | Stephens' Digest of Canadian Cases. |
| Story | Story (U. S. Circuit Court). |
| Sup. Ct. | Supreme Court. |
| Super. Ct. | Superior Court. |
| Swanst. | Swanston. |
| T. M. A. | Trade Marks Registration Act. |
| T. R. | Term Reports. |
| Tex. | Texas Reports. |
| 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. | United States Supreme Court Reports. |
| 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. Sup. Ct. | United States Supreme Court. |
| V. & B. | Vesey and Beames. |
| V.-C. | Vice-Chancellor. |
| V. L. R. Eq. | Victoria Law Reports (New Series) Equity. |
| V. R. Eq. | Victoria Reports (First Series) Equity. |
| Va. | Virginia Reports. |
| Ves. | Vesey. |
| Vt. | Vermont Reports. |
| W. N. | Weekly Notes. |
| W. R. | Weekly Reporter. |
| W. Va. | West Virginia Reports. |
| 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). |

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| W. A'B. & W. Eq. ..... | Webb, A'Beckett and Williams' Victoria Reports (Equity). |
| Wallace ..... | Wallace (U. S. Supreme Court). |
| Wall., Jr. ..... | Wallace, Junior (U. S. Circuit Court). |
| Washb. ..... | Washburn (Vermont). |
| Webs. P. C. ..... | Webster, Patent Cases. |
| Wend. ..... | Wendell (New York). |
| West. L. J. ..... | Western Law Journal. |
| Wils. ..... | Wilson. |
| Wils. (Ind.) ..... | Wilson's Indianapolis Reports. |
| Wisc. ..... | Wisconsin Reports. |
| Wood. & M. ..... | Woodbury and Minot (U. S. Circuit Court). |
| Y. & C. Ch. ..... | Younge and Collyer's Chancery Reports. |

THE

# LAW OF TRADE MARKS.

## CHAPTER I.

### GENERAL INTRODUCTION.

General principle of trade mark law.

The general principle upon which the Courts exercise jurisdiction in the case of trade marks is, that "a manufacturer who produces an article of merchandise which he announces as one of public utility, and who places upon it a mark by which it is distinguished from all other articles of a similar kind, with the intention that it may be known to be of his manufacture, becomes the exclusive owner of that which is henceforth called his trade mark. By the law of this country—and the like law prevails in most other civilised countries—he obtains a property in the mark which he so affixes to his goods. The property thus acquired by the manufacturer, like all other property, is under the protection of the law, and for the invasion of the right of the owner of such property the law affords a remedy similar in all respects to that by which the possession and enjoyment of all property is secured to the owners" (*a*). "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 manufacture of another person" (*b*). "Supposing the rival trader to have obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods, or from the higher price which the

(*a*) *Per* Bacon, V.-C., in *Ransome* v. *Graham*, 51 L. J. Ch. 897.

(*b*) *Per* Lord Langdale, M. R., in *Perry* v. *Truefitt*, 6 Beav. 66.

public are willing to give for them, rather than for the goods of other manufacturers whose reputation is not so high. Where, therefore, a manufacturer has been in the habit of stamping the goods which he has manufactured with a particular mark or brand, so that thereby persons purchasing goods of that description know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp. By doing so he would be substantially representing the goods to be of the manufacture of the manufacturer who had previously adopted the stamp or mark in question, and so would or might be depriving him of the profit he might have made by the sale of the goods which, *ex hypothesi*, the purchaser intended to buy. The law considers this to be wrong towards the person whose mark is thus assumed, for which wrong he has a right of action, or, which is the more effectual remedy, a right to restrain by injunction the wrongful use of the mark thus pirated" (*a*).

**Function of trade mark.**

The function of the trade mark is to give the purchaser a satisfactory assurance of the make and quality of the article he is buying. Thus, it was said by Lord Cottenham, C. (*b*), "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." It is on the faith of the mark being genuine, and representing a quality equal to that which he has previously found a similar mark to indicate, that the purchaser makes his purchase. "That, in truth," said James, L. J. (*c*), "is the meaning and object of a trade mark. It indicates this—that you may take this as a warranty that it has come from the particular manufacturer of the goods with which you have been hitherto pleased." So, again, it was said by Kay, J. (*d*)—"What does a trade mark mean? It means the mark under which a particular individual trades, and

(*a*) *Per* Lord Cranworth, C., in *Seixo* v. *Provezende*, L. R. 1 Ch. 192. And see *per* the United States Supreme Court in *Canal Co.* v. *Clark*, 80 U. S. 311; *McLean* v. *Fleming*, 96 U. S. 245; and *Amoskeag Manufacturing Co.* v. *Trainer*, 101 U. S. 51; and *per* Molesworth, J., in the Supreme Court of Victoria in *In re Brenner*, 2 W. & W. 12; and *per* Levinge, J., in the High Court of Bengal, in *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hyde, 185.

(*b*) In *Spottiswoode* v. *Clarke*, 2 Ph. 154. And see *Sohl* v. *Geisendorf*, 1 Wils. (Ind.) 60; *Kidd* v. *Johnson*, 100 U. S. 617.

(*c*) *Massam* v. *J. W. Thorley's Cattle Food Co.* (2), 14 Ch. D. 748. And see *Amoskeag Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Liggett and Myers Tobacco Co.* v. *Hynes*, 20 Fed. Rep. 863; *Holt* v. *Menendez*, 128 U. S. 182.

(*d*) *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278. And see *In re Kinahan*, 10 P. R. 393.

which indicates the goods to be his goods—either goods manufactured by him, or goods selected by him, or goods which in some way or other pass through his hands in the course of trade. That is the meaning of a trade mark. It is a mode of designating goods as being the goods which have been, in some way or other, dealt with by the person who owns the trade mark." Similarly, Bowen, L. J. (*a*), has described the function of a trade mark as being "to give an indication to the purchaser or possible purchaser as to the manufacture or quality of the goods—to give an indication to his eye of the trade source from which the goods come, or the trade hands through which they pass on their way to the market."

Mere statement of quality, no trade mark.

Yet, while the object of the trade mark is to indicate quality, a mere English adjective, or word in common use (*b*), which indicates quality and nothing more, not serving to connect the goods with any particular manufacturer or seller, cannot be appropriated as a trade mark; for no person can be permitted to exclude others from the use of words common to all, even in their application to goods; and without such exclusive appropriation, the mark is a mere statement, offering no guarantee and making no one responsible for its correctness. And in the same way the use of a mark which has for its object the enabling purchasers to divide into equal pieces the substance to which it is applied, cannot deprive other makers of the right to use other somewhat similar marks with the same object (*c*).

Exception.

Marks, however, which do serve to indicate the production of a certain manufacturer, though at the same time subject to variation for the purpose of denoting different qualities, are entitled to protection (*d*). And it may be observed that a symbol or word

(*a*) *In re Powell* (2), (1893) 2 Ch. 388.

(*b*) *Braham* v. *Bustard*, 1 H. & M. 447; *Raggett* v. *Findlater*, L. R. 17 Eq. 29; *In re Barrows*, 5 Ch. D. 353; *Spottiswoode* v. *Clarke*, 1 Coop. 264; *Gillott* v. *Esterbrook*, R. Cox, 353; *Osgood* v. *Allen*, 1 Holmes, 185; *In re Eagle Pencil Co.*, 10 U. S. Pat. Gaz. 981; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537; *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460; *Liggett and Myers' Tobacco Co.* v. *Reid Tobacco Co.*, 104 Mo. 53; 43 Am. St. Rep. 313; *Listman Mill Co.* v. *William Listman Milling Co.*, 88 Wisc. 334; 43 Am. St. Rep. 907.

(*c*) *Dausman and Drummond Tobacco Co.* v. *Ruffner*, 15 U. S. Pat. Gaz. 559.

(*d*) *Hirst* v. *Denham*, L. R. 14 Eq. 542; *Ransome* v. *Graham*, 51 L. J. Ch. 897; *Moses* v. *Sargood*, Dig. 636; *Sohl* v. *Geisendorf*, 1 Wils. (Ind.) 60; *Godillot* v. *Harris* (*per* Danforth, J.), 81 N. Y. 263. See *Stokes* v. *Landgraff*, 17 Barb. 608; R. Cox, 137; *Gillott* v. *Kettle*, 3 Duer, 624; R. Cox, 148; *Gillott* v. *Esterbrook*, 47 Barb. 455; R. Cox, 340; 48 N. Y. 374; *Amoskeag Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Merry* v. *Hoopes*, 111 N. Y. 415; *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417. And see *Wood* v. *Lambert*, 32 Ch. D. 247.

indicating quality in one class of goods need not necessarily do so in another (*a*).

Trade mark not always indicative of actual manufacturer.

The use of the trade mark is not in all cases to designate the maker of the substance to which it is attached (*b*), though that is usually so; it may indicate some other person who has expended labour on the article, so that, as finished, it owes some portion of its value to him. Thus, in a case in the Supreme Court of New York (*c*) it was held that, where one person manufactured cotton cloths, and another printed them, the mark was indicative of the printer and not of the original manufacturer. So a trade mark has been recognized as indicating the bleacher who finished the goods which another person had manufactured (*d*); and in the same way, one may serve to denote the importer (*e*) or exporter (*f*) of manufactured goods.

May be indicative of selector.

Again, a trade mark may be so composed as to indicate that the goods have been examined and selected by a person of known ability, so that they have attributed to them such value as his approval can give, and his reputation depends upon their corresponding to their alleged quality. In such a case, therefore, the trade mark belongs to the selector and not to the manufacturer (*g*).

May indicate natural products.

To go farther, it is not necessary that the goods to which the mark is affixed should be manufactured goods at all; it is sufficient if the vendors, whose property the trade mark is, have alone the opportunity of procuring the article in question, so that the trade mark indicates accurately the source from which the article is derived. This is particularly the case with mineral waters and

(*a*) *In re English*, U. S. Pat. Comm. Decis. 1870, 142; *In re Dick & Co.*, 9 U. S. Pat. Gaz. 538.

(*b*) See *per* Bacon, V.-C., in *Ford* v. *Foster*, L. R. 7 Ch. 611. See, also, *Knott* v. *Marshall*, W. N. 1894, 214.

(*c*) *Amoskeag Manufacturing Co.* v. *Garner*, 55 Barb. 151; R. Cox, 541. See *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298; and *Wamsutta Mills* v. *Allen*, 12 Phila. 535.

(*d*) *In re Sykes*, 43 L. T. N. S. 626.

(*e*) *Godillot* v. *Hazard*, 44 N. Y. Super. Ct. 427; *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417; *Taylor* v. *Virasami*, Ind. L. R. 6 Mad. 108; *In re Apollinaris Co.*, (1891) 2 Ch. 186, 226, 230.

(*f*) *Robinson* v. *Finlay*, 9 Ch. D. 487, though it was held on appeal that in that particular instance this was not the case.

(*g*) *Hirsch* v. *Jonas*, 3 Ch. D. 584; *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278; *In re Apollinaris Co.*, (1891) 2 Ch. 186, 226, 230; *Leahy* v. *Glover*, 10 P. R. 141; *Benedictus* v. *Sullivan, Powell & Co.*, 12 P. R. 25; *Thomson & Co.* v. *Robertson*, Ct. Sess. Cas. 4th Ser. XV. 880; *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183; *Holt* v. *Menendez*, 128 U. S. 182; *Levy* v. *Waitt*, 56 Fed. Rep. 1016; 61 Fed. Rep. 1008. And see *Wood* v. *Lambert*, 32 Ch. D. 247; and *In re Wills* (2), (1893) 2 Ch. 262.

similar productions (*a*). A mere name, however, for a natural product which is available by all the world, cannot be exclusively appropriated by an individual, who possesses no exclusive access to its source (*b*).

Advantages of use of trade marks.

The benefits derivable from the recognition of the exclusive right of a trader to his trade mark are apparent from the consideration that the "trade mark is both a sign of the quality of the article and an assurance to the public that it is the genuine product of his manufacture. It thus often becomes of great value to him, and in its exclusive use the Court will protect him against attempts of others to pass off their products upon the public as his. This protection is afforded, not only as a matter of justice to him, but to prevent imposition upon the public" (*c*).

The protection of trade marks is, therefore, beneficial to the public, since it enables them to buy with confidence—that they are getting what they require; while at the same time it is beneficial to the manufacturer, since it affords him the means of securing the benefit of the custom which he deserves and which is intended for him. When the owner of a trade mark is asserting his exclusive rights, "monopoly is not the thing for which the one party struggles and which the other resists. On the contrary, fair trading is all for the protection of which the law is invoked; and the public, as well as the manufacturer or merchant, are concerned that infringement of trade marks and trade designations should be prevented. For there is a double wrong: the public are or may be deceived, and the trader whose trade mark or trade designation is infringed is or may be injured" (*d*). So advantageous did the

(*a*) *Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 242; *Apollinaris Co.* v. *Edwards*, Seton, 5th ed. 537 (Apollinaris Water); *Radde* v. *Norman*, L. R. 14 Eq. 348 (Leopoldsball Kainit); *Congress and Empire Spring Co.* v. *High Rock Congress Spring Co.*, 57 Barb. 526; R. Cox, 599 (Congress Spring Water); *Wheeler* v. *Johnston*, 3 L. R. Ir. 284 (Cromao Springs Water); *Dunbar* v. *Glenn*, 42 Wisc. 118 (Bethesda Mineral Water); *Carlsbad* v. *Tibbetts*, 51 Fed. Rep. 852; *Carlsbad* v. *Thackeray*, 57 Fed. Rep. 18; *Carlsbad* v. *Kutnow*, 68 Fed. Rep. 794; 71 Fed. Rep. 167; *Carlsbad* v. *Schultz*, 78 Fed. Rep. 469 (Carlsbad Salts); *République Francaise* v. *Schultz*, 57 Fed. Rep. 37 (Vichy Water); *Parkland Hills Blue Lick Water Co.* v. *Hawkins*, 95 Ky. 502; 44 Am. St. Rep. 254 (Blue Lick Water). And see the coal cases—*Braham* v. *Beachim*, 7 Ch. D. 848; *Davis* v. *Tylor*, Jessel, M. R., April 24th, 1879; *Lochgelly Co., Ld.* v. *Lumphinnans Iron Co.*, Ct. Sess. Cas. 4th Ser. VI. 482.

(*b*) *Young* v. *Macrae*, 9 Jur. N. S. 322 (Paraffin Oil); *Canal Co.* v. *Clark*, 80 U. S. 311 (Lackawanna Coal); *Montgomerie* v. *Donald & Co.*, Ct. Sess. Cas. 4th Ser. XI. 506 (Water of Ayr Stone); *Hoyt* v. *J. T. Lovett & Co.*, 71 Fed. Rep. 173 (Green Mountain Grapes).

(*c*) *Per* U. S. Sup. Ct. in *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218. And see *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sandf. S. C. 599.

(*d*) *Per* Lord Craighill in *Dunnachie* v.

adoption of a trade mark speedily prove to be that, in 1742, Lord Hardwicke, C., said that "every particular trader had some particular mark or stamp" (*a*).

*Southern* v. *How.*

In the earliest case on record (*b*) damages were given for the infringement of a mark on cloth, though it is not clear from the reports whether the plaintiff was a clothmaker whose mark had been pirated, or a purchaser who had been deceived into buying the wrong goods.

*Blanchard* v. *Hill.*

In *Blanchard* v. *Hill* (*c*), however, in 1742, Lord Hardwicke refused to protect the "Great Mogul" stamp on cards, deciding, in effect, that there was no right of property in a trade mark, though actual fraud might be restrained or punished, as in *Southern* v. *How* (*d*). The decision seems in great measure to have been founded upon a dread of setting up a monopoly, the distinction between a trade mark and a patent not being clearly present to his lordship's mind.

*Singleton* v. *Bolton.*

In *Singleton* v. *Bolton* (*e*), in the Court of King's Bench (1783), Lord Mansfield, C. J., said that if the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie; but the name of an original inventor being the trade mark in question, evidence was necessary of the medicine having been sold as if prepared by the plaintiff, a distinction being thus drawn between the transmissibility of a name and that of other trade marks, which has since been removed (*f*).

*Sykes* v. *Sykes.*

In Scotland an interdict was granted in 1823 to restrain the infringement of a trade mark (*g*), but in England it was for the first time perceived, in 1824, that goods sold with a pirated mark attached, though they might not deceive an immediate purchaser, yet might deceive an ultimate purchaser, who might have no notice of the fraud (*h*).

Requisites to entitle to damages at Common Law.

This case marks the last stage of development in the law of trade marks as recognised at Common Law (*i*); and the requisites neces-

*Young & Sons*, Ct. Sess. Cas. 4th Ser. X. 874. And see *State of Missouri* v. *Gibbs*, 56 Mo. 133; and *Blackwell* v. *Wright*, 73 N. Car. 310.

(*a*) *Blanchard* v. *Hill*, 2 Atk. 484, 485.

(*b*) *Southern* v. *How*, Poph. 144; 3 Cro. 471; 2 Rolle, 28.

(*c*) 2 Atk. 484.

(*d*) Poph. 144.

(*e*) 3 Doug. 293.

(*f*) See *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. C. 523, and cases collected at p. 101, note (*c*).

(*g*) *Wilkie* v. *McCulloch*, Ct. Sess. Cas. 1st Ser. II. 413.

(*h*) *Sykes* v. *Sykes*, 3 B. & Cr. 541.

(*i*) See *per* Sir G. Mellish, L. J., in *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 454.

sary to entitle a plaintiff to recover damages were, in accordance with the judgment of Sir T. Wilde, C. J., in *Rodgers* v. *Nowill* (*a*), that he should have been accustomed to use a certain mark upon goods of his manufacture to denote that that was so, that that mark was known in the trade (*b*), and that the defendant had imitated the mark and sold goods bearing it, as and for the plaintiff's goods, with intent to defraud (*c*).

Lord Blackburn in *Singer Manufacturing Co.* v. *Loog*.

Lord Blackburn, discussing the history of trade mark law in *Singer Manufacturing Co.* v. *Loog* (*d*), said: "The original foundation of the whole law is this—that when one, knowing that goods are not made by a particular trader, sells them as and for the goods of that trader, he does that which injures that trader. At first it was put upon the ground that he did so when he sold inferior goods as and for the trader's; but it is established, alike at law and in equity, that it is an actionable injury to pass off goods known not to be the plaintiff's as and for the plaintiff's, even though not inferior. The modes in which goods may be passed off as and for the plaintiff's vary. The most usual is where a particular mark on the goods, or on the packages in which they are sold, has been used to denote that they are made by a particular firm to such an extent that it is understood in the market to bear that meaning. The law as to those trade marks is now regulated by statutes, but before there was any legislation on the subject it was well settled that when any one adopted a mark so closely resembling the trade mark of the plaintiff that it would be likely to be mistaken for it, and put it on his goods and sold them, knowing that though the persons to whom he sold them were well aware that they were not the plaintiff's make, yet that they were meant to be sold to others who would see only the trade mark, and were likely to be deceived by its resemblance to that of the plaintiff, he might be properly found to have knowingly and fraudulently sold the goods as and for the plaintiff's goods. And, so far, there was no difference between law and equity.

"But at law it was necessary to prove that an injury had been

(*a*) 5 C. B. 109.

(*b*) Application for registration, provided the connection with the goodwill of the business is observed, is now equivalent to public use of a mark: Patents Act, 1883, § 75, as amended by the Act of 1888; and see Trade Marks Act, 1875, § 2. This was held to be so also in America under the U. S. Statute of 1870: *In re The Dutcher Temple Co*, U. S. Pat. Comm. Decis. 1871, 248. And see § 7 of the U. S. Act of 1881.

(*c*) See, however, the Judicature Act of 1873, § 25, by which the rules of equity prevail.

(*d*) 8 App. Cas. 29.

actually done; in equity it was enough to show that the defendant threatened to do, and would, if not prevented, do that injury. But there is a further question on which there may be a difference between law and equity." The difference to which allusion is here made arises from the fact that in equity the protection to the manufacturer and the public was carried a stage farther in 1833 by the decision of Lord Cottenham, C., in *Millington* v. *Fox* (*a*), since which time it has not been necessary to prove an actual fraudulent intention, the remedy being obtainable if the defendant's conduct has been such as to produce the effects of fraud, though he may, in fact, have acted in perfect innocence.

Equity—*Millington* v. *Fox*.

Limits to Court's interposition.

It is, however, "no part of the duty of the Court to enforce the observance of the dictates of morality" (*b*), and therefore, if a defendant "has an abstract right to do what he has done, the Court must permit it, however opposed to one's moral sense" (*c*). The Court will not interfere, simply on the ground that there is a misrepresentation, unless some right belonging to the plaintiff has been interfered with (*d*).

Acquisition of trade marks.

The mode of acquiring a right to a trade mark was, from 1875 to 1883, regulated by the Trade Marks Registration Acts, 1875—1877 (*e*). The trade mark was required to accord with the definition contained in section 10 of the Act of 1875 (*f*), and not to be obnoxious to the restrictions of section 6; and it had to be registered, or, if it had been used before the passing of the Act, application must have been made for registration, and have been refused, in which case a certificate of refusal could be obtained from the registrar (*g*), unsuccessful applicants thus retaining whatever rights might have been theirs before the Act. For a mark to have been used before the Act, it was sufficient for a

(*a*) 3 My. & Cr. 338. In *Gout* v. *Aleploglu*, 5 Leg. Obs. 496, the Vice-Chancellor of England held that "the plaintiff had acquired by long previous usage *the exclusive right*" to his trade marks, but the report is too brief to show whether that expression was employed in its full meaning. *Hogg* v. *Kirby*, 8 Ves. 215 (1803); and *Day* v. *Binning*, C. P. Cooper, 489; and 1 Leg. Obs. 205 (1831), were cases of fraudulent competition; and in *Henry* v. *Price*, 1 Leg. Obs. 364 (1831), there were circumstances of fraud.

(*b*) *Per* Wood, V.-C., in *Batty* v. *Hill*, 1 H. & M. 264. And see *Roper's, &c. Co.* v. *Copeman's, &c. Association, Limited*, 28 Sol. J. 218; *Native Guano Co.* v. *Sewage Manure Co.*, 8 P. R. 125; *Schneider* v. *Williams*, 44 N. J. (Eq.) 391.

(*c*) *Braham* v. *Bustard*, 1 H. & M. 447.

(*d*) See *Batty* v. *Hill*, *ubi supra*.

(*e*) 38 & 39 Vict. c. 91; 39 & 40 Vict. c. 33; 40 & 41 Vict. c. 37.

(*f*) Which was so restricted as to exclude from registration some marks previously recognized: *Ex parte Stephens* (2), 3 Ch. D. 659; *In re Mitchell* (1), 7 Ch. D. 36. See *Rose* v. *Evans*, 48 L. J. Ch. 618.

(*g*) § 2 of Amendment Act, 1876.

vendible article to have been actually in the market, bearing the mark in question; it was not necessary for this to have been the case for any length of time, so long as there was some user (*a*).

The Trade Marks Acts, 1875-7, are now repealed, and replaced by the Patents Acts, 1883-8 (*b*), which contain a wider and more comprehensive definition of a trade mark (*c*), but are in other respects substantially identical, so far as concerns the acquisition of trade marks, with the repealed Acts (*d*).

Appropriation to special classes of goods.

A trade mark must, under the present Acts, as under the repealed Acts, be registered as belonging to particular goods or classes of goods (*e*), according to the classification of goods contained in the Rules; and trade marks used before the Act of 1875 can only be protected in respect of the same classes of goods as those to which they have been habitually applied, for no man could be so deceived as to suppose that he was buying A.'s linen because he saw the same mark as A's on B's iron (*f*).

Assignment and transmission.

A trade mark is assignable and transmissible, but only in connection with the goodwill of the business concerned with the goods or classes of goods to which it relates (*g*). A trade mark cannot exist in gross and unattached to specific articles (*h*), for, if that could be so, the mark might come to be an instrument of deception, instead of a guarantee of genuineness (*i*). In an assignment of

(*a*) *Per* Lord Westbury, C., in *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *In re Simpson, Davies & Sons* (2), Jessel, M. R., Jan. 12, 1881; *Somerville* v. *Schembri*, 12 App. Cas. 453; and other cases.

(*b*) 46 & 47 Vict. c. 57; 48 & 49 Vict. c. 63; 51 & 52 Vict. c. 50.

(*c*) See § 64 of the Act of 1883 as amended by § 10 of the Act of 1888.

(*d*) See §§ 62—74.

(*e*) Trade Marks Act, 1875, § 2; Patents Act, 1883, § 65.

(*f*) *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Merchant Banking Co.* v. *Merchants' Bank*, 9 Ch. D. 560; *Société Anonyme des Mines, &c.* v. *Baxter*, 14 Bl. C. C. 261; *Colman* v. *Crump*, 70 N. Y. 573; *Hart* v. *Colley*, 44 Ch. D. 193.

(*g*) Patents Act, 1883, § 70. And see Trade Marks Act, 1875, § 2; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Wellcome*, 32 Ch. D. 213; *In re Bolonachi's Empire Chocolate Co.*, 89 L. T. Jo. 273; *Thorneloe* v. *Hill*, (1894) 1 Ch. 569; *Dixon Crucible Co.* v. *Guggenheim*, 2 Brews. 321; R. Cox, 559; *Smith* v. *Fair*, 14 Ont. Rep. 729; *McVeagh* v. *Valencia Cigar Factory*, 32 U. S. Pat. Gaz. 1124. And see *Hammond* v. *Malcolm Brunker & Co.*, 9 P. R. 301, where an assignment of a trade mark with such portion of the goodwill as related to the goods to which the trade mark applied was held valid; and *In re Magnolia Metal Co.*, (1897) 2 Ch. 371, where the goodwill was only indirectly connected with the goods for which the trade mark was registered.

(*h*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Leather Cloth Co.* v. *American Leather Cloth Co.*, *ib.* 137; 11 H. L. C. 523; *Dixon* v. *Guggenheim*, *ubi supra*; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *Kidd* v. *Johnson*, 100 U. S. 617; *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54; *S. C.* (2), 51 How. Pr. 455.

(*i*) *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *Pinto* v. *Badman*, 8 P. R. 181; *Hammond* v. *Malcolm, Brunker & Co.*, 9 P. R. 301. See *Witthaus* v. *Braun*, 44 Md. 303.

the business and goodwill, the trade mark, in the absence of any indication to the contrary (*a*), passes as a matter of course (*b*), or, if specially excepted, must cease to be available by the vendor. On the death of a registered proprietor, his legal personal representative acquires the title to the mark. Subsequent registered proprietors stood in the same position, under § 4 of the Trade Marks Act of 1875, as if their title were a continuation of the title of the first registered proprietor (*c*). And this will still be so, though the section has not been re-enacted in the present Acts.

Bankruptcy.

It has been held in bankruptcy that a trade mark passes to a trustee in bankruptcy, as being "goods and chattels" within § 15, sub-s. 5, of the Bankruptcy Act, 1869 (*d*).

Trade mark lost.

Apart from the special provisions of the Patents Act, 1883, a trade mark may be lost, as by its coming to be commonly applied to a special article, in which case it becomes *publici juris*; thus "Worcestershire sauce," which might at one time have been protected, could no longer be so when it had come into common use (*e*). But for general user to render a mark of common right, it must be used on the same goods as those for which an exclusive right to it is claimed (*f*). It was also held, before the passing of the Registration Acts, that if a person abandons a suit which he has undertaken to restrain infringement, he abandons his exclusive right (*g*).

Infringement.

When once a person has acquired a right in the trade mark, any infringement of that right will form a ground for the interference of the Court. For the Court to interfere there must be fraud, for

(*a*) *In re Roger* (2), 12 P. R. 149; *Currie* v. *Currie*, 15 P. R. 339.

(*b*) *Shipwright* v. *Clements*, 19 W. R. 599. And see cases collected at p. 100, note (*a*).

(*c*) And see *Walton* v. *Crowley*, 3 Bl. C. C. 440; R. Cox, 166.

(*d*) *Ex parte Young; Re Lemon, Hart & Son*, Dig. 537. And see *Kelly* v. *Hutton*, L. R. 3 Ch. 703; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; and cases at p. 104, note (*m*); also the Bankruptcy Act, 1883, § 44 (iii). In America it has been considered a disputable question whether property in a trade mark is the subject of attachment or levy under execution (*Hegeman & Co.* v. *Hegeman*, 8 Daly, 6), or whether it will pass under a general assignment (*Milliken* v. *Dart*, 33 N. Y. Sup. Ct. 24).

(*e*) *Lea* v. *Millar*, Dig. 513. And so "Maizena"—*National Starch Manufacturing Co.* v. *Munn's Patent Maizena and Starch Co.*, (1894) A. C. 275; "Kaiser" spring water—*Luyties* v. *Hollender* (2), 24 Bl. C. C. 353; "Gold Leaf" Tobacco—*Partlo* v. *Todd*, 12 Ont. Rep. 171; "Imperial Cough Drops"—*Watson* v. *Westlake*, 12 Ont. Rep. 449. And see *per* Sir G. Mellish, L. J., in *Ford* v. *Foster*, L. R. 7 Ch. 611; adopted by Lord Macnaghten in *Leahy* v. *Glover*, 10 P. R. 141. Also *Neva Stearine Co.* v. *Mowling*, 9 V. L. R. Eq. 98; *Portuondo* v. *Monne*, 28 Fed. Rep. 16; *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 138 U. S. 537.

(*f*) *Somerville* v. *Schembri*, 12 App. Cas. 453.

(*g*) *Browne* v. *Freeman*, 12 W. R. 305.

where there is no fraud there is no wrong to be redressed and no remedy applicable. But it is not necessary that there should be fraud in the sense that the infringer knowingly and wilfully makes a fraudulent attempt to appropriate to himself the fruits of another's reputation; if he acts so that custom intended for another is diverted to himself, and that the public buy and pay for one thing while intending to buy and pay for another, so that both vendor and purchaser are injured, there is fraud, and the animus of the infringer is unimportant (*a*). Even if the purchaser is told that the goods are the goods of the actual seller, but the imitated mark is upon them, there is ground for interference, since the goods may be resold bearing the mark, but without the information necessary to correct the statement thereby made (*b*). There is infringement if ordinary purchasers purchasing with ordinary caution are likely to be misled (*c*): on the one hand, the Court will not strain its jurisdiction to protect fools and idiots (*d*); on the other hand, it will not require such minuteness of imitation as to deceive persons of unusual sagacity and information.

Remedies for infringement.

Infringement is criminally punishable under an indictment for obtaining money by false pretences (*e*), or in accordance with the special provisions of the Merchandise Marks Act, 1887 (*f*), expressly enacted to prevent such practices. The Common Law remedy is by an action on the case for damages caused by the offender's fraud (*g*). The equitable remedy is by injunction, together with an account, or damages, if preferred. The greater suitability of this form of remedy has occasioned the adjudication in Chancery of the great majority of trade mark cases, and the carrying into operation of the Trade Marks Registration Acts was specially entrusted to the Chancery Division (*h*).

Fraudulent intention.

At Common Law, at all events until the Judicature Acts, it was necessary to prove knowledge of the plaintiff's rights and intentional deception on the part of the defendant (*i*); to obtain an

(*a*) See cases collected at p. 166, note (*a*).

(*b*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; and cases at p. 158.

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

(*d*) *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 447; *Blackwell* v. *Wright*, 73 N. Car. 310.

(*e*) See Ch. 5.

(*f*) 50 & 51 Vict. c. 28.

(*g*) An injunction may now form part of the relief.

(*h*) Trade-marks Rule 42 of 1876.

(*i*) *Rodgers* v. *Nowill*, 5 C. B. 109.

injunction in Chancery this has not been required since *Millington* v. *Fox* (*a*), in 1833. It may, however, be material with reference to the extent of the relief to be granted, since a plaintiff has been thought to be only entitled to an account in respect of such user of his trade mark by the defendant as has been subsequent to the latter becoming aware of the prior ownership, or at least of the prior existence as a trade mark of the mark used by him (*b*).

Plaintiff disentitled to relief.

A plaintiff who in other respects would be entitled to obtain a remedy against an infringer may yet be deprived of his right by reason of some fraudulent statement contained in his own trade mark (*c*), for "*ex turpi causâ non oritur actio*, and if the trade mark contains a false representation calculated to deceive the public, a man cannot by using that which is in itself a fraud obtain any right at all in the mark" (*d*).

When not disentitled.

A mere collateral misrepresentation, not contained in the trade mark itself, and therefore not repeated at every transfer of the article, is not sufficient to disentitle the trade mark to protection (*e*).

Unauthorised use of word "patent," &c.

A particular form of misstatement which has proved fatal in several cases has been the insertion or retention in a trade mark of the words "patent" or "patented," so as to indicate the protection of an existing patent, to which the article bearing the trade mark is not in fact entitled (*f*).

Distinction between trade mark and patent.

"Trade marks have sometimes been likened to letters patent and sometimes to copyrights, from both of which they differ in many respects" (*g*). "There is this difference between the case of a trade mark and that of a patent: in the former case the article sold is open to the whole world to manufacture, and the only right the plaintiff seeks is that of being able to say—'Don't sell any goods under my mark.' He may find his customers fall off in consequence of the defendant's manufacture; but it does not necessarily follow that the plaintiff can claim damages for every article manufactured by the defendant, even though it be under that mark. On the other hand, every sale without licence of a patented article

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

(*b*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Cartier* v. *Carlile*, 31 Beav. 292; *Moet* v. *Couston*, 33 Beav. 578.

(*c*) See *Pidding* v. *How*, 8 Sim. 477; *Perry* v. *Truefitt*, 6 Beav. 66; and other cases in Ch. 7.

(*d*) *Per* Sir G. Mellish, L. J., in *Ford* v. *Foster*, L. R. 7 Ch. 611.

(*e*) *Ford* v. *Foster*, *ubi supra*.

(*f*) See the cases in Ch. 7.

(*g*) *Per* Lord Blackburn, in *Johnston* v. *Orr-Ewing*, 7 App. Cas. 219, 228.

must be a damage to the patentee" (*a*). In the case of a trade mark, "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" (*b*). The broad difference between a patent and a trade mark is, therefore, that the public are prohibited and restrained from manufacturing any article protected by the former, so long as the protection exists, whereas the public are at full liberty to manufacture an unpatented article (*c*), and that according to the identical original process, and to say that they are so doing, and this is so whether the original makers use, or do not use, a trade mark upon their goods. What the subsequent manufacturers may not do is to put upon their goods the mark used by the original makers, so as to represent that such goods are the actual goods of the original makers, and not merely equivalent goods made by others. The benefit conferred upon the public by the communication of a new invention, which after a limited period all can use, is the consideration in respect of which a monopoly of the invention is granted to the inventor for that limited period (*d*). Any attempt, therefore, to prolong the term of the patent by means of a trade mark will be discouraged (*e*).

Trade mark distinguished from copyright.

As a trade mark is not the same thing as a patent, so it is not the same as a copyright (*f*). The difference between them is in fact so wide that the United States statute of 1870, by which the registration of trade marks was authorised and regulated, was held to be unconstitutional and invalid on the express ground that the

(*a*) *Per* Wood, V.-C., in *Davenport* v. *Rylands*, L. R. 1 Eq. 302.

(*b*) *Per* Monell, C. J., in *Godillot* v. *Hazard*, 49 How. Pr. 5. And see *McLean* v. *Fleming*, 96 U. S. 245; and *Swift* v. *Peters*, 11 U. S. Pat. Gaz. 1110.

(*c*) This is quite clear in America as well as in this country. See *Thomson* v. *Winchester*, 36 Mass. 214; R. Cox, 7; *Coffeen* v. *Brunton* (1), 4 McLean, 516; R. Cox, 82; *Davis* v. *Kendall*, 2 R. I. 566; R. Cox, 112; *Comstock* v. *White*, 18 How. Pr. 421; R. Cox, 232; *Phalon* v. *Wright*, 5 Phila. 464; R. Cox, 307; *Falkinburg* v. *Lucy*, 35 Cal. 52; R. Cox, 448; *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392; *Godillot* v. *Hazard*, 44 N. Y. Super. Ct. 427; *Hardy* v. *Cutter*, 3 U. S. Pat. Gaz. 468; *Frese* v. *Bachof* (2), 14 Bl. C. C. 432; *Manhattan Medicine Co.* v. *Wood*, 4 Cliff. 461. So also in Scotland, *Singer Manufacturing Co.* v. *Kimball and Morton*, Ct. Sess. Cas., 3rd Ser. XI. 267.

(*d*) *Cheavin* v. *Walker*, 5 Ch. D. 850, 863.

(*e*) See *per* Sir G. Mellish, L. J., in *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 456.

(*f*) *Farina* v. *Silverlock*, 6 De G. M. & G. 214; *Collins Co.* v. *Cowen*, 3 K. & J. 428; *Correspondent Newspaper Co.* v. *Saunders*, 11 Jur. N. S. 540; *Kelly* v. *Hutton*, L. R. 3 Ch. 703; *Dicks* v. *Yates*, 18 Ch. D. 76; *Taylor* v. *Carpenter*, 11 Paige, 292; 2 Sandf. 603; R. Cox, 45; *Wolfe* v. *Barnett*, 24 La. Ann. 97; 13 Amer. Rep. 111; *Munro* v. *Beadle*, 62 N. Y. Sup. Ct. 312; *Munro* v. *Smith*, 62 N. Y. Sup. Ct. 419; *Munro* v. *Tonsey*, 129 N. Y. 38.

clause in the Constitution empowering the Legislature to regulate patents and copyrights conferred upon it no authority to make a statute for the regulation of trade marks. A copyright, like a patent, relates to the substance of an article, but differs in that it has reference to a literary instead of a material production. A trade mark does not protect the substance of the article to which it is attached from being imitated, but it identifies an article and indicates the source to which that article is to be attributed. Trade mark not being copyright, registration of a trade mark, or, what comes to be much the same thing, a title of a book or paper, under the Copyright Acts, is unnecessary and useless (*a*).

The difference between trade mark and copyright is well illustrated by *Schauer* v. *Field* (*b*), where the defendants registered as a trade mark a photograph of a German picture in which there was copyright in Germany but not in England. After the English copyright had been acquired by the plaintiff under the International Copyright Act, 1886, the defendants reproduced their trade mark in various sizes and colours on show cards and price lists for purposes of advertisement. Chitty, J., refused to grant an injunction on the ground that the interest which, by the saving clause of the International Copyright Act, 1886 (*c*), was reserved to the defendants as proprietors of the trade mark extended to advertising their trade mark as well as to using it. "This interest in the defendants," said the learned judge, "is wholly unconnected with any copyright in the defendants; they have none and claim none; it arises from or in connection with their trade mark alone"; he therefore thought it immaterial to consider when any particular show card or advertisement of the trade mark was first produced. But, of course, the fact that a picture is used by a trader to advertise his goods does not of itself prevent such use from being an infringement of copyright (*d*).

**Trade marks of aliens protected.**

Since trade marks are recognised throughout the world, and not merely in the manufacturer's own country, as indicative of his goods, so that the subjects of any country are liable to be defrauded by goods bearing an imitation of a foreign trade mark, and any manufacturer is liable to suffer by the forgery of his

(*a*) *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Kelly* v. *Hutton*, L. R. 3 Ch. 703; *Hirsch* v. *Jonas*, 3 Ch. D. 584; *Scoville* v. *Toland*, 6 West. L. J. 84; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 399.

(*b*) (1893) 1 Ch. 35.

(*c*) § 6.

(*d*) See *Hanfstaengl* v. *American Tobacco Co.*, (1895) 1 Q. B. 347.

marks abroad, the right of property in a trade mark is not limited by territorial bounds (*a*), though a limitation may be imposed by means of an exception of specified places by the assignor of a trade mark on assignment (*b*), and aliens' marks are protected in the English Courts in precisely the same manner as if they belonged to British subjects (*c*). The same is the case in the United States (*d*), in India (*e*), Canada (*f*), and elsewhere.

Conflict of laws.

No direct conflict of laws has as yet arisen in the English Courts with respect to trade marks (*g*), though on some occasions such has appeared likely to be the case. In *Farina* v. *Cathery* (*h*) the question was raised whether a Prussian manufacturer could be restrained in this country from using a trade mark which he was entitled to use under Prussian law. It was held, however, that the mark was not identical with that to which a right had been acquired in Prussia. In *Compagnie Laferme* v. *Hendrickx* (*i*) there was a question whether a German manufacturer could acquire a right in England to the exclusive use of a trade mark consisting of the word "Laferme," a mere word not being allowed in Germany to constitute a trade mark; but as the plaintiff failed to satisfy the Court that he had been the first to use the word in Germany, no decision was given on the point. In *In re Farina* (2) (*k*), registration was refused to a German mark on the ground of too great a similarity existing between it and a previously registered German mark, notwithstanding that the German Court of Appeal, reversing the decision of the Court of First Instance, had held that there was no such similarity as to prevent the registration in that country of the second mark (*l*). And in

(*a*) *Derringer* v. *Plate*, 29 Cal. 292; R. Cox, 325.

(*b*) *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218.

(*c*) *Collins Co.* v. *Cowen*, 3 K. & J. 428; and cases at p. 84, note (*a*).

(*d*) *Taylor* v. *Carpenter* (1), 3 Story, 458; R. Cox, 14; and cases at p. 84, note (*a*).

(*e*) *Orr-Ewing* v. *Chooncloll Mullick*, Cor. 150.

(*f*) *Davis* v. *Kennedy*, 13 Grant Up. Can. Ch. 523.

(*g*) Unless the refusal to register in England trade marks already registered in the United States is to be considered as such. See *In re Californian Fig Syrup Co.*, 40 Ch. D. 620; *In re Carter Medicine Co.*, (1892) 3 Ch. 472.

(*h*) L. J. N. of C. 1867, p. 134.

(*i*) Dig. 512. In the United States registration of a single word has been granted to a German, though he could not obtain registration in his own country, it being shown that registration of a single word had been granted in Germany to citizens of the United States. *Ex pte. Portland Cement Fabrik, &c.*, 64 U. S. Pat. Gaz. 858.

(*k*) 27 W. R. 456.

(*l*) With regard to the effect of a decision in a trade mark case in one country upon the jurisdiction of another country to entertain a similar action, it has been held in America that it is not an answer to an action in that country to restrain an infringement of a trade mark by the sale in America of the article alleged to be an infringement

*Rodgers & Sons, Ld.* v. *Rottgen* (*a*), a German defendant was restrained from using a trade mark which he had registered in Germany, but which resembled the plaintiff's mark. For registration in this country a title good in English law must be shown (*b*). It has also been held that user abroad is not such user as will bring the person using within the three-mark rule (*c*), and that a person who has not even an intention of using a trade mark in England cannot be a person aggrieved by a wrongful entry on the register (*d*); but the latter decision was reversed (*e*). Sections 103 and 104 of the Patents Act provide for the grant of privileges to foreigners and colonists in cases in which their governments give protection to British subjects.

Cases analogous to trade mark cases.

Besides cases of infringement of trade marks proper, there are some other classes of cases nearly akin to the former, but differing from them in some important particulars, which yet require notice in connection with the subject of trade marks, as where there is an unfair competition in trade contrived, not by imitation of trade marks, but by other forms of representation that one man's goods are another's. Such cases are governed by substantially identical principles with those which regulate the law of trade marks, the decision of the Court of Appeal to the contrary (*f*) having been overruled by the House of Lords (*g*). But the injunction granted differs in being abstract in form.

Trade names.

In imitations of trade names, again, used as such and not as trade marks on goods, there is a difference from trade mark cases proper: there is a false representation, but it is a representation, not that certain goods are certain other goods, but that a certain

that an injunction had been refused against the defendant's principal in Germany, first, because the question whether the alleged infringement was likely to impose upon the public depended upon the circumstances of the place, and, secondly, because the particular subject-matter of the two actions was not identically the same. *Hohner* v. *Gratz*, 50 Fed. Rep. 3. And see *Carlsbad* v. *Kutnow*, 68 Fed. Rep. 794; *Kaiserbrauerei Beck & Co.* v. *J. & P. Baltz Brewing Co.*, 71 Fed. Rep. 695; 74 Fed. Rep. 222; *Walter Baker & Co.* v. *Sanders*, 80 Fed. Rep. 889. Cf. *Jaros Hygienic Underwear Co.* v. *Fleece Hygienic Underwear Co.*, 65 Fed. Rep. 424, where an injunction was refused on the ground of *res judicata*; *Prince Metallic Co.* v. *Prince Manufacturing Co.*, 17 U. S. App. 145.

(*a*) 5 Times L. R. 678.

(*b*) *Pinto* v. *Badman*, 8 P. R. 181, 192, 193; *In re Californian Fig Syrup Co.*, 40 Ch. D. 620; *In re Carter Medicine Co.*, (1892) 3 Ch. 472.

(*c*) *In re Münch*, 50 L. T. N. S. 12. And see *Berliner Brauerei Gesellschaft Tivoli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70; *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *Newman* v. *Pinto*, 4 P. R. 503 (*per* Kekewich, J.); *In re Mccus*, (1891) 1 Ch. 41; and the Canadian case of *Smith* v. *Fair*, 14 Ont. Rep. 729.

(*d*) *In re Riviere & Co.*, 53 L. J. Ch. 455.

(*e*) 26 Ch. D. 48.

(*f*) *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434.

(*g*) S. C. 3 App. Cas. 376.

establishment is a certain other establishment, the object being that the one establishment should obtain custom intended for the other. Such cases are not cases of trade mark, not being concerned with marks placed on vendible articles in the market (*a*), but still the Court has to proceed on much the same lines.

All such cases, whether of trade mark, or trade name, or other unfair use of another's reputation, are concerned with an injurious attack upon the goodwill of a rival business; customers are diverted from one trader to another, and orders intended for one find their way to the other. Trade marks are really a branch of the goodwill of the business with which they are connected, representing it in the market, while the trade name over the shop represents it to the passer-by. It is by the devolution of the goodwill that that of the trade marks is regulated (*b*); they are in fact included in, and valued as part of, the goodwill (*c*); severed from it they cannot exist (*d*). Goodwill.

(*a*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380.

(*b*) § 70 of Patents Act, 1883. And see Rule 38, also § 2 of Trade Marks Act, 1875, and Rule 27 of the Trade Marks Rules, 1876.

(*c*) *Hall* v. *Barrows*, 4 De G. J. & S. 150.

(*d*) *Thorneloe* v. *Hill*, (1894) 1 Ch. 569.

# CHAPTER II.

## WHAT IS A TRADE MARK?

What is a trade mark?

THE first point which has to be considered in regard to the law of trade marks is, "What is a trade mark?" With what class of objects is this branch of law concerned? On the answer to this question must necessarily depend the principles to be applied in any given case.

A true trade mark must be affixed to the article.

The most important criterion by which a case of trade mark may be distinguished from a case of false representation not amounting to an infringement of trade mark, was thus described by Sir G. Jessel, M. R. (*a*): "The cases which have come before the Courts may, I think, be conveniently divided into two classes. The first class, which is the more numerous, consists of cases where the goods manufactured are distinguished by some description or device in some way or other affixed to the article sold. It may be descriptive—that is, it may consist of a name or names or a lengthy description consisting of names with superadded words—and that description may be either affixed to, or impressed upon, the goods themselves by means of a stamp or an adhesive label, or it may be made to accompany the goods by being impressed or made to adhere to an envelope or case containing the goods (*b*).

"An illustration of the first class would be the common trade mark, which is either the name or the image of some known or unknown thing, actually impressed upon, or worked into, the material, or made to adhere to the surface of the material; or it may be not what is commonly known as a trade mark, a distinguishing mark which, perhaps, to a legal mind would be a trade mark, but some form of the material itself." His lordship then

(*a*) *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 440.

(*b*) See the definition by the V.-C. of Ireland in *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; also *Jay* v. *Ladler*, 40 Ch. D. 649; *St. Louis Piano Manufacturing Co.* v. *Merkel*, 1 Mo. App. 305; *Metcalfe* v. *Brand*, 86 Ky. 331; 9 Am. St. Rep. 282.

instanced a case recently before him in which the trade mark consisted of certain lines woven into the fringe of a certain make of cloth, and continued:—

"Sometimes you do not find anything put on the goods themselves, the reason often being that the goods are not capable of it; for instance, when these are liquids, upon which, of course, you cannot put a mark, and therefore a mark is put on the bottle containing the liquid, or on the cork which is in the bottle and helps to retain the liquid. These are again true trade marks, whether affixed in the shape of a label on a bottle of liquid, or in the shape of a device on the cork, or in the case of other goods, such as cigars, affixed to the box which contains the cigars, or the string which encircles them,—they are in some way or other attached to the goods, and go along with the goods on sale. That I call the first class."

As to the second class, his lordship said that "they are cases where the defendant, without putting any trade mark at all on his goods, or putting a trade mark which is admittedly different in substance from the trade mark, if any, of the plaintiff on the goods, has represented the goods as being goods manufactured by the plaintiff. Here, again, the Court has to try the question of representation. What the defendant has said or has done must amount to a representation that the goods to be sold are the goods of the plaintiff, or that they are manufactured by the plaintiff. What amount of representation will be sufficient for that purpose must again depend, of course, on the facts of each particular case."

Registration equivalent to public use.

For a trade mark to be entitled to protection, it must therefore not only be applicable, but be actually applied to a "vendible article" (*a*) in the market; the registration, however, of a trade mark under the Patent Acts, 1883—1888, as under the Trade Marks Acts of 1875—1877, is equivalent to public use of the same (*b*).

(*a*) See *per* Lord Westbury, C., in *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; also *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512; *In re Simpson, Davies & Sons*, Jessel, M. R., Jan. 12th, 1881; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *Candee* v. *Deere*, 54 Ill. 439; *Avery & Sons* v. *Meikle & Co.*, 27 U. S. Pat. Gaz. 1027; *Ex parte Roy & Nourse*, 54 U. S. Pat. Gaz. 1267, where an unsuccessful attempt was made to register a trade-mark for land.

(*b*) 38 & 39 Vict. c. 91, § 2; 46 & 47 Vict. c. 57, § 75. By 51 & 52 Vict. c. 50, § 17, application for registration is substituted for actual registration, but it would appear that this must be followed by registration. See § 77 of the Act of 1883. See also *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Batt & Co.*, (1898) 2 Ch. 432. And this is so also in the United States. See *In re Dutcher Temple Co.*, U. S. Pat. Comm. Decis. 1871, 248.

Not every mark applied can be a trade mark.

But it is not everything that can be marked on goods that will constitute a valid trade mark: a mere descriptive adjective, for instance, cannot be appropriated from the rest of the world (*a*); it is necessary, therefore, to distinguish true trade marks from other marks, which, though affixed to goods, yet cannot be claimed as the exclusive trade marks of any individual.

Name and address of proprietor need not be stated.

In some American cases (*b*) a difficulty has been raised with regard to a supposed requirement for a trade mark to contain an indication of the name and address of its proprietor. This requirement, however, which appears to have been based on a misconstruction of the language of Duer, J., in *Amoskeag Manufacturing Co.* v. *Spear* (*c*), has in practice been disregarded, and the reasoning of the U. S. Commissioner of Patents, when admitting the number "140" to registration as a trade mark for umbrellas (*d*), seems to be conclusive. "A trade mark," he says, "must be of such a character as, when attached to the applicant's goods in the market, will distinguish them as to origin from other goods of the same class. To do this, it need not necessarily give the name of the person owning the said mark, nor the place where the goods are made or sold. It is enough if the mark is of such a character as to indicate to the purchaser that all articles bearing it come from one and the same source. The object a man has in view in adopting a trade mark is to secure to himself the benefits arising from the superior merits of his goods over others of the same class. To do this he puts upon them a peculiar mark, that purchasers may be able to distinguish them in the market. It matters not to him nor to others whether the purchasers know either his name or place of

(*a*) Cf. *Raggett* v. *Findlater*, L. R. 17 Eq. 29; *Braham* v. *Bustard*, 1 H. & M. 447; *In re Brandreth*, Dig. 626; *Fulton* v. *Sellers*, 4 Brews. 42; *Hoeb* v. *Bishop*, 49 U. S. Pat. Gaz. 1845; *Ex parte Peyser & Co.*, 62 U. S. Pat. Gaz. 588, and other cases. As to trade marks composed of an essential particular with an addition varied to indicate different qualities or other matters, and how such marks should be registered, see *infra*.

(*b*) *E.g.*, *Ferguson* v. *Davol Mills*, 2 Brews. 314; *Dixon Crucible Co.* v. *Guggenheim*, 7 Phila. 408; *White* v. *Schlect*, 14 Phila. 88.

(*c*) 2 Sandf. S. C. 599; R. Cox, 87. The passage alluded to runs thus:— "The owner of an original trade mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to an exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact which it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose."

(*d*) *Ex parte Dawes and Fanning*, 1 U. S. Pat. Gaz. 27.

business, provided that his goods have some mark by which they may be designated and inquired for." Again, "If a trade mark possesses the evidence upon its face that it is put forth or given out as a distinguishing mark of the goods to which it is attached—that is, distinguishing as to origin, and not as to kind or quality—it may have all the requisites of a valid trade mark without naming the person or place whence it came" (*a*). In short, if a trade mark is properly distinctive—a condition which is indispensable (*b*)—no further particularity can be required, unless under the provisions of some statutory enactment.

Non-restraint of mark, no presumption in favour of mark.

The fact that an action to restrain the use of a particular trade mark has been successfully defended raises no presumption that the defendant's mark is a valid trade mark or capable of registration, for the action may have failed on such grounds as, *e.g.*, that the plaintiff's and defendant's marks were alike descriptive (*c*).

Definition of trade mark in Merchandise Marks Act, 1862.

For the purposes of the Merchandise Marks Act, 1862 (*d*), a very wide definition was adopted for the words "trade marks," a definition too little precise to be of much practical use outside of that Act, although it was adopted by the V.-C. of Ireland in *Wheeler* v. *Johnston* (*e*). The Merchandise Marks Act, 1887 (*f*), extends to all trade marks registered under the Patents Act, 1883.

Definition in Patents Acts, 1883—1888.

The Trade Marks Registration Act of 1875 (*g*), however, contained a definition, which was not only valuable in itself, but was of great practical importance, qualifying as it did, for registration and the accompanying advantages, all marks which satisfied its requirements. This definition was repeated, in a somewhat amplified form, in the Patents Act, 1883 (*h*), and has been still further enlarged by the Patents Act, 1888 (*i*).

The definition in question, as it stands for marks tendered for registration since the last Act came into force, is as follows:—

"(1) For the purposes of this Act a trade mark must consist of or contain at least one of the following essential particulars:—

(a) A name of an individual or firm printed, impressed or woven in some particular and distinctive manner; or

(*a*) *Per* U. S. Commissioner in *In re Dutcher Temple Co.*, U. S. Pat. Comm. Decis. 1871, 248.

(*b*) See *Lavergne* v. *Hooper*, Ind. L. R. 8 Mad. 148, and many other cases.

(*c*) *In re Anderson*, 26 Ch. D. 409; 54 L. J. Ch. 1084 (App.).

(*d*) 25 & 26 Vict. c. 88, § 1.

(*e*) 3 L. R. Ir. 284.

(*f*) 50 & 51 Vict. c. 28.

(*g*) § 10.

(*h*) § 64.

(*i*) § 10.

(b) A written signature, or copy of a written signature, of the individual or firm applying for registration thereof as a trade mark; or

(c) A distinctive device, mark, brand, heading, label or ticket; or

(d) An invented word or invented words; or

(e) A word or words having no reference to the character or quality of the goods, and not being a geographical name.

(2) There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or any of them; but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register.

(3) Provided as follows:—

(i.) A person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business; but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof;

(ii.) Any special and distinctive word or words, letter, figure, or combination of letters or figures (*a*), or of letters and figures, used as a trade mark before the 13th day of August, 1875, may be registered as a trade mark under this part of this Act" (*b*).

And by § 74 of the Act of 1883 further provision is made for the registration of additions to registered trade marks.

Effect of this definition.

The effect of this definition is to restrict the variety of marks now capable of adoption for the first time by a manufacturer, for he cannot register or obtain protection under the Act for a new mark which does not comply with this definition by containing some one of the five first-mentioned essential particulars, although previously to the Act it would have been perfectly good. "There

(*a*) "Figures" means "numerals." *Ex parte Stephens*, 3 Ch. D. 659.

(*b*) And see the definitions in *McLean* v. *Fleming*, 96 U. S. 245, and *Avery & Sons* v. *Meikle & Co.*, 27 U. S. Pat. Gaz. 1027. The House of Lords appears to have considered that it was the essential elements that constituted the trade mark, not the whole label with all the minor and immaterial additions: *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479.

was obviously much more difficulty," said Lord Blackburn (*a*), referring to the Act of 1875, "in dealing with existing trade marks, in which there was a vested right of property, than in dealing with new trade marks, as to which no one as yet had a vested right. According to the usual course of legislation in this country, vested rights of property are to be respected, and not interfered with farther than is necessary; but as to rights to be acquired hereafter, it is merely a question of expediency what conditions the Legislature may think fit to attach to the acquiring of those rights." The Act of 1883 went beyond the Act of 1875 in admitting to registration as a new trade mark "a fancy word or fancy words,"—an expression for which sub-clauses (d) and (e) of the amended § 64 (1) have now been substituted,—but there are still some marks incapable of registration as new ones which would have been protected before the Act of 1875. However, a manufacturer is entitled under § 64 to register any distinctive mark used as such *before* the passing of the Act of 1875, and which is within the wording of § 64 (*b*), so obtaining for it the benefits of the Act, or, in case of registration being refused, to demand a certificate of such refusal (*c*), the possession of which will place him in a position to exercise whatever rights he may have had before and independently of the Acts.

First class of trade marks.—A name.

In accordance with the above definition, the first species of trade marks consists of a name of an individual or firm, printed, impressed, or woven in some particular and distinctive manner, to which essential particular may be added any letters, words, or figures, or combination of letters, words, or figures, or of any of them.

How names differ from other trade marks.

There is between a name of an individual or firm used as a trade mark, and a fancy name or arbitrary symbol used for the same purpose, a broad distinction, which was early perceived, and which caused some difficulty in the universal acceptance of a name as an efficacious trade mark. This difference is that a name is in its very nature generic, and is properly applied to designate, not one individual in the world, but, it may be, many thousands, to all of

(*a*) *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 495.

(*b*) This is wider than the wording of § 10 of the Act of 1875, and a single distinctive letter or figure may now be registered as an old trade mark, though this was not so under the Act of 1875: *In re Mitchell* (1), 7 Ch. D. 36.

(*c*) Patents Act, 1883, § 77.

whom it is equally appropriate. The addition of the Christian to the surname does, indeed, diminish the number of persons to whom the appellation belongs; but the Christian name is commonly abbreviated to an initial letter, and, in any case, the surname is the important part of the name, beyond which many persons do not care to investigate.

**Consequently the right in a name used as a trade mark is less complete.**

The impossibility of a single manufacturer being allowed to arrogate to himself the exclusive use of a name which he shares in common with many other persons is apparent; and from this circumstance the rule was deduced that while, as against persons bearing a different name, a manufacturer's right in his name trade mark is absolute and exclusive, as against persons bearing the same name no such exclusive right can be set up (*a*). Thus in *Dence* v. *Mason* (*b*), Malins, V.-C., held that during the continuance of the partnership between two persons named Mason and Brand they could not be prevented from using the latter's name in their business, notwithstanding that it was well known in connection with a similar old-established business; and the Court of Appeal held (*c*) that the same would be the case if a new *bonâ fide* partnership should be formed. This rule must, however, be qualified by the statement that where a person uses his own name for the purpose of fraud, and satisfactory evidence of fraudulent intention can be produced, such unfair conduct will be restrained, even though the free use of the man's own name may be thereby hindered (*d*). And the Criminal Law also admits of the punishment of such fraudulent user of a man's own name (*e*).

(*a*) *Burgess* v. *Burgess*, 3 De G. M. & G. 896, and *infra*, p. 27; *Faber* v. *Faber*, 49 Barb. 357; R. Cox, 401; *Meneely* v. *Meneely*, 62 N. Y. 427. See *Howe* v. *Howe Machine Co.*, 59 Barb. 236; R. Cox, 421; *Lazenby* v. *White* (1), 41 L. J. Ch. 354; *Massam* v. *Thorley's Cattle Food Co.* (1), 6 Ch. D. 574; *Turton* v. *Turton*, 42 Ch. D. 128; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Jamieson & Co.* v. *Jamieson*, 15 P. R. 169; *Valentine* v. *Valentine*, 31 L. R. Ir. 488; *McLean* v. *Fleming*, 96 U. S. 245; *Binninger* v. *Wattles*, 28 How. Pr. 206; *Gilman* v. *Hunnewell*, 122 Mass. 139; *Prince Metallic Paint Co.* v. *Carbon Metallic Paint Co.*, Dig. 573; *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 463; *Aikins* v. *Piper*, 15 Grant Up. Can. Ch. 581; *Decker* v. *Decker*, 52 How. Pr. 218; *Hardy* v. *Cutler*, 3 U. S. Pat. Gaz. 468; *In re Consolidated Fruit Jar Co.*, 14 U. S. Pat. Gaz. 269; *Marshall* v. *Pinkham*, 52 Wisc. 572; *Frazer* v. *Frazer Lubricator Co.*, 121 Ill. 147; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Pratt's Appeal*, 117 Pen. St. 401. And in the same way it seems that a manufacturer may put his address, the name of his mill, on his goods, though it may resemble the address on another man's goods: *Carmichael* v. *Latimer*, 11 R. I. 395.

(*b*) Dig. 534.

(*c*) 41 L. T. N. S. 573.

(*d*) *Holloway* v. *Holloway*, 13 Beav. 209, and *infra*; *Rodgers* v. *Nowill*, 6 Hare, 325; 5 C. B. 109; *Taylor* v. *Taylor*, 23 L. J. Ch. 255; *James* v.

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(*e*) *R.* v. *Dundas*, 6 Cox, 380.

Statements on this point.

A valuable statement of the law was made by Lord Craighill in the Scottish Court of Session, in *Dunnachie* v. *Young & Sons* (*a*), in which he said:—"The name of a person may be a trade mark; there may be other manufacturers of goods of the same description, and the latter are not precluded from placing their own names on their goods by reason of the fact that this name has already become the trade mark of another manufacturer. The only condition they must fulfil is that the name as used by them shall be accompanied with something which shall be a distinction, if the bare name would lead to the deception of the public and the injury of the trader on whose goods the name first appeared as a trade mark." And in the New York case of *England* v. *New York Publishing Co.* (*b*), Daly, C. J., said:—"The fact that a man has used his own name to designate the article he produces, and that the name has become valuable to him through the article becoming extensively known, gives him no right to exclude any other man of the same name from affixing his name upon the same kind of article, if he manufactures it. The test is whether he uses the name honestly and fairly in the ordinary prosecution of his business, or dishonestly, to palm off his own commodity as the production of another."

*Holloway* v. *Holloway*.

In *Holloway* v. *Holloway* (*c*), the defendant, Henry Holloway, sold pills and ointment in packets and pots, similar to those in which his brother, Thos. Holloway, sold his, and the defendant also affixed to his packets and pots similar labels and wrappers, but with "H. Holloway," instead of simply "Holloway." Thomas Holloway having filed a bill for an injunction, Lord Langdale, M.R., granted the injunction, saying, on the evidence, that it was as clear and as plainly avowed a fraud as he ever knew. He, however, expressly stated that, "the defendant's name being Holloway, he had a right to constitute himself a vendor of

*James*, L. R. 13 Eq. 421; *Fullwood* v. *Fullwood*, W. N. 1873, pp. 93, 185; *Fullwood* v. *Fullwood* (2), 9 Ch. D. 176; *Massam* v. *Thorley's Cattle Food Co.* (2), 14 Ch. D. 748; *Pullar* v. *Pullar*, Fry, J., April 9th, 1883; *Warner* v. *Warner*, 5 Times L. R. 359; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *In re Hopkinson*, (1892) 2 Ch. 116; *Gillis* v. *Hall*, R. Cox, 596; *Stonebraker* v. *Stonebraker*, 33 Md. 252; *McLean* v. *Fleming*, 96 U. S. 245; *Devlin* v. *Devlin*, 69 N. Y. 212; *Wilder* v. *Wilder*, Dig. 372; *Peltz* v. *Eichele*, 62 Mo. 171; *Rogers* v. *Taintor*, 97 Mass. 291; *In re Consolidated Fruit Jar Co.*, 14 U. S. Pat. Gaz. 269; *Shaver* v. *Shaver*, 52 Iowa, 208; *India Rubber Comb Co.* v. *Rubber Comb and Jewelry Co.*, 45 N. Y. Super. Ct. 258, and see cases collected at p. 261.

(*a*) Ct. Sess. Cas. 4th Ser. X. 874.

(*b*) 8 Daly, 375.

(*c*) 13 Beav. 269.

Holloway's pills and ointment," and that he, the M. R., "did not intend to say anything tending to abridge such right"; the defendant had, nevertheless, no right to do so with such additions to his own name as to deceive the public and make them believe that he was selling the plaintiff's pills and ointment.

*Burgess* v. *Burgess.*

The case of *Burgess* v. *Burgess* (*a*) was somewhat similar. There the plaintiff's father, to whose business the plaintiff had succeeded, had invented "Burgess' Essence of Anchovies." He employed his two sons as his assistants, and the business was conducted by him and them at 107, Strand. After a time one of the sons, W. H. Burgess, took a house in King William Street, and setting up for himself, put on his shop front, "W. H. Burgess, late of 107, Strand." He also headed his labels, "36, King William Street, City, London (Royal Arms), late of 107, Strand, Burgess' Essence of Anchovies"; plaintiff's labels being headed, "107 (Royal Arms), Strand, corner of the Savoy Steps, John Burgess and Son, Original and Superior Essence of Anchovies." Sir R. T. Kindersley, V.-C., granted an injunction as to "late of 107, Strand," and the continuance on the sides of the defendant's shop door of a plate with the words "Burgess' Fish Sauce Warehouse, late of 107, Strand"; but the part of the motion which referred to the use of the words "Burgess' Essence of Anchovies," being refused, the plaintiff appealed, and the Lords Justices then distinctly refused to deny a man the use of his own name. Sir J. L. Knight-Bruce, L. J., said, "All the Queen's subjects have a right to sell their articles in their own names, and not the less so that they bear the same name as their fathers (*b*). The defendant carries on business in his own name, and sells his essence of anchovies as 'Burgess' Essence of Anchovies,' which, in truth, it is"; and Sir G. Turner, L. J., added that, "where a person was selling goods under a particular name, and another person, not having that name, was using it, it might be presumed that he so used it to represent the goods sold by himself as the goods of the person whose name he used (*c*); but that where the defendant

(*a*) 3 De G. M. & G. 896.

(*b*) And see *Hardy* v. *Cutter*, 3 U. S. Pat. Gaz. 468. However, a son has no right to deceive the public by using his father's new name, after the father has assumed a different name from that to which the son is entitled: *Gouraud* v. *Trust*, 10 N. Y. Sup. Ct. 627; but if the son has assumed the same fictitious name with the father, by the father's desire, the latter cannot afterwards interfere with the honest use of the fictitious name by the son: *England* v. *New York Publishing Co.*, 8 Daly, 375.

(*c*) See *Perks* v. *Hall & Co.*, W. N. 1881, p. 111.

sold goods under his own name, and it did happen that the plaintiff had the same name, it did not follow that the defendant was selling his goods as the goods of the plaintiff" (*a*); if, however, a fraudulent intention had been proved, both judges agreed that the case would have been different.

*Ainsworth* v. *Walmsley.*

The fact that according to these cases a man might with impunity, in the absence of proof of actual fraud, sell the same goods as another, under the same name, provided that his own name was the same as that of the rival manufacturer, who had been in the habit of using his name as his trade mark, not unnaturally produced doubts whether a trade mark which was not capable of protection against infringement in all cases could rightly be termed a trade mark at all; and in *Ainsworth* v. *Walmsley* (*b*), where the defendant had affixed to thread not of the plaintiff's make labels with the words "Ainsworth's Thread," it was argued that such a case was no case of trade mark, and that, this being so, it became necessary for the plaintiff to prove the *scienter* on the part of the defendant. Sir W. P. Wood, V.-C., however, declined to adopt that argument, and intimated that in his opinion a man's name was "as strong an instance of trade mark as could be suggested," adding that it was subject "only to this inconvenience—that if a Mr. Jones or a Mr. Brown relied on his name, he might find it a very inadequate security, because there might be several other manufacturers of the same name."

A name may be a true trade mark.

The decision in this case finally established the principle that the name of an individual or firm duly appended to the vendible article is a valid trade mark (*c*), subject to the inconvenience mentioned above.

A name now first used as a trade mark must be in a distinctive form.

That inconvenience has now been removed as to new marks by the requirement for the name claimed as a trade mark to be "printed, impressed, or woven in some particular and distinctive manner" (*d*). For the future, a new trade mark consisting of a

(*a*) In *Massam* v. *J. W. Thorley's Cattle Food Co.* (2), 14 Ch. D. 748, James, L. J., expressed the opinion that the language of Turner, L. J., was to be preferred to that of Knight-Bruce, L. J., the terms used by the latter being somewhat calculated to mislead; and this view has since been adopted by Lord Herschell in *Reddaway* v. *Banham*, (1896) A. C. 199. See also *Richards* v. *Butcher*, (1891) 2 Ch. 522, and *In re Hopkinson*, (1892) 2 Ch. 116. Compare *Turton* v. *Turton*, 42 Ch. D. 128.

(*b*) L. R. 1 Eq. 518.

(*c*) See *per* Lord Kingsdown, in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523, where he treats a name as a good trade mark. Cf. *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

(*d*) Patents Acts, 1883-8, § 64; Trade Marks Act, 1875, § 10. And see *In re*

name will be available against all the world, without exception, for with the mere collocation of letters there is to be combined some further element, in respect of colour, pattern, or some other such differentia, which shall effectually distinguish the trade mark from even a similar succession of letters from which that further characteristic shall be absent (*a*). The effect of this provision is to render necessary for the future a precaution which many manufacturers have already voluntarily adopted; and the employment of a mode of printing, the imitation of which would furnish an almost irrefutable presumption of fraud, may be instanced from *Stephens* v. *Peel* (*b*), in which case the labels on the bottles containing the plaintiff's ink were printed in letters which are described as being in part white on a red ground, in part white on a blue ground, and in part blue on a white ground. This requirement, however, does not apply to old marks (*c*), and a manufacturer may still obtain protection for his name as an old mark though not printed in any particular or distinctive manner (*d*).

The name need not be that of the actual manufacturer.

There is no provision, either in the Act of 1875 or in the Act of 1883, which requires that the name selected as the trade mark shall be the name of the individual or firm by whom the goods to which the trade mark is to be attached are actually manufactured. Neither was this the case before the passing of those Acts. In many instances, it is true, the name was that of the actual manufacturer: thus, the words "Ainsworth's Thread" (*e*) and "Taylor's Persian Thread" (*f*) were used as trade marks on thread produced by those makers, "Ramsay" was used on bricks by G. H. Ramsay (*g*), Thomas Holloway placed "Holloway's Pills" and "Holloway's

*Gianaclis*, 6 P. R. 467; *In re Hannay*, 7 P. R. 46; also *In re Price's Patent Candle Co.*, 27 Ch. D. 681; *In re Edge*, 8 P. R. 207; *In re Bradley*, 9 P. R. 205; *In re Carroll*, 16 P. R. 82.

(*a*) See *per* Jessel, M. R., in *In re Horsburgh & Co.*, 53 L. J. Ch. 237. In the same way, the United States Statute of 1870, § 79, provided that the Commissioner of Patents should not receive and record any proposed trade mark which was merely the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the same name where used by other persons. And the Statute of 1881, now in force, provides by § 3, that "no alleged trade mark shall be registered which is merely the name of the applicant." See the decisions in *In re India Rubber Comb Co.*, 8 U. S. Pat. Gaz. 905, and *In re Rowe & Post*, 9 U. S. Pat. Gaz. 496, under the Act of 1870, and other cases noted against the Act.

(*b*) 16 L. T. N. S. 145. See *Royal Baking Powder Co.* v. *Davis*, 26 Fed. Rep. 293.

(*c*) Patents Acts, 1883—1888, § 64; Trade Marks Act, 1875, § 10.

(*d*) *In re Hopkinson*, (1892) 2 Ch. 116, and see *In re Wright, Crossley & Co.*, 15 P. R. 131, 377.

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

(*f*) *Taylor* v. *Taylor*, 23 L. J. Ch. 255.

(*g*) *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537.

Ointment" on his boxes and pots (*a*), and so in many cases more (*b*).

A name become a trade mark may pass with the business.

But where a name has once become a trade mark by registration, or, if used before the passing of the Trade Marks Registration Act of 1875, by actual user on a vendible article (*c*), since followed by registration or the procurement of a certificate of refusal to register, it is assignable (*d*), subject to a connection with the goodwill of the business (*e*), and may easily pass to and become the property of a person or firm whose own name is widely different. Thus the trade mark "William Ash" in *Bury* v. *Bedford* (*f*), "1847, Rogers Bros. A. 1," in *Meriden Britannia Co.* v. *Parker* (*g*), "Thorley's Cattle Food" in *Massam* v. *J. W. Thorley's Cattle Food Co.* (2) (*h*), "D. Simmons" in *Weed* v. *Peterson* (*i*), "Pepper's Signal Oil" in *Weston* v. *Ketcham* (1), (2) (*k*), "Dr. C. McLane's Pills" in *McLean* v. *Fleming* (*l*), "Smith, Snyder & Co." in *Young* v. *Jones Bros. & Co.* (*m*), "Oakes' Candies" in *Probasco* v. *Bouyon* (*n*). But it is a fraudulent act to purchase the right to use the name of a small maker because it happens to be identical with that of a maker of reputation (*o*).

Names of fancy personages.

Among trade marks used before the passing of the Trade Marks Act of 1875, instances are not unusual of marks consisting of a name which neither is nor ever has been borne by the present or any past manufacturer, but which either belongs to some person who actually exists or has existed, or to some imaginary or symbolical personage, or character from a book. Thus, the names "Victoria," "Albert," &c., are very commonly used on a great variety of articles; thus "Bismarck" denoted paper collars (*p*), and "Roger Williams" long cloth (*q*), "Dave Jones" whiskey (*r*),

(*a*) *Holloway* v. *Holloway*, 13 Beav. 209.

(*b*) *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Wedgwood* v. *Smith*, Dig. 96; *Collins Co.* v. *Brown*, 3 K. & J. 423; *Stephens* v. *Peel*, 16 L. T. N. S. 145, &c.

(*c*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380.

(*d*) *Hall* v. *Barrows*, 4 De G. J. & S. 150; *The Leather Cloth Companies' case*, 1 H. & M. 271 (V.-C. Wood), and 11 H. L. C. 523 (Lords Cranworth and Kingsdown); *Rogers* v. *Taintor*, 97 Mass. 291; *Emerson* v. *Badger*, 101 Mass. 82.

(*e*) Trade Marks Registration Act, 1875, § 2. Patents Act, 1883, § 70.

(*f*) 32 L. J. Ch. 741; and 4 De G. J. & S. 352.

(*g*) 39 Conn. 450; 12 Amer. Rep. 401.

(*h*) 14 Ch. D. 748.

(*i*) 12 Ab. Pr. N. S. 178.

(*k*) 39 N. Y. Super. Ct. 54; 51 How. Pr. 455.

(*l*) 96 U. S. 245.

(*m*) 3 Hughes, 274.

(*n*) 1 Mo. App. 241.

(*o*) *Perks* v. *Hall & Co.*, W. N. 1881, p. 111.

(*p*) *Messerole* v. *Tynberg*, 4 Abb. Pr. N. S. 410; R. Cox, 479. In the U. S. Patent Office it has been held that one man may register as his trade mark another man's name with the latter's written consent: *Ex parte Sullivan & Burke*, 16 U. S. Pat. Gaz. 765; *Ex parte Paco, Talbott & Co.*, *ib.* 909.

(*q*) *Barrows* v. *Knight*, 6 R. I. 434; R. Cox, 238.

(*r*) *Kidd & Co.* v. *Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337.

"Lone Jack" tobacco (*a*); so too "Britannia," "Dolly Varden," &c. All such names, when of fictitious characters, will properly be classed under sub-clause (e) of the amended § 64 (1) (*b*).

Name sometimes used alone.

In some cases the name constituting the trade mark is used alone, as "Wilkie" in *Wilkie* v. *McCulloch* (*c*), "Dent" in *Dent* v. *Turpin* (*d*), "Ramsay" in *Dixon* v. *Faucus* (*e*), "Howe" in *Howe* v. *Howe Machine Co.* (*f*), "Wedgwood" in *Wedgwood* v. *Smith* (*g*), "Derringer" in *Derringer* v. *Plate* (*h*), "Jules Jurgensen" in *Jurgensen* v. *Alexander* (*i*), "A. W. Faber" in *Faber* v. *Faber* (*k*), "Hopkinson" and "J. J. Hopkinson" in *In re Hopkinson* (*l*).

Sometimes in combinations.

In other cases the name is used in combination with other letters, words, or figures, or combinations of letters, words, or figures; and the name of an inventor, discoverer, manufacturer, &c., "may make words distinctive which, without the name, would not be so" (*m*). Thus "Chubb's Patent-Lock Fire-proof Safe" (*n*), "Collins & Co. Hartford Cast Steel, Warranted" (*o*), "Taylor's Persian Thread" (*p*), "Stephens' Blue Black Writing Fluid" (*q*), "Thorley's Cattle Food" (*r*), "Coe's Super-phosphate of Lime" (*s*), "Wolfe's Aromatic Schiedam Schnapps" (*t*), "Mrs. Winslow's Soothing Syrup" (*u*), "1847, Rogers Bros., A. 1" (*v*), "Meneely's West Troy, N.Y." (*w*). Again, "J. Rodgers & Sons" was coupled with a crown between the initials of the sovereign (*x*), and "Ransomes & Co." was followed by "H. H. 6" (*y*).

(*a*) *Carroll* v. *Ertheiler*, 1 Fed. Rep. 683.

(*b*) See *In re Holt & Co.*, (1896) 1 Ch. 711 ("Trilby"); see *In re Banks & James*, 12 P. R. 333 ("Shakespeare"); *In re Carroll*, 16 P. R. 82 ("Princess Christian").

(*c*) Ct. Sess. Cas. 1st Ser. II. 413.

(*d*) 2 J. & H. 139.

(*e*) 3 Ell. & Ell. 537.

(*f*) 50 Barb. 236; R. Cox, 421.

(*g*) Dig. 96.

(*h*) 29 Cal. 292; R. Cox, 324.

(*i*) 24 How. Pr. 269; R. Cox, 298.

(*k*) 49 Barb. 357; R. Cox, 401.

(*l*) (1892) 2 Ch. 116. And see *Richards* v. *Williamson*, 30 L. T. N. S. 746; *Fullwood* v. *Fullwood*, W. N. 1873, pp. 93, 185; *Tonge* v. *Ward*, 21 L. T. N. S. 480; *Fullwood* v. *Fullwood* (2), 9 Ch. D. 176; *Bowman* v. *Floyd*, 85 Mass. 76; *Rogers* v. *Taintor*, 97 Mass. 291; *Emerson* v. *Badger*, 101 Mass. 82; *Sohier* v. *Johnson*, 111 Mass. 238; *Sherwood* v. *Andrews*, 3 Am. L. Reg. N. S. 588; *In re India Rubber Comb Co.*, 8 U. S. Pat. Gaz. 905; *India Rubber Comb Co.* v. *Meyer*, *ib.* 905; *India Rubber Comb Co.* v. *Rubber Comb & Jewelry Co.*, 45 N. Y. Super. Ct. 258; *In re Rubber Clothing Co.*, 10 U. S. Pat. Gaz. 111; *In re Coggin, Kidder & Co.*; 11 U. S. Pat. Gaz. 1109; *In re Hall & Co.*, 13 U. S. Pat. Gaz. 229; *Carmichel* v. *Latimer*, 11 R. I. 395.

(*m*) *Fullon* v. *Sellers*, 4 Brews. 42.

(*n*) *Chubb* v. *Priest*, 1 L. T. 142.

(*o*) *Collins Co.* v. *Brown*, 3 K. & J. 423; *Collins Co.* v. *Cowen*, *ib.* 428.

(*p*) *Taylor* v. *Taylor*, 23 L. J. Ch. 255.

(*q*) *Stephens* v. *Peel*, 16 L. T. N. S. 145.

(*r*) *Massam* v. *J. W. Thorley's Cattle Food Co.* (2), 14 Ch. D. 748.

(*s*) *Bradley* v. *Norton*, 33 Conn. 157; R. Cox, 331.

(*t*) *Burke* v. *Cassin*, 45 Cal. 467; 13 Amer. Rep. 204.

(*u*) *Curtis* v. *Bryan*, 2 Daly, 212; R. Cox, 434.

(*v*) *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450; 12 Amer. Rep. 401.

(*w*) *Meneely* v. *Meneely*, 62 N. Y. 427.

(*x*) *Rodgers* v. *Nowill*, 6 Hare, 325; 5 C. B. 109; 3 Do G. M. & G. 614.

(*y*) *Ransome* v. *Bentall*, 3 L. J. Ch.

But the mere combination of a name in the genitive case and in ordinary type with ordinary descriptive words does not constitute a registrable new trade mark. Thus "Gianaclis' Cigarettes" (*a*), "Edge's Filtered Blue" (*b*).

Second class of trade marks.—A signature.

The second class of trade marks to which the Act allows registration is really little else than a subdivision of the first class, consisting as it does, of "a written signature, or copy of a written signature of the individual or firm applying for registration thereof as a trade mark," to which there may be added, as before, "any letters, words, or figures, or combination of letters, words, or figures, or of any of them." The signature of an individual or firm is in fact the name of the individual or firm printed or written in a "particular and distinctive manner," and as such, even before the Registration Acts, necessarily exhibited characteristics which could hardly be copied without the presumption being irresistible that the imitation was fraudulent and intended to invade the rights of the person whose signature was in question. In the cases of *Farina* v. *Silverlock* (*c*) and *Welch* v. *Knott* (*d*) the signature formed an important part of the trade mark concerned, and in America the signatures of individuals and firms have been ad-

161. And see *Green* v. *Folgham*, 1 S. & S. 398; *James* v. *James*, L. R. 13 Eq. 421; *Lazenby* v. *Lazenby*, Dig. 160; *Gillis* v. *Hall*, R. Cox, 596; also *Wilder* v. *Wilder*, Dig. 372 ("J. B. Wilder & Co.'s Stomach Bitters"); *Weston* v. *Hemmons*, 2 V. L. R. Eq. 121 ("Weston's Wizard Oil"); *Filkins* v. *Blackman*, 13 Bl. C. C. 440 ("Dr. J. Blackman's Genuine Healing Balsam"); *Gouraud* v. *Trust*, 10 N. Y. Sup. Ct. 627 ("Gouraud's Oriental Cream or Magical Beautifier"); *Weston* v. *Ketcham* (1) and (2), 39 N. Y. Super. Ct. 54; 51 How. Pr. 455 ("Capt. S. Pepper's Extra Signal Oil"); *In re Rohland*, 10 U. S. Pat. Gaz. 980 ("Dr. Lobenthal's Essentia Antiphthisica"); *Swift* v. *Peters*, 11 U. S. Pat. Gaz. 1110 ("The John C. Ragsdale Ammoniated Dissolved Bone"); *McLean* v. *Fleming*, 96 U. S. 245 ("Dr. C. McLane's Liver Pills"); *Davis* v. *Kennedy*, 13 Grant Up. Can. Ch. 523 ("Perry Davis' Vegetable Pain-Killer"); *Fulton* v. *Sellers*, 4 Brews. 42 ("Dr. J. M. Lindsey's Improved Blood Searcher"); *Manhattan Medicine Co.* v. *Wood*, 4 Cliff. 461 ("Atwood's Physical Vegetable Jaundice Bitters"); *Hostetter* v. *Vowinkle*, 1 Dill. 329; and *Hostetter* v. *Anderson*, 1 V. R. Eq. 7 ("Hostetter's Celebrated Stomach Bitters"); *Radway* v. *Coleman*, 15 Grant Up. Can. Ch. 50 ("Radway's Ready Relief"); *Chinn* v. *Thomas*, 5 V. L. R. Eq. 188 ("Hood & Co.'s Soluble Sheep Dip"); *Hanford* v. *Westcott*, 16 U. S. Pat. Gaz. 1181 ("Hanford's Chestnut Grove Whiskey"); *Morgan* v. *Rogers*, 26 *ib.* 1113 ("Dr. Haynes' Arabian Balsam"); *Funke* v. *Dreyfus*, 34 La. Ann. 80 ("Boker's Stomach Bitters"); *Hoxie* v. *Chaney*, 143 Mass. 592 ("A. N. Hoxie's Mineral Soap"), ("A. N. Hoxie's Pumice Soap"); *Frost* v. *Rindskopf*, 42 Fed. Rep. 408 ("Warren Hose Supporter" coupled with a picture of a hose supporter).

(*a*) *In re Gianaclis*, 6 P. R. 467.

(*b*) *In re Edge*, 8 P. R. 207. And see *Pirie* v. *Goodall*, (1892) 1 Ch. 35; cf. *In re Colman*, (1894) 2 Ch. 115.

(*c*) 1 K. & J. 509; 6 De G. M. & G. 214; 4 K. & J. 650.

(*d*) 4 K. & J. 747. See *Massam* v. *Thorley's Cattle Food Co.* (1), 6 Ch. D. 574; *In re Farina* (2), 27 W. R. 456; *In re Farina* (3), Dig. 654; *In re Maignen*, 28 W. R. 759.

mitted to registration on the same principle. Under the Act of 1875, § 10, there was no necessity for the signature to be that "of the individual or firm applying for registration thereof as a trade mark," but that is now required by § 64, both as originally contained in the Act of 1883, and as amended by the Act of 1888; so that an individual or firm will not in the future be able to register the signature of the person or firm to whose business he or they succeeded, unless that is an old mark, having been used as such before the passing of the Act of 1875. However, when the signature is once registered as a trade mark, whether with or without additions, it will descend and be assignable just as any other trade mark, without its new owner being liable to any imputation of representing the person whose signature is employed to be still in charge of the business, although formerly the use of a mark of this description might not improbably have been held to convey some such representation to the public. To a case of this description Lord Cranworth's observations very directly apply, when, speaking of a buyer of a business using the name of a former maker, he said (*a*), "the question in every such case must be whether the purchaser in continuing the use of the original trade mark would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade mark. In such a case I see nothing to make it improper for the purchaser to use the old trade mark, as the mark would in such a case indicate only that the goods so marked were made at the manufactory which he had purchased." The provision in the Acts of 1875 (*b*) and 1883 (*c*) that a trade mark "shall be assigned and transmitted only in connexion with the goodwill of the business" will enable the purchaser to use the trade mark so acquired by him without his motives being open to question, and will at the same time insure that marked goods purchased by the public shall, except in cases of punishable infringement, be produced at the works from which they purport to have come.

**Third class of trade marks.—A distinctive device, &c.**

The third class of marks comprises "a distinctive device, mark, brand, heading, label, or ticket," to which again may be added

(*a*) *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523.

(*b*) § 2.
(*c*) § 70.

"any letters, words, or figures, or combination of letters, words, or figures, or of any of them."

Distinctiveness required.

The important feature which is absolutely necessary in all the varieties of trade marks included in this class is that of distinctiveness (*a*): each mark must be such that, if a question of infringement arises, it shall be perfectly clear what it is that is being infringed, and that this something is quite different from all other marks used upon the same class of goods.

Composition of trade mark, and manner of use alluded to.

Of the words "device, mark, brand, heading, label, or ticket," some point more directly to the matter of which the trade mark is composed, others to the manner in which it is affixed to the vendible article.

"Device" and "mark."

"Device" and "mark" seem, at first sight, wide enough to include any of the symbols or combinations of which a trade mark could consist. It has, however, been held, under the Act of 1875, that they do not include a mere word, or collocation of letters or figures, however strangely combined, or singular in their application (*b*), and the decision seems to be equally applicable to the Acts of 1883—1888.

Mode of application indicated by them.

When used as indicative of the mode of application of the trade mark, these words will include such cases as where the mark is stamped on shirts (*c*) or other cotton goods (*d*), or imprinted on sticks of liquorice (*e*) or sealing wax (*f*), and, generally, any cases which do not come within the remaining and more exact terms.

"Brand."

"Brand" refers to cases in which the trade mark is branded on metal goods (*g*), or on wine casks (*h*), or corks (*i*), and it may possibly include a water mark woven into the texture of paper (*k*).

"Heading."

"Heading" possibly applies to cases where, in addition to the ordinary label on the goods, there is a separate label affixed above it, on which the special mark is exhibited (*l*). But it more especially

(*a*) See *per* Cotton, L. J., in *Waterman* v. *Ayres*, 39 Ch. D. 33; and *per* Chitty, J., in *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274.

(*b*) *Ex parte Stephens*, 3 Ch. D. 659.

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

(*d*) *Henderson* v. *Jorss*, Dig. 198; *Carver* v. *Pinto Leite*, L. R. 7 Ch. 90; *Broadhurst* v. *Barlow*, W. N. 1872, p. 212; *Carver* v. *Bowker*, Dig. 581.

(*e*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380.

(*f*) *In re Hyde & Co.*, 7 Ch. D. 724.

(*g*) *Motley* v. *Downman*, 3 My. & Cr. 1; *Millington* v. *Fox*, *ib.* 338; *Crawshay* v. *Thompson*, 4 M. & G. 357; *Hall* v. *Barrows*, 32 L. J. Ch. 548; and 4 De G. J. & S. 150, &c.

(*h*) *Seixo* v. *Provezende*, L. R. 1 Ch. 192; *Moet* v. *Couston*, 33 Beav. 578; *Fonsardin* v. *Peto*, 33 Beav. 642, &c.

(*i*) *Moet* v. *Clybouw*, Dig. 533; *Moet* v. *Pickering*, 8 Ch. D. 372.

(*k*) *Pirie* v. *Goodall*, (1892) 1 Ch. 35.

(*l*) *Ex parte Stephens*, 24 W. R. 963.

applies to the kind of marks applicable to the case of textile fabrics, in which a heading of special pattern is inwoven into the edge of the goods (*a*).

"Label." "Label" indicates an impression of a trade mark upon a piece of paper, or some other thin substance, which is made to adhere to the goods to which it is applied, or to the vessel containing them. Thus, in *Wotherspoon* v. *Currie* (*b*), the label was affixed to packets of starch; in *Bass* v. *Dawber* (*c*) to bottles of beer; in *Blackwell* v. *Crabb* (*d*), *Cocks* v. *Chandler* (*e*), *Cotton* v. *Gillard* (*f*), and other cases, to bottles of pickle.

"Ticket." "Ticket" points to a mark also impressed upon a separate material, but only loosely attached to the goods the make of which it indicates. Thus the trade mark of a wire manufacturer consisted of an anchor stamped on the tallies, or metal labels, attached to the bundles of his wire (*g*); the trade mark of a clothier was imprinted on a ticket pinned on to his wares (*h*). In the case of textiles the "ticket" is gummed on to the fabric. Mere words do not constitute a distinctive heading (*i*), or label, or ticket (*j*).

Composition of trade mark. The question, "What is a trade mark?" is, however, less directed to the manner in which the trader's symbol is attached to his goods than to its composition, and the varieties of mark which will merit and receive protection.

"Device." The original form of trade mark was probably the representation of some animal, or other natural object, or mathematical figure, as the Hall mark of the lion or leopard's head, the Freemasons' square and compasses (*k*), or the Government broad arrow. Such a mark would be independent of language, and would serve to distinguish goods of a certain make, even for the illiterate.

(*a*) *Harter* v. *Souvazoglu*, W. N. 1875, pp. 11, 101; *Carver* v. *Bowker*, Dig. 581; *Robinson* v. *Finlay*, 9 Ch. D. 487; and see *per* Sir G. Jessel, M. R., in *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434.

(*b*) L. R. 5 H. L. 508. See *Gilman* v. *Hunnewell*, 122 Mass. 139.

(*c*) 19 L. T. N. S. 626.

(*d*) 36 L. J. Ch. 504.

(*e*) L. R. 11 Eq. 446.

(*f*) 44 L. J. Ch. 90.

(*g*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.

(*h*) *Hirst* v. *Denham*, L. R. 14 Eq. 542.

(*i*) *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288.

(*j*) *Great Tower St. Tea Co.* v. *Smith*, 6 P. R. 165.

(*k*) As to this Freemasons' emblem, it has been held in the United States that it is so generally appropriated to a special purpose as not to be registrable by a private firm, even in combination: *In re Tolle*, 2 U. S. Pat. Gaz. 415. But this decision was not followed in *In re Thomas*, 14 U. S. Pat. Gaz. 821, or *Ex parte King* (2), 46 U. S. Pat. Gaz. 119, though in *Ex parte Smith* (3), 16 U. S. Pat. Gaz. 764, registration was refused to the word "Masonic."

Such marks are still frequently employed, and this clause specially includes them. To this class belong the marks of an anchor (*a*), an eagle (*b*), a lion (*c*), an elephant (*c*), a cross (*d*), a pyramid (*e*), a bell (*f*), a hand (*g*), a cock (*h*), a rising sun (*i*), or a triangle (*j*). Examples.

A crest is just as capable of becoming a trade mark as any other arbitrary device (*k*). In *Beard* v. *Turner* (*l*) Sir W. P. Wood, V.-C., said, "I am not prepared to say or hold that a man putting his crest should not so put it as to establish his right to say, 'Nobody shall use my crest.' It is incumbent on him, as on every plaintiff, to show that the crest is an essential part of his trade mark." The readiest way of proving this is now by reference to the Register of Trade Marks. A crest.

The portrait of a person whose name has become descriptive of the goods, is not sufficiently distinctive to be registered as a good trade mark (*m*). The portrait of a public character has, however, been allowed to be registered in America (*n*), and even in this country in ordinary cases a trader may obtain registration of his own portrait as a trade mark (*o*). Portrait.

Before the Trade Marks Act of 1875 a trade mark might consist of initials, either alone or in combination with other ingredients (*p*). Now, however, it would be difficult to assert that initials alone, printed in the usual manner, and without any distinguishing peculiarities of shape, colour, &c., could be described as "a distinc- Initials.

(*a*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.

(*b*) *Standish* v. *Whitwell*, 14 W. R. 512.

(*c*) *Henderson* v. *Jorss*, Dig. 198.

(*d*) *Cartier* v. *Carlile*, 31 Beav. 292; *Cartier* v. *Westhead*, Dig. 199; *Cartier* v. *May*, Dig. 200.

(*e*) *Bass* v. *Dawber*, 19 L. T. N. S. 626.

(*f*) *Bell, Black & Co.* v. *Bell & Co.*, Dig. 514.

(*g*) *Allsopp* v. *Walker*, Dig. 545.

(*h*) *In re Walkden Aërated Waters Co.*, 54 L. J. Ch. 394.

(*i*) *Morse* v. *Worrell*, 10 Phila. 168.

(*j*) *In re Worthington*, 14 Ch D. 8.

(*k*) In *Steinthal* v. *Samson*, Dig. 546, the trade mark consisted of the crest, arms, and motto of the plaintiff's family. See *Robinson* v. *Finlay*, 9 Ch. D. 487; *Hargreaves* v. *Smith*, Dig. 338; *In re Rosing*, 54 L. J. Ch. 975; *In re Farina* (1), 26 W. R. 261; *In re Farina* (3), Dig. 654; *Godillot* v. *Hazard*, 81 N. Y. 263; *Mackinnon* v. *Thompson*, 5 Can. Leg. News, 396, also Instructions as to royal, national, municipal, &c., arms.

(*l*) 13 L. T. N. S. 746. In *Standish* v. *Whitwell*, 14 W. R. 512, the defendant was restrained from using what he alleged to be his own crest as his trade mark. So in *Mackinnon* v. *Thompson*, 5 Can. Leg. News, 396, where the trade mark, consisting of the defendant's name and arms, had been sold to the plaintiff.

(*m*) *In Re Anderson*, 26 Ch. D. 409; 54 L. J. Ch. 1084 (App.).

(*n*) *Ex parte Sullivan & Burke*, 16 U. S. Pat. Gaz. 765; *Ex parte Pace, Talbott & Co.*, *ib.* 909.

(*o*) *Rowland* v. *Michell*, (1897) 1 Ch. 71; and see *Richmond Nervine Co.* v. *Richmond*, 159 U. S. 293; *Kathreiner's Malz Kaffee Fabriken, &c.* v. *Pastor Kneip Medicine Co.*, 82 Fed. Rep. 321.

(*p*) See pp. 76, 77, *infra*.

tive device, mark, brand, heading, label, or ticket." Where the letters are combined together into the form of a monogram, or enclosed within a distinctive border, or are in any other way used in such a combination as to be distinguishable from the same letters used in the plain ordinary way, it might have been supposed that a device or mark would be constituted capable of registration; but in *Lucke* v. *Webster* (*a*), Sir G. Jessel, M. R., while admitting to registration as an old mark a monogram on a shield, suggested that he could not have done so if it had been a new mark. In the American case of *United States* v. *Marble* (*b*), the Commissioner of Patents considered that the letters "W. G." in a monogram were registrable as a trade mark.

Marks with a mechanical purpose.

Marks which have a mechanical purpose, *e.g.*, to serve as guides for the equal division of the article to which they are applied, cannot deprive other manufacturers of the right to use somewhat similar marks for the same purpose (*c*).

Marks representing the article.

In some American cases it has been held or suggested that a device which represents the article to which it is intended to be applied must be treated as descriptive and incapable of appropriation, in the same way as words which are descriptive of the article to which they are applied are refused recognition as distinctive names. Thus the representation of a pig, attached to packages of lard (*d*); the representation of a fish, for fishing-lines (*e*); the representation of a bed made under a special patent, for beds so made (*f*); the representation of a barrel composed of alternate light and dark staves, for barrels of flour so made up (*g*); the representation of a twig with three leaves and a plum, for medicated prunes (*h*). But there is no English authority in favour of such devices being incapable of appropriation, and it is very doubtful whether the principle would be recognised in this country. In the case of the descriptive name, the right to use it could hardly be separated from the right to make and sell the article; but there

(*a*) Jessel, M. R., April 4th, 1879.
(*b*) 22 U. S. Pat. Gaz. 1366.
(*c*) *Dausman and Drummond Tobacco Co.* v. *Ruffner*, 15 U. S. Pat. Gaz. 559.
(*d*) *Popham* v. *Wilcox*, 66 N. Y. 59.
(*e*) *In re Pratt & Farmer*, 10 U. S. Pat. Gaz. 866.
(*f*) *Tucker Manufacturing Co.* v. *Boyington*, 9 U. S. Pat. Gaz. 455.
(*g*) *Ex parte Halliday Brothers*, 16 U. S. Pat. Gaz. 500.
(*h*) *Ex parte Smith* (2), 16 U. S. Pat. Gaz. 679; and see *Merriam* v. *Famous Shoe and Clothing Co.*, 47 Fed. Rep. 411; *Merriam* v. *Texas Siftings Publishing Co.*, 49 Fed. Rep. 944. But this rule does not appear to be of universal application. See *Frost* v. *Rindskopf*, 42 Fed. Rep. 408; *Harris Drug Co.* v. *Stucky*, 46 Fed. Rep. 624. Cf. *Fish Brothers Wagon Co.* v. *La Belle Wagon Works*, 82 Wisc. 546; 33 Am. St. Rep. 72.

is no imperative necessity that every one who has the latter right should also be entitled to sell the article under a mark containing a representation of it. If the trade are entitled to sell the article, and to sell it by its appropriate name, their requirements appear to be satisfied. However, the question would probably be treated as being, to some extent at least, one of degree. In *In re James* (*a*) an application was made for the removal from the register of a trade mark for black lead, which consisted of the representation of a dome-shaped cylinder of black lead, on the ground that the trade mark was simply a pictorial description of the goods in the form in which they were usually sold; but the decision of Pearson, J., allowing the application, was reversed by the Court of Appeal. This was principally on the ground that the black lead was not necessarily sold in that shape, and that the mark had sometimes been applied and might properly be applicable to blocks of black lead in any shape; and the Court did not actually decide what would be done if the trade mark had consisted of a pictorial representation of the goods in the only shape in which they could be made, but the inclination of the Court of Appeal would appear to have been rather in the direction above suggested. The Comptroller-General has now signified his intention not to accept as trade marks pictorial representations of the goods to which they are to be applied (*b*).

"Heading." *Harter* v. *Souvazoglu.*

In *Harter* v. *Souvazoglu* (*c*) the trade mark consisted of a certain combination of purple, pink, and green threads, nine stripes in three gradations, which were woven as a heading into cotton goods, which were forwarded to the markets of Turkey and the Levant. The owners of this mark having filed a bill for an injunction against a rival trader who had copied the mark, Sir C. Hall, V.-C., held "that a heading could be the subject of a trade mark, that the evidence in the case showed that this heading was distinguished from others in Turkey, and that it had become a trade mark, although it was sometimes associated with stamps on the goods, of the lion and the sun, and other devices. Customers had bought goods because of this particular heading, and he therefore considered that the plaintiffs who had adopted it were entitled to the protection they asked, and that no other persons could use it" (*d*).

(*a*) 33 Ch. D. 392. And see *Ripley* v. *Bandey*, 14 P. R. 691, compromised on appeal, *ib.* 944.

(*b*) See *In re Sphincter Grip Armoured Hose Co.*, 10 P. R. 84.

(*c*) W. N. 1875, pp. 11—101.

(*d*) And see *per* Sir G. Jessel, M. R., in *Singer Manufacturing Co.* v. *Wilson*,

Fancy words.

Besides the varieties of marks to which reference has already been made, the third class of registrable trade marks under § 64 of the Patents Acts, 1883, before its amendment by the Act of 1888, also included "a fancy word or words not in common use." This was not so under the Trade Marks Registration Acts, 1875—1877, which entirely excluded fancy words from registration as new marks, and only admitted such as had been used before the Act of 1875. This exclusion was, however, found to cause great annoyance and inconvenience, since a fancy name is of all trade marks the most useful, seeing that it affords so easy a mode of inquiring for and obtaining goods produced by the precise manufacturer whose production is desired. For this reason the use of such words as trade marks has been more general than that of any other description of mark, and during the period of exclusion from registration recourse was had to all kinds of contrivances for obtaining the registration and at least partial protection of fancy names.

Requirements.

For words to be capable of exclusive appropriation under this provision of the Act of 1883, which is still operative with respect to words registered under it, they had to comply with three requirements. First, they had to be fancy words; secondly, they had to be distinctive; and, thirdly, they had to be not in common use. Each of these requirements has been the subject of decision under the Act.

Fancy words defined.

As to what is meant by "a fancy word or fancy words," it was at first very generally supposed, and was so held by Chitty, J. (*a*), and Bacon, V.-C. (*b*), that the term would include any word fancifully applied, such as would have been protected by the Courts irrespective of any Registration Act. The Court of Appeal, however, took a more stringent view of the meaning of the phrase, and the effect to be given to it is now ascertained with reasonable clearness. Thus, in the leading case on the subject (*c*), Cotton, L. J., said, "To be registered, the word must be a 'fancy word'; and in order to come within that description it must be a word which obviously cannot have reference to any description or designation of where the article is made, or of what its character

2 Ch. D. 434. Also *Carver* v. *Bowker*, Dig. 581, and *Robinson* v. *Finlay*, 9 Ch. D. 487, where a heading of coloured threads formed a part of the combination mark, though not mentioned in the report. The heading is practically always an element in the combination of markings on cotton piece goods.

(*a*) *In re Stapley & Smith*, 29 Ch. D. 877.

(*b*) *In re Van Duzer*, 34 Ch. D. 623; *In re Leaf, Sons & Co.*, 34 Ch. D. 632.

(*c*) *In re Van Duzer*, 34 Ch. D. 623.

is"; and Lindley, L. J., said, "To be a 'fancy word' the word must either have to ordinary English people, to whom the Act is addressed, no meaning, like the word 'Eureka,' or the word 'Aeilyton,' or, if it has any meaning at all, it must be obviously [non-descriptive] (*a*) when used as a trade mark." And Lopes, L. J., added, "A word to be a 'fancy word' must be obviously meaningless as applied to the article in question. It must be a word fanciful in its application to the article to which it is applied, in the sense of being so obviously and notoriously inappropriate as neither to be deceptive nor descriptive, nor calculated to suggest deception or description. Further than that, the word must have an innate and inherent character of fancifulness, which must not depend on evidence (*b*), and cannot be supported by evidence, to show that in fact it is neither deceptive nor descriptive, nor calculated to be deceptive or descriptive. A fancy word must speak for itself: it must be a fancy word of its own inherent strength." Again, in *Waterman* v. *Ayres* (*c*), Fry, L. J., after expressing his concurrence in the definitions given above, added further, "That which is the only name of a thing cannot, it seems to me, be a fancy word with regard to it. The word 'spade' describes the thing. You can never take the word 'spade' and call it a fancy word for the thing." And in another case (*d*) Chitty, J., said that, "in reference to an article produced in a foreign country and imported into England, where it was previously unknown and without a name, the word used in that foreign country as the common term to describe or denote the article is not a fancy word within the meaning of the Act."

The effect of these statements has been so to narrow and restrict the meaning of the phrase that in nearly all the cases in which the question of "fancy word" has been brought before the Court the decision has been adverse to the claimant. In fact, in only five cases (*e*), one of which has since been disapproved (*f*), has the word been upheld; whereas in many cases it has been disallowed

(*a*) See 34 Ch. D. 645. See also *In re Bovril Trade Mark*, (1896) 2 Ch. 600, 605, 607.

(*b*) And see *Hodgson* v. *Sinclair*, 9 P. R. 22.

(*c*) 39 Ch. D. 29.

(*d*) *In re Davis & Co.*, 6 P. R. 207.

(*e*) *In re Stapley & Smith*, 29 Ch. D. 877 ("Alpine" cotton); *Slazenger* v. *Malings*, W. N. 1885, p. 124 ("The Lawford" racquet); *In re Burgoyne*, 6 P. R. 227 ("Oomoo" wine); *In re Densham*, (1895) 2 Ch. 176 ("Mazawattee" tea); *In re Bovril Trade Mark*, (1896) 2 Ch. 600 ("Bovril").

(*f*) *In re Stapley & Smith* in *In re Van Duzer*, 34 Ch. D. 623.

on the ground of descriptiveness or suggestion of descriptiveness (*a*). It is, however, to be observed that the recent 'Mazawattee' and 'Bovril' decisions might well have been adverse to the trade mark owners if the Courts had been disposed to show as great severity as in some of the previous cases, so that the greater leniency shown in these cases may possibly imply that marks will be expunged with less frequency in future.

"Distinctive."

As to the requirement that a fancy word shall be distinctive, it seems that the meaning to be placed upon this is that the word must be one which serves to distinguish the goods of one maker or dealer from the goods of all others (*b*), and that it cannot be distinctive if a word of similar sound, though different in spelling, is in use in the trade (*c*).

"Not in common use."

The further requirement that fancy words shall be "not in common use" has been interpreted by Chitty, J. (*d*), to mean that

(*a*) Words which have been held not to be "fancy words": *In re Price's Patent Candle Co.*, 27 Ch. D. 681 ("National Sperm" candles); *In re Friedlander*, W. N. 1885, p. 85 ("Zephyr Asiatic Walnut Pipe"); *In re Harden Star, &c. Co., Ld.*, 3 P. R. 132 ("Hand Grenade Fire Extinguisher"); *In re Van Duzer*, 34 Ch. D. 623 ("Melrose Favourite Hair Restorer"); *In re Leaf, Sons & Co.*, 34 Ch. D. 632 ("Electric Velveteen"); *In re Arbenz*, 35 Ch. D. 248 ("Gem" air-guns); *Lever* v. *Goodwin*, 36 Ch. D. 1 ("The Self-Washer"); *Towgood Bros.* v. *Pirie & Sons, Ld.*, 4 P. R. 67 ("The Jubilee Note" paper); *In re Ainslie & Co.*, 4 P. R. 212 ("Ben Ledi" whiskey); *In re Laing*, L. J. N. of C. 1887, p. 102 ("Glengowrie Blend of Fine Old Highland Whiskey"); *In re Hanson*, 37 Ch. D. 112 ("Red, White, and Blue" label tea); *In re Sanitas Co., Ld.*, 4 P. R. 533 ("Sanitas" medicines); *In re Waterman*, 39 Ch. D. 29 ("Reversi" game); *In re Davis & Co.*, 6 P. R. 207 ("Boköl" beer); *Humphries* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820 ("Herbalin" medicine); *In re Californian Fig Syrup Co.*, 40 Ch. D. 620 ("Syrup of Figs"); *In re Jackson & Co.*, 6 P. R. 80 ("Kokoko" cotton piece goods); *In re Thompson & Co.*, 6 P. R. 213 ("Manor" tin plates); *In re Grossmith*, 6 P. R. 180 ("Emollio" toilet cream); *Great Tower Street Tea Co.* v. *Smith*, 6 P. R. 165 ("Tower Tea"); *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274 ("Washerine" soap); *In re Vignier*, 6 P. R. 490 ("Monobrut" champagne); *In re Batt & Co.*, 6 P. R. 493 ("The Brymbo Special" iron); *In re Hannay*, 7 P. R. 46 ("Electroid" anti-fouling composition); *Stuart & Co.* v. *Scottish Val de Travers Paving Co., Ld.*, Ct. Sess. Cas. 4th Ser. XIII. 1 ("Granolithic" artificial stone); *In re Apollinaris Co.*, (1891) 2 Ch. 186, 221 ("Apollinaris," "Friedrichshall," and "Hunyadi Janos" mineral waters and products); *In re Edge*, 8 P. R. 207 ("Filtered Blue"); *Pirie* v. *Goodall*, (1892) 1 Ch. 35 ("Parchment Bank" paper); *Hodgson* v. *Sinclair*, 9 P. R. 22 ("Britannia" soap); *In re Paine* (1), 9 P. R. 130 ("John Bull Brand" beer); but see *Paine* v. *Daniells*, (1893) 2 Ch. 567; *In re Harris*, 9 P. R. 492 ("Beatrice" shoes); *In re Lloyd*, 10 P. R. 281 ("Carnival" cigarettes); *In re Talbot*, 11 P. R. 77 ("Emolliolorum" saddle paste); *In re Banks & James*, 12 P. R. 333 ("Shakspere" cigars); *In re Thompson*, 13 P. R. 35 ("Roadster" boots); *In re Davis*, 14 P. R. 903 ("Compactum" umbrellas); *Meaby & Co.* v. *Triticine, Ld.*, 15 P. R. 1 ("Triticumina" food).

(*b*) See *Wood* v. *Lambert*, 32 Ch. D. 257; *Waterman* v. *Ayres*, 39 Ch. D. 29; *In re Jackson & Co.*, 6 P. R. 80; *In re Apollinaris Co.*, (1891) 2 Ch. 186; *In re Magnolia Metal Co.*, (1897) 2 Ch. 371.

(*c*) *Per* Kay, J., in *In re Jackson & Co.*, 6 P. R. 80. And see *In re Ripley*, 15 P. R. 151.

(*d*) *In re Stapley & Smith*, 29 Ch. D. 877; *In re Burgoyne*, 6 P. R. 272.

they must not be in common use in the trade with respect to which it is sought to appropriate them; and though other judges have rather avoided expressing an opinion as to the meaning of the phrase, it would appear that this is the true meaning to be attached to it. The fact that a word may have been generally used and have acquired a descriptive signification in one trade may well leave it "obviously meaningless" in another. In Scotland, Lord Craighill (*a*) seems to have taken substantially the same view as Chitty, J., for he says that the term "'common use,' as employed in the statute, does not necessarily import that the word must have been used commonly by all members of the community, or by people in all parts of the country. What is enough, in my opinion, to establish common use, in the sense of the statute, is this: if it shall be shown that the word has been commonly used by persons who had occasion to use it, and who are connected more or less directly with the use of the commodity to which the word has been applied." Conversely it has been laid down by Kekewich, J., that if words are in common use generally, they are in common use within the meaning of the Statute (*b*).

Fourth class of trade marks.—Invented words.

The fourth class of marks comprises "an invented word or invented words," to which, as in other cases, additions may be made. The introduction of this expression into the Act was generally considered to have been intended to bring within its scope, and to render registrable as new marks, such words as "Washerine" (*c*) and "Monobrut" (*d*), which were rejected as fancy words, or as "Pectorine" (*e*), "Lactopeptine" (*f*), "Valvoline" (*g*), which were not submitted to that test. The judges were, however, unable to remove from their minds the impression produced upon them by the rigidity with which the term "fancy word" had been construed, and which had been carried so far as to exclude from registration, not merely words which contained direct statements as to the character or quality of the goods, but even invented words which had never been heard of before, but which

Compare *Great Tower Street Tea Co.* v. *Smith*, 6 P. R. 165; and *In re Banks & James*, 12 P. R. 333.

(*a*) In *Stuart & Co.* v. *Scottish Val de Travers Paving Co., Ld.*, Ct. Sess. Cas., 4th Ser. XIII. 1.

(*b*) *In re Paine* (1), 9 P. R. 130.

(*c*) *Burland & Co.* v. *Broxburn Oil Co.* (2), 42 Ch. D. 274.

(*d*) *In re Vignier*, 6 P. R. 490.

(*e*) *Smith* v. *Mason*, W. N. 1875, p. 62.

(*f*) *Carnrick* v. *Morson*, L. J. N. of C. 1877, p. 71.

(*g*) *Leonard & Ellis* v. *Wills & Co.*, 26 Ch. D. 288.

were supposed to contain some remote suggestion of descriptiveness. Under the influence of this impression, they applied to this class of "invented words" the same prohibition of any reference to the character or quality of the goods which was contained in the succeeding clause of the Act relating to existing words, and having so introduced this prohibition they construed it with no less strictness than had previously been adopted in the case of "fancy words." In this way "Satinine" was rejected as a trade mark for starch, soap, blue, and similar goods (*a*), "Emolliolorum" for saddle paste (*b*), "Somatose" for an extract of meat (*c*). On the other hand "Mazawattee" was approved for tea (*d*), and "Kynite" for explosives (*e*). Finally the refusal of the Courts to register the invented word "Solio" for photographic paper (*f*) led to the question being submitted to the House of Lords, with the result that a decision was obtained from the highest tribunal that the term "invented word" in the later Act is to be construed without reference to the decisions on "fancy word" in the earlier Act, and that the prohibition of descriptiveness is not to be extended from the clause of the statutory definition relating to known words, where it was placed by the Legislature, to the clause relating to "invented words," where the Legislature omitted it. In fact in such cases the only question which has to be determined is, as stated by Lord Herschell in the "Solio" case, "whether the word sought to be registered is an invented word." In one of the cases on this subject, Lord Justice Kay said: "There is extremely little invention in the matter. It may be that the word 'Satinine,' which was there in question, was objectionable on other grounds; but if the word be an 'invented' one, I do not think the *quantum* of invention is at all material. An invented word is allowed to be registered as a trade mark, not as a reward of merit, but because its registration deprives no member of the community of the rights which he possesses to use the existing vocabulary as he pleases. It may no doubt sometimes be difficult to determine whether a word is an invented word or not. I do not think the combination of two English words is an invented word, even although the combination may not have been in use before, nor do I think that

(*a*) *In re Meyerstein*, 43 Ch. D. 604.
(*b*) *In re Talbot*, 11 P. R. 77.
(*c*) *In re Farbenfabriken*, (1894) 1 Ch. 645.
(*d*) *In re Densham*, (1895) 2 Ch. 176.
(*e*) *In re Kynoch*, 14 P. R. 905.
(*f*) *In re Eastman Photographic Materials Co., Ld.*, (1898) A. C. 571.

a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form. Again, I do not think that a foreign word is an invented word, simply because it has not been current in our language. At the same time, I am not prepared to go so far as to say that a combination of words from foreign languages so little known in this country that it would suggest no meaning except to a few scholars might not be regarded as an invented word."

It is apprehended, however, that this decision does not affect such decisions as that in *In re British Electrozone Co.* (*a*), where it was held that a word known in an English-speaking country (the United States) could not be an invented word, or that in *In re Ripley* (*b*), where it was held that a new word "Pirle," identical in sound with a common and well-known word "Pearl," though differently spelt, could not be registered as an invented word.

Fifth class of trade marks.—Non-descriptive words.

The fifth class of marks comprises "a word or words having no reference to the character or quality of the goods, and not being a geographical name," with or without additions. This seems designed to include such terms as "Pharaoh's Serpents" toys (*c*), "United Service" soap (*d*), and "Charter Oak" stoves (*e*). Geographical words remain excluded (*f*), as they had already been under the meaning given by the Courts to the term "fancy words."

The question what is a geographical word is, however, not always easy of solution. Thus, in *In re Salt* (*g*), the word "Eboline" was held to be geographical, as being the name of the Italian town of "Eboli" with an ordinary suffix, though the word had been composed in ignorance of the existence of the town. Again, many words are used as names of places, while their original signification has no geographical reference at all. Such a case was that of "Magnolia" (*h*), which was the name of many small American towns and villages, yet was considered to be registrable, the geographical allusion not being generally understood in this

(*a*) 13 P. R. 447.
(*b*) 15 P. R. 151.
(*c*) *Barnett* v. *Leuchars*, 13 L. T. N. S. 495.
(*d*) *Field* v. *Lewis*, Seton, 5th Ed. 537.
(*e*) *Filley* v. *Fassett*, 44 Mo. 173.
(*f*) See *In re Apollinaris Co.*, (1891) 2 Ch. 186, 221 ("Apollinaris," "Friedrichshall," and "Hunyadi Janos" mineral waters and products).
(*g*) (1894) 3 Ch. 166.
(*h*) *In re Magnolia Metal Co.*, (1897) 2 Ch. 371. See also *In re Apollinaris Co., Ld.*, (1891) 2 Ch. 186.

country. The effect of this decision appears to be that a word is not to be regarded as geographical unless its primary signification is geographical, or unless it has become recognised in this country as a geographical word.

With reference to existing words free from any geographical meaning, the question still remains whether they have or have not any reference to the character or quality of the goods. That this question will be looked into very closely may be assumed from the cases cited above with respect to "invented words." And this seems very reasonable, for the right of the public to use descriptive words in a descriptive sense ought to be strictly maintained, as was pointed out by Lord Herschell in the "Solio" case (*a*). Whether it was necessary to discover a descriptive allusion in all the cases in which the Court discovered it may perhaps be doubted, but it is clear from the decision of the House of Lords that no non-invented word which really is descriptive will be allowed to be registered as a new trade mark (*b*). Where, however, a name which is not naturally descriptive, such as "Magnolia," has been given to a new article, that application of the word does not necessarily cause it to have reference to the character or quality of the goods, though if the word has come to be known as the name of the article, irrespective of the manufacturer, it may become open to objection on the ground that it has ceased to be distinctive (*c*).

The names of imaginary persons, such as the characters in books, *e.g.*, "Trilby," fall within this class of words (*d*).

Sixth class of trade marks. —Old marks.

Marks which come within any of the above five classes are capable of registration, whether they were used before the passing of the Trade Marks Registration Act, 1875, or not; but many valuable trade marks adopted and used before any precise definition was provided are not included in any of these five classes, and would consequently be deprived of the benefits of the Act, unless some special provision were made for their protection. To meet this case it is provided, by § 64 (3) (ii), that "any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures, used as a trade mark before the 13th day of August, 1875, may be registered as a trade mark under this part of this Act."

(*a*) *In re Eastman Photographic Materials Co., Ld.*, (1898) A. C. 571.

(*b*) See *In re Linotype Co.*, 14 P. R. 900 ("Typograph").

(*c*) *In re Magnolia Metal Co.*, (1897) 2 Ch. 371.

(*d*) *In re Holt*, (1896) 1 Ch. 711.

Old word-marks.

By far the most important description of marks included in this class is that defined as "any special and distinctive word or words used as a trade mark before the 13th day of August, 1875," which brings within the scope of the Act the numerous varieties of words which were used as old marks, whether they come within the definitions applicable to new marks or not. With respect to them, two conditions are prescribed. First, the word or words must be "special and distinctive"; and, secondly, they must have been used as a trade mark before the passing of the Act of 1875.

"Used as a trade mark."

Passing over for the moment the question what words can be properly regarded as special and distinctive, it seems convenient first to consider here the further requirement that the word or words shall have been "used as a trade mark before the 13th day of August, 1875," a requirement which, it will be observed, applies also to the other varieties of old marks comprised in § 64 (3) (ii).

The expression "used as a trade mark" was much considered in the case of *Richards* v. *Butcher* (2) (*a*), where Kay, J., said that "'user as a trade mark' means, not what the person who uses has in his own mind about it, not what he has registered in a foreign country, but what the public would understand, when the trade mark or so called trade mark is impressed upon the goods, or upon some wrapper or case containing the goods, to be the trade mark. That is the trade mark proper; and 'user as a trade mark' means, and must necessarily mean, the impressing of those words either upon the goods, or upon some wrapper or case containing the goods, in such a way that the public would necessarily understand those words to be, and alone to be, the trade mark of the person who uses them." Again in *In re Powell* (2) (*b*), where the question was as to the use of the words "Yorkshire Relish" on packing cases containing bottles of the sauce of that name, Bowen, L. J., said, "although it is perfectly possible that a mark on a packing case may be intended to be used as a trade mark, it can only, as a rule, be so when the packing case is intended to sell the goods, and the packing case is intended to be the thing shown to the purchaser."

There must, then, have been user of the word or other mark before August 13th, 1875, and such user must have been user as a

(*a*) (1891) 2 Ch. 522, 532. (*b*) (1893) 2 Ch. 388; affirmed (1894) A. C. 8.

trade mark, and not as a descriptive term relating to the character or pattern of the goods or the like (*a*). The word or other mark must have been used *per se*, and not as part of a mark which included other elements (*b*); and if it has always been used with such other elements, it cannot, apart from them, be claimed as an old mark, even though in some cases some of the elements comprising the entire trade mark have been used on one side of the article and the remainder on the other side (*c*). Moreover, it is not sufficient that there has been user on price lists, bill heads, or other trade documents; for user as a trade mark there must have been user on the goods themselves (*d*), or on the boxes or wrappers containing them (*e*),—though slight user is sufficient (*f*), unless the claim is for registration under the three-mark rule (*g*),—and the user before August 13th, 1875, must have been within the United Kingdom; for foreign user (*h*) or registration (*i*) is immaterial, and the mere passage through England of marked goods, without any sale or exposure for sale, is not user of the mark (*j*). And even if all these conditions have been complied with, the old user only gives a right to registration in respect of the goods with relation to which the old user existed, and not to registration as an old mark in respect of any other goods (*k*).

"Special and distinctive."

As to the requirement that the word or words shall be "special

(*a*) *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288; *In re Harrison, McGregor & Co.*, 42 Ch. D. 691; *Richards* v. *Butcher* (2), (1891) 2 Ch. 522; *In re Powell* (2), (1893) 2 Ch. 388; (1894) A. C. 8.

(*b*) *In re Palmer* (3), 24 Ch. D. 504; *In re Royal Baking Powder Co.*, W. N. 1880, p. 49; *In re Hayward & Sons*, 54 L. J. Ch. 1003; *In re Chorlton & Dugdale*, 53 L. T. N. S. 337; *In re Perry Davis & Son*, 15 App. Cas. 316; *In re Grossmith*, 6 P. R. 180; *In re Dunn*, 41 Ch. D. 439; *In re Apollinaris Co.*, (1891) 2 Ch. 186; *In re Kinahan*, 10 Pr. 393; *In re Powell* (2), (1893) 2 Ch. 388; (1894) A. C. 8. The same rule applies to a device claimed as an old mark; *Baker* v. *Rawson*, 45 Ch. D. 519, 528, 532; *In re Fuente*, (1891) 2 Ch. 166.

(*c*) *In re Spencer*, 54 L. T. N. S. 659; *Richards* v. *Butcher* (2), (1891) 2 Ch. 522.

(*d*) *In re Palmer* (3), 24 Ch. D. 504; *In re Chorlton & Dugdale*, 53 L. T. N. S. 337; *In re Perry Davis & Son*, 5 P. R. 333; 15 App. Cas. 316; *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217.

(*e*) *Jay* v. *Ladler*, 40 Ch. D. 649. And see *Richards* v. *Butcher* (2), (1891) 2 Ch. 522.

(*f*) *In re Chorlton & Dugdale*, 53 L. T. N. S. 337.

(*g*) *In re Hodson & Co.*, 26 Sol. J. 43.

(*h*) *In re Münch*, 50 L. T. N. S. 12; *In re Riviere & Co.*, 26 Ch. D. 48; *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288 (*per* Fry, L. J.); *Berliner Brauerei Gesellschaft Tivoli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70; *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *Smith* v. *Fair*, 14 Ont. Rep. 729. But see *In re Eastman*, W. N. 1880, p. 128.

(*i*) *Richards* v. *Butcher* (2), (1891) 2 Ch. 522, 532.

(*j*) *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *Newman* v. *Pinto*, 4 P. R. 503 (*per* Kekewich, J.); *In re Mecus*, (1891) 1 Ch. 41.

(*k*) *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *Edwards* v. *Dennis*, 30 Ch. D. 454. And see *per* Pearson, J., in *In re Lyndon*, 32 Ch. D. 109; and *Phillips* v. *Ogden*, 12 P. R. 325, 331.

and distinctive," it has been said by an Irish judge (*a*) that "special" means that the words must not ordinarily be applied to goods of the class in respect of which they are used, and that "distinctive" means that they must be suitable for distinguishing the particular goods as to which they are used from other goods of the same class. And in *Wood* v. *Lambert* (*b*), Fry, L. J., said: "It appears to me that to satisfy the requirements of the definition (*c*), the word or words must be distinctive in this sense, that they distinguish the manufacture of the person who has registered the trade mark from the manufacture of all other persons. I say 'manufacture,' but of course there may be cases in which they distinguish, not the manufacture, but the selection, or some other operation upon the goods. But in all cases the word or words must distinguish the product of the person claiming the trade mark from the product of all other persons, and it appears to me that it must have that distinctive character at the time of the registration" (*d*). And in the same case Lindley, L. J., said, "What is meant by a 'distinctive' trade mark? It must mean some mark which distinguishes the goods to which it is attached as those made or sold by the person who uses the mark." So in *In re Perry Davis & Son* (*e*), Lopes, L. J., stated that "the authorities are clear to show that it" (*i.e.*, a word claimed as an old mark) "must be a word distinguishing the article manufactured by one person from a similar article manufactured by another person, and not a word that is merely descriptive of the article itself" (*f*); and in the same case Lord Halsbury said in the House of Lords (*g*), "The word 'distinctive' means distinguishing a particular person's goods from somebody else's goods—not a quality attributed to the particular article, but distinctive in that respect—that it means that it is a manufacture of his as distinguished from somebody else's. The manufacture may or may not be new, but that is the sort of distinction contemplated by the statute."

(*a*) Chatterton, V.-C. of I., in *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236.

(*b*) 32 Ch. D. 247.

(*c*) The definition there referred to is that contained in the Trade Marks Act, 1875, § 10 (3), with which, for this purpose, the present words are identical.

(*d*) This definition, Fry, L. J., repeated in substance in *In re Perry Davis & Son*, 5 P. R. 333. And see *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 400.

(*e*) 5 P. R. 333.

(*f*) And see *per* Fry, L. J., in *Waterman* v. *Ayres*, 39 Ch. D. 29; *Richards* v. *Butcher* (2), (1891) 2 Ch. 522; *In re Hopkinson*, (1892) 2 Ch. 116; *In re Magnolia Metal Co.*, (1897) 2 Ch. 371.

(*g*) 15 App. Cas. 316, 320.

*Wood* v. *Lambert.*

In *Wood* v. *Lambert* (*a*) the word "Eton," which was registered as a trade mark by the plaintiffs, had been habitually used by them in conjunction with names of imaginary firms; and the Court of Appeal held that such user had destroyed whatever distinctiveness the word might otherwise have possessed. Fry, L. J., in whose views the other Lords Justices concurred, laid down that "when a person uses a name and represents that name to be applicable to the product of a manufacturer or manufacturers other than himself, so as to induce the belief that the goods are the manufacture of that third person or persons, he cannot say that the word is distinctive of his own manufacture. Nor do I think that that principle applies the less because the plaintiff may be false in the assertion that there is any such firm or firms as the manufacturer represents. He who has made the goods has taken upon himself to represent two things: in the first place, that they are not his manufacture, but somebody else's; in the second place, that a firm exists which does not exist at all."

Leniency of Courts.

In the majority of the cases in which the validity and right to registration of a word claimed as an old mark have been considered, the question has turned on the user or non-user as a trade mark before the 13th of August, 1875; but when the question has turned on the words being distinctive or otherwise, the Courts have shown themselves far more leniently disposed than in the case of "fancy words," and words which must have been refused registration as "fancy words" have been recognised as registrable in the character of "special and distinctive words" (*b*). In fact, in some of these cases the words have been so far descriptive as to cause a reasonable doubt whether the leniency shown was not excessive.

(*a*) 32 Ch. D. 247.

(*b*) The following words have been recognised as special and distinctive words: *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57 ("Family Salve"); *Talbot* v. *Webley*, 3 P. R. 276 ("Baffle" stoves); *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288 ("Valvoline" oil); (but compare *In re Horsburgh*, 53 L. J. Ch. 237); *In re Eastman*, W. N. 1880, p. 128 ("Kitchen Crystal Soap"); *Blair* v. *Stock*, 52 L. T. N. S. 123 ("Strathmore" whiskey); *Compania General de Tobacos* v. *Rehder & Co.*, 5 P. R. 61 ("Cavite" cigars); *Fishers and Dredgers of Whitstable* v. *Elliott*, W. N. 1888, p. 27 ("Whitstable native oysters"); *B. Edgington, Ld.* v. *J. Edgington & Co.*, 6 P. R. 513 ("Frigi Domo" canvas); and see *Evans* v. *Smith*, 3 Times L. R. 390 ("Montserrat" lime-juice); *In re Grossmith*, 6 P. R. 180 ("Emollio" toilet cream); *Thompson* v. *Montgomery*, 41 Ch. D. 35 ("Stone Ales"). In *In re Perry Davis & Son*, 58 L. T. N. S. 695; 15 App. Cas. 315, the term "Pain-Killer" medicines seems to have been thought too descriptive, though there were other reasons for invalidating the trade mark.

Descriptiveness fatal.

Although there may be questions as to the application of the principle in particular cases, there can be no doubt that, as was clearly laid down in *Wood* v. *Lambert* (*a*), descriptiveness is fatal to a word claimed as an old trade mark, though it will not be invalidated for such a mere suggestion or suspicion of descriptiveness as has in some instances proved fatal to words claimed as "fancy words" (*b*). The intention of the proviso admitting old word marks to registration is evidently to give protection to words used as trade marks, and which would have been protected as such before the first Trade Marks Registration Act; and it may probably be said that words which would have been recognised as trade marks before 1875 will now be recognised as coming within the statutory proviso in favour of old marks. "The Legislature in the Act of 1875 did no more than adopt the language of the cases, by reducing them into a compressed form, and say really that what the Court would have held to be a trade mark independently of the Act should now be capable of registration as a trade mark under the Act, provided only that the mark had been used as a trade mark before the passing of the Act" (*c*).

Descriptive words.

When, however, a word is purely descriptive, that is to say, when it expresses accurately and appropriately the material or mode of composition of the goods to which it is affixed, then, unless the exclusive manufacture of such goods is protected by a patent, and the same result cannot be attained without infringement of the patent, all the world has the right to make and sell such goods; and further, when the goods are manufactured and in course of sale, the vendor not only has the right, but is in duty bound to describe them, for the proper information and protection of the public, in such manner as will convey the most correct idea. Hence the original maker can claim no exclusive right in the properly descriptive name; nor would it be in accordance with the principles of equity that he should be able to do so, for, as was well said by Mr. Justice Strong, in the Supreme Court of the United States (*d*), "Equity will not enjoin against telling the truth."

(*a*) 32 Ch. D. 247.

(*b*) *E.g.*, in *Waterman* v. *Ayres*, 39 Ch. D. 29; *In re Sanitas Co., Ld.*, 4 P. R. 533; *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274; *In re Vignier*, 6 P. R. 490; *Stuart & Co.* v. *Scottish Val de Travers Paving Co., Ld.*, Ct. Sess. Cas. 4th Ser. XIII. 1.

(*c*) *In re Hopkinson*, (1892) 2 Ch. 116, *per* Kekewich, J.

(*d*) *Canal Co.* v. *Clark*, 80 U. S. 311; cf. *Reddaway* v. *Banham*, (1896) A. C. 199, 212.

*Young* v. *Macrae.*

The reasoning of Wood, V.-C., in *Young* v. *Macrae* (*a*), affords a good example of the just way of considering cases of this description. In that case the plaintiffs, who held a patent for manufacturing a kind of oil which they called "Paraffin oil," filed a bill against the defendant, who sold a substance which he styled "Kerosene oil," or "American Paraffin oil." The case coming on on motion for injunction, the Vice-Chancellor said, "In the patent the process is described as 'a distillation of coal so as to obtain oil containing paraffin, and from this oil I obtain paraffin.' So he calls it paraffin oil because it contains paraffin. Here is a well-known substance called 'paraffin.' A chemist discovers that by the same process by which paraffin is produced, an oil containing paraffin, and from which paraffin can again be produced, is obtainable. Therefore, it being an oil containing paraffin, and producing paraffin, he calls it 'paraffin oil.' It is not a fanciful or whimsical name, but it describes the thing which he has produced. A man cannot take out a patent for a natural substance, but he can take out a patent for arriving at that natural substance, and he may christen it, putting aside all other people having called it by that name." The Vice-Chancellor then put the case of a man extracting sugar from beet-root by a patented process, and calling the extract "beet-root sugar" for a period of ten years. In such a case, when beet-root sugar was asked for, it would be known that his was meant, because he was the only man who made it. "The name," the Vice-Chancellor said, "does not become a trade mark, but it gets fixed to his sugar simply because nobody else could make it. Then, suppose that another man found out another method of making sugar from beet-root, and so extracted it, not wanting to patent it, and described it as 'beet-root sugar,' may he not call it 'beet-root sugar' because the other gentleman for ten years has been the manufacturer of it, and sold it as such? I think the question of the fancifulness of the name is a question whether it is taken by way of trade mark or not. All he (*i.e.*, the plaintiff) has done here is this: he has found out an article which is a natural product, and he has given that natural product a name. . . . This is not like the case of the 'Medicated Mexican Balm,' which is a name extravagantly ridiculous. I therefore should not assume *mala fides* against a person who calls the thing

(*a*) 9 Jur. N. S. 322.

what it is. It is paraffin and it is oil, therefore paraffin oil. There is paraffin in it, and paraffin to be obtained from it, and it is American." Injunction refused.

In a later case (*a*) the same Vice-Chancellor referred to the above case of *Young* v. *Macrae* (*b*), and remarked that "if the evidence had gone to show that the plaintiff had been the first to apply the name 'paraffin' to the oil, he would have granted an injunction (*c*); but that he had there had it proved that the name 'paraffin oil' had long been known as the scientific name of the article, and that the defendant could not well have called it anything else."

Name becomes *publici juris*.

Again, a word which was first applied to, or was even invented for the sole and express purpose of designating a substance or composition may prove, on investigation, to have ceased to retain the characteristic, which it once possessed, of conveying the idea of the goods being of a particular manufacture; in which case the person who first used the word, though its inventor, will cease to have any exclusive rights in it, since it will have become purely descriptive of an article which all may freely make (*d*). The name thus becomes *publici juris*, and not only can be, but ought to be, employed by all who manufacture and sell an article which they are at perfect liberty to manufacture and sell, and of which the name in question is generally recognized as the appropriate designation. This point is well stated by Lord Selborne, C.,

(*a*) *Braham* v. *Bustard*, 1 H. & M. 447. See also the remarks on *Young* v. *Macrae*, in *Reddaway* v. *Banham*, (1896) A. C. 199, in the House of Lords. See also *Powell* v. *Birmingham Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710; *Rockingham Rail. Co.* v. *Allen*, 12 Times L. R. 345; *Parsons* v. *Gillespie*, 15 P. R. 57; *Daniel* v. *Whitehouse*, (1898) 1 Ch. 685.

(*b*) 9 Jur. N. S. 322.

(*c*) So in *Eno* v. *Stephens*, Dig. 609, the term "Fruit Salt" was protected at the instance of the person who was the first to use it. And see *In re Dunn*, 41 Ch. D. 439; 15 App. Cas. 252; also *Siegert* v. *Findlater*, 7 Ch. D. 801; *Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. D. 834; *Grezier* v. *Autran*, 13 P. R. 1; *In re Bovril Trade Mark*, (1896) 2 Ch. 600; *Powell* v. *Birmingham Vinegar Brewery C* (1896) 2 Ch. 54; (1897) A. C. 710; *Rockingham Rail. Co.* v. *Allen*, 12 Times L. R. 345; *Parsons* v. *Gillespie*, 15 P. R. 57; *Daniel* v. *Whitehouse*, (1898) 1 Ch. 685; *Canal Co.* v. *Clark*, 80 U. S. 311; and *Schendel* v. *Silver*, 70 N. Y. Sup. Ct. 330, as to a name which is appropriated to an article.

(*d*) *E.g.*, "Worcestershire Sauce"—*Lea* v. *Millar*, Dig. 513; *Lea* v. *Deakin*, 11 Biss. 23; "Gem" air-guns, *In re Arbenz*, 35 Ch. D. 248; "Maizena," *National Starch Manufacturing Co.* v. *Munn's Patent Maizena and Starch Co.*, (1894) A. C. 275; "Magnolia" Metal, *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 P. R. 389; "Winser" (Sewer-trap) Interceptors, *Winser & Co., Ld.* v. *Armstrong & Co.*, 16 P. R. 167; "Neva Stearine" candles, *Neva Stearine Co.* v. *Mowling*, 9 V. L. R. Eq. 98; "Calhoun Plough," *In re Hall & Co.*, 13 U. S. Pat. Gaz. 229; "Holbrook's School Apparatus," *Shercood* v. *Andrews*, 3 Am. L. Reg. N. S. 588; "Dr. Ward's Liniment," *Watkins* v. *Landon*, 52 Minn. 389; 38 Am. St. Rep. 560.

in *Singer Manufacturing Co.* v. *Loog* (3) (*a*), where he says, "The reputation acquired by machines of a particular form or construction is one thing; the reputation of the plaintiffs, as manufacturers, is another. If the defendant has no right under colour of the former to invade the latter, neither have the plaintiffs any right under colour of the latter to claim (in effect) a monopoly of the former. If the defendant has a right to make and sell, in competition with the plaintiffs, articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common in his trade, provided always that he does this in a fair, distinct and unequivocal way."

**Effect of registration.**

The registration as a trade mark of a name of this description will somewhat complicate the question, as registration of a trade mark is *primâ facie* evidence, and, after five years' registration, conclusive evidence of the right of the registered owner to the exclusive use of such trade mark (*b*); but the wording of the Act is entirely directed to the registration of "a trade mark," the exclusive use of "a trade mark," &c., and since a name which has become *publici juris*, whether registered or not, cannot be a "trade mark" within the definition section of the Act, because it contains nothing distinctive, it seems that, at all events within the five years, this enactment does not preclude a defence on the ground that the name so registered is in fact no trade mark, and was registered, or is continued on the register, by error. However, whether that be so or not, it has been repeatedly decided that five years' registration cannot protect a mark which has been registered as a trade mark, but is invalid by reason of its being descriptive or otherwise, from being removed from the register (*c*); and the remarks of Mellish, L. J., in *Ford* v. *Foster* (*d*), appear to be equally applicable since the Act as before it. "There is no doubt,

(*a*) 8 App. Cas. 27; and see *per* Mellish, L. J., in *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 456. See also *Winser & Co., Ld.* v. *Armstrong & Co.*, 16 P. R. 167.

(*b*) Patents Act, 1883, § 76.

(*c*) *In re Palmer* (1) and (3), 21 Ch. D. 47; 24 *ib.* 504; *In re Lloyd & Sons*, 27 Ch. D. 646; *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Wragg*, 29 Ch. D. 551; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Spencer*, 54 L. T. N. S. 659; *In re Apollinaris Co.*, (1891) 2 Ch. 186; *Richards* v. *Butcher* (2), (1891) 2 Ch. 522. And it has been so held also in Victoria: *Lewis* v. *Klapproth*, 11 V. L. R. 214; *Wolfe* v. *Alsop* (2), 12 V. L. R. 421; *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752. The wisest course to take in such a case is no doubt to apply to rectify the register by the removal of the offending mark—*e. g. Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288.

(*d*) L. R. 7 Ch. 611.

I think, that a word which was originally a trade mark, to the exclusive use of which a particular trader, or his successor in trade, may have been entitled, may subsequently become *publici juris*, as in the case which has been instanced of Harvey's Sauce (*a*). Then, what is the test by which a decision is to be arrived at whether a word which was originally a trade mark has become *publici juris*? I think the test must be, whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, or can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent a trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone" (*b*).

The three-mark rule.

When the Trade Marks Registration Act, 1875, first came into operation, it was found that in many trades application was made by two or more traders for the registration of substantially identical marks—the fact being that the marks had not previously come into collision on account of their being used in different parts of the country—without any suspicion of want of *bona fides* on the part of any of the rival applicants. If the strict letter of the Act and Rules had been adhered to, much injustice would have been done to the later applicants, whose applications must have been refused; and the Commissioners of Patents therefore framed the rule that identical or similar *old* marks—*i.e.*, marks used before the 13th August, 1875—might be registered by different persons in the same trade up to the number of three, but not more; the rule providing that if the mark had been used *bonâ fide* by more than three persons it must be treated as common to the trade, and no registration at all be allowed. This rule was recognised by Courts

(*a*) With respect to this example, an injunction was granted by Sir J. Romilly, M. R., in 1858, to restrain a representation that the defendant's sauce was that of the inventor's successor in business. See *Lazenby* v. *Lazenby*, Dig. 160. But in *Lazenby* v. *White*, 41 L. J. Ch. 354, it was admitted that the name was common to the trade.

(*b*) For instances of marks proved to be common to particular trades, see note (*c*) to § 74 of the Patents Act, 1883, *infra*.

of First Instance in numerous cases (*a*); and in one case (*b*) three substantially identical marks, of which two were old and one was new, and in another case (*c*) three substantially identical *new* marks, were allowed to be registered for the same goods by different traders with consent of all the parties concerned. A provision derived from this rule is now to be found in § 74 of the Patents Act, 1883, by which it is enacted that any device which was before August 13th, 1875, publicly used by more than three persons on the same or a similar description of goods shall, for the purposes of the section (*i.e.*, for the purpose of registration as an addition to a trade mark, exclusive rights therein being disclaimed) be deemed common to the trade in such goods (*d*).

Name indicative of a principle of construction.

In the majority of cases in which the question has been raised whether a word was descriptive of the article to which it was applied, or distinctive of the maker by whom that article was made, the question has been whether the word, according to the ordinary usage of the English language, indicated correctly the nature or origin of the article. Thus, "Porous Plasters" (*e*), "Croup Tincture" (*f*), and so on. But in a considerable number of instances the question has been whether a word, which had no descriptive signification to persons unacquainted with the particular trade, did or did not indicate to persons versed in the trade an article prepared according to a definite process, or a machine constructed on a definite principle, the rule being that if the word indicates such a process or principle it is descriptive and incapable of exclusive appropriation.

Articles made according to a patented process.

This difficulty has especially arisen with respect to articles made under a patent, which can only be made by the patentee during the existence of the patent, and to which, consequently, his name or some other special name usually becomes attached. "Where a patented article is known in the market by any specific designation,

(*a*) *In re Walkden Co.*, 54 L. J. Ch. 394; *In re Powell* (1), Dig. 589; *In re Hyde & Co.*, 54 L. J. Ch. 395; *In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *Ex parte Sales, Pollard & Co.*, Dig. 620; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *In re Brook*, 26 W. R. 791; *In re Hodson & Co.*, 26 Sol. J. 43; *Benbow* v. *Low* (4), 44 L. T. N. S. 875; *In re Sone & Fleming Manufacturing Co.*, 30 Ch. D. 505; *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *In re Bancroft & Co.*, 5 P. R. 209.

(*b*) *In re Walkden Co.*, 54 L. J. Ch. 394.

(*c*) *In re Vergaras*, Hall, V.-C., June 3rd, 1881.

(*d*) Common user is not proved by the books containing applications for registration: *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434; 7 App. Cas. 219.

(*e*) *In re Brandreth*, Dig. 626.

(*f*) *In re Roach*, 10 U. S. Pat. Gaz. 333.

whether of the name of the patentee or otherwise, every person at the expiration of the patent has a right to manufacture and vend the same under the designation thereof by which it was known to the public. . . . . The original patentee or his assignees have no right to the exclusive use of the designation as a trade mark. Their rights were under the patent, and expired with it" (*a*).

The sewing-machine cases.

Thus, in the case of *Wheeler & Wilson Manufacturing Co.* v. *Shakespeare* (*b*), James, V.-C., and in that of *Singer Manufacturing Co.* v. *Wilson* (*c*), Jessel, M. R. (affirmed by the Court of Appeal), refused to assist an attempt at continuing the monopoly in sewing machines which had been patented, after the expiration of the patent, by a claim to the exclusive use, by way of trade mark, of the name by which the peculiar principle of construction had come to be generally known. In the latter case the House of Lords declined to decide whether the name "Singer" was indicative of a maker or of a principle of construction, the defendant's evidence being incomplete; but it was assumed that if the latter had been proved, the defendant would have succeeded (*d*), and that result actually took place in *Singer Manufacturing Co.* v. *Loog* (3) (*e*). So in America, in *Singer Manufacturing Co.* v.

(*a*) *Per* Treat, J., in *Singer Manufacturing Co.* v. *Stanage*, 2 McCrary, 512. And see *Edelsten* v. *Vick*, 11 Hare, 78; *Young* v. *Macrae*, 9 Jur. N. S. 322; *Green* v. *Rooke*, W. N. 1872, p. 49; *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298; *Same* v. *Anderson*, W. N. 1883, p. 185; *Lazenby* v. *White*, 41 L. J. Ch. 354; *Condy* v. *Mitchell*, 37 L. T. N. S. 766; *James* v. *James*, L. R. 13 Eq. 421; *Cheavin* v. *Walker*, 5 Ch. D. 850; *Massam* v. *Thorley's Cattle Food Co.* (1), 6 Ch. D. 574; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. D. 834; *In re Ralph*, 25 Ch. D. 194; *In re Leonard & Ellis*, 26 Ch. D. 288, *per* Cotton, L. J.; *Native Guano Co., Ld.* v. *Sewage Manure Co.*, 8 P. R. 125; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 400; *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 P. R. 289; *In re Davis*, 14 P. R. 903; *Meaby & Co.* v. *Triticine, Ld.*, 15 P. R. 1; *Magnolia Metal Co.* v. *Tandem Smelting Co.*, 15 P. R. 701; *In re Richardson*, 3 U. S. Pat. Gaz. 120; *Tucker Manufacturing Co.* v. *Boyington*, 9 U. S. Pat. Gaz. 455; *Canal Co.* v. *Clark*, 80 U. S. 323, *per* Strong, J.; *In re Kane & Co.*, 9 U. S. Pat. Gaz. 105; *In re Consolidated Fruit Jar Co.*, 14 U. S. Pat. Gaz. 269; *Ex parte Consolidated Fruit Jar Co.*, 16 *ib.* 679; *Fairbanks* v. *Jacobus*, 14 Bl. C. C. 337; *Burton* v. *Stratton*, 12 Fed. Rep. 696; *Green* v. *Woodhouse*, 38 U. S. Pat. Gaz. 1491; *Gally* v. *Colt's Patent Fire Arms Manufacturing Co.*, 30 Fed. Rep. 118; *Goodyear Rubber Co.* v. *Goodyear India Rubber Glove Manufacturing Co.*, 128 U. S. 598; *Adee* v. *Peck Bros. & Co.*, 48 U. S. Pat. Gaz. 823; *Leclanche Battery Co.* v. *Western Electric Co.*, 21 Fed. Rep. 538; *Goodyear Rubber Co.* v. *Day*, 22 Fed. Rep. 44; *Hiram Holt Co.* v. *Wadsworth*, 41 Fed. Rep. 34; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Chadwick* v. *Covell*, 151 Mass. 190; *Dover Stamping Co.* v. *Fellows*, 163 Mass. 191; *Air Brush Manufacturing Co.* v. *Thayer*, 79 U. S. Pat. Gaz. 683; *Centaur Co.* v. *Heinsfurter*, 84 Fed. Rep. 955. See *In re Eastman*, W. N. 1886, p. 128, in which registration was granted to a name which had been used for soap made under a patent. See also *Waterman* v. *Shipman*, 130 N. Y. 301.

(*b*) 39 L. J. Ch. 36.

(*c*) 2 Ch. D. 434.

(*d*) 3 App. Cas. 376.

(*e*) 8 *ib.* 15.

*Larsen* (*a*), *Singer Manufacturing Co.* v. *Stanage* (*b*), *Singer Manufacturing Co.* v. *Riley* (*c*), and *Brill* v. *Singer Manufacturing Co.* (*d*), though in the earlier Scotch case of *Singer Manufacturing Co.* v. *Kimball & Morton* (*e*), the decision was in favour of the company; and in the recent case of *Singer Manufacturing Co.* v. *Spence* (*f*), it was held, distinguishing *Singer Manufacturing Co.* v. *Loog* (*g*), that in the absence of any context the word "Singer" or "Singer's," as applied to sewing machines, *primâ facie* denoted to the public a machine of the company's manufacture, and an injunction was granted.

Where, during the continuance of a patent granted to one Foley the defendants had made articles in accordance with the patent and called them "Foley's Patent Valves," it was held in America that they had infringed the patent, but not any trade mark rights (*h*).

And it has further been decided in America that a patented instrument for distinguishing a manufacturer's goods—*e.g.*, a special tin tag or ticket—cannot be recognised as a trade mark during the continuance of the patent (*i*), and that the special shape of an article made under a patent is similarly incapable of individual appropriation (*j*).

New name for new article.

And even where no patent is obtained, "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" (*k*). Thus it was held by the Court of Appeal that a firm who invented a new description of oil, and called it "Valvo-

(*a*) 8 Biss. 181.
(*b*) 2 McCrary, 512.
(*c*) 11 Fed. Rep. 706.
(*d*) 41 Ohio St. 127.
(*e*) Ct. Sess. Cas. 3rd Ser. XI. 267.
(*f*) 10 P. R. 297. And see *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 75 U. S. Pat. Gaz. 1703; and *Singer Manufacturing Co.* v. *Bent*, 75 U. S. Pat. Gaz. 1713.
(*g*) 8 App. Cas. 376.
(*h*) *Adee* v. *Peck Bros. & Co.*, 48 U. S. Pat. Gaz. 823.
(*i*) *Lorillard* v. *Pride*, 28 Fed. Rep. 434.
(*j*) *Wilcox & Gibbs Sewing Machine Co.* v. *Gibbon's Frame*, 21 Bl. C. C. 431; *Brill* v. *Singer Manufacturing Co.*, 41 Ohio St. 127.
(*k*) *Per* Fry, J., in *Siegert* v. *Findlater*, 7 Ch. D. 801. And see *Linoleum Manufacturing Co.* v. *Nairn*, *ib.* 834; *Waterman* v. *Ayres*, 39 Ch. D. 29; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 400; *Winser & Co., Ld.* v. *Armstrong & Co.*, 16 P. R. 167. So also in United States: *Leclanche Battery Co.* v. *Western Electric Co.*, 21 Fed. Rep. 538; *Dadirrian* v. *Yacubian*, 72 Fed. Rep. 1010; *Dadirrian* v. *Theodorian*, 74 U. S. Pat. Gaz. 1902; and in New Zealand: *Marshall* v. *Hawkins*, 4 N. Z. L. R. Sup. Ct. 59.

line." had no right of trade mark in the word (*a*); and so where the word "Albion" had been used to indicate metal goods of a particular pattern, and not to indicate a particular manufacturer (*b*). But where the article is not a new article, but only an improved form of an old article, the same considerations do not apply (*c*). The law has been thus summed up by Lord Justice Rigby, delivering the judgment of the Court of Appeal, in the recent case of *In re Magnolia Metal Co.* (*d*): "When the article is made under a secret process or its manufacture is protected by a patent, no person who has not acquired the secret or obtained a licence from the patentee can manufacture it. Accordingly, it is established as a general rule that, when an article is made under a secret process, or when the manufacturer of it is protected by a patent, the manufacturer or patentee cannot, by any means, entitle himself to a monopoly in the use, after the secret process has been discovered or the term of the patent has expired, of the name by which the manufactured article is exclusively known whilst the secret is undiscovered, or the term of the patent is unexpired."

Actual fraud.

This rule, however, will of course not enable rival traders after the expiration of the patent, or the discovery of the secret, to represent their goods as the goods of the original manufacturer, and the Court will, in the exercise of its general jurisdiction for the repression of fraud, award an injunction or damages in a case of fraud in which, but for the fraud, no remedy would have been given. Thus, for instance, in a case in which the infringer might have taken with impunity the name of an article invented by another, but, not content with so doing, described his own manufacture as "the original" article, he was restrained by injunction from the use of that misleading epithet (*e*).

Name merely

The general principle, however, is that where a name used by

(*a*) *In re Leonard & Ellis*, 26 Ch. D. 288. See *Leonard & Ellis* v. *White's Golden Lubricator Co.*, 48 U. S. Pat. Gaz. 1401.

(*b*) *In re Harrison, M'Gregor & Co.*, 42 Ch. D. 691. And see *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 P. R. 389.

(*c*) *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 403.

(*d*) (1897) 2 Ch. 371, 391.

(*e*) *Cocks* v. *Chandler*, L. R. 11 Eq. 446. And see *Reddaway* v. *Banham*, (1896) A. C. 199; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710; *Frost* v. *Rindskopf*, 42 Fed. Rep. 408; *Merriam* v. *Famous Shoe & Clothing Co.*, 47 Fed. Rep. 411; *Merriam* v. *Texas Siftings Publishing Co.*, 49 Fed. Rep. 944; *Merriam* v. *Holloway Publishing Co.*, 43 Fed. Rep. 450; *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 75 U. S. Pat. Gaz. 1703; *Singer Manufacturing Co.* v. *Bent*, 75 U. S. Pat. Gaz. 1713. The presumption of fraud may, however, be refuted, as by a fair statement of the maker's own name; *Browne* v. *Freeman*, 12 W. R. 305.

descriptive cannot be protected.

way of a trade mark either was originally, or has since come to be, merely descriptive of the article to which it is attached, so that while serving to indicate what the article is, it does not serve to connect it with any particular manufacturer or manufacturing establishment, that name cannot be protected as a trade mark (*a*)

Descriptive words.

(*a*) **The following are cases in which words have been held to be descriptive:**—*Thomson* v. *Winchester*, 36 Mass. 214 ("Thomsonian Medicines"); *Fetridge* v. *Wells*, R. Cox, 180 ("Balm of Thousand Flowers"); *Wolfe* v. *Goulard*, 18 How. Pr. 64 ("Schiedam Schnapps"); *Burke* v. *Cassin*, 45 Cal. 467 (do.); *Wolfe* v. *Hart*, 4 V. L. R. Eq. 125 (do.); *Wolfe* v. *Alsop* (1), 10 V. L. R. Eq. 41 (do.); (2) 12 V. L. R. 421 (do.); *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752 (do.); *Corwin* v. *Daly*, 7 Bos. 222 ("Club House Gin"); *Young* v. *Macrae*, 9 Jur. N. S. 322 ("Paraffin Oil"); *Phalon* v. *Wright*, 5 Phila. 464 ("Extract of Night-Blooming Cereus"); *Binninger* v. *Wattles*, 28 How. Pr. 206 ("Old London Dock Gin"); *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298 ("Liebig's Extract of Meat"); *Same* v. *Anderson*, W. N. 1883, p. 185 (do.); *Caswell* v. *Davis*, 58 N. Y. 223 ("Ferrophosphorated Elixir of Calisaya Bark"); *Town* v. *Stetson*, 4 Abb. Pr. N. S. 218 ("Desiccated Codfish"); *Canal Co.* v. *Clark*, 80 U. S. 311 ("Lackawanna" coal); *Choynski* v. *Cohen*, 39 Cal. 501 ("Antiquarian Book Store"); *Gray* v. *Koch*, 2 Mich. N. P. 119 ("Mammoth Wardrobe"); *In re Hauthaway* (1 and 2), U. S. Pat. Comm. Decis. 1871, 97, 284 ("Beeswax Oil"); *In re Roberts* (4), *ib.* 100 ("Razor Steel"); *In re Blakeslee & Co.*, *ib.* 284 ("Cundurango Ointment. C. O."); *Ex parte Palmer*, *ib.*, 289 ("Invisible Face Powder"); *Rowland* v. *Breidenbach*, Dig. 386 ("Macassar" oil); *James* v. *James*, L. R. 13 Eq. 421 ("Lieut. James' Horse Blister"); *Green* v. *Rooke*, W. N. 1872, p. 49 ("Golden Ointment"); *In re Johnson & Co.*, 2 U. S. Pat. Gaz. 315 ("Parsons' Purgative Pills, P. P. P." and "Johnson's American Anodyne Liniment, Established A.D. 1810"); *In re Graham*, 2 *ib.* 618 ("New Manny Harvester"); *In re Richardson*, 3 *ib.* 120 ("Richardson's Patent Union Leather-splitting Machine"); *In re The American Sardine Co.*, 3 *ib.* 495 ("American Sardines"); *Hardy* v. *Cutter*, 3 *ib.* 468 ("Old Bourbon" whiskey); *Tucker Manufacturing Co.* v. *Boyington*, 9 *ib.* 455 ("Tucker Spring Bed"); *Browne* v. *Freeman*, 12 W. R. 305 ("Chlorodyne"); *Bulloch, Lade & Co.* v. *Gray*, 19 Journ. of Jurisp. 218 ("Loch Katrine" whiskey); *Godillot* v. *Hazard*, 81 N. Y. 263 ("Julienne" soup); *In re Dick & Co.*, 9 U. S. Pat. Gaz. 538 ("Tasteless" drugs); *In re Lawrence & Co.*, 10 *ib.* 163 ("Für Familien Gebrauch," and "Lawrence Feiner Familien Flannel"); *In re Roach*, 10 *ib.* 333 ("Croup Tincture"); *Gilman* v. *Hunnewell*, 122 Mass. 139 ("Cough Remedy"); *In re Goodyear Rubber Co.*, 11 U. S. Pat. Gaz. 1062 ("Crack-proof" indiarubber); *In re Warburg & Co.*, 13 *ib.* 44 ("Cachemire Milano"); *Ayer* v. *Rushton*, 7 Daly, 9 ("Cherry Pectoral"); *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453 ("Highly Concentrated Compound Fluid Extract of Buchu"); *In re Dole Brothers*, 12 U. S. Pat. Gaz. 939 ("Egg Macaroni"); *Siegert* v. *Findlater*, 7 Ch. D. 801; and *Siegert* v. *Abbott*, 79 N. Y. Sup. Ct. 243 ("Angostura Bitters"); *In re Horsburgh*, 53 L. J. Ch. 237 ("Valvoline" oil); but see *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288; *In re Rader & Co.*, 13 U. S. Pat. Gaz. 596 ("Ironstone" water-pipes); *In re Saunion & Co.*, Dig. 625 ("Anglo-Portugo" oysters); *In re Brandreth*, Dig. 626 ("Porous" plasters); *Ex parte Safety Powder Co.*, 16 U. S. Pat. Gaz. 136 ("Safety" powder); *Fairbanks* v. *Jacobus*, 14 Bl. C. C. 337 ("Fairbanks' Patent"); *Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. D. 834 ("Linoleum"); *Lazenby* v. *White*, 41 L. J. Ch. 354 ("Harvey's Sauce"); *Wotherspoon & Co.* v. *Gray & Co.*, Ct. Sess. Cas. 3rd Ser. II. 38 ("Victoria" lozenges); *Popham* v. *Wilcox*, 66 N. Y. 69 ("Prime Leaf" lard); *Sherwood* v. *Andrews*, 3 Amer. L. Reg. N. S. 588 ("Holbrook's School Apparatus"); *Alleghany Fertiliser Co.* v. *Woodside*, 1 Hughes, 115 ("Ammoniated Bone Superphosphate of Lime"); *Frese* v. *Bachof* (2), 14 Bl. C. C. 432 ("Hamburg" tea); *Ex parte Alden*, 15 U. S. Pat. Gaz. 389 ("Evaporated" articles of food); *Ex parte Marsching & Co.*, 15 *ib.* 294 ("French" paints); *Ex parte Cohn* (1), 16 *ib.* 680 ("Standard A" cigars); *Ex parte Cohn* (2), 16 *ib.* 680 ("Druggists' Sundries"

or registered as special and distinctive. The Act establishing registration "takes nothing away from anybody. It confers, upon certain conditions and under particular circumstances, rights which,

cigars); *Ex parte Smith* (2), 16 *ib.* 679 ("Medicated Prunes"); *Ex parte Thompson, Derby & Co.*, 16 *ib.* 137 ("Swing" scythe-sockets); *Ex parte Smith* (3), 16 *ib.* 764 ("Masonic" cigars); *Ex parte Waeferling*, 16 *ib.* 764 ("Granulated Dirt-killer Soap"); *Lamplough* v. *Beedzler*, C. A., Nov. 12th, 1880 ("Pyretic Saline"); *Day* v. *Neale*, Bacon, V.-C., May 24th, 1881 ("White Chemical Extract," "Brown Chemical Extract," "Red Paste," "Red Drench," "Gaseous Fluid," &c.); *In re Price's Patent Candle Co.*, 27 Ch. D. 681 ("National Sperm" candles); *In re Hudson*, 32 Ch. D. 311 ("Carbolic Acid Soap Powder"); *In re Atkins Filter & Engineering Co., Ld.*, 3 P. R. 164 ("The Sanitary Filter, easily cleaned"); *Native Guano Co., Ld.* v. *Sewage Manure Co.*, 8 P. R. 125 ("Native Guano"); *Schove* v. *Schmincke*, 33 Ch. D. 546 ("Castle Album"); *Watt* v. *O'Hanlon*, 4 P. R. 1 ("Old Inuishowen" whiskey); *Symington & Co.* v. *Footman, Pretty & Co.*, 56 L. T. N. S. 696 ("Guaranteed Corset"); *In re Perry Davis & Son*, 5 P. R. 333; 15 App. Cas. 316 ("Pain-Killer" medicines); *In re Dunn*, 41 Ch. D. 439; 15 App. Cas. 252 ("Fruit Salt"); *In re Ralph*, 25 Ch. D. 194 ("The Home-washer"); *Roberts* v. *Sheldon*, 8 Biss. 398 ("Parabola"—eye needles); *Van Beil* v. *Prescott*, 82 N. Y. 630 ("Rye and Rock" liquor); *Marshall* v. *Pinkham*, 52 Wisc. 572 ("Old Dr. S. Marshall's Celebrated Liniment"); *Hostetter* v. *Adams*, 20 Bl. C. C. 326 ("Celebrated Stomach Bitters"); *Ex parte Brigham*, 20 *ib.* 891 ("Satin Polish" boots and shoes); *Ex parte Ams*, 23 *ib.* 344 ("Albany Beef"); *Ex parte Strasburger & Co.*, 20 *ib.* 155 ("Time-keeper" watches); *Ex parte Kipling*, 24 *ib.* 899 ("Cristalline" brilliants); *Electro-Silicon Co.* v. *Levy*, 59 How. Pr. 469 ("Silicon" polishing powder); *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1 ("Hegeman's Ferrated Elixir of Bark, or Elixir of Calisaya Bark with Iron," "Hegeman's Compound Fluid Extract of Buchu," "Hegeman's, formerly Velpeau's, Celebrated Remedy for Diarrhœa"); *Goodyear Rubber Co.* v. *Goodyear Indiarubber Glove Manufacturing Co.*, 128 U. S. 598 ("Goodyear Rubber"); *Moxie Nerve Food Co.* v. ——, 43 U. S. Pat. Gaz. 888 ("Nerve Food"); *Kerry* v. *Les Sœurs de l'Asile de la Providence*, 2 St. Dig. 726 ("Syrup of Red Spruce Gum"); *McCall* v. *Theal*, 28 Grant Up. Can. Ch. 48 ("Bazaar Patterns" for clothing); *Montgomerie* v. *Donald & Co.*, Ct. Sess. Cas. 4th Ser. XI. 506 ("Water of Ayr" stone); *Stuart & Co.* v. *Scottish Val de Travers Paving Co., Ld.*, Ct. Sess. Cas. 4th Ser. XIII. 1 ("Granolithic" artificial stone); *Lewis* v. *Klapproth*, 11 V. L. R. 214 ("Borax Soap"); *Dreydoppel* v. *Young*, 14 Phila. 226 (do.); *Hop Bitters Manufacturing Co.* v. *Luke*, 10 V. L. R. (Eq.) 234 ("Hop Bitters," said to be no more distinguishing than "Olive Oil" or "Buttermilk"); *Hop Bitters Manufacturing Co.* v. *Wharton*, 10 V. L. R. (L.) 337 (do.); *Larrabee* v. *Lewis*, 67 Ga. 561 ("Snowflake" biscuits); *Eggers* v. *Hink*, 63 Cal. 445 ("Philadelphia Beer"); *Ball* v. *Siegel*, 116 Ill. 137 ("Health Preserving" corset); *Humphreys' Specific, &c. Co.* v. *Wenz*, 14 Fed. Rep. 250 ("Homœopathic Specifics"); *Carbolic Soap Co.* v. *Thompson*, 25 Fed. Rep. 625 ("Cresylic Ointment"); *Pratt Manufacturing Co.* v. *Astral Refining Co., Ld.*, 27 Fed. Rep. 493 ("Astral Oil"); *Alden* v. *Gross*, 25 Mo. App. 123 ("Fruit" vinegar); *Trask Fish Co.* v. *Wooster*, 28 Mo. App. 408 ("Selected Shore Mackerel"); *Rumford Chemical Works* v. *Muth*, 35 Fed. Rep. 524 ("Acid Phosphate"); *Colgan* v. *Danheim*, 35 Fed. Rep. 150 ("Toffy Tolu"); *Clotworthy* v. *Schapp*, 42 Fed. Rep. 62 ("Roso" vanilla); *New York & Rosendale Cement Co.* v. *Coplay Cement Co.*, 44 Fed. Rep. 277; 45 Fed. Rep. 212 ("Rosendale" cement); *Jaros Hygienic Underwear Co.* v. *Fleece Hygienic Underwear Co.*, 65 Fed. Rep. 424 ("Hygienic" underwear); *Bennett* v. *McKinley*, 65 Fed. Rep. 505; 26 U. S. App. 496 ("Instantaneous" preparation of tapioca); *California Fig Syrup Co.* v. *Putnam*, 66 Fed. Rep. 750; 69 Fed. Rep. 740; *California Fig Syrup Co.* v. *Stearns*, 67 Fed. Rep. 1008; 73 Fed. Rep. 812 ("Fig Syrup"); (cf. *Improved Fig Syrup Co.* v. *California Fig Syrup Co.*, 54 Fed. Rep. 175, and *California Fig Syrup Co.* v. *E. Worden & Co.*, 86 Fed. Rep. 212;) *Dadirrian* v. *Yacubian*, 72 Fed. Rep. 1010 ("Matzoon" milk food); cf. *Dadirrian* v. *Theodorian*, 74 U. S. Pat. Gaz. 1902; *Beadleston & Woerz* v. *Cooke Brewing Co.*, 74 Fed. Rep. 229 ("Imperial" beer); *Ex parte Brand Stove Co., Ld.*, 62

but for the Act of Parliament, would not be as clearly asserted, but it takes nothing away. Any man who has a right to a trade mark has his trade mark just the same after the passing of the Trade

U. S. Pat. Gaz. 588 ("Famous" stoves); *Ex parte Stokes*, 64 U. S. Pat. Gaz. 437 ("Splendid" flour); *Ex parte Grove*, 67 U. S. Pat. Gaz. 1447 ("Bromo"-quinine); (cf. *Keasbey* v. *Brooklyn Chemical Works*, 142 N. Y. 467;) *Alff* v. *Radam*, 77 Tex. 530; 19 Am. St. Rep. 792; and *Radam* v. *Capital Microbe Destroyer Co.*, 81 Tex. 122; 26 Am. St. Rep. 783 ("Microbe Killer"); *Gessler* v. *Grieb*, 80 Wisc. 21; 27 Am. St. Rep. 20 ("Headache Wafers"); *Corbin* v. *Gould*, 133 U. S. 308 ("Tycoon" tea); *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540 ("Iron bitters"); *Stuart* v. *F. G. Stewart Co.*, 85 Fed. Rep. 778 ("Dyspepsia Tablets"); *Von Mumm* v. *Wittemann*, *ib.* 966 ("Extra Dry" Champagne); *Parsons* v. *Gillespie*, 17 N. S. W. R. (Eq.) 227; (1898) App. Cas. 239 ("Flaked Oatmeal"); *Sparks* v. *Harper*, 3 Queensl. L. J. Rep. 158; *ib.* 201 ("French Coffee"). And see cases as to "fancy words," *supra*, p. 40.

Distinctive words.

**In the following cases descriptiveness has either not been alleged or has been held not to be established, and the words have been treated as distinctive words:**—*Pidding* v. *How*, 6 Sim. 477 ("Howqua's Mixture"); *Perry* v. *Truefitt*, 6 Beav. 56 ("Medicated Mexican Balm"); *Taylor* v. *Carpenter* (1), 3 Story, 458 ("Persian Thread"); S. C. (2), 2 Wood. & M. 1 (do.); S. C. (3), 2 Sandf. Ch. 603 (do.); *Taylor* v. *Taylor*, 2 Eq. Rep. 290 (do.); *Hine* v. *Lart*, 10 Jur. 106 ("Ethiopian" stockings); *Fowle* v. *Spear*, 7 Penn. L. J. 176 ("Wistar's Balsam of Wild Cherry"); *Coffeen* v. *Brunton* (1), (2), 4 McLean, 516; 5 *ib.* 256 ("Chinese Liniment"); *Davis* v. *Kendall*, 2 R. I. 566 ("Pain-Killer" medicine); *Davis* v. *Kennedy*, 13 Grant Up. Can. Ch. 523 (do.), (but see *In re Perry Davis & Son*, 5 P. R. 333; 15 App. Cas. 315); *R.* v. *Dundas*, 6 Cox, 380 ("Everett's Premier" blacking); *Heath* v. *Wright*, R. Cox, 154 ("Kathairon"); *Fetridge* v. *Merchant*, 4 Abb. Pr. 156 ("Balm of Thousand Flowers"); *Williams* v. *Johnson*, 2 Bos. 1 ("Yankee Soap"); *Williams* v. *Spence*, 25 How. Pr. 366 (do.); *Williams* v. *Adams*, 8 Biss. 452 (do.); *Comstock* v. *White*, 18 How. Pr. 421 ("Dr. Morse's Indian Root Pills"); *Braham* v. *Bustard*, 1 H. & M. 447 ("Excelsior" soap); *McAndrew* v. *Bassett*, 4 De G. J. & S. 380 ("Anatolia" liquorice); *Faber* v. *Hovey*, Dig. 481 ("Star" pencils); *Rillet* v. *Carlier*, 61 Barb. S. C. 435 ("Grenade" syrup); *Smith* v. *Woodruff*, 48 Barb. 438 ("Sweet Opoponax of Mexico" perfume); *Burnett* v. *Phalon*, 3 Keyes, 594 ("Cocoaine" hair oil); *Messerole* v. *Tynberg*, 4 Abb. Pr. N. S. 410 ("Bismarck" collars); *Rowley* v. *Houghton*, 2 Brews. 303 ("Hero" jars); *Palmer* v. *Harris*, 60 Penn. St. 156 ("Golden Crown" cigars); *Filley* v. *Fassett*, 44 Mo. 173 ("Charter Oak" stoves); *Filley* v. *Child*, 16 Bl. C. C. 376 (do.); *Lockwood* v. *Bostwick*, 2 Daly, 521 ("Bovileno" pomade); *Congress & Empire Spring Co.* v. *High Rock Congress Spring Co.*, 45 N. Y. 291 ("Congress Spring" water); *Alleghany Fertiliser Co.* v. *Woodside*, 1 Hughes, 115 ("Eureka" manure); *Ford* v. *Foster*, L. R. 7 Ch. 611 ("Eureka" shirts); *Seltzer* v. *Powell*, 8 Phila. 296 ("Silver Grove" whiskey); *In re Francis & Mallon*, U. S. Pat. Comm. Decis. 1871, 283 ("Beaverine" boots); *Blackwell* v. *Armistead*, 5 Am. L. T. 85 ("Durham" tobacco); *Armistead* v. *Blackwell*, 1 U. S. Pat. Gaz. 603 (do.); *Blackwell* v. *Wright*, 73 N. Car. 310 (do.); *Blackwell* v. *Dibrell*, 14 U. S. Pat. Gaz. 633 (do.); *Hirst* v. *Denham*, L. R. 14 Eq. 542 ("Turin," "Sefton," "Leopold," "Liverpool," cloth); *Sternberger* v. *Thalheimer*, 3 U. S. Pat. Gaz. 120 ("Centennial" clothing); *In re Bush & Co.*, 10 *ib.* 164 ("Centennial" wines); *Kidd & Co.* v. *Mills, Johnson & Co.*, 5 *ib.* 337 ("Magnolia," "Dave Jones" whiskey); *Morse* v. *Worrell*, 10 Phila. 168 ("Rising Sun" stove polish); *Cotton* v. *Gillard*, 44 L. J. Ch. 90 ("Licensed Victuallers' Relish"); *Smith* v. *Mason*, W. N. 1875, p. 62 ("Pectorino" medicine); *Gouraud* v. *Trust*, 10 N. Y. Sup. Ct. 627 ("Gouraud's Oriental Cream"); *In re Glines*, 8 U. S. Pat. Gaz. 435 ("Slate Roofing Paint"); *In re Green*, 8 *ib.* 729 ("German Sirup"); *In re Weaver*, 10 *ib.* 1 ("Lion" goods); *Grillon* v. *Guénin*, W. N. 1877, p. 14 ("Tamar Indien" lozenges); *Carnrick* v. *Morson*, Dig. 543 ("Lactopeptine" medicine); *In re Cornwall* (2), 12 U. S. Pat. Gaz. 312 ("Dublin" soap); *Eno* v. *Stephens*, Dig. 609 ("Fruit Salt"), but see *In re Dunn*, 41 Ch. D. 439; 15 App. Cas. 252; *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57 ("Family

Marks Registration Act as he had before. Only, if the persons enjoying the trade mark have been so numerous that it is impossible to say that any of them, or all of them together, had an exclusive right to it, then they shall not have the benefit of the registration, which would give an exclusive right" (*a*). Common

Salve"); *Rosing* v. *Atkinson*, 27 Sol. J. 534 ("Edelweiss" perfume); *Berliner Brauerei Gesellschaft Tivoli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70 ("Tivoli" lager beer); *In re Porter Blanchard's Sons*, U. S. Pat. Comm. Decis. 1871, 97 ("Blanchard Churn"); *In re Rohland*, 10 U. S. Pat. Gaz. 980 ("Dr. Lobenthal's Essentia Antiphthisica"); *Sorg* v. *Welsh*, 16 U. S. Pat. Gaz. 910 ("Tidal Wave" tobacco); *In re Eastman*, W. N. 1880, p. 128 ("Kitchen Crystal Soap"); *Burton* v. *Stratton*, 12 Fed. Rep. 696 ("Twin Brothers" yeast); *Hier* v. *Abrahams*, 82 N. Y. 519 ("Pride" cigars); *Insurance Oil-tank Co.* v. *Scott*, 33 La. Ann. 946 ("Insurance" oil); *Smith* v. *Sixbury*, 32 N. Y. Sup. Ct. 232 ("Magnetic Balm"); *Ex parte Heyman*, 18 U. S. Pat. Gaz. 922 ("Invigorator" spring bed-bottoms); *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288 ("Valvoline" oil); *Leonard & Ellis* v. *White's Golden Lubricator Co.*, 48 U. S. Pat. Gaz. 1401 (do.), (but see *In re Horsburgh*, 53 L. J. Ch. 237); *Atlantic Milling Co.* v. *Robinson*, 20 Fed. Rep. 217 ("Champion" flour); *Ex parte Wiesel*, 36 U. S. Pat. Gaz. 689 ("Kollerina"); *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183 ("Grand Master" cigars); *Holt* v. *Menendez*, 128 U. S. 182 ("La Favorita" flour); *Lyman* v. *Burns*, 47 U. S. Pat. Gaz. 660 ("Pigs in Clover" game); *Selchow* v. *Baker*, 93 N. Y. 59 ("Sliced Animals" toys); *Electro-Silicon Co.* v. *Hazard*, 36 N. Y. Sup. Ct. 369 ("Electro-Silicon" polishing powder); *O'Rourke* v. *Central City Soap Co.*, 26 Fed. Rep. 576 ("Anti-Washboard" soap); *Funke* v. *Dreyfus*, 34 La. Ann. 80 ("Boker's Stomach Bitters"); *Hoxie* v. *Chaney*, 143 Mass. 592 ("A. N. Hoxie's Mineral Soap," "A. N. Hoxie's Pumice Soap"); *Hecht* v. *Porter*, 9 Pac. C. L. J. 569 ("Ironclad" boots); *Sheppard & Co.* v. *Stuart & Peterson*, 13 Phila. 117 ("Excelsior" stoves); *Lauferty* v. *Wheeler*, 63 How. Pr. 488; 11 Daly, 194 ("Alderney" oleo-margarine); *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395 ("Osman" towels); *Hiram Holt Co.* v. *Wadsworth*, 41 Fed. Rep. 34 ("Lightning" hay knives); *Clotworthy* v. *Schapp*, 42 Fed. Rep. 62 ("Puddine" for uncooked pudding); *Battle & Co.* v. *Finlay*, 45 Fed. Rep. 796; 50 Fed. Rep. 106 ("Bromidia" medicine); *George* v. *Smith*, 52 Fed. Rep. 830 ("Epicene" salmon); *New Home Sewing Machine Co.* v. *Bloomingdale*, 59 Fed. Rep. 284 ("Home" sewing machine); *Social Register Asson.* v. *Howard*, 60 Fed. Rep. 270 ("Social Register" for directory); *N. K. Fairbank Co.* v. *Central Lard Co.*, 64 Fed. Rep. 133 ("Cottolene" for preparation of cotton oil); *American Fibre Chamois Co.* v. *De Lee*, 67 Fed. Rep. 329 ("Fibre Chamois" dress lining); *American Grocery Co* v. *Sloan* 68 Fed. Rep. 639 ("Momaja" for a blend of Mocha, Mazacaiba and Java coffee); *Royal Baking Powder Co.* v. *Raymond*, 70 Fed. Rep. 376; 85 Fed. Rep. 231; ("Royal" baking powder); *Kaiser Brauerei Beck & Co.* v. *J. & P. Baltz Brewing Co.*, 71 Fed. Rep. 695; 74 Fed. Rep. 222 ("Kaiser" beer); *Potter Drug & Chemical Co.* v. *Miller*, 75 Fed. Rep. 656 ("Cuticura" soap); *Pennsylvania Salt Manufacturing Co.* v. *Myers*, 79 Fed. Rep. 87 ("Saponifer" lye); *Sterling Remedy Co.* v. *Eureka Chemical & Manufacturing Co.*, 80 Fed. Rep. 105 ("Notobac" for a cure for the tobacco habit); *Stoughton* v. *Woodard*, 50 U. S. Pat. Gaz. 1297 ("Cough Cherries" for a confection for curing coughs); *Bailly* v. *Nashawannuk Manufacturing Co.*, 51 U. S. Pat. Gaz. 970 ("Hygienic" suspenders, the Court being of opinion that words inferentially or remotely descriptive might be regarded as fanciful or arbitrary in a legal sense); *Waterman* v. *Shipman*, 130 N. Y. 301 ("Ideal" fountain pen); *Keasbey* v. *Brooklyn Chemical Works*, 142 N. Y. 467; 40 Am. St. Rep. 623 ("Bromo-caffeine"). Cf. *Ex parte Grove*, 67 U. S. Pat. Gaz. 1447; *Listman Mill Co.* v. *William Listman Milling Co.*, 88 Wisc. 334; 43 Am. St. Rep. 907 ("Marvel" flour); *Tetlow* v. *Tapper*, 85 Fed. Rep. 774 ("Swan Down" face powder). Cf. *In re Magnolia Metal Co.*, (1897) 2 Ch. 371, where a word not *per se* descriptive was held not distinctive on the ground that it had become descriptive.

(*a*) *Per* Bacon, V.-C., in *Benbow* v. *Low* (4), 44 L. T. N. S. 875.

marks may, however, now be registered as additions to good trade marks, if an exclusive right in them is disclaimed (*a*). If the name is descriptive, the addition of "new" or "improved" does not better the case (*b*), nor that of initials representing the name of the goods (*c*), or of a mere oval border (*d*).

Name not distinctive.

Again, where a mark, though not descriptive, yet does not serve to distinguish the person using it from a number of other persons who use or are entitled to use it, it cannot be a valid trade mark, since it is common, if not to the whole world, at all events to a class of persons. Thus "prize medal" (*e*), "gold medal" (*f*). The objection, however, will not prevail where the class is very limited (*g*).

Adjective denoting quality only, no trade mark.

"Terms which designate merely the name, quality, kind, size, number, or elements of an article, or have become its proper appellation, or that merely describe it, or direct the mode of its use, purely generic and geographical terms, and the necessary and common uses in which the English language and arabic numerals are employed by people to express their ideas and feelings and to tell the truth, are common property which all may use, but which none may exclusively appropriate as a trade mark, or acquire as absolute individual property" (*h*). Consequently, an ordinary adjective in the common language of the country, descriptive of the quality of the article, and not designating it to be of the manufacture of a certain individual or establishment, as "superior" (*i*), "superfine" (*i*), "nourishing" (*k*), cannot be exclusively appro-

(*a*) Patents Act, 1883, § 74.

(*b*) *In re Graham*, 2 U. S. Pat. Gaz. 618. See *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306; *Russia Cement Co.* v. *Le Page*, 147 Mass. 206; *Alexander* v. *Morse*, 14 R. I. 153; *Humphreys' Specific, &c. Co.* v. *Wenz*, 14 Fed. Rep. 250.

(*c*) *In re Blakeslee & Co.*, U. S. Pat. Comm. Decis. 1871, 284; *In re Dick & Co.*, 9 U. S. Pat. Gaz. 538.

(*d*) *In re Rader & Co.*, 13 U. S. Pat. Gaz. 596.

(*e*) *Batty* v. *Hill*, 1 H. & M. 264. See *Roper's, &c. Co.* v. *Copeman's, &c. Association, Ld.*, 28 Sol. J. 218; and *In re Bryant & May, Ld.*, 8 P. R. 69. And see *Schneider* v. *Williams*, 44 N. J. (Eq.) 391; *Ex parte Cigar Makers' Association*, 16 U. S. Pat. Gaz. 958; *Cigar Makers' Protective Union* v. *Conhains*, 40 Minn. 243; 12 Am. St. Rep. 726; *McVey* v. *Brendal*, 144 Penn. St. 235; 27 Am. St. Rep. 625; *Weener* v. *Brayton*, 152 Mass. 101; *Ex parte Kuppenheimer*, 60 U. S. Pat. Gaz. 439; *State* v. *Bishop*, 128 Mo. 373; 49 Am. St. Rep. 569; cf. *Strasser* v. *Moonelis*, 108 N. Y. 611; *Allen* v. *McCarthy*, 37 Minn. 347; *People* v. *Fisher*, 57 N. Y. Sup. Ct. 552; *Cohn* v. *People*, 149 Ill. 486; 41 Am. St. Rep. 304; *Carson* v. *Ury*, 49 U. S. Pat. Gaz. 411; *Gravel Roofers' Exchange* v. *Turnbull*, 64 U. S. Pat. Gaz. 441.

(*f*) *Taylor* v. *Gillies*, 59 N. Y. 331.

(*g*) *Dent* v. *Turpin*, 2 J. & H. 139. And see p. 108, note (*e*).

(*h*) *Per* Kentucky Court of Appeal in *Avery & Sons* v. *Meikle & Co.*, 27 U. S. Pat. Gaz. 1027.

(*i*) *Braham* v. *Bustard*, 1 H. & M. 447.

(*k*) *Ragget* v. *Findlater*, L. R. 17 Eq. 29; and see *Spottiswoode* v. *Clarke*, 1 Coop. 254; *Gillott* v. *Esterbrook*, R. Cox, 353; *Ex parte Palmer*, U. S. Pat. Comm. Decis. 1871, 289; *In re Dick & Co.*, 9 U. S. Pat. Gaz. 538; *In re Goodyear Rubber Co.*, 11 *ib.* 1062; *Fulton* v. *Sellers*,

priated as a trade mark. And the same is the case with a word or symbol which is understood generally, or in the trade, to indicate quality and not a special manufacturer. Thus "A, No. 1," "A X, No. 1" (*a*), "A 1" (*b*), "Best six-cord"—"200 yds." (*c*).

Marks denoting maker as well as quality.

But in some of the American cases this principle appears to have been carried to an extent which is unreasonable, and which has not been and would not be recognised in this country, the rule having been laid down too generally that every word or symbol which serves to indicate quality is incapable of appropriation as a trade mark, the qualification being omitted that, if such word or symbol also serves to indicate a particular manufacturer, the mark may be a good trade mark. In *Amoskeag Manufacturing Co.* v. *Trainer* (*d*) the Supreme Court of the United States itself appears to have decided in favour of the wider rule. There the plaintiff company manufactured cotton tickings, and sold the different qualities under different labels, of which the one affixed to the best quality of the goods bore a combination device, in which the prominent and conspicuous feature consisted of the letters "A. C. A." Those letters had for many years been recognised as indicating that the goods to which they were attached were of the plaintiff company's manufacture, and also of the best quality of the goods so manufactured, and the plaintiffs' user of the letters had been substantially exclusive. In an action, however, brought against defendants who had sold similar goods of their own manufacture under a label containing the same letters in a conspicuous place, the Supreme Court held that, the letters being indicative of quality, no protection could be given. All trade marks, however, which are of any value at all, denote that the goods to which they are attached are of good quality, and by far the greater number of large manufacturing firms use a variety of trade marks, which they

4 Brews. 42; *Ex parte Cohn* (1), 16 U. S. Pat. Gaz. 680; *Royal Baking Powder Co.* v. *Sherrill*, 93 N. Y. 331; *Smith* v. *Imus*, 32 Alb. L. J. 455; *Smith* v. *Walker*, 37 Mich. 456.

(*a*) *Candee, Swan & Co.* v. *Deere & Co.*, 54 Ill. 439; 5 Amer. Rep. 125; and see *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sand. S. C. 599; R. Cox, 87; *Same* v. *Trainer*, 101 U. S. 51; *Burke* v. *Cassin*, 45 Cal. 467; 13 Amer. Rep. 204; *Stokes* v. *Landgraff*, 17 Barb. 608; R. Cox, 137; *Kinney* v. *Allen*, 1 Hughes, 106; *In re Eagle Pencil Co.*, 10 U. S. Pat. Gaz. 981; *Osgood* v. *Allen*, 1 Holmes, 185; *Carver* v. *Bowker*, Dig. 581; *Avery* v. *Meikle*, 27 U. S. Pat. Gaz. 1027; *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 138 U. S. 537: *Barlow* v. *Gobindram*, Ind. L. R. 24 Calc. 364.

(*b*) *Rogers* v. *Rogers*, 53 Conn. 121.

(*c*) *Coats* v. *Merrick Thread Co.*, 45 U. S. Pat. Gaz. 347; 149 U. S. 562.

(*d*) 101 U. S. 51. And see *Royal Baking Powder Co.* v. *Sherrill*, 93 N. Y. 331.

apply to goods of different descriptions or qualities, or intended for different markets; and possibly the explanation of the decision may be that the Court really considered that the letters, though only used by the plaintiffs, indicated nothing beyond quality (*a*).

Such marks valid.

It seems clear that the English rule that combinations of letters, or words, or symbols, which indicate that the goods to which they are applied have been manufactured by a particular person or firm, may constitute valid and registrable trade marks, notwithstanding that they also indicate the quality or pattern of the goods as compared with other goods of the same makers (*b*), is preferable to that which appears to have been formulated in some of the American Courts. Thus, in *Hirst* v. *Denham* (*c*), different fancy patterns of the plaintiff's cloth were marked with different names, each of which was protected; in *Moses* v. *Sargood, Ewen & Co.* (*d*), the plaintiff's clothing was marked with a number of crowns, varying from one to six, according to quality; in *Ransome* v. *Graham* (*e*) the plaintiff's ploughs were marked with the letters "R. N." and an additional letter or numeral, varied according to pattern and quality (*f*). In the Indian case of *Taylor* v. *Virasami* (*g*) the plaintiff's shirtings were marked with scimitars, varying in number from two to five, according to quality. Even in some of the American Courts the English rule has been recognised, and it was well stated by the Supreme Court of Rhode Island (*h*) as follows:—

"Undoubtedly, if it be assumed that a given mark indicates quality only, and not origin, it will follow that purchasers of goods so marked have not been misled thereby into the supposition that they were buying a plaintiff's goods, and hence he would show no cause for relief. . . . . But it by no means follows as a rule of law that marks indicating style or quality may not also indicate origin, and thus be a subject of trade mark. . . . . A person may have different symbols for different grades of goods, which will indicate both quality and origin with respect to the goods so marked. A

(*a*) See *American Solid Leather Button Co.* v. *Anthony*, 15 R. I. 338.

(*b*) *Ransome* v. *Graham*, 51 L. J. Ch. 897.

(*c*) L. R. 14 Eq. 542.

(*d*) Dig. 636.

(*e*) 51 L. J. Ch. 897.

(*f*) And see *In re Brook*, 26 W. R. 791; *Mitchell* v. *Henry*, 15 Ch. D. 181; *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 412, 415; and *per* Pearson, J., in *Wood* v. *Lambert*, 32 Ch. D. 247; and the American cases of *Lawrence Manufacturing Co.* v. *Lowell*, 129 Mass. 325; *Godillot* v. *Hazard*, 81 N. Y. 263, *per* Danforth, J.; *Sohl* v. *Geisendorf*, 1 Wils. (Ind.) 60; *Merry* v. *Hoopes*, 111 N. Y. 415.

(*g*) Ind. L. R. 6 Mad. 108.

(*h*) In *American Solid Leather Button Co.* v. *Anthony*, 15 R. I. 338.

manufacturer may adopt such symbols, not simply to mark a style or quality, but *his* style and *his* quality as well. He is entitled to have his style and his quality protected from misrepresentation, and to have the benefit of any favourable reputation they may have gained."

Marks denoting quality in only one trade.

If a word or symbol is only indicative of quality in a particular trade, it seems that it may be used as a trade mark in a different trade (*a*).

Deceptive marks.

Again, a trade mark which contains false representations, so as to deceive the public, will not be protected in equity as a valid trade mark (*b*), and cannot be registered as such under the Patents Acts, 1883—1888 (*c*). In short, as was said by Wallace, J., in *Ginter* v. *Kinney Tobacco Co.* (*d*), "no principles are better settled in the law of trade marks than that a generic name, or a name merely descriptive of the ingredients, quality, or characteristics of an article of trade, cannot be the subject of a trade mark; and that the use of a name or to n which is likely to deceive the public in reference to the components or nature of the article to which it is applied will not be tolerated." But mere collateral misrepresentations do not disqualify (*e*).

Marks which are either descriptive or deceptive.

An attempt has occasionally been made to meet the contention that a word claimed as a trade mark is incapable of appropriation by reason of its descriptiveness, by the allegation that the goods to which it is applied do not answer the description imported by the word, and therefore that the word is not, in fact, descriptive of the goods. But in cases where a word is used which is descriptive of qualities which the goods might reasonably be supposed to possess, if the goods do not possess those qualities the use of the word is deceptive, so that *quâcunque viâ* the claim fails. Thus, in *In re Saunion & Co.* (*f*), Sir G. Jessel, M.R., refused registration to the words "Anglo-Portugo Oysters," on the ground that if the oysters were Anglo-Portuguese the use of the term was descriptive, while, if they were not, it was deceptive. And the same view was

(*a*) *In re English*, U. S. Pat. Comm. Decis. 1870, 142.

(*b*) *Pidding* v. *How*, 8 Sim. 477; *Perry* v. *Truefitt*, 6 Beav. 66; *Flavel* v. *Harrison*, 10 Hare, 467; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137; *Morgan* v. *McAdam*, 36 L. J. Ch. 228; *Lewis's* v. *Goodbody*, 67 L. T. N. S. 194; *In re Hill*, 10 P. R. 113; *Connell* v. *Reed*, 128 Mass. 477; *Ex parte Chichester Chemical Co.*, 52 U. S. Pat. Gaz. 1061; *Ex parte Zwack & Co.*, 76 U. S. Pat. Gaz. 1855; and see c. 7, *infra*.

(*c*) See § 73, and *In re Edge*, 8 P. R. 207.

(*d*) 12 Fed. Rep. 782.

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

(*f*) Dig. 625.

adopted by Lopes, L. J., in *In re Van Duzer* (*a*). There are many American authorities to the same effect (*b*). But if the term claimed is one which is notoriously inappropriate to the article, it will not be treated as deceptive. Thus the name "Edelweiss" was allowed to be appropriated to scent not derived from that flower, it being well known that the edelweiss yields no perfume (*c*).

**Extravagance an advantage in word trade marks.**

It may be stated as a general rule that the more extraordinary and extravagant the name that is adopted by way of trade mark, the better will the object be attained, and the protection of the Courts and of the Registration Office secured; for the more uncommon the designation is, the less obnoxious is the exclusive claim of the manufacturer, and the more conclusive the evidence of fraud supplied by an infringement. Thus, Wood, V.-C., said, "I have not the least doubt that if the plaintiff (if I doubted I should be going quite contrary to the Mexican Balm case and other cases in which ridiculous names have been used) had invented a fanciful and ridiculous name—and the more ridiculous, the better it is for his purpose—and had used it for eight or ten years in his trade, the Court would take care that nobody else should use that absurd name; for such user could only be a user for the express purpose of imitating the plaintiff's, and so defrauding the plaintiff, by representing goods manufactured by one person to be goods manufactured by another" (*d*).

**Words specially invented.**

In many cases the word used as a trade mark is an entirely new word, invented for the occasion by the manufacturer of the material or composition to which it is applied, and such a name may be registered and otherwise treated as a valid trade mark (*e*). Thus

(*a*) 34 Ch. D. 631. Compare *Free Fishers & Dredgers of Whitstable* v. *Elliott*, W. N. 1888, p. 27; and see *In re Hannay*, 7 P. R. 46; *In re Edge*, 8 P. R. 207; *Parsons* v. *Gillespie*, 17 N. S. W. R. (Eq.) 227; (1898) A. C. 239.

(*b*) *Fairbanks* v. *Jacobus*, 14 Bl. C. C. 337 ("Fairbanks' Patent"); *In re American Sardine Co.*, 3 U. S. Pat. Gaz. 495 ("American Sardines"); *In re Dole Brothers*, 12 *ib.* 939 ("Egg Macaroni"); *In re Warburg & Co.*, 13 *ib.* 44 ("Cachemire Milano" silks); *Ex parte Marsching & Co.*, 15 *ib.* 294 ("French" paints); *Ex parte Knapp*, 16 *ib.* 318 ("London" animal foods); *Ex parte Farnum & Co.*, 18 *ib.* 412 ("Lancaster" tickings); *Ginter* v. *Kinney Tobacco Co.*, 12 Fed. Rep. 782 ("Straight-cut" cigarettes); *California Fig Syrup Co.* v. *Stearns*, 67 Fed. Rep. 1008; 73 Fed. Rep. 812; *California Fig Syrup Co.* v. *Putnam*, 66 Fed. Rep. 750; 69 Fed. Rep. 740 ("Fig Syrup"); *Ex parte Grove*, 67 U. S. Pat. Gaz. 1447 ("Bromo-Quinine"). With which compare *In re Green*, 8 U. S. Pat. Gaz. 729 ("German Sirup"); *In re Cornwall* (2), 12 *ib.* 312 ("Dublin" soap); *California Fig Syrup Co.* v. *Improved Fig Syrup Co.*, 51 Fed. Rep. 296; 54 Fed. Rep. 175; *Same* v. *E. Worden & Co.*, 86 Fed. Rep. 212.

(*c*) *Rosing* v. *Atkinson*, 27 Sol. J. 534. And see *In re Densham*, (1895) 2 Ch. 176.

(*d*) *Young* v. *Macrae*, 9 Jur. N. S. 322; and see *Fetridge* v. *Merchant*, 4 Abb. Pr. 156; R. Cox, 194.

(*e*) See Patents Act, 1883, § 64, as amended by the Act of 1888.

"Pectorine" (*a*) and "Lactopeptine" (*b*) were protected as names for medical compounds; "Cocoaine" (*c*) and "Bovilene" (*d*) for pomades. "Chlorodyne" (*e*) was only not protected because the proprietor, on a mistaken view of his rights, consented to have his bill for an injunction dismissed with costs. Invented words (*f*) were, however, occasionally refused registration as "fancy words" under § 64 of the Act of 1883, where they were considered to suggest a description of the article—*e.g.*, "Washerine" soap (*g*), "Monobrut" champagne (*h*); and Jessel, M. R., treated "Valvoline" oil as descriptive (*i*), though Lord Selborne (*k*) and a United States circuit judge (*l*) have thought differently.

Existing words composing a word trade mark.

In many other cases the trade mark consists, not of a newly coined word, but of a word, or a combination of words, already in common use, but which for the purpose of the trade mark, is or are used and applied in a manner quite different from the ordinary use and application, so different that it is seen at the first glance that the word or combination of words is or are being used quite out of the common signification, and in the nature of a fancy name designatory of the goods (*m*). Thus "Pharaoh's Serpents" (*n*),

(*a*) *Smith* v. *Mason*, W. N. 1875, p. 62.

(*b*) *Carmick* v. *Morson*, L. J. N. of C. 1877, p. 71.

(*c*) *Barnett* v. *Phalon*, 9 Bos. 192; R. Cox, 376.

(*d*) *Lockwood* v. *Bostwick*, 2 Daly, 521; R. Cox, 555.

(*e*) *Browne* v. *Freeman*, 12 W. R. 305.

(*f*) *In re Francis & Mallon*, U. S. Pat. Comm. Decis. 1871, 283 ("Beaverine" boots and shoes); *Enoch Morgan's Sons' Co.* v. *Schwachhofer*, 55 How. Pr. 37, and *Same* v. *Hunkele*, 16 U. S. Pat. Gaz. 1092 ("Sapolio" soap); *Electro-Silicon Co.* v. *Trask*, 59 How. Pr. 189 ("Electro-silicon"); *Electro-Silicon Co.* v. *Hazard*, 36 N. Y. Sup. Ct. 369 (do.). And see *Young* v. *Macrae*, 9 Jur. N. S. 322, in which "Paraffin Oil," *Lamplough* v. *Balmer*, W. N. 1867, p. 293, in which "Pyretic saline," and *Wolfe* v. *Goulard*, 18 How. Pr. 64, R. Cox, 226, in which "Schiedam Schnapps," was not protected for special reasons only.

(*g*) *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274.

(*h*) *In re Vignier*, 6 P. R. 490.

(*i*) *In re Horsburgh*, 53 L. J. Ch. 237.

(*k*) *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288.

(*l*) *Leonard & Ellis* v. *White's Golden Lubricator Co.*, 48 U. S. Pat. Gaz. 1401.

(*m*) See *Newman* v. *Alvord*, R. Cox, 413, in which Daniels, J., said that "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 will 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;" *Osgood* v. *Allen*, 1 Holmes, 185, in which Shepley, J., said that "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;"

(*n*) *Barnett* v. *Leuchars*, 13 L. T. N. S. 495.

applied to a toy; "The Licensed Victuallers' Relish" (*a*), to a sauce; "Turin," "Sefton," "Leopold," and "Liverpool" (*b*), to cloth; "United Service" (*c*) and "Genuine Yankee" (*d*), to soap; "Sweet Opoponax of Mexico" (*e*) and "Balm of Thousand Flowers" (*f*), to perfume; and "Charter Oak" to stoves (*g*).

Inscriptions or advertisements.

Occasionally it has been sought to protect as a trade mark, and to claim exclusive rights in, an inscription or advertisement composed of ordinary English words, used in their ordinary sense, and only peculiar from the length of the sequence. Usually, indeed, there is in such cases some feature which might be really distinctive but of which the plaintiff, for some reason or other, is unable to avail himself; this failing, the whole inscription is claimed. Such cases, however, are in fact "advertisements of the character and quality of the goods" (*h*), in which advertisements no exclusive rights can be claimed, as was expressly decided by the Court of Appeal in *Cheavin* v. *Walker* (*i*), where the inscription was

*Lea* v. *Wolff*, 15 Abb. Pr. N. S. 1; *Ex parte Palmer*, U. S. Pat. Comm. Decis. 1871, 289; *M'Lean* v. *Fleming*, 96 U. S. 245; *Smith* v. *Woodruff*, 48 Barb. 438; and *Ex parte Halliday Brothers*, 16 U. S. Pat. Gaz. 500.

(*a*) *Cotton* v. *Gillard*, 44 L. J. Ch. 90.

(*b*) *Hirst* v. *Denham*, L. R. 14 Eq. 542.

(*c*) *Field* v. *Lewis*, Dig. 280.

(*d*) *Williams* v. *Johnson*, 2 Bos. 1; R. Cox, 214; *Williams* v. *Spence*, 25 How. Pr. 366; R. Cox, 305.

(*e*) *Smith* v. *Woodruff*, 48 Barb. 438; R. Cox, 373.

(*f*) *Fetridge* v. *Merchant*, 4 Abb. Pr. 156; R. Cox, 194. But see *Fetridge* v. *Wells*, 13 How. Pr. 385; R. Cox, 180.

(*g*) *Filley* v. *Fassett*, 44 Mo. 173; R. Cox, 530; *Filley* v. *Child*, 16 Bl. C. C. 376. And see *Weston* v. *Hemmons*, 2 V. L. R. Eq. 121 ("Wizard" oil); *Sternberger* v. *Thalheimer*, 3 U. S. Pat. Gaz. 120 ("Centennial" clothing); *Kidd & Co.* v. *Mills, Johnson & Co.*, 5 *ib.* 337 ("Magnolia" whiskey); *Kidd* v. *Johnson*, 100 U. S. 617 (do.); *In re Glines*, 8 U. S. Pat. Gaz. 435 ("Slate Roofing Paint"); *In re Kimball*, 11 *ib.* 1109 ("Vanity Fair" cigarettes); *Marcovitch* v. *Bramble, Wilkins & Co.*, Dig. 595 (do.); *Davis* v. *Kennedy*, 13 Grant Up. Can. Ch. 523 ("Pain-Killer" medicine); *Faber* v. *Hovey*, Dig. 481 ("Star" pencils); *Ex parte Peper*, 16 U. S. Pat. Gaz. 678 ("Corn" tobacco); *Wright* v. *Simpson*, 15 *ib.* 968 ("Pond Lily Wash"); *Crawford* v. *Shuttock*, 13 Grant Up. Can. Ch. 149 ("Imperial" soap); *Degraves* v. *Whiteman*, 5 V. L. R. Eq. 304 ("Cascade" ale); *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183 ("Grand Master" cigars); *Hecht* v. *Porter*, 9 Pac. C. L. J. 569 ("Ironclad" boots). But where the name "Astral Lamp" had been long in use for a particular kind of oil lamp, it was held that no exclusive right could be acquired in the word "Astral" as applied to oil: *Pratt Manufacturing Co.* v. *Astral Refining Co., Ld.*, 27 Fed. Rep. 493.

(*h*) *Per* Lord Westbury, C., in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523, which see.

(*i*) 5 Ch. D. 850. And see *Blackwell* v. *Crabb*, 36 L. J. Ch. 504; *Alleghany Fertiliser Co.* v. *Woodside*, 1 Hughes, 115 ("Ammoniated Bone Superphosphate of Lime"); *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453 ("Highly Concentrated Compound Fluid Extract of Buchu"); *In re Johnson & Co.*, 2 U. S. Pat. Gaz. 315 ("Johnson's American Anodyne Liniment, Established A.D. 1810"); *Gilman* v. *Hunnewell*, 122 Mass. 139 ("A sure remedy for chronic or common cough, sore throat, and other minor throat complaints, so often by neglect the forerunner of consumption"); *Cady* v. *Schultz*, 19 R. I. 193; 61 Am. St. Rep. 763 ("Scientific dentistry at moderate prices").

"G. Cheavin's improved patent, gold-medal, self-cleaning, rapid water filter, Boston, England," the name Cheavin having become indicative of a principle of construction. In *Shrimpton* v. *Laight* (*a*), the use of the words "graduated, grooveless, drill-eyed, ground-down" needles was also accompanied by that of the maker's name, and this being obviously imitated by the defendant, the injunction was granted.

Words taken from the dead languages.

Sometimes a word taken from a dead language has been applied to goods and protected as a valid trade mark, as the Latin word "Excelsior" in respect of soap (*b*), or stoves (*c*); or the Greek word "Eureka" on shirts (*d*), or on an agricultural compost (*e*).

Or from modern foreign languages.

In some instances words taken from modern foreign languages have been protected, though the precise extent to which trade marks so composed will be acknowledged has not yet been authoritatively decided. Where the name employed is a fancy name which happens to be in a foreign language, or framed in imitation of the forms of a foreign language, there is no doubt that there is just as good a trade mark as if it had been in English or framed on English forms; thus, "Flor Fina Prairie Superior Tabac" (*f*) was allowed to be a good trade mark, though the defendant was held not to have infringed; and "Tamar Indien" (*g*) was actually protected. In *In re Rotherham* (*h*), an Arabic word, used by way of a pun, was held to be entitled to registration as a good trade mark, though the Commissioners of Patents had directed the registrar to the contrary.

Foreign words in their ordinary signification.

When, however, the foreign words are used in their ordinary sense, or in a sense not widely remote therefrom, the case is

(*a*) 18 Beav. 164. And see *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402; R. Cox, 490, where an injunction was given. In *Roberts* v. *Sheldon*, 8 Biss. 398. the plaintiff used the words "Roberts' Parabola Gold-Burnished Sharps" on his needles, and the defendant was restrained from using the words "William Clark & Sons' Parabola Gold-Burnished Sharps." In *In re Roberts*, (1), (2), (3), U. S. Pat. Comm. Decis. 1871, 113, 100, 101, the following were registered as trade marks:—"A luxury — R. J. Roberts' Razor-Steel Scissors. The best in the world. The best is the cheapest. For sale here"; "An exquisite pleasure to shave with R. J. Roberts' Diamond-Edged Razors"; "R. J. Roberts' Diamond-Edge Razor. Every razor warranted."

(*b*) *Braham* v. *Bustard*, 1 H. & M. 447.

(*c*) *Sheppard & Co.* v. *Stuart & Peterson*, 13 Phila. 117.

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

(*e*) *Alleghany Fertiliser Co.* v. *Woodside*, 1 Hughes, 115. See *Raggett* v. *Findlater*, L. R. 17 Eq. 29.

(*f*) *Cope* v. *Evans*, L. R. 18 Eq. 138.

(*g*) *Grillon* v. *Guénin*, W. N. 1877, p. 14. And see *Carmencho* v. *Stephenson*, 25 Sol. J. 929 ("Intimidad" cigars); *Holt* v. *Menendez*, 128 U. S. 182 ("La Favorita" flour).

(*h*) 14 Ch. D. 585.

*Gout* v. *Alcploglu.*

different. In *Gout* v. *Alcploglu* (*a*), the plaintiff was a maker of watches for the Turkish market. These watches he marked in Turkish with his own name (Ralph Gout) with the word "Pessendede" ("warranted"), with his initials "R. G." and a crescent, and also with a sprig and crescent. The defendant procured watches to be made, in which the minor features of the marks used by the plaintiff were omitted, but in which the main characteristics, the name ("Ralph Gout") and the word "Pessendede," in Turkish characters, were reproduced, the style of engraving being copied. Such watches were then sent by the defendant to Constantinople, and there sold, to the prejudice of the plaintiff's business. This was a clear case of fraud, and so it was held to be by the Vice-Chancellor of England, Sir L. Shadwell, who, however, did express an opinion that the plaintiff had acquired an exclusive right in the word "Pessendede" (*b*). But the point that had to be decided was not simply whether the word "warranted," in Turkish, could be protected; and, indeed, when it is considered that the watches were to be sold in Turkey, the case does seem to be just the same as if the word had been engraved in English on watches to be sold in this country, when such a proposition would be clearly untenable. But not only the word, but the manner of engraving it was copied, and not only that word, but the name of the maker; and what the Vice-Chancellor actually decided was that here there was a clear case of attempted fraud, which was quite sufficient ground for the issue of an injunction, without its being necessary to consider whether the imitation of one single feature would have been sufficient to entitle the plaintiff to that remedy. The use of the name "Ralph Gout" alone by the defendant, whose own name was entirely different, would indeed have been sufficient to entitle the plaintiff to an injunction (*c*), but the case with respect to "Pessendede" was different.

*Broadhurst* v. *Barlow.*

In *Broadhurst* v. *Barlow* (*d*), the case was again a far more complicated one than that of a single foreign word, or even a succession of words taken from the same foreign language. Here the plaintiffs were spinners and manufacturers at Manchester and

(*a*) 6 Beav. 69; 5 Leg. Obs. 496.
(*b*) 5 Leg. Obs. 496.
(*c*) See *per* Sir G. Turner, L. J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Perks* v. [illegible] & *Co.*, W. N. 1881, p. 111.

(*d*) W. N. 1872, p. 212; and L. J. N. of C. 1872, p. 183. There have been numerous unreported cases with reference to cotton goods to the same effect.

Bolton, who exported to the East large quantities of pieces of Spanish shirting, which they marked with their proper trade mark, a lion in a border, and with the words "Spanish shirting" in a scroll, and "No. 120." To this they had added "exactly 12 yards," in Turkish, Armenian, and Greek, the same statement being repeated in the three languages, placed one below the other (*a*). The defendants were discovered to be preparing Spanish shirting for export, similarly marked, except that there were five lines instead of four, and that an elephant was used in place of the lion. Wickens, V.-C., held that "though an elephant was used by the defendants, the three sentences in the same languages in the same order was an infringement of the plaintiffs' rights," and he therefore granted the injunction to restrain the use of the words in the three languages in the order used by the plaintiffs.

Conclusion.

The true principle appears to be that, while foreign words employed in their ordinary signification may, even when used on goods intended for consumption in the country where that foreign language is spoken, form a part of a combination trade mark, the infringement of which will be restrained, the exclusive use of such words themselves, apart from fraud, will not be protected in this country, any more than that of an ordinary English adjective (*b*). In an American registration case (*c*) it was sought to register the German words "Für Familien Gebrauch," and "Lawrence Feiner Familien Flannel," meaning respectively "For Family Use" and "Lawrence Fine Family Flannel"; but the application was refused, on the ground of descriptiveness. In *Rillet* v. *Carlier* (*d*) it was indeed held that an American maker of pomegranate syrup had acquired an exclusive right in America to the term "Grenade Syrup," though "Grenade" was the ordinary French word for pomegranate, and the term "Grenade Syrup"

(*a*) In *Curtis* v. *Bryan*, 2 Daly, 212; R. Cox, 434, a label was used, with an inscription in English, French, German, and Spanish. And see *Siegert* v. *Findlater*, 7 Ch. D. 801; and *Siegert* v. *Ehlers*, Dig. 432; *Klotz* v. *Hecht*, 73 Fed. Rep. 822.

(*b*) This was so laid down with respect to words claimed as fancy words under the Patents Act, 1883, § 64, by Chitty, J., in *In re Davis & Co.*, 6 P. R. 207.

(*c*) *In re Lawrence & Co.*, 10 U. S. Pat. Gaz. 163. And see *Dadirrian* v. *Yacubian*, 72 Fed. Rep. 1010, where the word "Matzoon," the Armenian name for an article of food made from fermented milk, was held incapable of being monopolised in America by the person introducing the article into that country. Cf. *Dadirrian* v. *Theodorian*, 74 U. S. Pat. Gaz. 1302. And compare *In re Davis & Co.*, 6 P. R. 207 ("Bokül" beer).

(*d*) 61 Barb. S. C. 435.

was in common use in France. In this case, however, there were elements of fraud, and actual fraud will always be restrained.

Geographical names.

Under the head of "distinctive words" should be included trade marks consisting of geographical names. For registration, it is indispensable to prove user as a trade mark before August 13th, 1875, for such words have never been allowed to be registered as new marks. This was so under the Act of 1875, because that Act did not allow any mere words to be registered as new marks (*a*), and under the Act of 1883, because the construction placed on the term "fancy word" was such as to exclude geographical names (*b*); and is still so under the Act of 1888, because such names are expressly excluded from registration as new marks (*c*). But it seems that where a geographical name has been used *per se* as a trade mark before August 13th, 1875, and is not in common use, it will be recognised as a "special and distinctive" word (*d*). When geographical names are used as trade marks they are in that application to be understood, not as ascribing the goods to which they are affixed to any special section of the earth's surface, but as expressing the works at which, or the manufacturer by whom, those goods have been produced. So Wood, V.-C., in the "Anatolia" liquorice case (*e*), said that "the plaintiffs had established beyond all doubt the connection of their name with that mark, that was beyond dispute," and that "he could not treat the word as being otherwise than a designation mark, which the plaintiffs had caused to be attached to that particular article of liquorice which they so manufactured, and which they had a right to consider, in that qualified sense, property." Lord Westbury, C., in that case strongly confirmed the opinion of the Vice-Chancellor; and in the later case of *Wotherspoon* v. *Currie* (*f*),

(*a*) Trade Marks Act, 1875, § 10.

(*b*) *In re Van Duzer*, 34 Ch. D. 623 ("Melrose Favourite Hair Restorer"); *In re Ainslie & Co.*, 4 P. R. 212 ("Ben Ledi" whiskey); *In re Laing*, L. J. N. of C. 1887, p. 102 ("Glengowrie Blend of Fine Old Highland Whiskey"); *In re Thompson & Co.*, 6 P. R. 213 ("Manor" tin plates) (as to which see *Pinto* v. *Badman*, 8 P. R. 181, 188, 191); *Great Tower Street Tea Co.* v. *Smith*, 6 P. R. 165 ("Tower Tea"); *In re Batt & Co.*, 6 P. R. 493 ("The Brymbo Special" iron goods); *Hodgson* v. *Sinclair*, 9 P. R. 22 ("Britannia" soap).

(*c*) Patents Act, 1888, § 10.

(*d*) *In re Van Duzer*, 34 Ch. D. 623 (*per* Cotton, L. J.); *Compania General de Tabacos* v. *Rehder*, 5 P. R. 61 ("Cavito" cigars); *Evans* v. *Smith*, 3 Times L. R. 390 ("Montserrat" lime juice). See *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217.

(*e*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561; 4 De G. J. & S. 380 (App.).

(*f*) L. R. 5 H. L. 508. See also *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217 ("Stone Ales"); *Huntley & Palmer* v. *Reading Biscuit Co.*, 10 P. R. 277 ("Reading" biscuits); *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710 ("Yorkshire

where the subject of dispute was the word "Glenfield" applied to starch, he stated that that word had acquired a secondary signification or meaning in connection with a particular manufacture: in short, it had become the trade designation of the starch made by the appellants. It was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary signification to which he had referred. The word "Glenfield," therefore, as a denomination of starch, had become the property of the appellants. It was their right and title in connection with the starch.

Rules as to geographical names.

In some cases there is no pretence for saying that the name is used in its ordinary geographical sense. Thus no one could affirm that the use of the names "Persian thread" (*a*) or "Ethiopian stockings" (*b*) had induced him to suppose that the articles in question were imported from those countries. In other cases, however, the name is less purely arbitrary, and was originally, at least, indicative of local origin. For instance, the pipes marked with "E. Southorn, Broseley" (*c*), were manufactured at a village of that name; Glenfield starch (*d*), in the same manner, came from Glenfield; Anatolia liquorice (*e*), and Leopoldshall Kainit (*f*), from those respective places. This fact, however, does not deprive the trade mark of the right to protection. It is true that the name

Relish"); *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893 ("Hunyadi" water); *Bewlay & Co.* v. *Hughes*, 15 P. R. 290 ("Dindigul" cigars); *In re Clement & Cie.*, 16 P. R. 173 (Vin de "St. Raphael"). And see *Reddaway* v. *Banham*, (1896) A. C. 199; *Rockingham Rail. Co.* v. *Allen*, 12 Times L. R. 345.

(*a*) *Taylor* v. *Taylor*, 23 L. J. Ch. 255.

(*b*) *Hine* v. *Lart*, 10 Jur. 106. And see *In re Clement & Cie.*, 16 P. R. 173 (Vin de "St. Raphael"); *In re Cornwall* (2), 12 U. S. Pat. Gaz. 312 ("Dublin" soap); *Fleischmann* v. *Schuckmann*, 62 How. Pr. 92 ("Vienna" bread); *Lauferty* v. *Wheeler*, 63 *ib.* 488; 11 Daly, 194 ("Alderney" oleo-margarine).

(*c*) *Southorn* v. *Reynolds*, 12 L. T. N. S. 75.

(*d*) *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508.

(*e*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380.

(*f*) *Radde* v. *Norman*, L. R. 14 Eq. 348. And see *Apollinaris Co.* v. *Edwards*, Seton, 5th ed. 537; and *Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 242 ("Apollinaris Water"); *Congress and Empire Spring Co.* v. *High Rock Congress Spring Co.*, 57 Barb. 526; R. Cox, 599 ("Congress Spring Water"); *Amoskeag Manufacturing Co.* v. *Garner* (1), 55 Barb. 151; R. Cox, 541; and S. C. (2), 54 How. Pr. 298 ("Amoskeag" cloths); *Newman* v. *Alvord*, 51 N. Y. 189 ("Akron"); *Lea* v. *Millar*, Dig. 513 ("Worcestershire Sauce"); *Powell* v. *McNulty*, Dig. 526, and *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710 ("Yorkshire Relish"); *Siegert* v. *Findlater*, 7 Ch. D. 801 ("Angostura Bitters"); *Kinney* v. *Basch*, Dig. 542 ("St. James' Cigarettes"); *Wheeler* v. *Johnston*, 3 L. R. Ir. 284 ("Cromac Springs"); *Davis* v. *Tylor*, Jessel, M. R., April 24th, 1879 ("Ferndale" coal); *Lochgelly Co., Ld.* v. *Lumphinnans Iron Co.*, Ct. Sess. Cas. 4th Ser. VI. 482 ("Lochgelly" coal); *Blair* v. *Stock*, 52 L. T. N. S. 123 ("Strathmore" whiskey); *Grezier* v. *Autran*, 13 P. R. 1 ("Chartreuse" liqueur); *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893 ("Hunyadi" water).

of an existent place cannot for all purposes be appropriated (*a*), and that any one who manufactures at a place the name of which has become another's trade mark, indicative of that other's productions, may still describe his goods as made on that spot (*b*). But by English law he cannot stamp that name on his goods in the character of a trade mark of his own. In *Seixo* v. *Provezende* (*c*), where it was urged by the defendants that parts of their vineyards were known by the name of Seixo, the Lord Chancellor (Lord Cranworth) said that even assuming that to be true, "that did not justify the defendants in adopting a device or brand, the probable effect of which was to mislead the public, when purchasing their wine, to suppose that they were purchasing wine produced from the vineyards, not of the defendants, but of the plaintiff. Cases might be imagined, though very unlikely to arise, in which a person bringing into the market for the first time the produce of a newly established manufacture, to come into competition with one already established, might really be embarrassed as to the mode in which he should describe it, so as not to interfere with the description adopted by a manufacturer who had been before him." And he added that if such a case should arise, it would have to be dealt with on its own merits.

*McAndrew* v. *Bassett.*

Again, in *McAndrew* v. *Bassett* (*d*), Lord Westbury, C., said, "I am told that the word 'Anatolia,' being a general geographical expression—being, in point of fact, the geographical designation of a whole country—is a word common to all, and that in it, therefore, there can be no property. That is nothing in the world more than a repetition of the fallacy which I have frequently had occasion to expose. Property in the word for all purposes cannot

(*a*) "Property in the word for all purposes cannot exist": *per* Lord Westbury, C., *McAndrew* v. *Bassett*, 4 De G. J. & S. 380. In *Watt* v. *O'Hanlon*, 4 P. R. 1, the words "Old Innishowen" were held to be descriptive of a particular quality of whiskey, and an injunction was refused. And see *Rugby Portland Cement Co.* v *Rugby & Newbold Portland Cement Co.*, 8 P. R. 241; 9 P. R. 46; *New York & Rosendale Cement Co.* v. *Coplay Cement Co.*, 44 Fed. Rep. 277; 45 Fed. Rep. 212.

(*b*) Thus, in *Braham* v. *Beachim* (1), 7 Ch. D. 848, an injunction was only granted to restrain the defendants from describing their coal as "Radstock" until they had some justification for so describing it, and when that justification could be produced, no relief was granted against them. And so in *Free Fishers & Dredgers of Whitstable* v. *Elliott*, W. N. 1888, p. 27. But this course was not taken in *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217, *q. v.* See *Braham* v. *Beachim* (2), Dig. 633; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Bewlay & Co.* v. *Hughes*, 15 P. R. 290.

(*c*) L. R. 1 Ch. 192.

(*d*) 4 De G. J. & S. 380. See *Wheeler* v. *Johnston*, 3 L. R. Ir. 284.

exist; but property in that word, as applied by way of stamp upon a stick of liquorice, does exist the moment the liquorice goes into the market so stamped, and obtains acceptance and reputation in the market, whereby the stamp gets currency as an indication of superior quality, or of some other circumstances that render the article so stamped acceptable to the public."

Geographical names in America.

In America, the rule prohibiting the appropriation of geographical names as trade marks appears to be more stringent than prevailed in England before the introduction of the registration system, as the Courts there deny that such names can constitute trade marks (*a*), and registration is, as a rule, refused to them (*b*); and the Scotch Courts appear inclined to take the same course (*c*). Where, however, the use of a geographical name is clearly fraudulent (*d*), or where it is used by a defendant whose residence and works are not situate in the locality the name of which he seeks to

(*a*) Thus, in *Canal Co.* v. *Clark*, 80 U. S. 311, the Supreme Court of the United States allowed the defendants to use the name "Lackawanna" on coal produced in that district, though the defendants had previously so used it. And see *Candee, Swan & Co.* v. *Deere & Co.*, 54 Ill. 439; 5 Amer. Rep. 125 ("Moline" ploughs); *Glendon Iron Co.* v. *Uhler*, 75 Penn. St. 467; 15 Amer. Rep. 599 ("Glendon" iron); *Carmichel* v. *Latimer*, 11 R. I. 395 ("Stillman Mill"); *Eggers* v. *Hink*, 63 Cal. 445 ("Philadelphia Beer"); *Evans* v. *Van Laer*, 32 Fed. Rep. 153 ("Montserrat" lime juice); *Osgood* v. *Allen*, 1 Holmes, 185; *Dunbar* v. *Glenn*, 42 Wisc. 118; *Burton* v. *Stratton*, 12 Fed. Rep. 696; *Anheuser Busch Brewing Association* v. *Piza*, 23 Bl. C. C. 245; *Lea* v. *Deakin*, 11 Biss. 23; *Pratt's appeal*, 117 Penn. St. 401; *Smith* v. *Imus*, 32 Alb. L. J. 455; *Smith* v. *Walker*, 37 Mich. 456; *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460 ("Columbia" flour); *New York & Rosendale Cement Co.* v. *Coplay Cement Co.*, 44 Fed. Rep. 277; 45 Fed. Rep. 212; ("Rosendale" cement); *Carlsbad* v. *Tibbetts*, 51 Fed. Rep. 852; *Genesee Salt Co.* v. *Burnap*, 67 Fed. Rep. 534; 73 Fed. Rep. 818; *Hoyt* v. *J. T. Lovett & Co.*, 71 Fed. Rep. 173; *Metcalfe* v. *Brand*, 86 Ky. 331; 9 Am. St. Rep. 282; *Nebraska Loan & Trust Co.* v. *Nine*, 9 Nebr. 507; 20 Am. St. Rep. 686; *Pillsbury-Washburn Flour Mills Co.* v. *Eagle*, 82 Fed. Rep. 816. But see Mr. R. Cox's note to *Glendon Iron Co.* v. *Uhler*, at 13 Am. L. Reg. N. S. 543, in which he disputes the decision that a geographical name cannot be a trade mark. Cf. *El Modello Cigar Manufacturing Co.* v. *Gato*, 25 Fla. 886; 23 Am. St. Rep. 537.

(*b*) *Armistead* v. *Blackwell*, 1 U. S. Pat. Gaz. 603 ("Durham" tobacco); *Blackwell* v. *Dibrell*, 14 *ib.* 633 (do.); *In re Tolle*, 2 *ib.* 415 ("Cherry St. Mills," "Market St. Mills"); *In re American Sardine Co.*, 3 *ib.* 495 ("American Sardines"); *In re Warburg & Co.*, 13 *ib.* 44 ("Cachemire Milano"); *Ex parte Marsching & Co.*, 15 *ib.* 294 ("French" paints); *Ex parte Knapp*, 16 *ib.* 318 ("London" animal foods); *Ex parte Farnum & Co.*, 18 *ib.* 412 ("Lancaster" tickings); *Ex parte Oliver*, 18 *ib.* 923 ("Raleigh" tobacco); *Ex parte Procter*, 51 *ib.* 1785 ("Cromarty" cured fish); *Ex parte American Saw Co.*, 58 *ib.* 521 ("Trenton" saws); *Ex parte Headley*, 72 *ib.* 1654 ("Cloverdale" canned fruits).

(*c*) *Montgomerie* v. *Donald & Co.*, Ct. Sess. Cas. 4th Ser. XI. 506 ("Water of Ayr" stone).

(*d*) *Kinney* v. *Basch*, Dig. 542 ("St. James' Parish" cigarettes); *Dunbar* v. *Glenn*, 42 Wisc. 118 ("Bethesda" mineral water); *Anheuser Busch Brewing Association* v. *Piza*, 23 Bl. C. C. 245; *Southern White Lead Co.* v. *Carey*, 25 Fed. Rep. 125; *Pike Manufacturing Co.* v. *Cleveland Stone Co.*, 35 Fed. Rep. 896; *Gebbie* v. *Stitt*, 89 N. Y. Sup. Ct. 93; *Whitfield* v. *Loveless*, 64 U. S. Pat. Gaz. 442.

employ (*a*), relief may be obtained; and registration has also been effected in cases where there was a plausible ground for the assertion that the name was selected and used in a purely arbitrary way (*b*).

Words disentitled to protection.

In addition to deceptive words, no other words, the use of which would be deemed disentitled to protection in a court of justice, can be registered (*c*).

Letters and figures.

The provision inserted in favour of old marks in § 64 of the Patents Acts, 1883—1888, also includes "any special and distinctive letter, figure (*d*), or combination of letters or figures, or of letters and figures, used as a trade mark before August 13th, 1875." It will be observed that the wording of this part of the section differs considerably from that of the corresponding part of § 10 of the Registration Act, 1875, the object being to bring all old trade marks composed of letters, figures, or combinations within the scope of the provisions for registration, an object which the old section had failed to achieve (*e*).

Letters.

Letters, generally in the form of initials, have, with or without additions, frequently been treated as trade marks. Among the earliest of these cases are *Motley* v. *Downman* (*f*) and *Millington* v. *Fox* (*g*); in the first of which cases "M. C.," and in the second "J. H.," was branded on iron. Still earlier than these cases, in the year 1834, "H. H. 6" formed part of a trade mark protected by injunction (*h*). In *Crawshay* v. *Thompson* (*i*), "W. C." in an

(*a*) *Lea* v. *Wolff*, 15 Abb. Pr. N. S. 1 ("Worcestershire Sauce"); *Anheuser Busch Brewing Association* v. *Piza*, 23 Bl. C. C. 245; *Southern White Lead Co.* v. *Carey*, 25 Fed. Rep. 125; *Pike Manufacturing Co.* v. *Cleveland Stone Co.*, 35 Fed. Rep. 896; *Carlsbad* v. *Tibbetts*, 51 Fed. Rep. 852; *Carlsbad* v. *Thackeray*, 57 Fed. Rep. 18; *Carlsbad* v. *Kutnow*, 68 Fed. Rep. 794; 71 Fed. Rep. 167; *Carlsbad* v. *Schultz*, 78 Fed. Rep. 469; *In re Kutnow*, 10 P. R. 401; *Metcalfe* v. *Brand*, 86 Ky. 331; 9 Am. St. Rep. 282; *Parkland Hills Blue Lick Water Co.* v. *Hawkins*, 95 Ky. 502; 44 Am. St. Rep. 254; *République Française* v. *Schultz*, 57 Fed. Rep. 37.

(*b*) *In re Green*, 8 U. S. Pat. Gaz. 729 ("German Sirup"); *In re Cornwall* (2), 12 *ib.* 312 ("Dublin" soap); *Ex parte Dover Stamping Co.*, 51 U. S. Pat. Gaz. 1784; *Ex parte Portland Cement Fabrik Germania H. Manske & Co.*, 64 U. S. Pat. Gaz. 858; *Ex parte Mississippi Glass Co.*, 64 U. S. Pat. Gaz. 713; *Ex parte Indiana Bicycle Co.*, 72 U. S. Pat. Gaz. 1654. And see *Ex parte Farnum & Co.*, 18 *ib.* 412, in which it was said that a geographical name would not be registered in the U. S. Patent Office unless it was clearly shown that it would be understood to be primarily fanciful, and that manufacturers residing at the place denoted by the name could be excluded from the use of it. See also *Ex parte American Saw Co.*, 58 U. S. Pat. Gaz. 521; *Ex parte Headley*, 72 U. S. Pat. Gaz. 1654.

(*c*) See Patents Acts, 1883—1888, § 73.

(*d*) *I.e.*, numeral. See *Ex parte Stephens*, 3 Ch. D. 659.

(*e*) See *In re Mitchell* (1), 7 Ch. D. 36.

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

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

(*h*) *Ransome* v. *Bentall*, 3 L. J. Ch. 161.

(*i*) 4 M. & G. 357.

oval was employed, and infringement being alleged through the use of "W. O." in a similar oval, a verdict was given by the jury for the defendants. The question whether initial letters could form a trade mark alone or in conjunction with other symbols, was definitively raised before the Lord Chancellor of Ireland, in *Kinahan* v. *Bolton* (*a*). In that case the alleged trade mark consisted of the letters "L. L." (standing for "Lord Lieutenant"), with a ducal coronet, which mark, it was alleged, had been adopted at a time when there was a ducal Lord Lieutenant of Ireland. The case of the defendants was that "L. L." could no more compose a trade mark than "X. X.," but was a mere mark of quality. The Lord Chancellor, saying that there was no doubt as to this mark being a trade mark "in the strictest sense," went on to observe: "A most competent witness says that this whiskey, under the name of 'L. L.,' is a well-known article of commerce, that it has no other name than 'L. L.,' that under this name it has acquired a special reputation, and that for the long period of forty years this name has been applied to it. What is a trade mark more than that? It is proved that these two letters designate this whiskey. The letters of themselves mean nothing; no one *à priori* could know the meaning of such a trade mark: it is merely like a diamond, an anchor, or a crown, stamped on any article, the mark by which the vendor enables the public to recognise his wares."—"There can be no doubt, and indeed it is not disputed, that two letters may constitute a trade mark." Reference was then made to the cases of *Motley* v. *Downman* (*b*) and *Millington* v. *Fox* (*c*), and the injunction was granted. Since that time "S. and H." with a crown (*d*), "B. B. H." with a crown (*e*), or in any other combination (*f*), "C. B." with a cross (*g*), "M. and C." in a circle (*h*), and other letters (*i*), have been treated as undoubted trade marks.

(*a*) 15 Ir. Ch. 75.
(*b*) 3 My. & Cr. 1.
(*c*) 3 My. & Cr. 338.
(*d*) *Hopkins* v. *Hitchcock*, 14 C. B. N. S. 65.
(*e*) *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Barrows* v. *Pelsall Coal & Iron Co.*, Dig. 530.
(*f*) *In re Barrows*, 5 Ch. D. 353.
(*g*) *Cartier* v. *Carlile*, 31 Beav. 292; *Cartier* v. *Westhead*, Dig. 199; *Cartier* v. *May*, Dig. 200.
(*h*) *Moet* v. *Clybouw*, Dig. 533; *Moet* v. *Pickering*, 8 Ch. D. 372.
(*i*) See *Ex parte Young*, Dig. 537 ("L. H. & S."); *Carver* v. *Bowker*, Dig. 581 ("R. H."); *Ransome* v. *Graham*, 51 L. J. Ch. 897 ("R. N."); *Bayer* v. *Connel* (2), 16 P. R. 157; *Bondier* v. *Depatie*, 3 Doriou, 233 ("G. B. D."). See also *In re Brook*, 26 W. R. 791; *Candee* v. *Deere*, 54 Ill. 439; *Amoskeag Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Avery & Sons* v. *Meikle & Co.*, 27 U. S. Pat. Gaz. 1027; *Burton* v. *Stratton*, 12 Fed. Rep. 696; *Smith* v. *Imus*, 32 Alb. L. J. 455; *Giron* v. *Gartner*, 47 Fed. Rep. 467; *Burt* v. *Smith*, 71 Fed. Rep. 161; *Godillot* v. *American Grocery Co.*, 71 Fed. Rep.

Conclusion. In the result, while letters used as a trade mark for the first time since the Act of 1875 must be combined with some distinctive feature, it seems clear that, if used as such before the Act, they will, even standing alone, be entitled to protection, though probably not as against persons having them for their initials and using them *without fraud* (*a*).

Single letters. The Trade Marks Registration Act of 1875, § 10, only authorised the registration of letters by the use of the term "any special and distinctive combination of figures or letters;" and in *In re Mitchell* (1) (*b*), Hall, V.-C., felt himself compelled to hold that a single letter, however long and exclusively used by an applicant for registration, was not within the section, and was incapable of registration. Now, however, the wording of the present Act permits in express terms the registration of a "letter" as an old mark, so that the difficulty is removed. The letter will, of course, have to be proved to be special and distinctive. In America, the single letter "D" in a lozenge has been admitted to registration (*c*), notwithstanding the decision in *Ferguson* v. *Davol Mills* (*d*) with respect to the letter "K" enclosed in circular lines—a decision which appears to have been founded on the mistaken interpretation of the expressions used in *Amoskeag Manufacturing Co.* v. *Spear* (*e*), previously referred to.

Disclaimers. In *Rosenthal* v. *Reynolds* (*f*), where a trader registered as a new mark a device with initial letters added, but disclaimed the right to the exclusive use of the added matter, it was held by North, J., that a rival trader could not be restrained on motion from using the same initials in a similar position upon similar goods as being calculated to deceive, but this case has been questioned in Scotland by the Lord President in *Bayer* v. *Baird* (*g*).

Numerical figures. Numerals can only be registered as part of a new mark when combined with some essential particular (*h*); but provision is made for the registration of a single numeral or a combination of numerals, when it was used as an old mark and is special and

873; *Frank* v. *Sleeper*, 150 Mass. 583; *Frankau* v. *Pope*, 11 Cap. Good Hope, 209.

(*a*) The case is much the same as that of a maker's name. See *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518.

(*b*) 7 Ch. D. 36.

(*c*) *In re The Dutcher Temple Co.*, U. S. Pat. Comm. Decis. 1871, 248. And see *In re Imbs*, 10 U. S. Pat. Gaz. 463.

(*d*) 2 Brows. 314.

(*e*) 2 Sandf. S. C. 599.

(*f*) (1892) 2 Ch. 301. Cf. *In re Loftus*, (1894) 1 Ch. 193; *Packham & Co. Lim.* v. *Sturgess & Co.*, 15 P. R. 669. See Chapter 8, and *Reddaway* v. *Banham*, (1896) A. C. 199.

(*g*) 15 P. R. 615, 634.

(*h*) See Patents Act, 1883, § 64, as amended by the Act of 1888.

distinctive, and in America a numeral may be registered as a trade mark (*a*). There does not, however, appear to be any case in which the English Courts have recognised a mere numeral or combination of numerals, standing alone, as sufficiently special and distinctive to constitute a trade mark (*b*); and in *Carver* v. *Bowker* (*c*), Little, V.-C. of Lancaster, held that that could not be; and in *Kinney* v. *Basch* (*d*) and *Burton* v. *Stratton* (*e*) the American Courts seem to have been of the same opinion. The use of numerals is, however, common in some trades, especially in the cotton trade, in which the usual combination marks generally include some arbitrary number or numbers termed "range numbers"; and there have been cases, in England (*f*), America (*g*) and India (*h*), in which the imitation of numbers has been restrained. In such cases, however, either the numerals have been parts of combination marks (*i*), or they have been printed in a special and distinctive colour and configuration (*j*), or they have been selected in so arbitrary a manner that they conveyed no idea of number (*k*), or there has been an evident intention to commit a fraud (*l*); and it is apprehended that if a case were to occur in which the plaintiff's numeral was printed in an ordinary style, and the defendant could show any reason for desiring to use the

(*a*) *Ex parte Dawes & Fanning*, 1 U. S. Pat. Gaz. 27. And see *Dawes* v. *Davies*, Dig. 426.

(*b*) In *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518, the imitation of a series of numbers was held to be an important *indicium* of fraud, but the V.-C. did not treat the numbers as a trade mark; on the contrary, he distinguished them from one. See L. R. 1 Eq. 527.

(*c*) Dig. 581. The decision of the V.-C. was affirmed by the Court of Appeal in general terms.

(*d*) Dig. 542.

(*e*) 12 Fed. Rep. 696.

(*f*) *Carver* v. *Pinto Leite*, L. R. 7 Ch. 90; *Carver* v. *Bowker*, Dig. 581; *Broadhurst* v. *Barlow*, W. N. 1872, p. 212; *Robinson* v. *Finlay*, 9 Ch. D. 487.

(*g*) *Gillott* v. *Kettle*, 3 Duer, 624; *Gillott* v. *Esterbrook*, 48 N. Y. 374; *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402; *Kinney* v. *Basch*, Dig. 542; *Kinney* v. *Allen*, 1 Hughes, 106; *Lawrence Manufacturing Co.* v. *Lowell*, 129 Mass. 325; *India Rubber Comb Co.* v. *Rubber Comb & Jewellery Co.*, 45 N. Y. Super. Ct. 258; *Shaw Stocking Co.* v. *Mack*, 21 Bl. C. C. 1; *American Solid Leather Button Co.* v. *Anthony*, 15 R. I. 338.

(*h*) *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417. Cf. *Barlow* v. *Gobindram*, Ind. L. R. 24 Calc. 364.

(*i*) *Carver* v. *Pinto Leite*, L. R. 7 Ch. 90; *Carver* v. *Bowker*, Dig. 581; *Broadhurst* v. *Barlow*, W. N. 1872, p. 212; *Robinson* v. *Finlay*, 9 Ch. D. 487; *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402; *Lawrence Manufacturing Co.* v. *Lowell*, 129 Mass. 325; *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417; *Humphreys' Specific Homœopathic Medicine Co.* v. *Wenz*, 14 Fed. Rep. 250.

(*j*) *Kinney* v. *Basch*, Dig. 542; *Kinney* v. *Allen*, 1 Hughes, 106.

(*k*) See *Kinney* v. *Allen*, 1 Hughes, 106; *Shaw Stocking Co.* v. *Mack*, 21 Bl. C. C. 1; *American Solid Leather Button Co.* v. *Anthony*, 15 R. I. 338. And compare *Burton* v. *Stratton*, 12 Fed. Rep. 696; and *In re Eagle Pencil Co.*, 10 U. S. Pat. Gaz. 981, in which registration was refused to numerals which had not been selected with sufficient arbitrariness.

(*l*) *Gillott* v. *Kettle*, 3 Duer, 624; *Gillott* v. *Esterbrook*, 48 N. Y. 374; *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 412; *Kinney* v. *Basch*, Dig. 542.

number in the course of his business, which was not necessarily attributable to a wish to appropriate the plaintiff's custom, no relief would be granted against him (*a*).

Combinations of letters and figures.

A special and distinctive combination of letters and figures may also be registered as an old mark, and though the contention may possibly be raised that this does not include a combination of one letter and one figure, as "A 1," or of several letters with one figure (*b*), or of one letter with several figures, the intention of the words is so obviously comprehensive that it does not appear likely that the contention could succeed.

Trade marks under §§ 103 and 104 of Patents Act, 1883.

This completes the list of trade marks specifically embraced within § 64 of the Patents Acts, 1883—1888; but it is desirable to refer here to §§ 103 and 104 of the Act of 1883, by which subjects or citizens of foreign states or British possessions to which those sections have been made applicable by Order in Council are entitled to certain privileges in the registration of trade marks; and it is provided that "any trade mark the registration of which has been duly applied for in the country of origin may be registered" under the Act. This provision contains no reference to § 64, but that section says explicitly that "for the purposes of the Act a trade mark *must* consist of or contain at least one" of the specified essential particulars, so that it would appear that a foreign trade mark, whether actually registered or tendered for registration in the foreign country or not, ought not to be registered here unless the requirements of § 64 are satisfied, and this is in effect the result of the decisions (*c*). The contrary view would inflict great hardship on British subjects, seeing that in many foreign countries registration is regarded as a mere record of claim, conferring no rights, with the result that almost anything tendered for registration is registered there, so that to admit such marks to the British register would often confer a monopoly in the most ordinary English words.

Combination marks.

In some cases protection has been granted to a combination of marks, taken as a whole, notwithstanding that some of the component marks were *publici juris* (*d*); but it has been held in

(*a*) See *Barlow* v. *Gobindram*, Ind. L. R. 24 Calc. 364.

(*b*) *E.g.*, "H. H. 6," in *Ransome* v. *Bentall*, 3 L. J. Ch. 161; "R. N. 1," in *Ransome* v. *Graham*, 51 *ib.* 897.

(*c*) *In re Carter Medicine Co.*, (1892) 3 Ch. 472. And see *In re Californian Fig Syrup Co.*, 40 Ch. D. 620.

(*d*) *Carver* v. *Bowker*, Dig. 581; *Robinson* v. *Finlay*, 9 Ch. D. 487, &c.; *Pinto* v. *Badman*, 8 P. R. 181, 191; *In re Bradley*, 9 P. R. 205; and see *In re Smokeless Powder Co.*, (1892) 1 Ch. 590; *In re Clement & Cie.*, 16 P. R. 173. Cf. *In re Bryant & May, Ld.*, 8 P. R. 69; *Piric* v. *Goodall*, (1892) 1 Ch. 35.

America (*a*) and Victoria (*b*) that a combination of marks, none of which was capable in itself of forming a valid trade mark, could not be claimed. On the other hand, it has been held in Canada that words which separately are *publici juris* may in combination constitute a valid trade mark (*c*).

Official stamps.

An official stamp or brand can never become a private trade mark (*d*).

Colour.

It has been said in many cases that there can be no right of trade mark in the colour of wrappers, labels, &c.; but in the case of trade marks consisting of coloured threads in the border of a piece of stuff (*e*), or in the wick of a candle (*f*), or of the representation of a coin (*g*), the colour may form a material part of the mark, and such marks have been registered by deposit.

Price.

The price of the article to which the trade mark is attached is no part of the trade mark (*h*).

Shape of barrel, &c.

A particular shape of barrel, bottle, box, parcel, &c., containing goods is no trade mark for the goods contained in it (*i*); nor is the representation of such barrel, bottle, box, or parcel a trade mark for such goods (*k*), though the fraudulent imitation of it will be restrained (*l*). Nor is a mechanical convenience not used for purposes of identification, such as a strip of tobacco rolled round the mouthpiece of cigarettes (*m*), nor the general configuration and appearance of a machine (*n*), nor a sampler-pattern (*o*), nor the shape of a plug of tobacco (*p*), or of a stick of chewing-gum (*q*), nor

(*a*) *In re Tolle*, 2 U. S. Pat. Gaz. 415. See *Corbin* v. *Gould*, 133 U. S. 308.

(*b*) *Wolfe* v. *Alsop*, 10 V. L. R. (Eq.) 41.

(*c*) *Smith* v. *Fair*, 14 Ont. Rep. 729 ("Red Seal" cigars); cf. *Pirie* v. *Goodall*, (1892) 1 Ch. 35.

(*d*) *Chase* v. *Mayo*, 121 Mass. 343.

(*e*) *Harter* v. *Souvazoglu*, W. N. 1875, pp. 11, 101; *Carver* v. *Bowker*, Dig. 581; *Mitchell* v. *Henry*, 15 Ch. D. 181; *Robinson* v. *Finlay*, 9 Ch. D. 487.

(*f*) See the Public Stores Act, 1875.

(*g*) *In re Robinson*, 29 W. R. 31. See Patents Act, 1883, § 67.

(*h*) *In re Steedman*, L. J. N. of C. 1883, p. 83.

(*i*) *Moorman* v. *Hoge*, 2 Sawy. 78 (a barrel); *Harrington* v. *Libby*, 14 Bl. C. C. 128 (a collar box); *Sawyer* v. *Horn*, 4 Hughes, 239; *Ball* v. *Siegel*, 116 Ill. 137. See *In re Kane & Co.*, 9 U. S. Pat. Gaz. 105; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Hoyt* v. *Hoyt*, 143 Penn. St. 623; 24 Am. St. Rep. 575; *Babbit* v. *Brown*, 75 N. Y. Sup. Ct. 515; *Fischer* v. *Blank*, 138 N. Y. 244; *N. K. Fairbank Co.* v. *R. W. Bell Manufacturing Co.*, 77 Fed. Rep. 869; *Lafean* v. *Weeks*, 177 Pa. 412.

(*k*) *Ex parte Halliday Brothers*, 16 U. S. Pat. Gaz. 500.

(*l*) *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392, *et passim*. See cases collected at p. 139.

(*m*) *In re Gordon*, 12 U. S. Pat. Gaz. 517.

(*n*) *Fairbanks* v. *Jacobus*, 14 Bl. C. C. 337; *Wilcox & Gibbs Sewing Machine Co.* v. *Gibbon's Frame*, 21 Bl. C. C. 431; *Brill* v. *Singer Manufacturing Co.*, 41 Ohio St. 127.

(*o*) *In re Parker*, 13 U. S. Pat. Gaz. 323.

(*p*) *Liggett & Myers Tobacco Co.* v. *Hynes*, 20 Fed. Rep. 883.

(*q*) *Adams* v. *Heisel*, 31 Fed. Rep. 279.

a manner of packing, in boxes, cakes of soap wrapped in differently coloured paper wrappers (*a*), nor the use of a tin tag or ticket, irrespective of its shape and contents (*b*), a trade mark; though a tin tag of a special shape, size, and colour may be (*c*). But where the mark is "something different from the article itself which the mark designates" (*d*), such as a stick placed in a roll of carpet, showing an octagonal ring at each end (*e*), or a band attached to cigar boxes (*f*), and is special and distinctive, and not in common use, then it may be recognized as a good trade mark, notwithstanding that it is not attached to the goods in the usual way.

Mark may be consumed with the article.

If a mark is in other respects a good trade mark, the fact that it is consumed with the article to which it is attached is no objection to its validity (*g*).

(*a*) *Davis* v. *Davis*, 27 Fed. Rep. 490.
(*b*) *Lorillard* v. *Pride*, 28 *ib.* 434.
(*c*) *Lorillard* v. *Wight*, 15 *ib.* 383.
(*d*) *Per* Johnson, J., in *Fairbanks* v. *Jacobus*, 14 Bl. C. C. 337.
(*e*) *Lowell Manufacturing Co.* v. *Larned*, Dig. 428.
(*f*) *Ex parte Straiton & Storm*, 18 U. S. Pat. Guz. 923.
(*g*) *In re Gordon*, 12 *ib.* 517. And see *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 441.

# CHAPTER III.

## ACQUISITION, TRANSFER, AND DISCONTINUANCE OF TRADE MARKS.

### 1. *Acquisition.*

Who may acquire.

As a general rule, any person capable of acquiring any other species of property is capable of acquiring a right to a trade mark, and this is equally the case with artificial persons, as corporations (*a*), as with physical persons, or individuals.

Aliens.

A question has, however, been raised as to whether an alien was capable of acquiring a right to a trade mark, but when raised was at once finally decided by Wood, V.-C., in accordance alike with justice and expediency. The plaintiffs in *Collins Co.* v. *Cowen* (*b*), were an American firm of edge-tool manufacturers, whose trade marks appear to have been systematically infringed by English rivals. In the case in question the defendants, who had copied the plaintiffs' stamp of "Collins Co., Hartford, cast steel, warranted," demurred. The Vice-Chancellor overruled the demurrer, and observed in the course of his judgment, "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 civilised 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.' It would be most grievous if any Court should hold that there was an incapacity of affording relief in a case where a fraud has been committed upon a subject of any country. I speak, of course, of a fraud so far connected with property as to be not a shadowy but a substantial injury. If you use the name of another for the purpose of securing to yourself, in the disposition of property, advantages which belong to him, the fraud is complete, and the remedy ought to be complete, as in the case of a libel, where the action is allowed to a foreigner.

(*a*) See Patents Act, 1883, § 117, for definition of "person."
(*b*) 3 K. & J. 428.

I cannot in my own mind entertain the slightest misgiving in this case, whether it be new or not" (*a*).

Where no user in England.

When no goods bearing the foreign trade mark have been sold in this country, the trade mark can have acquired here no reputation for its foreign owner, so that it would appear doubtful whether the protection extended to foreign trade mark owners should be afforded in cases where there has been no user in this country, and the mark does not expressly state a foreign origin. In such a case the first person to use the mark in the United Kingdom is the first person to gain a reputation for it here (*b*). But foreign or colonial marks can be registered in England, and special provisions with regard to them are contained in §§ 103 and 104 of the Patents Act, 1883, and registration is equivalent to public use (*c*).

Sovereigns.

It seems that there is nothing to prevent sovereign princes or states from being the proprietors of trade marks in respect of goods manufactured or produced on their account (*d*).

Officials.

A person in an official position, using an official stamp in his official capacity, cannot thereby acquire any private right therein (*e*).

Agents.

Nor can an agent acquire any interest in his principal's mark from the fact that he has used it (*f*); nor a printer in the trade mark of a mercantile firm from the fact that he has been employed to print it (*g*).

Artisans.

In America the question has been much discussed whether the members of an artisans' trade society were entitled to claim an

(*a*) See also *Collins Co.* v. *Brown*, 3 K. & J. 423; *Collins Co.* v. *Walker*, 7 W. R. 222; *Collins Co.* v. *Reeves*, 28 L. J. Ch. 56; *Howe* v. *McKernan*, 30 Beav. 547; *National Folding Box & Paper Co.* v. *National Folding Box Co.*, 43 W. R. 156. So in Scotland the trade marks or names of American manufacturers have been protected: *Singer Manufacturing Co.* v. *Kimball & Morton*, Ct. Sess. Cas., 3rd Ser. XI. 267. The same rule obtains in America: *Taylor* v. *Carpenter*, 3 Story, 458; R. Cox, 14; Same v. Same, 2 Wood. & M. 1; R. Cox, 32; Same v. Same, 11 Paige, 292; R. Cox, 45; *Coats* v. *Holbrook*, 2 Sandf. Ch. 586; R. Cox, 20; *Lemoine* v. *Ganton*, 2 E. D. Smith, 343; R. Cox, 142; *Lacroix* v. *May*, 15 Fed. Rep. 236. And the infringement of a British trade mark has been criminally punished in Missouri: *State of Missouri* v. *Gibbs*, 56 Mo. 133. In India protection is afforded to British trade marks: *Orr-Ewing* v. *Chooneeloll Mullick*, Cor. 150; *Orr-Ewing* v. *Grant*, *Smith & Co.*, 2 Hyde, 185; and in Canada also the trade marks of aliens are protected: *Davis* v. *Kennedy*, 13 Grant, Up. Can. Ch. 523.

(*b*) See *In re Münch*, 50 L. T. N. S. 12; *In re Riviere & Co.*, 26 Ch. D. 48; *In re Leonard & Ellis*, *ib.* 288, *per* Fry, L. J.; *Berliner, &c. Tivoli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70; *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *Newman* v. *Pi[illegible]o*, 4 P. R. 508, *per* Kekewich, J.; *Smith* v. *Fair*, 14 Ont. Rep. 729. See *In re Meers*, (1891) 1 Ch. 41.

(*c*) Patents Act, 1883, § 75.

(*d*) See *Ex parte King of Saxony*, Dig. 598; *Republic of Peru* v. *Reeves*, 40 N. Y. Super. Ct. 316; *La République Française* v. *Schultz*, 57 Fed. Rep. 37; *Ex parte South Carolina*, 64 U. S. Pat. Gaz. 1395.

(*e*) *Chase* v. *Mayo*, 121 Mass. 343.

(*f*) *Hirsch* v. *Jonas*, 3 Ch. D. 584; *Swift* v. *Peters*, 11 U. S. Pat. Gaz. 1110.

(*g*) *Schumacher & Ettlinger* v. *Schwenke* (2), 36 U. S. Pat. Gaz. 457.

exclusive right in a label supplied by the society to its members, and affixed by them to goods manufactured by them, for the purpose of showing that such goods had been manufactured by members of the society. The objection which was raised to the claim was, that the members of the society did not manufacture or deal in the goods on their own account, but were merely workmen in the employment of various firms, whose product the goods were, and not that of the workmen, and that consequently the label was not distinctive of origin or ownership, and in some cases this objection has prevailed (*a*), but in other cases the decision has been in favour of the society, on the ground that its members were entitled to protection for the insignia which secured to them the benefit of their skilled labour (*b*); and although such labels may not be technically trade marks, they may be, and frequently are, protected in a similar manner by special legislation (*c*).

Chartered accountants.

Where there were three bodies of professional accountants, incorporated respectively by Royal Charter as the Society of Accountants in Edinburgh, the Institute of Accountants in Glasgow, and the Society of Accountants in Aberdeen, and the members of these bodies habitually used the initials "C.A." (for "chartered accountant"), the members of another body of accountants, incorporated under the Companies Acts, and not by Royal Charter, as the Corporation of Accountants, Limited, were restrained by the Court of Session from using the same initials "C.A." (for "corporate accountant") (*d*).

Length of user formerly required.

There was at one time a doubt as to the circumstances under which one person could acquire a sufficient right in a trade mark to be entitled to restrain another from infringing it. The right to redress being treated as founded on the defendant's fraud, it was thought that a plaintiff who claimed an injunction against a defendant ought to show that he (the plaintiff) had acquired for

(*a*) *Ex parte Cigar Makers' Association*, 16 U. S. Pat. Gaz. 958; *Schneider* v. *Williams*, 44 N. J. Eq. 391; *Cigar Makers' Protective Union* v. *Conhaim*, 40 Minn. 243; 12 Am. St. Rep. 726; *McVey* v. *Brendel*, 144 Penn. St. 235; 27 Am. St. Rep. 625; *Weener* v. *Brayton*, 152 Mass. 101. And see *Ex parte Kuppenheimer*, 60 U. S. Pat. Gaz. 439; *State* v. *Bishop*, 128 Mo. 373; 49 Am. St. Rep. 569.

(*b*) *Strasser* v. *Moonelis*, 108 N. Y. 611; *Allen* v. *Macarthy*, 37 Minn. 347; *People* v. *Fisher*, 57 N. Y. Sup. Ct. 552; *Bloete* v. *Simon*, 19 Abb. N. C. 88; *Carson* v. *Ury*, 49 U. S. Pat. Gaz. 411; *Gravel Roofers' Exchange* v. *Turnbull*, 64 U. S. Pat. Gaz. 441. And see *Cohn* v. *People*, 149 Ill. 486; 41 Am. St. Rep. 304.

(*c*) *Cohn* v. *People*, 149 Ill. 486; 41 Am. St. Rep. 304; *State* v. *Bishop*, 128 Mo. 373; 49 Am. St. Rep. 569.

(*d*) *Society of Accountants in Edinburgh* v. *Corporation of Accountants, Limited*, Ct. Sess. Cas., 4th Ser. XX. 750.

the mark indicating his manufacture such a reputation (*a*) as would raise a presumption that the defendant in adopting a similar mark had done so with the intention of availing himself of that reputation to divert to himself the plaintiff's custom, or at all events that the plaintiff ought to show that he had used the mark long enough to render it probable that such a reputation had been acquired (*b*).

Latterly considered unnecessary.

But when it came to be recognised that there was a right of property in a trade mark, intentional fraud being unnecessary to justify restraint, it was at once seen that, as was stated by Romilly, M. R., "the interference of a Court of Equity could not depend on the length of time the manufacturers had used it" (*c*), but that "from the time of their commencing the user of their trade mark they became entitled to the protection of the Court against any other persons using the same, so that purchasers might be induced to purchase the goods of other persons as theirs" (*d*). "As soon as a trade mark has been so applied in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes, to that extent, the exclusive property of the firm, and no one else has a right to copy it, or even to appropriate any part of it, if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to

(*a*) In *Hine* v. *Lart*, 10 Jur. 106, Shadwell, V.-C. of England, thought that the imitation by a defendant of a plaintiff's trade mark afforded a presumption of that mark having acquired a reputation. And see *Dixon* v. *Jackson*, Ct. Sess. Cas., 3rd Ser. V. 326, *per* the Lord Justice Clerk; *Alleghany Fertiliser Co.* v. *Woodside*, 1 Hughes, 115; *Avery & Sons* v. *Meikle & Co.*, 27 U. S. Pat. Gaz. 1027; *Brower* v. *Boulton*, 53 Fed. Rep. 389; *New Home Sewing Machine Co.* v. *Bloomingdale*, 59 Fed. Rep. 284.

(*b*) See *Parser* v. *Brain*, 17 L. J. Ch. 141; *Edelsten* v. *Vick*, 11 Hare, 78; *Collins Co.* v. *Brown*, 3 K. & J. 423. And compare *Spottiswoode* v. *Clarke*, 2 Ph. 154.

(*c*) *Hall* v. *Barrows*, 32 L. J. Ch. 548.

(*d*) *Per* Hall, V.-C., in *Cope* v. *Evans*, L. R. 18 Eq. 138. And see *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hyde, 185; *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183; *Kathreiner's Malz Kaffee Fabriken, &c.* v. *Pastor Kneip Medicine Co*, 82 Fed. Rep. 321. This principle does not appear to be universally recognised in America. See *Seltzer* v. *Powell*, 8 Phila. 296. In *Sternberger* v. *Thalheimer*, 3 U. S. Pat. Gaz. 120, it was held that prior registration and prior use of about six days, but only on a few articles by way of experiment, by one manufacturer, did not disentitle another to registration, he having systematically used the mark for some time before his rival had seriously adopted it. It is the adoption and use, not the invention, of the mark that gives a title to it: *Swift* v. *Peters*, 11 U. S. Pat. Gaz. 1110; *Hoosier Drill Co.* v. *Ingels*, 14 *ib.* 785; *Leidersdorf* v. *Flint* (1), 8 Biss. 327; *McLean* v. *Fleming*, 96 U. S. 245; *U. S.* v. *Steffens*, 100 *ib.* 82; and a trade mark may have been in part purchased and in part invented: *Sohl* v. *Geisendorf*, 1 Wils. (Ind.) 60.

whom the trade mark belongs" (*a*). There must, however, have been a real user (*b*).

Wrongful user gives no title.

Even, however, if user be established, extending over a considerable period, it does not follow that a title to the trade mark is made out; for if the user was fraudulent in its inception, and is still calculated to deceive, the user gives no right (*c*); and it has been held in America that if A. has been using a trade mark which was really the property of B., and then B. ceases to use it, A. cannot acquire any title to the mark by continuing to use it after B.'s discontinuance, on account of the wrongful inception of his user (*d*).

Acquisition by common repute.

In *Siegert* v. *Findlater* (*e*), it was even held that the plaintiffs were entitled to restrain the defendant from using the term "Angostura Bitters," although the defendant had used it on his labels before the plaintiffs had done so, on the ground that, before the plaintiffs had themselves used the term, it had become attached to their article in common parlance. But acquisition of a trade mark by common repute has not been universally recognized (*f*).

How property in a trade mark acquired.

Lord Westbury, C., said, in *McAndrew* v. *Bassett* (*g*), that an element of the right to property in a trade mark might 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 imitated it; and he went on: "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) (*h*); 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" (*i*).

(*a*) *Per* the Privy Council in *Somerville* v. *Schembri*, 12 App. Cas. 453.

(*b*) *Humphries* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820.

(*c*) *In re Heaton*, 27 Ch. D. 570.

(*d*) *O'Rourke* v. *Central City Soap Co.*, 26 Fed. Rep. 576; *Parlett* v. *Guggenheimer*, 67 Md. 542.

(*e*) 7 Ch. D. 801. And see *In re Barker & Son*, 53 L. T. N. S. 23; *Smith* v. *Woodruff*, 48 Barb. 438; *Rowley* v. *Houghton*, 2 Brews. 303; *Degraves* v. *Whiteman*, 5 V. L. R. Eq. 304; *Levy* v. *Waitt*, 61 Fed. Rep. 1008.

(*f*) See *Blackwell* v. *Armistead*, 5 Am. L. T. 85; *Lorillard* v. *Pride*, 28 Fed. Rep. 434.

(*g*) 4 De G. J. & S. 380.

(*h*) Compare §§ 72, 73, 86 of the Patents Act, 1883. And see *In re Heaton*, 27 Ch. D. 570, and *O'Rourke* v. *Central City Soap Co.*, 26 Fed. Rep. 576; with which compare *Symonds* v. *Greene*, 28 Fed. Rep. 834.

(*i*) Compare remarks of Lord Kingsdown in the *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523.

The mark must be on a vendible article.

From this judgment it follows, and it was expressly recognised in *Maxwell* v. *Hogg* (*a*), that no property could be acquired in a trade mark, except through the process of sale, or offering for sale, in the market, of the article to which the trade mark was affixed (*b*). And in the last-mentioned case it was held that no expenditure during the course of manufacture in advertisements or other announcements to the public of the article so in course of manufacture could give any right in the mark or name by which it was intended that the article should be known when completed and in the market (*c*). Moreover, user must be as of a trade mark, and not as of a mere descriptive term (*d*).

Acquisition by registration.

By the Trade Marks Registration Act, 1875, now repealed, a new manner of acquiring a right to a trade mark was introduced, and with respect to new marks substituted for the earlier method. By the Patents Acts, 1883—1888 (*e*), which have now taken the place of the Act of 1875, no infringement of a registrable trade mark can be restrained or civilly punished, unless the mark has been registered. For five years after registration the fact of registration is *primâ facie* evidence of the right of the registered proprietor to the exclusive use of the trade mark (*f*), or, in other words, it qualifies him for taking proceedings against infringers (*g*);

(*a*) L. R. 2 Ch. 307.

(*b*) And see *per* Willes, J., in *Lawson* v. *Bank of London*, 18 C. B. 84; also *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512; *In re Simpson, Davies & Sons*, Jessel, M. R. Jan. 12th, 1881; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *Rowley* v. *Houghton*, 2 Brews. 303; R. Cox, 486; *Bowman* v. *Floyd*, 85 Mass. 76; *McLean* v. *Fleming*, 96 U. S. 245; *St. Louis Piano Manufacturing Co.* v. *Merkel*, 1 Mo. App. 305; *Avery & Sons* v. *Meikle & Co.*, 27 U. S. Pat. Gaz. 1027; *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183; *Schneider* v. *Williams*, 44 N. J. (Eq.) 391; *Jaeger's, &c. Co.* v. *Le Boutillière*, 54 N. Y. Sup. Ct. 521; *McCall* v. *Theal*, 28 Grant Up. Can. Ch. 48; *William Rogers Manufacturing Co.* v. *Rogers & Spurr Manufacturing Co.*, 11 Fed. Rep. 495; *Sheppard & Co.* v. *Stuart & Peterson*, 13 Philu. 117. As to the difficulty of acquiring a right of trade mark in a name applied to a patented article, see p. 56, *ante*.

(*c*) And see *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512; and *Schneider* v. *Williams*, 44 N. J. (Eq.) 391.

(*d*) *In re Leonard & Ellis*, 26 Ch. D. 288; *In re Harrison, McGregor & Co.*, 42 Ch. D. 691; *Richards* v. *Butcher*, (1891) 2 Ch. 522; *In re Powell*, (1893) 2 Ch. 398; (1894) A. C. 8.

(*e*) § 77. And see *Goodfellow* v. *Prince*, 35 Ch. D. 9; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 405, 411, which shows that the section merely enacts a condition precedent to suing, and does not prevent a plaintiff from recovering damages for infringements before registration: *Hargreave* v. *Freeman*, (1891) 3 Ch. 39, 43; *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 P. R. 389.

(*f*) § 76. And see *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284.

(*g*) *Nuthall* v. *Vining*, C. A. Jan. 21st, 1880; *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398. In the case of *Morse* v. *Martin*, Quebec Super. Ct. Feb. 28th, 1882, it was held that the corresponding Canadian statute gave no right of action for anything done before registration. But the Quebec Court of Queen's Bench did not decide the point: 3 Dorion, 353.

after five years have expired from the date of registration, the fact of registration becomes conclusive evidence of his right to the mark (*a*) in any action brought by him (*b*), though the mark is still liable to removal from the register in proceedings taken for that purpose, if it was registered wrongfully (*c*). Registration protects the trade mark in all sizes and in all colours, whether registered in colour (*d*) or not (*e*). In the case of trade marks in use before August 13th, 1875, application must be made for registration, and if that is refused, a certificate of refusal will preserve to the applicant whatever rights he would hav ad independently of the Act (*f*).

Registration before user.

In several cases (*g*) doubts were expressed whether a trade mark could be registered before it had been used, the doubt being founded on the old principle that a right in a trade mark could only be acquired by its being attached to vendible goods in the market, until which was the case user by others could lead to no deception; but these doubts were set at rest by *In re Hudson* (*h*), where the Court of Appeal came to a clear decision that registration before user was allowable. Where, however, it is proved that a mark which it is sought to register without prior user is not intended to be used by the applicant, but that the proposed registration is directed to a different end, registration will be refused (*i*).

Goods classified.

A trade mark must be registered as belonging to particular goods or classes of goods (*j*), as arranged in the Third Schedule to the Rules; the class to which the goods belong being determined, in case of doubt, by the comptroller (*k*). This requirement is no alteration of the rules of the pre-existing law, but is merely a statement of one of those rules as bearing upon registration under the Act. It had been already fully recognised that a particular trade mark could be protected as such only in connection with

(*a*) § 76. This is, however, subject to the provisions of the Act, *e.g.* as to the connection with the goodwill: § 70.

(*b*) *Edwards* v. *Dennis*, 30 Ch. D. 454.

(*c*) *In re Palmer* (1), 21 Ch. D. 47; S. C. (3), 24 *ib.* 504; *In re Leonard & Ellis*, 26 Ch. D. 288; *In re Lloyd & Sons*, 27 Ch. D. 646; *In re Wragg*, 29 Ch. D. 551; *Edwards* v. *Dennis*, 30 Ch. D. 454; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Spencer*, 54 L. T. N. S. 659; 3 P. R. 73; *In re Apollinaris Co.*, (1891) 2 Ch. 186. And so in Victoria: *Lewis* v. *Klapproth*, 11 V. L. R. 214; *Wolfe* v. *Alsop* (2), 12 V. L. R. (E.) 421; [illegible] v. *Lang & Co.*, 13 V. L. R. 752.

(*d*) See § 67.

(*e*) *Nuthall* v. *Vining*, C. A. [illegible] 21st, 1880.

(*f*) § 77.

(*g*) *In re Anderson*, 54 L. J. Ch. [illegible], *Edwards* v. *Dennis*, 30 Ch. D. 3[illegible]; *In re Lyndon*, 32 Ch. D. 109.

(*h*) 32 Ch. D. 311.

(*i*) *In re Apollinaris Co.*, (1891) 2 Ch. 186, 234; *In re Batt & Co.*, (1898) 2 Ch. 432.

(*j*) § 65. (*k*) Rule 6.

particular goods or classes of goods. Thus Lord Westbury, C., says, "Property in a trade mark is the right to the exclusive use of some mark, name, or symbol in connection with a particular manufacture or vendible commodity; consequently the use of the same mark in connection with a different article is not an infringement of such a right of property" (*a*). And again, "An iron-founder who uses a particular mark for his manufactures in iron could not restrain the use of the same mark when impressed upon cotton or woollen goods; for the property in a trade mark consists in the exclusive right to the use of that mark as applied to some particular manufacture" (*b*). And V.-C. Wood similarly says, that "this Court has taken upon itself to protect a man in the use of a certain trade mark as applied to a particular description of article. He has no property in that mark, *per se*, any more than in any other fanciful denomination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them," his right to the mark so applied will be protected (*c*).

Limit of rights acquired by user.

As a result of the rule that a trade mark can only be acquired by user in respect of the goods on which it has been used, it has been decided that the use of a mark before August 13th, 1875, on certain descriptions of goods gives no right to have it registered in respect of other descriptions of goods, except as a new mark; so that although the mark may have been long used in respect of some goods, it will be refused registration in respect of different goods or classes of goods (though of a somewhat similar character), if it conflicts with another mark already registered therein (*d*), or if

(*a*) *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137. And see *Celluloid Manufacturing Co.* v. *Read*, 47 Fed. Rep. 712.

(*b*) *Hall* v. *Barrows*, 4 De G. J. & S. 150.

(*c*) *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518. And see *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 443; *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank, Ld.*, 9 *ib.* 560; *Colladay* v. *Baird*, 4 Phila. 139; R. Cox, 257; *Rowley* v. *Houghton*, 2 Brews. 303; R. Cox, 486; *Amoskeag Manufacturing Co.* v. *Garner*, 55 Barb. 151; R. Cox, 541; *Colman* v. *Crump*, 70 N. Y. 573; *Société Anonyme, &c.* v. *Baxter*, 14 Bl. C. C. 261.

(*d*) *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *Edwards* v. *Dennis*, 30 Ch. D. 454. And see *In re Braby & Co.*, 21 Ch. D. 223; also *In re Lyndon*, 32 Ch. D. 109, *per* Pearson, J., and the American case of *Ex parte King* (2), 46 U. S. Pat. Gaz. 119.

for any reason it is not registrable as a new mark. If, however, it has been used for goods which, though not identical, were yet substantially the same as those for which it is claimed, registration may be allowed (*a*). And it has been held in American, with apparently good reason, that a mark which is descriptive, and therefore incapable of registration, when applied to one variety of goods, may be open to no such objection when applied to another variety of goods (*b*). Similarly, a mark may be in general use in connection with a variety of goods, and yet be perfectly good and distinctive in connection with particular goods on which there has been no such user. Thus it has been said in the Privy Council (*c*) that "the acquisition of an exclusive right to a mark or name in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of a totally different character, and such use by others can as little interfere with his acquisition of the right."

New user of old mark may be infringement.

As a consequence of the rule that user only gives a right to the mark in respect of the goods for which it has been used, the user of a mark in connection with goods different from those in respect of which it has previously been used, though of a somewhat similar character, may amount to an infringement of the rights of another person who has had an earlier user in respect of those different goods. Thus in *Moses* v. *Sargood* (*d*) it was held to be an infringement of the plaintiffs' rights for the defendants, who had previously only exported goods unmade up, and used their trade mark upon such goods, to begin to export and to use their trade mark upon ready-made clothing, having regard to the fact that the plaintiffs had been in the habit of exporting and using a somewhat similar trade mark upon made-up goods. And in *Upper Assam Tea Co.* v. *Herbert & Co.* (*e*) the proprietors of a mark which had been used and registered for coffee were restrained from applying it to tea, though in the same class, having regard to the fact that a similar mark had been used and registered for tea by another firm.

(*a*) *Jackson & Co.* v. *Napper*, 35 Ch. D. 162. And compare *Collins Co.* v. *Ames & Sons*, 20 Bl. C. C. 542.

(*b*) *In re English*, U. S. Pat. Comm. Decis. 1870, 142; *In re Dick & Co.*, 9 U. S. Pat. Gaz. 638; *George* v. *Smith*, 52 Fed. Rep. 830.

(*c*) *Somerville* v. *Schembri*, 12 App. Cas. 453.

(*d*) Dig. 636.

(*e*) 7 P. R. 183.

Wide registration, but limited user.

Again, though by § 75 of Patents Act, 1883, registration (*a*) of a trade mark is to be deemed to be equivalent to public use of the trade mark, it has been held by the Court of Appeal that if a trader has registered a mark for a variety of goods, and has only used it in connection with some of them, he is not entitled to restrain the use by another trader of a somewhat similar mark in connection with the goods for which his mark has not been used (*b*). So also where a trade mark has been registered for a variety of goods, though it contains indications that it is only applicable to some of such goods, and it has only been used as registered in respect of such limited description of goods, it will not be protected in respect of other goods for which it is registered, even though the essential parts of it may have been used in respect of such other goods (*c*). Upon the same principle where a mark registered for tobacco generally was used for cigars only, the consent of the owner to the registration of a similar mark by a rival trader for packet tobacco was held not to estop him from restraining an infringement of his mark in respect of cigars (*d*). It has been also laid down by the Court of Appeal in a recent case that a man cannot properly register a trade mark for goods in which he does not deal or intend to deal, meaning by intending to deal, having at the time of registration some definite and present intention to deal in certain goods, or descriptions of goods, and not a mere general intention of extending his business at some future time to anything which he may think desirable (*e*).

Mark only protected for goods for which registered.

Another question which has been raised, bearing on this point, is whether a mark which has been registered for some of the goods in a class can be protected for other goods in the class, as having been used in respect of them; and it would seem that, having regard to § 65, by which a trade mark must be registered for particular goods or classes of goods, a trade mark which is registered only for particular goods in a class is not registered for other goods, whether in the same or a different class, and consequently that by § 77 (*f*) it is deprived of any right to protection in

(*a*) Now "application for registration," § 17 of the Patents Act, 1888.

(*b*) *Edwards* v. *Dennis*, 30 Ch. D. 454. Cf. *Phillips* v. *Ogden*, 12 P. R. 325.

(*c*) *Hargreave* v. *Freeman*, (1891) 3 Ch. 39.

(*d*) *Benedictus* v. *Sullivan, Powell & Co.*, 12 P. R. 25. See *Phillips* v. *Ogden*, 12 P. R. 325; *In re Banks & James*, 12 P. R. 333; *Freeman Bros.* v. *Sharpe Bros. & Co., Ld.*, 16 P. R. 205.

(*e*) *In re Batt & Co.*, (1898) 2 Ch. 432.

(*f*) See *Goodfellow* v. *Prince*, 35 Ch. D. 9; and *Richards* v. *Butcher* (1), 7 P. R. 288.

respect of such other goods; and in *Hart* v. *Colley* (*a*), North, J., decided in favour of the view here suggested.

Provisions in the Patents, &c. Acts and Rules.

By § 72 the registration of a mark identical with, or nearly similar to a mark already registered, is prohibited, not generally, but in connection with such goods or description of goods as those in respect of which the mark already on the register is registered. And, with a view to the protection of the public, this prohibition is extended over a period of one year after the removal of the mark once registered from the register for non-payment of a continuance fee, during which period of one year the removed mark in question is to be still deemed to be registered for this purpose only (*b*).

Steps necessary to obtain registration: The application.

A person desirous of having his trade mark registered must send an application to the comptroller in the prescribed form (*c*), together with the prescribed number (*d*) of representations (*e*) of the trade mark. When a representation cannot be given in the usual manner, a specimen or copy of the trade mark may be supplied instead (*f*). The application must state the particular goods or classes of goods in connection with which the applicant desires the trade mark to be registered (*g*). Words in other than Roman characters must have a translation supplied, and a translation may be required by the comptroller in all cases of foreign words (*h*). Applications for registration in classes 23, 24, or 25, are to be sent to the Manchester Branch Office (*i*).

When mark is an old mark.

When the mark is claimed as an old mark—*i.e.*, a mark used before the passing of the Trade Marks Registration Act, 1875 (August 13th, 1875)—the facts as to such prior user are to be stated (*k*), and it is essential that the mark should be claimed and registered precisely in the form in which it has been used (*l*). In such cases a statutory declaration verifying the old user is no longer prescribed by rule, but the comptroller is entitled to re-

(*a*) 44 Ch. D. 193; compare *Jay* v. *Ladler*, 40 Ch. D. 649.

(*b*) § 79 (5), as amended by § 19 of the Act of 1888, *q.v.*

(*c*) Form F in the Second Schedule to the Rules. See § 62 (2) and Rules 4, 5, 11, 12. The Rules now in force are the Rules of 1890 as amended by the Rules of 1897 and 1898. See pp. 401—415.

(*d*) In respect of goods of all classes one representation must be placed on the application form. The number of additional representations to be sent is as follows:—In respect of goods in classes 5—7, 11—14, 22—35 four; in respect of goods in all other classes three. See Rule 13. Applications for the registration of a series of marks under § 66 are governed by Rule 14.

(*e*) For form of Additional Representation, see Form G. See also § 62 (3).

(*f*) See Rule 13. (*g*) § 62 (3).

(*h*) Rule 15.

(*i*) Rule 8. (*k*) Rule 11.

(*l*) See p. 45, *supra*, and note (*p*) to § 64 of the Patents Act, 1883.

quire, and frequently does require, such a declaration to be made by some one acquainted with the facts, and the existence of such a declaration on the files of the office is rather advantageous to the proprietor of the trade mark. If such a declaration is called for, the facts which it must verify are that the mark applied for (which it is well to exhibit to the declaration) has, in the exact form shown, and by itself, been used as a trade mark by the applicant (and his predecessor in business, if so) within the United Kingdom, in respect of the exact goods for which registration is sought, continuously since a specified date before the 13th day of August, 1875, and that save the said mark there did not appear upon the said goods, or upon the packages, &c. containing them, any device, words, numerals, letters, or other particulars whatsoever.

When by firm.

When the application is made by a firm or partnership it may be signed by some one or more members of the firm or partnership, as the case may be (*a*).

When by a body corporate.

When the application is made by a body corporate, it may be signed by the secretary or other principal officer of such body corporate (*a*).

Manner of making application.

The application and all other communications between the applicant and the comptroller may be made by or through a duly authorised agent (*b*), and may be sent by a prepaid letter through the post (*c*). If the applicant is abroad at the time of his application, and is not claiming under an international convention, he must give an address for service within the United Kingdom (*d*).

Advertisement, &c.

All that remains to be done by the applicant for registration, after sending in his application, is to await an acknowledgment of its receipt by the comptroller (*e*), and then to furnish the comptroller with the means of inserting in the official paper the necessary advertisement of the application (*f*).

Registration.

At the expiration of one month from the date of the advertisement, and subject to any proceedings which may have been taken, the comptroller, is, if satisfied of the applicant's title, to register the trade mark (*g*) as from the date of the receipt of the application for registration (*h*), and upon registration is to send

(*a*) Rule 7.
(*b*) Rule 9.
(*c*) § 97 and Rule 16.
(*d*) § 8 of Act of 1888.
(*e*) Rule 10.
(*f*) § 68 and Rules 27—30.
(*g*) Rule 32.
(*h*) § 17 of the Act of 1888.

notice thereof to the registered proprietor with a reference to the advertisement (*a*).

If an applicant dies between application and registration the registration may be completed in the name of the successor to the goodwill of his business (*b*). In case of applicant's death.

Trade marks applied for in respect of goods within the Cutlers' Company's Acts (*c*) are governed by special rules (*d*); but marks on cotton goods, even B list marks, are for the future to be dealt with on the same footing as other trade marks. The only special requirements in the case of cotton marks are for the name by which the mark would be referred to in invoices to be stated (*e*), and for four additional representations to be sent (*f*), and for applications to be made at Manchester (*g*). Sheffield and cotton marks.

Where it is desired to register a number of trade marks which, while resembling each other in the material particulars thereof (*h*), yet differ in respect of statements of the goods for which they are to be used, or of numbers, or price, or quality, or names of places, they may be registered as a series in one registration, each of the marks being treated as separately registered, except for purposes of assignment and transmission (*i*). Series of marks.

Additions which are common to the trade may, in accordance with the provisions of § 74, as amended by § 16 of the Act of 1888, be registered together with trade marks, but such common elements must be disclaimed by the applicant (*k*). Common marks.

No provision is made in the Patents Act, 1883, for registering alternative marks, as has sometimes been done in America, *e.g.*, where a trade mark was registered as consisting either of the figure of a lion, or the word "lion," or both (*l*). But the registration of a series of marks has to some extent the same effect. Alternative marks.

(*a*) Rule 35.
(*b*) Rule 33.
(*c*) See Appendix H, *infra*.
(*d*) § 81 as amended by § 20 of the Act of 1888, and Rules 56—59.
(*e*) Instructions, par. 14.
(*f*) Rule 13.
(*g*) Rule 8.
(*h*) See § 64 as to essential particulars.
(*i*) § 66 and Rules 14 and 30. This is new as an enactment, but the practice is not new. See note (*a*) to § 66, and note (*e*) to § 72, *infra*.
(*k*) The practice of requiring common parts of marks or additions to marks to be disclaimed is not new. See *per* Jessel, M. R., in *In re Kuhn & Co.*, 53 L. J. Ch. 238; and *per* Kay, J., in *In re Hayward & Sons*, 54 L. J. Ch. 1003; and *In re Davies*, before Chitty, J., March 9th, 1885. Also notes to § 74, and note (*e*) to § 72, *infra*. And it exists in America also; *Harris Drug Store* v. *Stucky*, 46 Fed. Rep. 624.
(*l*) *In re Weaver*, 10 U. S. Pat. Gaz. 1. And see *Ex parte Roth Grocery Co.*, 62 *ib.* 315; *Ex parte Kinney*, 72 *ib.* 1349; *Ex parte Lazarus, Schwarz & Lipper*, 64 *ib.* 1396.

Colour.

Trade marks may now be registered in colour, and the effect of such registration is no longer to limit the protection conferred by registration to the one colour in which the registration has been effected (*a*).

Registration by deposit.

Provision is made by the rules for registration by deposit in cases where such a course is rendered necessary by the nature of the trade mark (*b*).

Refusal to register.

Registration is by no means a necessary consequence of application. The comptroller may refuse to grant registration if he thinks fit (*c*), or if he thinks the use of the mark would be contrary to law or morality (*d*), and he must refuse registration where the same or a similar mark is already registered for the same goods (*e*), or where words calculated to deceive are offered for registration (*f*). Where the refusal is made in the exercise of a discretion vested in the comptroller, he is not to exercise that discretion adversely to the applicant until he has had an opportunity of being heard personally, or by his agent (*g*), and if he does, in his discretion, refuse to register, there is an appeal to the Board of Trade (*h*), who may, if they think fit, refer the appeal to the Court (*i*).

When, as frequently happens, a mark tendered for registration is objected to by the comptroller, *e.g.*, on the ground that it does not come within the definition of registrable marks in § 64, or on the ground that it too closely resembles some other mark or marks already on the register (*k*), the proper course for the applicant to take, if he desires to persevere with the application, is to apply for a hearing before the comptroller, who may, and frequently does, waive all or some of the objections raised to the registration. The application for a hearing must be made within one month

(*a*) See § 67, and note thereto, *infra*.

(*b*) See the substituted Rule 13 and Rule 27, and note to § 67.

(*c*) § 62 (4).

(*d*) § 86.

(*e*) § 72.

(*f*) § 73.

(*g*) § 94, and Rules 17—19.

( ) § 62 (4). See Rules 20—26.

( ) § 62 (*b*). "The Court" is the High Court of Justice (§ 117), the Chancery Division being no longer specified; but recourse is still had to that Division. In the case of applications at the Manchester Office "the Court" is the Lancaster Palatine Chancery (§ 26 of the Act of 1888). When the registration is objected to on the ground that the mark tendered for registration is not qualified for registration, "the first duty cast upon the Court is to ascertain whether some one or more than one of the essential particulars of a trade mark, as defined by the Act, is found to exist, so that the mark may be described with the one or more than one essential particular or particulars which distinguish it." *Per* Lord Cairns, C., in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 484.

(*k*) § 72.

after the objection is notified. If an appeal against an adverse decision is contemplated; it is practically imperative on the applicant to take a hearing before the comptroller, in order that the case may be fully considered before it goes farther.

Even if the comptroller is willing to treat the application as unobjectionable, any person (*a*) may give notice of opposition at the Patent Office within one month or such further time, not exceeding three months, as the comptroller may allow, after the advertisement, and the applicant is then allowed one month for sending in a counter-statement, or the registrar may extend the time. If no such counter-statement is sent, the application is deemed to be withdrawn; if it is sent, the person giving notice of opposition will be furnished with a copy of it, and the comptroller will then hear the case (*b*); but his decision is to be subject to an appeal to the Board of Trade (*c*), who may, if it appears expedient, refer the appeal to the Court (*d*). Opposition to application.

In deciding whether registration is to be allowed or not, the Court has frequently granted the application in such a limited form as to obviate the risk of its clashing with the mark which it is considered to resemble (*e*). Thus registration has been granted in such a form as to be partial in respect of the mark itself which is registered (*f*), or of the goods for which it is registered (*g*), or of the manner of user in respect of colour (*h*), or otherwise (*i*), or of the locality within which it is to be used (*k*), or of the persons Limited registration.

(*a*) It need not be the proprietor of a registered mark. In *In re Simpson, Davies & Sons* (2), Jessel, M.R., Jan. 12th, 1881, the proprietors of a trade mark registered for coal in Class 4 successfully opposed the registration of a similar mark for railway waggons in Class 22, the opponent's coal being carried in and sold out of waggons.

(*b*) The practice in such case is prescribed by Rule 31.

(*c*) See Rules 20—26.

(*d*) § 69 as amended by § 13 of the Act of 1888, which for the first time gave the comptroller jurisdiction in such cases. As to the old practice, see *Ex parte Stephens*, 24 W. R. 819; *In re Salamon*, Dig. 569; *In re Johnston*, 43 L. T. N. S. 672; *In re Simpson, Davies & Sons*, 15 Ch. D. 525. As to costs, see *In re Brandreth*, 9 Ch. D. 618; *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278.

(*e*) See as to the growth of this form of registration, *per* Jessel, M. R., in *In re Kuhn & Co.*, 53 L. J. Ch. 238.

(*f*) See note (*e*) to § 72, and *In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *In re Hoyle & Sons, Ld.* (2), Chitty, J., Nov. 30th, 1883; *In re Hayward & Sons*, 54 L. J. Ch. 1003; *In re Davies*, Chitty, J., March 9th, 1885.

(*g*) See note to § 65, *infra*. The registration should always be so limited. See *Edwards* v. *Dennis*, 30 Ch. D. 454; *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454; *In re Batt & Co.*, (1898) 2 Ch. 432.

(*h*) *In re Johnson, Philpott & Co.*, North, J., Feb. 21st, 1888; *In re Jeffrey & Co.*, Stirling, J., May 18th, 1888.

(*i*) See note (*e*) to § 72, *infra*; and *In re Whiteley*, 43 L. T. N. S. 627; *In re Sykes, ib.* 626; *In re Farina* (3), Dig. 654.

(*k*) *In re Rabone*, Dig. 643; *In re Keep Bros.*, 26 Ch. D. 187; *In re Mitchell & Co.*, 28 Ch. D. 666; *In re Johnson, Philpott & Co.*, North, J., Feb. 21st,

against whom it is to be protected (*a*). At the present time the usual question is, supposing the mark to be registered at all, what disclaimer, if any, should be required.

Conflicting claims.

Again, where each of several persons claims the same trade mark the comptroller may refuse to register any of them until their rights have been determined according to law, and he may himself submit or require the claimants to submit their rights to the Court (*b*) in the form (unless the Court shall otherwise order) of a special case (*c*), agreed to by the parties, or, in case of difference, settled by the comptroller (*d*).

Issue may be directed.

In any proceeding for rectification of the register, the Court may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved (*e*).

Alteration of registered trade mark.

Subsequently to registration clerical errors may be corrected by the comptroller (*f*), who may also allow the application to be amended by admitting any of the goods for which the mark is claimed (*f*), and may, after registration, alter the address of the registered proprietor (*g*), and by leave of the Court the registered proprietor may alter his trade mark and procure an alteration of the register accordingly, but the alteration must not extend to any of the "essential particulars" of the trade mark (*h*).

No trust entered on register.

No notice of any trust, expressed, implied, or constructive, can be received by the comptroller, or entered in the register (*i*).

## 2. *Transfer.*

Assignment and transmission.

A trade mark is capable of being assigned during the life of its proprietor, and of being transmitted at his death; but it can be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered (*k*), and "an assignee has no

1888; *In re Steel*, Chitty, J., Jan. 12th, 1893. But registration with such limitations is not now regarded with favour: *In re Dewhurst & Sons, Ld.*, (1896) 2 Ch. 137.

(*a*) *Ex parte Henning & Son*, Jessel, M. R., April 27th, 1881.

(*b*) § 71, and Rules 42, 43.

(*c*) Rule 44, and see note to § 71, *infra*.

(*d*) Rule 45.

(*e*) § 90.

(*f*) § 91.

(*g*) Rule 48.

(*h*) § 92. And see *In re Dewhurst*, Jessel, M. R., June 11th, 1880, and cases collected in the note to the section. Notice of the application must be given to the comptroller: Rule 48.

(*i*) § 85. See *In re Mitchell & Co.*, 28 Ch. D. 666; *In re De Oladuy*, L. J. N. of C. 1885, p. 155.

(*k*) § 70. See *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Ex parte Lawrence Bros.*, 44 L. T. N. S. 98; *In re Wellcome*, 32 Ch. D. 213.

exclusive right to a trade mark unless the assignment is of a business co-extensive with the trade mark as registered" (*a*). Trade marks registered as a series can only be assigned and transmitted as a whole (*b*).

Trade mark cannot be severed from goodwill.

Even apart from the Act, there is no doubt that the trade mark cannot be severed from and used independently of the goodwill. If that could be done, the *indicium* of genuineness might only serve to mislead. This view was clearly put by Lord Westbury, C., in the *Leather Cloth Companies' case* (*c*), when he suggested the case of a firm of clothiers in Wiltshire, trading as A. B. & Co. for fifty years, and acquiring a great reputation for their broad cloth marked "A. B. & Co. Wilts"; then, he asked, supposing A. B. & Co. to discontinue their business, and to sell the right to use the mark to C. D. & Co., clothiers in Yorkshire, would the latter be protected in equity in their claim to the exclusive use of the mark? and he answered the question in the negative. So in *Pinto* v. *Badman* (*d*), Fry, L. J., said: "By the English law, can a trader, who has used a brand upon a particular article, and who continues to manufacture that article, alienate that brand to another person, so as to give the alienee any right whatever? It appears to me that upon first principles he can have no such right. The brand is an indication of origin, and if you transfer the indication of origin, without transferring the origin itself, you are transferring a right, if any right at all, to commit a fraud upon the public, and such right is not recognised by the law of England."

Trade mark passes with goodwill.

To such an extent is a trade mark an accessory of the goodwill, that in *Shipwright* v. *Clements* (*e*), Malins, V.-C., held that in the

(*a*) *Per* Fry, L. J., in *Edwards* v. *Dennis*, 30 Ch. D. 454. If a trade mark registered in respect of an extensive class of goods is assigned together with the goodwill of a business concerned in some only of such goods, the assignment of the trade mark would apparently be valid *pro tanto*.

(*b*) § 68.

(*c*) 4 De G. J. & S. 137. And see *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *Taylor* v. *Bemis*, 4 Biss. 406; *Witthaus* v. *Braun*, 44 Md. 303; *Skinner* v. *Oakes*, 10 Mo. Ap. 45; *Morgan* v. *Rogers*, 19 Fed. Rep. 593; *McVeagh* v. *Valencia Cigar Factory*, 32 U. S. Pat. Gaz. 1124; *Oakes* v. *Tonsmierre*, 4 Woods, 547; *Smith* v. *Fair*, 14 Ont. Rep. 729; *Smith* v. *Imus*, 32 Alb. L. J. 455; *In re Rowley & Pyne*, 9 V. L. R. (L.) 307; *Chadwick* v. *Covell*, 151 Mass. 190; *Covell* v. *Chadwick*, 153 Mass. 263; 25 Am. St. Rep. 625; *Royal Baking Powder Co.* v. *Raymond*, 70 Fed. Rep. 376; 85 Fed. Rep. 231. As to the construction of a contract entered into on the sale of a trade mark, see *Goodman* v. *Meriden Britannia Co.*, 50 Conn. 139: *Oakes* v. *Tonsmierre* (2), 49 Fed. Rep. 447; *Chattanooga Medicine Co.* v. *Thedford*, 66 Fed. Rep. 544, reversing 58 Fed. Rep. 347, and overruling 49 Fed. Rep. 949.

(*d*) 8 P. R. 181, 194. And see *Thorneloe* v. *Hill*, (1894) 1 Ch. 569.

(*e*) 19 W. R. 599.

sale of the latter the trade mark would pass, whether specially mentioned or not (*a*).

Same principle adopted in America.

In a case before the New York Court of Appeals (*b*), the expression was adopted that "a property in trade mark might be obtained by transfer from him who had made the primary acquisition, though it was essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trade mark had been attached." In another American case (*c*), the statement that the "property or right to a trade mark might pass by an assignment or by operation of law," was followed by this limitation, "to any one who took at the same time the right to manufacture or sell the particular merchandise to which the trade mark had been attached." And in the case of *Kidd* v. *Johnson* (*d*), the Supreme Court of the United States laid down that "as distinct property, separate from the article created by the original producer or manufacturer, a trade mark may not be the subject of sale. But when it is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred, either by contract or operation of law, to others, the right to the use of the trade mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place, and are of the same character, as those to which the mark was attached by its original designer."

Personal trade mark.

It is possible that occasionally, though rarely, a trade mark may be so framed as not to be merely a simple indication of quality, or a guide to the place of manufacture, but to have the effect of

(*a*) And see *Churton* v. *Douglas*, Johns. 174; *In re Roger* (2), 12 P. R. 149; *Currie* v. *Currie*, 15 P. R. 339; *Fulton* v. *Sellers*, 4 Brews. 42; *Thompson* v. *Mackinnon*, 2 Steph. Dig. 726; *Merry* v. *Hoopes*, 111 N. Y. 415; *Metcalfe* v. *Brand*, 86 Ky. 331; 9 Am. St. Rep. 282; *Solis Cigar Co.* v. *Pozo*, 16 Col. 388; 25 Am. St. Rep. 279; *Fish Bros. Wagon Co.* v. *La Belle Wagon Works*, 82 Wisc. 546; 33 Am. St. Rep. 72; *Listman Mill Co.* v. *William Listman Milling Co.*, 88 Wisc. 334; 43 Am. St. Rep. 907; *Wilmer* v. *Thomas*, 74 Md. 485; *Prince Metallic Paint Co.* v. *Prince Manufacturing Co.*, 57 Fed. Rep. 938; 17 U. S. App. 145; *Cuervo* v. *Landauer*, 63 Fed. Rep. 1003; *Sanche* v. *Electrolibation Co.*, 64 U. S. Pat. Gaz. 1189; *Mitchell* v. *Joshua Bros.*, 17 V. L. R. 736. But an assignment can give no exclusive right in a word used as a mere indication of quality; *Merry* v. *Hoopes*, 111 N. Y. 415.

(*b*) *Congress & Empire Spring Co.* v. *High Rock Congress Spring Co.*, 45 N. Y. 291; R. Cox, 599.

(*c*) *Dixon Crucible Co.* v. *Guggenheim*, 2 Brews. 321; R. Cox, 559. And see *Walton* v. *Crowley*, 3 Bl. C. C. 440; R. Cox, 166; and *Derringer* v. *Plate*, 29 Cal. 292; R. Cox, 324.

(*d*) 100 U. S. 617.

ascribing the article to which it is attached to the personal skill or supervision of an individual. In such a case the question arises whether the trade mark, which when originally adopted contained no assertion which was incorrect, is capable of transfer to another person so as to enable him to apply it to his own goods and to prevent a similar use of it by others, the personal skill and supervision of its former proprietor having ceased to be applied.

Not assignable.

The considerations which occur in cases where such a contention is set up are well stated by the Supreme Court of Massachusetts (*a*) in the following terms:—"There may, no doubt, be cases where the personal skill of an artist or artisan may so far enter into the value of a product that a trade mark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and in such cases it would be a fraud upon the public if the trade mark should be used by other persons, and for this reason such a trade mark would be held to be unassignable. . . . . But, on the other hand, the usages of trade may be such that no such inference would naturally be drawn from the use of a trade mark which contains a person's name, and that all that purchasers would reasonably understand is that goods bearing the trade mark are of a certain standard, kind, or quality, or are made in a certain manner, or after a certain formula, by persons who are carrying on the same business that formerly was carried on by the person whose name is in the trade mark."

Name of former proprietor.

It is, indeed, settled law in England, though there is some American authority (*b*) to the contrary, that the mere fact of the trade mark consisting of or containing the name of its former proprietor, who originally conducted the business with which the trade mark is connected, is not of itself sufficient to disentitle the transmittee or assignee of the business to continue to use the mark, since the mere name of the maker will be deemed to be indicative rather of a business, in whosesoever hands it may be, than of an individual proprietor of it (*c*).

(*a*) *Hoxie* v. *Chaney*, 143 Mass. 592.

(*b*) *Sherwood* v. *Andrews*, 3 Amer. L. Reg. N. S. 588. And see *Partridge* v. *Menck*, 2 Sandf. Ch. 622; *Carmichel* v. *Latimer*, 11 R. I. 395; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Horton Manufacturing Co.* v. *Horton Manufacturing Co.*, 18 Fed. Rep. 816.

(*c*) *Bury* v. *Bedford*, 4 De G. J. & S. 352; *Churton* v. *Douglas*, Johns. 174; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. C. 523; *Massam* v. *J. W. Thorley's Cattle Food Co.* (2), 14 Ch. D. 748; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; and the American cases of *McLean* v. *Fleming*, 96 U. S. 245;

When trade mark is personal.

It is, however, conceivable that a trade mark may be "so completely personal as of necessity to import that the goods sold under it have been manufactured by a particular individual" (*a*), as if it contains not only the name of the proprietor, but also some reference to his personal qualifications or supervision (*b*), or an allusion to particular workmen in his employ (*c*), in which case the mark will already become deceptive even while the business remains in the same hands, if the proprietor should cease to give his personal attention or to employ the same workmen. And in *Manhattan Medicine Co.* v. *Wood* (*d*), the Supreme Court of the United States said that "if one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers. To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place by a person whose manufacture there had acquired a great reputation, when in fact it is manufactured by a different person at a different place, is a fraud upon the public which no Court of Equity will countenance."

*Filkins* v. *Blackman*, 13 Bl. C. C. 440; *Weed* v. *Peterson*, 12 Abb. Pr. N. S. 178; *Booth* v. *Jarrett*, 52 How. Pr. 169; *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54; S. C. (2) 51 How. Pr. 455; *Woods* v. *Sands*, Dig. 467; *Fulton* v. *Sellers*, 4 Brews. 42; *Young* v. *Jones Bros. & Co.*, 3 Hughes, 274; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Oakes* v. *Tonsmierre* (2), 49 Fed. Rep. 447; *Le Page* v. *Russian Cement Co.*, 51 *ib.* 94; *Pillsbury* v. *Pillsbury-Washburn Flour Mills Co.*, 64 *ib.* 841; *Feder* v. *Benkert*, 70 *ib.* 613; *Symonds* v. *Jones*, 82 Maine, 302; 17 Am. St. Rep. 485, which shows that care must be taken that the name shall not be so used as to lead to the belief that the former proprietor personally conducts the business: *Richmond Nervine Co.* v. *Richmond*, 159 U. S. 293, where the same principle was applied to a trade mark containing the portrait of the original proprietor. Compare *Clark* v. *German Mutual Fire Insurance Co.*, 7 Mo. App. 77; *Russia Cement Co.* v. *Le Page*, 147 Mass. 206; *Hoxie* v. *Chaney*, 143 Mass. 592; *Pepper* v. *Labrot*, 8 Fed. Rep. 29; *Société, &c. de la Bénédictine* v. *Micalovitch*, 36 Alb. L. J. 364; and the Canadian case of *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306.

(*a*) *Per* Turner, L. J., in *Bury* v. *Bedford*, 4 De G. J. & S. 352; so in *Carmichel* v. *Latimer*, 11 R. I. 395; *Oakes* v. *Tonsmierre*, 4 Woods, 547; *Hoxie* v. *Chaney*, 143 Mass. 592; *Mesker* v. *Fadettes*, 168 Mass. 140; 60 Am. St. Rep. 371.

(*b*) *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453; *Pinto* v. *Badman*, 8 Pr. 81, 187.

(*c*) And compare the reference by Lord Kingsdown to an artist's special skill, in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523.

(*d*) 108 U. S. 218. And see *In re Sweezey & Dart*, 62 How. Pr. 215; and Daly, C. J.'s observations in *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1. See also *In re Hill*, 10 P. R. 113; *Alaska Packers' Association* v. *Alaska Imperial Co.*, 60 Fed. Rep. 103.

No protection of deceptive marks.

In such a case, independently of statute, it is clear that no protection will be given to a mark become deceptive. Thus, Lord Westbury, C., was of opinion that the Court would not sell and transfer the right to use a mark of a personal character simply and without alteration (*a*).

The Patents, &c. Act, 1883.

The objection to the use of a trade mark become deceptive, which, independently of statute, applied rather to the use of the mark assigned than to the power of assigning it (*b*), should now, as it appears, more properly apply to the registration of the assignee or transmittee, by which the latter acquires, at least, a *primâ facie* right to practise deceit. The Act, indeed, contains no provision expressly directed to meet a case of this kind, the 73rd section being only aimed at an attempted registration of a mark disentitled from the beginning to protection, by reason of being inherently calculated to deceive, and not to a registration of a subsequent proprietor of a mark which has lost its right to protection through a change of circumstances. The spirit of the Act is, however, to favour the general assignability of trade marks together with the goodwill to which they are attached, and it may be expected that such elements in a trade mark as would impede this assignability will very rarely, if ever, survive the original process of registration now necessary.

Trade marks generally transferable.

Subject only to the provision prohibiting the severance of a trade mark from the goodwill of the business with which it is connected, the trade mark is freely assignable. "The right to a trade mark may, in general, treating it as property, or 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" (*c*). If

(*a*) *Hall* v. *Barrows*, 4 De G. J. & S. 150. See, too, the Clothiers' case, suggested by him in the *Leather Cloth Co.'s case*, 4 De G. J. & S. 137; and the remarks of Lord Cranworth in that case in the House of Lords, 11 H. L. C. 523; and those of the L. JJ. in *Bury* v. *Bedford*, 4 De G. J. & S. 352. And see *Pinto* v. *Badman*, 8 P. R. 181, 187; *Sherwood* v. *Andrews*, 3 Am. L. Reg. N. S. 588; *Partridge* v. *Menck*, 2 Sandf. Ch. 622; *Messer* v. *Fadettes*, 168 Mass. 140; 60 Am. St. Rep. 371.

(*b*) *Per* Turner, L. J., in *Bury* v. *Bedford*, 4 De G. J. & S. 352.

(*c*) *Per* Lord Cranworth in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523. And see *per* V.-C. Wood in *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; also *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Weed* v. *Peterson*, 12 Abb. Pr. N. S. 178; *Cook* v. *Starkweather*, 13 *ib.* 392; *Frese* v. *Bachof* (2), 14 Bl. C. C. 432; *In re Rohland*, 10 U. S. Pat. Gaz. 980; *Lockwood* v. *Bostwick*, 2 Daly, 521; *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306; and the clear and full statement by Daly, C. J., in *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1. It was said

this were not so, the value of a very valuable and important part of the goodwill of the business carried on by a person (*a*) would be seriously diminished. And for a similar reason, and in the interest alike of the owner of a trade mark himself and of his assignee, the original owner will, subsequently to assignment, be restrained from the use of his former trade mark, equally with persons who have never had an interest in it (*b*). Nor after that event does he retain any power of conferring on another a right to use it (*c*). The same will be the case if the sale has been made, not by the owner himself, but by his trustee in bankruptcy (*d*). In the sale of a business a trade mark will pass to the purchaser without special mention (*e*).

Registration of subsequent proprietor.

When a person becomes entitled to a registered trade mark by assignment or transmission, or other operation of law, the way in which he has to obtain the registration of himself as the proprietor (*f*) is by sending a request to that effect to the comptroller (*g*), signed in the same way as is required in the case of an original application (*h*), stating the name, address, and description of the claimant, and the particulars of his title, showing that the trade mark has gone with the goodwill of the business (*i*), and accompanied by a statutory declaration verifying the several statements made (*k*). And further proof of title is to be furnished to the comptroller if he requires it (*l*).

Transmission on bankruptcy.

On the owner of a trade mark becoming bankrupt, his trade mark is transmitted with his business to his representative in bankruptcy, and will, together with the business and goodwill, be dealt with by him (*m*); and it cannot be objected to an assignment

by Shipman, J., in the American case of *Filkins* v. *Blackman*, 13 Bl. C. C. 440, that "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."

(*a*) Compare the observations of Wood, V.-C., as to the sale of a trade name, involving the same considerations, in *Churton* v. *Douglas*, Johns. 174; also *Shipwright* v. *Clements*, 19 W. R. 599.

(*b*) *Bury* v. *Bedford*, 4 De G. J. & S. 352. And see *Churton* v. *Douglas*, Johns. 174.

(*c*) *Sohl* v. *Geisendorf*, 1 Wils. (Ind.) 60; *Filkins* v. *Blackman*, 13 Bl. C. C. 440.

(*d*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1.

(*e*) *Shipwright* v. *Clements*, 19 W. R. 599; and see cases collected at p. 100, note (*a*).

(*f*) § 87.

(*g*) Rule 36.

(*h*) Rule 37.

(*i*) Rule 38, and see § 70.

(*k*) Rule 39. For form of application and declaration, see Form K. in Second Schedule to Rules.

(*l*) Rule 40.

(*m*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *Bury* v. *Bedford*, 4 De G. J. & S. 352; *Ex parte Young*, Dig. 537; *Rogers* v. *Taintor*, 97 Mass. 291; *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1; *Warren* v. *Warren Thread*

of a trade mark by the trustee in bankruptcy of the owner that the goodwill has ceased because the trustee does not himself carry on the business (*a*). Similarly on the winding up of a company the trade mark will pass with the goodwill of the business to the liquidator (*b*). But, apart from the statutory provisions regulating registration, it seems that a trade mark which owes its value to its owner's personal skill will not pass; and in the American case of *In re Swezey and Dart* (*c*) an insolvent trader was directed to be examined for the purpose of ascertaining whether the value of the mark was owing to such skill or to the general working of the factory. And it has been held in America that an assignee in bankruptcy cannot sell a trade secret or a trade mark of which the main feature is the bankrupt's name, so as to restrict the bankrupt's right to use it (*d*); and also that where one of the partners in a solvent firm becomes bankrupt, his interest in the name or trade mark of the firm cannot be sold, on the ground that his right is only to an undivided part of the mark, and that this is of no value apart from its connection with the goodwill (*e*).

Formation of partnership.

Upon the formation of a partnership, one member of which is the proprietor of a trade mark, the trade mark will, in the absence of express provisions, or tacit acquiescence by the other partners in the previous owner's retention of his trade mark (*f*), pass into and become part of the partnership assets, for the trade mark is but an element of the trade (*g*). In that case it seems that the partner who has newly acquired an interest in the trade mark will be entitled to registration as joint proprietor with his partner who is already on the register. And where, without the actual formation of a partnership, three persons agreed to carry on business in common, one manufacturing, another acting as exporting agent,

*Co.*, 134 Mass. 247. And see *Longman* v. *Tripp*, 2 Bos. & P. N. R. 67; and *Ex parte Foss*, 2 De G. & J. 230.

(*a*) *Hammond* v. *Malcolm Brunker & Co.*, 9 P. R. 301.

(*b*) *In re Bolanachi's Empire Chocolate Co.*, 89 L. T. (J.) 273.

(*c*) 62 How. Pr. 215.

(*d*) *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453; *Iowa Seed Co.* v. *Dorr*, 70 Iowa, 481.

(*e*) *Taylor* v. *Bemis*, 4 Biss. 406.

(*f*) *Kidd* v. *Johnson*, 100 U. S. 617, practically reversing *Kidd & Co.* v. *Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337. Cf. *Sanche* v. *Electrolibation Co.*, 60 *ib.* 1189.

(*g*) *Bury* v. *Bedford*, 4 De G. J. & S. 352, *per* Turner, L. J. And see *Condy* v. *Mitchell*, 37 L. T. N. S. 268, *ib.* 766; *Filkins* v. *Blackman*, 13 Bl. C. C. 440; *Swift* v. *Peters*, 11 U. S. Pat. Gaz. 1110; *Rogers* v. *Taintor*, 97 Mass. 291; *Sohier* v. *Johnson*, 111 Mass. 238; *Weston* v. *Ketcham* (2), 51 How. Pr. 455; *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183.

and the third as consignee and merchant at Rangoon, it was held on appeal that neither had an exclusive right to the combination of marks used on the goods which had passed through this course, though some of the marks in the combination had been used separately by one of the three before the arrangement between them was made; the decision being based on the fact that the combination as a whole had come to denote goods which had passed through the hands of all three (*a*).

Dissolution of partnership.

Upon the dissolution of a partnership among whose property a trade mark is included, whether that dissolution be brought about by the mutual agreement of the partners or by the death of one of them, the trade mark, as forming part of the partnership assets, and also on account of its close connection with the goodwill of the business, must be treated in the same way as the business and goodwill are treated, unless there is an express agreement for its discontinuance. If the business and goodwill are sold, the trade mark will be included in the sale (*b*); if the share of the retiring or deceased partner is, by arrangement, taken over by the continuing or surviving partner or partners, the retiring or deceased partner's interest in the trade mark passes with his share in the business, and must be included in the valuation of that share (*c*); if the partners merely agree to divide the partnership assets, so that each in effect carries on the same business, though they carry it on severally instead of jointly, then each is at liberty to use the mark as he did before (*d*). Thus, where H. B. Condy had brought

(*a*) *Robinson* v. *Finlay*, 9 Ch. D. 487. Compare *In re Jones*, 53 L. T. N. S. 1.

(*b*) *Bradbury* v. *Dickens*, 27 Beav. 53; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Banks* v. *Gibson*, 34 Beav. 566; *Rogers* v. *Taintor*, 97 Mass. 291; *Armistead* v. *Blackwell*, 1 U. S. Pat. Gaz. 603; *Caswell* v. *Hazard*, 52 Fed. Rep. 431.

(*c*) *Banks* v. *Gibson*, 34 Beav. 566; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Hazard* v. *Caswell*, 93 N. Y. 259; *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306; *Hoxie* v. *Chaney*, 143 Mass. 592. And see *Rorke* v. *Société des Huiles d'Olive*, 14 App. Div. N. Y. 173; *Stewart* v. *Einstein* v. *Sachill*, 64 U. S. Pat. Gaz. 1333. But it seems that if a retiring partner sets up no claim to an interest in the trade mark, and the continuing partner continues to use it without objection, the former will be held to have given up his interest in favour of the latter: *Kidd & Co.* v. *Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337. See *Kidd* v. *Johnson*, 100 U. S. 617; *Holt* v. *Menendez*, 128 U. S. 182; and *Simpson* v. *Wright* (1), 15 U. S. Pat. Gaz. 248. On the other hand, the continued use of the mark by the retiring partner, even on a spurious article, is evidence of his intention to preserve his interest in the mark: *Wright* v. *Simpson*, 15 *ib.* 968.

(*d*) *Banks* v. *Gibson*, 34 Beav. 566. And see *Bond* v. *Milbourn*, 20 W. R. 197; *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54; S. C. (2), 51 How. Pr. 455; *Young* v. *Jones Bros. & Co.*, 3 Hughes, 274; *Hazard* v. *Caswell*, 93 N. Y. 259; *Robinson* v. *Finlay*, 9 Ch. D. 487. In *In re Jones*, 53 L. T. N. S. 1, it was held that neither of the parties to a

into a partnership formed between himself and one Mitchell certain trade marks, which consisted in part of the former's name, it was held that after the dissolution, on which the goodwill became divisible in equal shares between the partners, Mitchell was equally entitled with Condy to continue to use the trade mark (*a*). And where certain partners sold to their co-partner their interest in the business premises and in certain personal property connected with the business, but not their interest in the goodwill or trade mark, it was held that they retained their right to use the trade mark concurrently with their former co-partner (*b*).

Transmission on death.

Where a trade mark has been transmitted by the death of the registered proprietor, his legal personal representative will be recognised as having the title to the mark. So long since as the reign of King George II., Lord Hardwicke, C., decided (*c*) that shares in the goodwill of a newspaper, entitled *The St. James's Evening Post*, were to be considered as part of the personal property of the proprietor; and that, on the death of the proprietor, his trade mark passes to his personal representative with the remainder of his personal property has never been questioned (*d*). Where letters of administration to a person who had adopted a trade mark for an article of his invention had not been taken out, it was held that his son could not, by merely continuing to make the article and use the trade mark after his father's death, acquire a right in the trade mark so as to be entitled to prevent another person from using it; still less could a purchaser of the son's business do so (*e*). But a rather different view of the results of such a proceeding has been taken in America (*f*).

Bequest of trade mark.

The proprietor of a trade mark may bequeath it according to pleasure (*g*), but this is subject to the provisions prohibiting its transmission otherwise than in connection with the goodwill of his

joint adventure was entitled, after this had come to an end, to use or register the joint trade marks as against the others.

(*a*) *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766. And see *Caswell* v. *Hazard*, 121 N. Y. 484; 18 Am. St. Rep. 833, which shows that in such cases neither partner may use his own name in such a way as to interfere with the use of the firm name by the other.

(*b*) *Huwer* v. *Dannenhoffer*, 82 N. Y. 499; *Hazard* v. *Caswell*, 93 N. Y. 259.

(*c*) *Giblett* v. *Read*, 9 Mod. 459.

(*d*) Thus, in *Croft* v. *Day*, 7 Beav. 84; 28 Leg. Obs. 378, the successful plaintiffs were the executors of the former proprietor of the business and trade mark. See *In re Farina* (4), 44 L. T. N. S. 99.

(*e*) *Hovenden* v. *Lloyd*, 18 W. R. 1132. And see *Singleton* v. *Bolton*, 3 Doug. 293.

(*f*) *Pratt's Appeal*, 117 Penn. St. 401.

(*g*) *Dent* v. *Turpin*, 2 J. & H. 139; *M'Lean* v. *Fleming*, 96 U. S. 245.

business (*a*), and a registered series of marks can only be transmitted as a whole (*b*).

Several proprietors.

By means of bequest, dissolution of partnership, &c., it is possible for more than one person to become severally entitled to the same trade mark at the same time (*c*), and concurrent rights may similarly arise by reason of concurrent substantial user by more firms than one (*d*). In such cases it was provided by the old rules, now repealed, that the several claimants might, by their common consent, be registered separately as separate proprietors of such trade mark; but no such provision is contained in the new rules, and Stirling, J., has held that in such a case the comptroller ought not to register each of the claimants (*e*). Where one of the claimants has got on to the register, the comptroller cannot register the other without the leave of the Court (*f*); neither can he do so where either application is opposed (*g*).

Position of subsequent proprietors.

By the 4th section of the Act of 1875, it was provided that every proprietor registered in respect of a trade mark subsequently to the first registered proprietor was, as respected his title to that trade mark, to stand in the same position as if his title were a continuation of the title of the first registered proprietor (*h*). This section is not re-enacted, but there appears to be no doubt that in ordinary cases the result will be the same as if it had been. It may be noticed that by § 76 the privileges conferred by § 3 of the Act of 1875 upon the *first* registered proprietor are now given to the registered proprietor.

### 3. *Discontinuance.*

When trade mark protected.

In order for a trade mark to be entitled to protection, it is now necessary either that the trade mark shall be registered, or, if an old mark incapable of registration is in question, that registration

(*a*) § 70. And see Rules 38, 39, and Form K.

(*b*) § 66.

(*c*) *Hine* v. *Lart*, 10 Jur. 106; *Dent* v. *Turpin*, 2 J. & H. 139; *Banks* v. *Gibson*, 34 Beav. 566. And see *Southorn* v. *Reynolds*, 12 L. T. N. S. 75; *In re Roger*, 12 P. R. 149; *Pratt's Appeal*, 117 Penn. St. 401; *Waukesha Hygeia Springs Co.* v. *Hygeia Sparkling Distilled Water Co.*, 63 Fed. Rep. 438, 443; *Batchelor* v. *Thomson*, 86 Fed. Rep. 630.

(*d*) *In re Powell*, Dig. 589; *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *Benbow* v. *Low* (4), 44 L. T. N. S. 875; *Day* v. *Neale*, Bacon, V.-C., May 24th, 1881; *In re Hodson & Co.*, 26 Sol. J. 43; and other cases on the Three Mark Rule. See note (*e*) to § 72, *infra*.

(*e*) *In re Ehrmann*, (1897) 2 Ch. 495.

(*f*) § 72.

(*g*) § 69.

(*h*) Compare *Hovenden* v. *Lloyd*, 18 W. R. 1132.

shall have been refused (*a*). The protection of a mark once registered terminates, therefore, with the cessation of registration.

Duration of registration.

The original registration of a trade mark is for a period of fourteen years; and unless previously to the expiration of that period the fee for continuance is paid, the comptroller may, after the end of three months from such expiration, remove the mark from the register, and in the same way from time to time at the expiration of every fresh period of fourteen years (*b*). No difficulty need in ordinary cases be apprehended from the prolongation of registration, for the exclusive use of a trade mark is no injury or deprivation to the public, but a protection against fraud.

If subsequently to the expiration of the fourteen years, but before the expiration of the additional three months, the proprietor pays the increased fee, the comptroller may accept the fee as if paid before the expiration of the fourteen years, and allow the mark to remain on the register (*c*).

Restoration to register.

Even after the removal from the register for non-payment of the fee, the mark may be restored to the register by the comptroller, if he is satisfied that it is just so to do, on payment of an additional fee.

Must be a vendible article with trade mark attached.

Independently of registration no trade mark can exist as such unless there is actually existent in the market a vendible article to which the mark is in some way affixed or attached (*d*), though it is not necessary for the mark to be externally visible—*e.g.*, where it is placed on the bottom of a wine cork, which is not seen until the bottle is bought and opened (*e*).

Registration now equivalent to public use.

The necessity of proving the existence of such an article so marked, in the case of registered marks, now no longer exists, since, subject to the connection with the goodwill of the business,

(*a*) § 77.
(*b*) § 79 (1), (2).
(*c*) § 79 (3).
(*d*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Edwards* v. *Dennis*, 30 Ch. D. 454; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *Candee* v. *Deere*, 54 Ill. 439; *Blackwell* v. *Dibrell*, 14 U. S. Pat. Gaz. 633; *Avery & Sons* v. *Meikle & Co.*, 27 U. S. Pat. Gaz. 1027. And see *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434. In *Cotton* v. *Gillard*, 44 L. J. Ch. 90, the plaintiffs had bought from the trustee in bankruptcy the interest of the bankrupt in a certain sauce and in his trade mark, but the sauce being compounded according to a secret which the trustee could not communicate, Sir G. Jessel, M. R., held that the plaintiffs could not use or protect the trade mark. See *Witthaus* v. *Braun*, 44 Md. 303; *Taylor* v. *Bemis*, 4 Biss. 406; *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453; *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54; S. C. (2), 51 How. Pr. 455; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Morgan* v. *Rogers*, 19 Fed. Rep. 596.
(*e*) *Moët* v. *Pickering*, 8 Ch. D. 372; *Moët* v. *Clybourn*, Dig. 533. But see *In re Kinahan*, 10 P. R. 393.

registration is to be deemed to be equivalent to public use (*a*); although, if a mark somewhat similar to, but not identical with, the registered mark has been used on goods on which the registered mark has never been used, though they are covered by the registration, the Court may decline to recognise the probability of deception (*b*). But in the case of old marks, it seems that a certificate of refusal will not entitle the unsuccessful applicant to his remedy, if discontinuance can be established. The 34th Rule under the Act of 1875 contained provisions intended to prevent the continuance of restrictions which no longer served any useful purpose, and this was put into practice in the case of *In re Ralph* (*c*). It has not been re-enacted; but since, by § 70, a trade mark is determinable with the goodwill, it may be held, though it is not clear, that the Court has jurisdiction under § 90 to remove from the register, on the application of any person aggrieved, a trade mark which has lost its right to existence by the discontinuance of its proprietor's business (*d*). Whether this is so or not, it appears very improbable that in such a case an injunction would be granted to protect it.

Abandonment by disuse.

"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" (*e*), and the neglect on the part of the owner which is fatal to his exclusive right may either take the shape of cessation of user on his own part, or of the growth of a concurrent right in others. Each of these depends upon intention. "To constitute abandonment" (*i.e.*, by cessation of user) "an intention to abandon must be shown. Mere non-user of a trade mark can no more be said to constitute abandonment than the mere non-user of a right to foul a stream belonging to a mill as an easement can be said to constitute an abandonment of the easement" (*f*). But when the word claimed as a trade mark had not been used during a period of eleven years, and the sale of the article on which it had been used had been discontinued, and the labels on which it had

(*a*) § 75. This is so also in the United States: *In re Dutcher Temple Co.*, U. S. Pat. Comm. Decis. 1871, 248. See *Sternberger* v. *Thalheimer*, 3 U. S. Pat. Gaz. 120.

(*b*) *Edwards* v. *Dennis*, 30 Ch. D. 454; *Hargreave* v. *Freeman*, (1891) 3 Ch. 39. Cf. *Phillips* v. *Ogden*, 12 P. R. 325.

(*c*) 25 Ch. D. 194.

(*d*) See *In re Batt*, (1898) 2 Ch. 432.

(*e*) *Per* Hughes, J., in *Blackwell* v. *Dibrell*, 14 U. S. Pat. Gaz. 633. See *Lavergne* v. *Hooper*, Ind. L. R. 8 Mad. 149.

(*f*) *Per* Chitty, J., in *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398. It would be evidence of intention to abandon if a trade mark owner were to break up his moulds and erase the mark from his books and lists: *Ib.*

appeared had been destroyed, it was held that there had been abandonment (*a*).

Abandonment by permitting infringements.

"The question of abandonment" (*i.e.*, by non-interference with infringers) "is one of intention, and the burden of establishing it lies upon the party who affirms it," said an American judge (*b*); and in the same way it was said in the High Court of Bengal (*c*) that the right of property in a trade mark acquired by user "would continue until it had been proved by evidence that the proprietor had abandoned it." In particular, where the trade mark owner is ignorant of infringements taking place, it will not be held that he has abandoned his rights because of his failure to enforce them, that failure being due to his ignorance of what was going on (*d*); but it may be assumed that there must be reasonable diligence shown in the defence of his rights. In *Barlow & Jones, Limited* v. *Johnson & Co.* (*e*), it was held that the owners of a name and trade mark were not debarred from enforcing their rights because, after detecting a former infringement and obtaining the undertaking of the infringer to discontinue the infringement, they had allowed a small quantity of the infringing goods to be sold in the market under the imitated name and trade mark and had themselves purchased some of such goods.

Distinctive words become descriptive.

With respect to trade marks consisting of words which originally were distinctive, it has occasionally happened that they have ceased to denote the manufacture of any particular person, and have become simply descriptive of a certain article or a certain principle of manufacture. When that has become the case, such words have ceased to be capable of protection as trade marks, having become *publici juris*, open to the use of all (*f*). But a composite mark is

(*a*) *In re Grossmith*, 6 P. R. 180. And see *Brouer* v. *Boulton*, 53 Fed. Rep. 389; *Royal Baking Powder Co.* v. *Raymond*, 70 Fed. Rep. 376; 85 *ib.* 231; *Daniel* v. *Whitehouse*, (1898) 1 Ch. 685, 689.

(*b*) Morris, Comm., in *Julian* v. *Hoosier Drill Co.*, 75 Ind. 408, in which a delay of three years was held not to amount to abandonment.

(*c*) In *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hyde, 185, *per* Levinge, J.

(*d*) *Weldon* v. *Dicks*, 10 Ch. D. 247; *In re Farina* (2), 27 W. R. 456; *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 408; *Williams* v. *Adams*, 8 Biss. 452; *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601.

(*e*) 7 P. R. 395, 408; and see *Clark Thread Co.* v. *Armitage*, 67 Fed. Rep. 896; 74 *ib.* 936; *Tetlow* v. *Tapper*, 85 Fed. Rep. 774; cf. *Ripley* v. *Bandey*, 14 P. R. 691, 944.

(*f*) *Per* Mellish, L. J., in *Ford* v. *Foster*, L. R. 7 Ch. 611. And see *Wheeler & Wilson Manufacturing Co.* v. *Shakespeare*, 39 L. J. Ch. 36; *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298; *Same* v. *Anderson*, W. N. 1883, p. 185; *Lazenby* v. *White*, 41 L. J. Ch. 354; *In re Hyde & Co.*, 7 Ch. D. 724; *Browne* v. *Freeman*, W. N. 1873, p. 178; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395; *In re Wills*, (1893) 2 Ch. 262; *National Starch Manufacturing Co.* v. *Munn's Patent Maizena & Starch*

not abandoned by isolated words or symbols contained in it being used by others (*a*); and it has been held in America that where a word has been properly appropriated as a trade mark, and has not been formally abandoned, use in a descriptive sense by persons other than the proprietor does not make it open to the public (*b*). Where a name, which it has been attempted to appropriate as a trade mark, has been in fact descriptive throughout, the case can hardly be said to have arisen of a discontinuance of a trade mark, inasmuch as it was invalid originally (*c*).

The three-mark rule.

In this connection the "three-mark rule," as it is called, becomes of importance. This rule originated in the discovery—soon after the Act of 1875 came into operation—that the same or substantially the same trade mark was in many instances in use by more firms than one, generally carrying on business in different parts of the country; and in order to avoid injustice being done in such cases the rule was laid down by the Commissioners of Patents, and acted on in various decisions of the Courts, that where two or three firms could prove that they had used the same or substantially the same mark on the same or substantially the same goods, to a substantial extent, before the passing of the Act of 1875, each should be allowed to register; but that where the mark had been used by more than three firms it was common to the trade (*d*); and on this principle it has been held that various marks were common in different trades (*e*). This rule is now incorporated in § 74, so far as is necessary for the purpose of determining what parts of a composite mark must be disclaimed as common.

Trade mark not abandoned by habitual user in combination with name.

In *Braham* v. *Bustard* (*f*) and *Ford* v. *Foster* (*g*) it was held that the habitual use of the manufacturer's name (which was alone a sufficient trade mark), before the special and distinctive appellation

*Co.*, (1894) A. C. 275; *In re Magnolia Metal Co.*, (1897) 2 Ch. 371; *Lea* v. *Millar*, Dig. 513; *Lea* v. *Deakin*, 11 Biss. 23; *Nera Stearine Co.* v. *Mowling*, 9 V. L. R. (E.) 98; *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 138 U. S. 537; *Smith* v. *Imus*, 32 Alb. L. J. 455; *Wolfe* v. *Goulard*, 18 How. Pr. 64; R. Cox, 226; *Burke* v. *Cassin*, 45 Cal. 467; 13 Amer. Rep. 204.

(*a*) *Sohl* v. *Geisendorf*, 1 Wils. (Ind.) 60; *Filley* v. *Child*, 16 Bl. C. C. 376.

(*b*) *Celluloid Manufacturing Co.* v. *Cellonite Manufacturing Co.*, 32 Fed. Rep. 94; *Selchow* v. *Baker*, 93 N. Y. 59; *Société, &c., de la Bénédictine* v. *Micaloviteh*, 36 Alb. L. J. 364; *Celluloid Manufacturing Co.* v. *Read*, 47 Fed. Rep. 712; *Shendy* v. *Silver*, 70 N. Y. Sup. Ct. 330.

(*c*) *Young* v. *Macrae*, 9 Jur. N. S. 322; *Raggett* v. *Findlater*, L. R. 17 Eq. 29; *In re Horsburgh*, 53 L. J. Ch. 237; *Rowland* v. *Breidenbach*, Dig. 386; *In re Leonard & Ellis*, 26 Ch. D. 288; *Bulloch, Lade & Co.* v. *Gray*, 19 Journ. of Jurisp. 218. And see p. 58, note (*a*), *supra*.

(*d*) See note (*e*) to § 72, *infra*.

(*e*) See notes to § 74, *infra*.

(*f*) 1 H. & M. 447.

(*g*) L. R. 7 Ch. 611.

of "Excelsior" in the one case and "Eureka" in the other, did not amount to an abandonment of the manufacturer's right in those appellations when used without the name, but that the manufacturer remained entitled to his essential mark. In *Lea* v. *Millar* (*a*) it was held that, in addition to the evidence as to the common use of the alleged trade mark by persons other than the plaintiff, the fact that the plaintiff had recently adopted a new label upon his goods, on the ground that his existing label did not afford sufficient protection, was a public abandonment of the latter. And in *Manhattan Medicine Co.* v. *Wood* (*b*), it was held that a trade mark had been lost by abandonment, a new form of bottle and label having been adopted in place of the old ones. An exclusive right to a mark may be lost by its owner using it habitually and exclusively upon goods which pass through other persons' hands so that they acquire a right in it (*c*); and it would appear that notwithstanding certain American decisions (*d*) to the effect that the habitual addition to a label of the name of the merchant to whom the goods are supplied does not deprive the owners of the label of their right to it, yet such a practice would cause the label to lose its distinctive character as indicating its proprietor's goods (*e*).

Abandonment by a retiring partner.

It has been held in the United States that a partner who, on retiring from the partnership, sets up no claim to an interest in the trade mark, and sees, without objection, the remaining partner continuing to use it, must be taken to have abandoned all interest in it (*f*). But it has also been held in America that the continued use of the mark by the retiring partner, even on a spurious article, is evidence that he does not intend to abandon his interest (*g*).

Abandonment by dismissal of suit.

In *Browne* v. *Freeman* (*h*) it was held that the plaintiff, having previously commenced a suit against an infringer of his trade mark, and then having got his bill dismissed with costs in consequence of being advised that his right was doubtful, had lost all rights in the trade mark. Under the registration system such a

(*a*) Dig. 513.
(*b*) 108 U. S. 218.
(*c*) *Robinson* v. *Finlay*, 9 Ch. D. 487.
(*d*) *Pike Manufacturing Co.* v. *Cleveland Stone Co.*, 35 Fed. Rep. 896; *Sheppard & Co.* v. *Stuart & Peterson*, 13 Phila. 117.
(*e*) *Wood* v. *Lambert*, 32 Ch. D. 247.
(*f*) *Kidd & Co.* v. *Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337. But see *Kidd* v. *Johnson*, 100 U. S. 617. See also *Swift* v. *Peters*, 11 U. S. Pat. Gaz. 1110; *Simpson* v. *Wright* (1), 15 *ib.* 248; *Holt* v. *Menendez*, 128 U. S. 182.
(*g*) *Wright* v. *Simpson*, 15 U. S. Pat. Gaz. 968.
(*h*) 12 W. R. 305. And see W. N. 1873, p. 178. See *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748.

loss of trade mark can seldom occur, except in the case of unregistered though certified marks, since the rights of a proprietor of a registered mark are such that it is impossible to suppose that in many cases such a proprietor would resign his claims without a struggle. With respect to marks unregistered, or even uncertified, there does not appear to be anything in the Act to prevent proof of the imitation of such marks being given in support of an action for unfair competition in trade carried on by means of actual intentional fraud, and not depending solely on the similarity of the marks.

Abandonment of registered marks not to be anticipated.

On the whole, it may be expected that, with respect to registered marks, there will be in the future but little discontinuance or abandonment, except where registration has been discontinued in consequence of non-compliance on the part of the registered proprietor with the requirements of the Act with respect to prolonged registration.

Infringement of disused mark.

In *Lemoine* v. *Ganton* (*a*), a plaintiff was allowed to recover nominal damages for the infringement by the defendant of a trade mark which the plaintiff had formerly used, but had ceased to use for a year. And it has also been held by the United States Commissioner of Patents that a person who, after having acquired certain rights in a trade mark, has discontinued his business for several years, recovers, on again commencing business, superior rights in the trade mark to those possessed by another person who has used the mark during the period of discontinuance (*b*).

Effect of removed mark.

By § 79 (5), as amended by the Act of 1888, a registered trade mark removed from the register is, for the purpose of any application for registration during one year next after the date of such removal, to be deemed to be a trade mark already registered.

Cancellation.

By § 91 power is given to the comptroller, upon a proper application, to cancel the whole or a part of the entry of a trade mark on the register. In this case a statutory declaration by the registered proprietor is necessary (*c*).

(*a*) 2 E. D. Smith, 343; R. Cox, 142.
(*b*) *Armistead* v. *Blackwell*, 1 U. S. Pat. Gaz. 603.
(*c*) See notes to § 91, *infra*, and Forms O. and P.

# CHAPTER IV.

## INFRINGEMENT.

Requisites for infringement.

When an action has been commenced, having for its object the restraint of an unfair competition in trade, carried on by means of an employment by the defendant of a trade mark identical, or nearly identical, with the plaintiff's, there must be established, in order for the action to be successful, the existence of the trade mark, the plaintiff's exclusive right therein (*a*), the fact of an imitation, and the absence of licence or acquiescence on the part of the plaintiff (*b*).

Fact of infringement.

Assuming, then, the validity of the trade mark and the rights of the plaintiff therein to be established, the next and most important point for the plaintiff to prove is the fact of infringement. The plaintiff has no right to say that the defendant shall not sell exactly the same article, better or worse, or an article looking exactly like his own unpatented article; but he has a right to say that the defendant shall not sell such article in such a way as to steal (so to call it) the plaintiff's trade mark, and make purchasers believe that it is the manufacture to which that trade mark was originally applied (*c*). In the language of the Common Law, the defendant has no right to sell his goods "as and for" those of the plaintiff (*d*); and "where it is shown that a dealer has the imitated article in his store, and offers it for sale as genuine, even though but a single sale is proved (*e*), that is sufficient to sustain an injunction against

(*a*) As to this, see *Witthaus* v. *Braun*, 44 Md. 303; *Popham* v. *Wilcox*, 38 N. Y. Super. Ct. 274; *Weston* v. *Ketcham* (1) and (2), 39 *ib.* 54; 51 How. Pr. 455; and *Compagnie Laferme* v. *Hendrickx*, Dig. 512.

(*b*) See *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; and *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137.

(*c*) See *per* Lord Cranworth, C., in *Farina* v. *Silverlock*, 6 De G. M. & G. 214; and *per* Lord Langdale, M. R., in *Franks* v. *Weaver*, 10 Beav. 297.

(*d*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; *Morison* v. *Salmon*, 2 Man. & Gr. 385; *Crawshay* v. *Thompson*, 4 *ib.* 357.

(*e*) See *Bondier* v. *Depatie*, 3 Dorion, 233. Cf. *Leahy* v. *Glover*, 10 P. R. 141, where it was held that an isolated case of misrepresentation by an employée who had acted without the employer's sanction and had since left his service, was not of itself enough to support an injunction against the employer.

a continuance of the wrong, and an action for such injunction will not be defeated solely on the ground that on the day it is brought the dealer happens not to have any of the article on hand" (*a*).

Fraudulent intention.

The question of how far a fraudulent intention in the mind of the defendant was necessary to entitle the plaintiff to obtain redress from him long remained a subject of discussion in connection with trade marks. The doctrine of the Common Law was that, inasmuch as the only manner in which the Common Law could be set in motion to repair the wrongful proceedings of an infringer was by the institution of an action on the case (*b*), an allegation of intentional fraud (*c*), supported by evidence was necessary to enable the plaintiff to bring his action to a successful conclusion (*d*).

First purchaser not deceived.

While, however, it was necessary at Common Law for a fraudulent intention to be proved, it was not required that the defendant should have represented to his immediate purchaser that the goods marked were of the plaintiff's manufacture; it was sufficient to bring the case within the reach of the law if he had sold the goods for the purpose of their being resold as and for goods of the plaintiff's manufacture, which object the mark attached to them by the defendant would be calculated to facilitate (*e*).

Early doctrine in Chancery.

When plaintiffs in trade-mark cases began to seek redress in the Court of Chancery, desirous of obtaining the more convenient remedy by way of injunction and account, which was superior to the damages to be gained at Common Law alike in the compensation for the past and in the security for the future, the Chancery judges held that the Courts in which they presided could act only in aid of and as ancillary to the legal right (*f*). And acting upon this same principle, they held that the rules by which they had to judge of infringement must be identical with those of the Common Law, the plaintiff's right to his remedy being considered to be

(*a*) *Per* the New York Court of Appeals in *Low* v. *Hart*, 90 N. Y. 467.

(*b*) See *Crawshay* v. *Thompson*, 4 Man. & G. 357.

(*c*) *I.e.*, that the defendant had acted knowingly—*scienter*.

(*d*) *Singleton* v. *Bolton*, 3 Doug. 293; *Morison* v. *Salmon*, 2 Man. & G. 385; *Crawshay* v. *Thompson*, 4 *ib.* 357; *Rodgers* v. *Nowill*, 5 C. B. 109; and *Myers* v. *Baker*, 3 H. & N. 802. See, too, *per* Parke, B., in *Taylor* v. *Ashton*, 11 M. & W. 415.

(*e*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; and see *Chappell* v. *Davidson*, 2 K. & J. 123; *Rose* v. *Loftus*, 47 L. J. Ch. 576; *Orr-Ewing & Co.* v. *Johnston & Co.*, 7 App. Cas. 219; *Balfour & Co.* v. *Kilburn & Co.*, 1 Hyde, 270.

(*f*) See *per* Lord Cottenham, C., in *Motley* v. *Downman*, 3 My. & Cr. 1.

based, not on any right of property in him, but on the fraudulent proceedings of the defendant (*a*). The cases which were frequently sent by Chancery judges to be tried at Common Law by a jury were, of course, tried in accordance with Common Law principles (*b*).

Same injury caused, whether actual fraud or not.

It is, however, apparent that the seriousness of the injury inflicted on the manufacturer who has acquired a reputation for excellence in a particular class of goods, denoted by a special trade mark, by the offering for sale in the market of other goods, side by side with his, bearing the same mark, is not affected by the question whether such rival goods are made and marked by a person who is aware of the reputation of the original goods and desirous of attracting to himself some of the profits of that reputation, or by one who is actuated by no such motives, and is even ignorant of the prior use of the mark. As Lord Cairns, C., said, in a well-known case (*c*):—"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." "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" (*d*). The first maker is defrauded, even though his rival's conduct be not intentionally fraudulent.

(*a*) *Blanchard* v. *Hill*, 2 Atk. 484; *Canham* v. *Jones*, 2 V. & B. 218; *Perry* v. *Truefitt*, 6 Beav. 66; *Croft* v. *Day*, 7 Beav. 84. And see the observations of V.-C. Wood in *Edelsten* v. *Vick*, 11 Hare, 78; *Collins Co.* v. *Cowen*, 3 K. & J. 428; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; *Hall* v. *Barrows*, 32 L. J. Ch. 548; and *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.

(*b*) *E.g.*, *Rodgers* v. *Nowill*, 5 C. B. 109.

(*c*) *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 391.

(*d*) *Per* Lord O'Hagan, *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 396; and see *per* Cotton, L. J., in *Singer Manufacturing Co.* v. *Loog* (3), 18 Ch. D. 412; *Blackwell* v. *Wright*, 73 N. Car. 310; *Curtiss* v. *Messler*, 13 Alb. L. T. 127.

Later doctrine in Chancery.

In 1838, Lord Cottenham, C., awarded a perpetual injunction in a case in which he rejected any imputation of intentional fraud (*a*), and this is not now necessary to obtain redress in equity. The principles in accordance with which relief will be given in equity were summed up as follows by Lord Westbury, C.:—"At Law the proper remedy is by action on the case for deceit, and proof of fraud on the part of the defendant is of the essence of the action; but this Court will act on the principle of protecting property alone, and it is not necessary for the injunction to prove fraud in the defendant, or that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by loss of custom is sufficient to support his title to relief. Neither will the plaintiff be deprived of remedy in Equity, even if it be shown by the defendant that all the persons who bought from him goods bearing the plaintiff's trade mark were well aware that they were not of the plaintiff's manufacture. If the goods were so supplied by the defendant for the purpose of being sold again in the market the injury to the plaintiff is sufficient. Again, it is not necessary for relief in Equity that proof should be given of persons having been actually deceived, and having bought goods with the defendant's mark, under the belief that they were of the manufacture of the plaintiff, provided that the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other" (*b*). It is not necessary for the plaintiff to show that the defendant knew whose trade mark his resembled (*c*), nor, in fact, to show that the defendant knew that his trade mark resembled any existing mark (*d*). "The action of the Court must depend upon the right of the plaintiff, and the injury done to that right. What the motive of the defendant may be, the Court has very imperfect means of knowing. If he was ignorant of the plaintiff's rights in the first instance, he is, as soon as he becomes acquainted with them and perseveres in infringing upon them, as culpable as if he had originally known them" (*e*). In short, "the

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

(*b*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185. That the rule of the Court of Chancery was as here stated, was recognised by the Court of Queen's Bench in *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537. And see *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639.

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

(*d*) *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Burgess* v. *Hills*, 26 Beav. 244; *Harrison* v. *Taylor*, 11 Jur. N. S. 408; *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hyde, 185. And see *per* Cotton, L. J., in *Singer Manufacturing Co.* v. *Loog* (3), 18 Ch. D. 412.

(*e*) *Per* Lord Cairns, C., in *Singer*

absence of fraudulent intention is no defence against an application to the Court for an injunction by the person whose property has been injured" (*a*); and even if a person who has in his possession a quantity of goods bearing a spurious trade mark, is not intending to sell them or part with them, but to use them for his own consumption, relief may be granted against him (*b*).

Indulgence to innocent offender.

It was, however, suggested by Lord Romilly, M. R., that the Court would not require a person to completely change a trade mark which he had taken *bonâ fide*, and without any intention of deception, but which did in point of fact resemble the trade mark of another person, since the complete change of trade mark might be of serious consequence to the unintentional offender (*c*); and it seems that an innocent licensee from a registered proprietor who was deemed by his conduct to have previously made over his rights in his trade mark to another person in whose employment he was, is entitled to some consideration upon an interlocutory application (*d*). Again, it has been held in America that a plaintiff may lose by delay his right to an injunction against an innocent vendor of goods spuriously marked, whatever might be the case with regard to the guilty manufacturer (*e*).

Fraudulent intention, as affecting account, or damages.

It is also important to prove the fact of fraudulent intention, having regard to the account to be obtained, which may not be given in respect of sales by the defendant during such time as he

*Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376, 391. And see *In re Paine* (2), (1893) 2 Ch. 567.

(*a*) *Per* Stuart, V.-C., in *Clement* v. *Maddick*, 1 Giff. 98; *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434; *Rose* v. *Loftus*, 47 L. J. Ch. 576; *Upmann* v. *Forester*, 24 Ch. D. 231; *Cowen* v. *Hulton*, 46 L. T. N. S. 897; *Lewis's* v. *Goodbody*, 67 L. T. N. S. 194; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710; *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893. The same principle holds good in Ireland: *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236; in Scotland: *Crawford* v. *Bernard*, 11 P. R. 580; in the United States: *McLean* v. *Fleming*, 96 U. S. 245; *Stonebraker* v. *Stonebraker*, 33 Md. 252; *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298; *Colman* v. *Crump*, 70 N. Y. 573; *Blackwell* v. *Wright*, 73 N. Car. 310; *McCann* v. *Anthony*, 21 Mo. App. 83; *Williams* v. *Brooks*, 50 Conn. 278; *Pratt's Appeal*, 117 Penn. St. 401; *Cuervo* v. *Landauer*, 63 Fed. Rep. 1003; *El Modello Cigar Manufacturing Co.* v. *Gato*, 25 Fla. 886; 23 Am. St. Rep. 537; *Taendstieksfabrik Aktiebolaget Vulcan* v. *Myers*, 65 N. Y. Sup. Ct. 161; in India: *Balfour & Co.* v. *Kilburn & Co.*, 1 Hydo, 270; *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hydo, 185; *Graham & Co.* v. *Kerr, Dods & Co.*, 3 Beng. L. R. App. 4; and in Australia: *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216: *Hennessy* v. *Hogan*, 6 W. W. & A'B. Eq. 225; *Curtiss* v. *Messler*, 13 Alb. L. T. 127.

(*b*) *Upmann* v. *Forester*, 24 Ch. D. 231. But see *Upmann* v. *Currey*, 29 Sol. J. 735; and *American Tobacco Co.* v. *Guest*, (1892) 1 Ch. 630.

(*c*) *Bass* v. *Dawber*, 19 L. T. N. S. 626.

(*d*) *Lewis's* v. *Goodbody*, 67 L. T. N. S. 194.

(*e*) *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29.

continued in ignorance that he was infringing the plaintiff's rights (*a*), or with a view to the question of damages (*b*).

Fraudulent intention in case of delay.

Again, in *Rodgers* v. *Rodgers* (*c*), Mellish, L. J., expressed an opinion that, in a case in which the application for an injunction would, in the absence of proof of actual fraud, have to be rejected on the ground of long user by the defendants without assertion by the plaintiffs of their right, yet if it were clearly made out that the use of the trade mark by the defendants was fraudulent, and that it had the practical effect of deceiving the public, then in such a case the intentional fraud would operate to prevent the application for the injunction from being defeated on the ground of lapse of time.

In other respects.

Further, in *Radde* v. *Norman* (*d*), it was held by Wickens, V.-C., to be quite obvious that much less absolute proof of the plaintiff's title would be required where there was reason to doubt the defendant's good faith; and in *Cope* v. *Evans* (*e*), Hall, V.-C., said that where fraudulent intention was proved, the Court would restrain the defendants without further inquiry.

Circumstances pointing to fraudulent intention.

In default of direct proof of fraudulent intention, there are various circumstances which may serve to point to the conclusion that such intention has existed; thus, the continuing to use a mark after objections raised (*f*); the exact imitation of peculiar characteristics (*g*); the addition to an existing mark of a feature

(*a*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578. See *Rose* v. *Loftus*, 47 L. J. Ch. 576. As to the practice in the United States, see *Oakes* v. *Tonsmierre*, 49 Fed. Rep. 447.

(*b*) See *Faber* v. *D'Utassey*, 11 Abb. Pr. N. S. 399; *Weed* v. *Peterson*, 12 Abb. Pr. N. S. 173; *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639, where the principles applicable to an action for damages and an action for an injunction are discussed at length by Lopes, L. J.

(*c*) 31 L. T. N. S. 285. And see *McLean* v. *Fleming*, 96 U. S. 245, where an injunction which had been granted was confirmed by the U. S. Supreme Court, notwithstanding a delay of many years.

(*d*) L. R. 14 Eq. 348.

(*e*) L. R. 18 Eq. 138. And see *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Goodall* v. *Wilkinson*, 90 L. T. (Journal) 357; 91 *ib.* 29; *Wilson* v. *Maxfield*, L. J. N. of C. 1875, p. 51; *McLean* v. *Fleming*, 96 U. S. 245; *Moxie Nerve Food Co.* v. ——, 43 U. S. Pat. Gaz. 888; *Miller Tobacco Manufactory* v. *Commerce*, 45 N. J. Law, 123; *Scheuer* v. *Miller*, 74 Fed. Rep. 225.

(*f*) See *per* Lord Cairns in *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; and *per* Cotton, L. J., and Lord Blackburn in *Singer Manufacturing Co.* v. *Loog* (3), 18 Ch. D. 395; 8 App. Cas. 15. Also *Williams* v. *Osborne*, 13 L. T. N. S. 498; *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434; *In re Paine* (2), (1893) 2 Ch. 567; *Walker* v. *Alley*, 13 Grant Up. Can. Ch. 366; *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236; *Holt* v. *Menendez*, 128 U. S. 182.

(*g*) *Hine* v. *Lart*, 10 Jur. 106; *McLean* v. *Fleming*, 96 U. S. 245; *Frese* v. *Bachof* (2), 14 Bl. C. C. 432; *Davis* v. *Reid*, 17 Grant Up. Can. Ch. 69; *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29; *Landreth & Sons* v. *Landreth*, 22 Fed. Rep. 41;

taken from the plaintiff's mark (*a*); the imitating changes introduced by the plaintiff (*b*); the removal, one by one, of points of difference, which originally served to distinguish the defendant's mark from the plaintiff's (*c*); the marking goods in obedience to an order to imitate the plaintiff's mark (*d*); the giving orders for that to be done (*e*); the adoption of an essential part of the plaintiff's mark, with a trifling and colourable alteration (*f*); the placing of a word resembling the plaintiff's word on the same spot on an article of the same shape (*g*); the statement that the sources from which both plaintiff and defendant derive their raw material, and after which the plaintiff's works are named, are the defendant's sole property (*h*); the use on the goods of the name of a town where the defendant does not carry on business but the plaintiff does (*i*); the copying directions for use (*k*); the giving thanks to the plaintiff's customers for past favours (*l*); the adoption of a similar type to the plaintiff's (*m*); the use of large type for a catchword (*n*); or of small type for a word showing the article not to be

*Glen Cove Manufacturing Co.* v. *Ludeman*, 23 Bl. C. C. 46; *Southern White Lead Co.* v. *Carey*, 25 Fed. Rep. 125; *Anheuser Busch Brewing Association* v. *Clarke*, 26 Fed. Rep. 410; *Pierce* v. *Guittard*, 68 Cal. 68.

(*a*) *Dixon* v. *Jackson*, Ct. of Sess. Cas. 3rd Ser. V. 326 (a star added); *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417.

(*b*) *Braham* v. *Beachim* (1), 7 Ch. D. 848; *Siegert* v. *Findlater*, *ib.* 801.

(*c*) *Farina* v. *Cathery*, L. J. N. of C. 1867, p. 134; *Brown* v. *Mercer*, 37 N. Y. Super. Ct. 265; *Bell, Black & Co.* v. *Bell & Co.*, Dig. 514; *Reynolds & Son* v. *Walker*, 87 L. T. (Journal) 93; *Celluloid Manufacturing Co.* v. *Cellonite Manufacturing Co.*, 32 Fed. Rep. 94; *Pratt's Appeal*, 117 Penn. St. 401. And see *Giron* v. *Gartner*, 47 Fed. Rep. 467.

(*d*) *Woollam* v. *Ratcliff*, 1 H. & M. 259.

(*e*) *Godillot* v. *Hazard*, 81 N. Y. 263; *Twentsche Stoom Bleekery Goor* v. *Ellinger & Co.*, 26 W. R. 70.

(*f*) *Radde* v. *Norman*, L. R. 14 Eq. 348 ("Leopoldsalt" for "Leopoldshall"); *Derby Photographic Dry Plate Co.* v. *Pollard, Graham & Co.*, 2 Times L. R. 276 ("Derwent" for "Derby"); *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217 (a T for a cross); *Avery & Sons* v. *Meikle & Co.*, 27 U. S. Pat. Gaz. 1027; *Davis* v. *Reid*, 17 Grant Up. Can. Ch. 69; *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434; *Balfour & Co.* v. *Kilburn & Co.*, 1 Hyde, 270; *Hiram Walker & Sons* v. *Mikolas*, 79 Fed. Rep. 955.

(*g*) *Slazenger & Sons* v. *Feltham & Co.*, 6 P. R. 531.

(*h*) *Wheeler* v. *Johnston*, 3 L. R. Ir. 284.

(*i*) *Anheuser Busch Brewing Association* v. *Piza*, 23 Bl. C. C. 245; *Southern White Lead Co.* v. *Carey*, 25 Fed. Rep. 125.

(*k*) *Franks* v. *Weaver*, 10 Beav. 297; *Sedon* v. *Senate*, Dig. 18; *Youatt* v. *Winyard*, 1 Jac. & W. 394; *Blofeld* v. *Payne*, 4 B. & Ad. 410; *Day* v. *Walls*, 12 Phila. 274; *Simmons Medicine Co.* v. *Simmons*, 81 Fed. Rep. 163; and many other cases. See, however, *Gessler* v. *Grieb*, 80 Wisc. 21; 27 Am. St. Rep. 20.

(*l*) *Mogford* v. *Courtenay*, 45 L. T. N. S. 303; *Walker* v. *Alley*, 13 Grant Up. Can. Ch. 366.

(*m*) *India Rubber Comb Co.* v. *Rubber Comb & Jewellery Co.*, 45 N. Y. Super. Ct. 258; *Potter* v. *McPherson*, 28 N. Y. Sup. Ct. 559.

(*n*) *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Metzler* v. *Wood*, 8 Ch. D. 606; *Dence* v. *Mason* (1), Dig. 534; *Otard, Dupuy & Co.* v. *Otard de Montebello Cognac Co.*, 9 Times L. R. 295; 10 *ib.* 67; *Bayer* v. *Baird*, 15 P. R. 615; *Foot* v. *Lea*, 13 Ir. Eq. 484; *Keller* v. *Goodrich Co.*, 117 Ind. 556; 10 Am. St. Rep. 88.

the original (*a*); the imitation of numbers (*b*) or initials (*c*) used by the plaintiff; the imitation of the barrels (*d*), or bottles (*e*), containing the plaintiff's article; the buying up and using the plaintiff's old bottles (*f*); the use by the defendant of a name not his own (*g*), possibly under the authority of some person who bore the same name as the plaintiff (*h*); the formation of a partnership with another person, whose name or initial was such as to enable the defendant to imitate the plaintiff's mark with some specious pretence of legality (*i*); the addition of "and Co." after the name (*k*); the alteration of a name acquired by purchase with the goodwill of a business, so as to assimilate it to the name of another firm carrying on a similar business (*l*); the removal into the plaintiff's neighbourhood (*m*); the adoption of a name of a manufactory similar to that used by another, and placing it on goods, but keeping it out of the Directory (*n*); the making an improper use

(*a*) *Day* v. *Binning*, C. P. Coop. 489; *Glenny* v. *Smith*, 2 Dr. & Sm. 476; *Hookham* v. *Pottage*, L. R. 8 Ch. 91; *Robineau* v. *Charbonnel*, W. N. 1876, p. 160; *Dence* v. *Mason* (1), Dig. 534; 41 L. T. N. S. 573; *Singer Manufacturing Co.* v. *Spence*, 10 P. R. 293, 306; *Colton* v. *Thomas*, 7 Phila. 257; *Chubb* v. *Priest*, 1 L. T. 142; *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216; *Morgan* v. *Schuyler*, 79 N. Y. 490; *Giron* v. *Gartner*, 47 Fed. Rep. 467; *Hohner* v. *Gratz*, 52 Fed. Rep. 871.

(*b*) *Humphreys' Specific Homœopathic Medicine Co.* v. *Wenz*, 14 Fed. Rep. 250.

(*c*) *Bayer* v. *Baird*, 15 P. R. 615; *Bayer* v. *Connell* (2), 16 *ib.* 157.

(*d*) *Moorman* v. *Hoge*, 2 Sawy. 78; *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392.

(*e*) *Henry* v. *Price*, 1 Leg. Obs. 364; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Wolfe* v. *Goulard*, 18 How. Pr. 64; *Laird* v. *Wilder*, 9 Bush, 131; *Congress Co.* v. *High Rock Co.*, 45 N. Y. 291; *Wilder* v. *Wilder*, Dig. 372; *Wolfe* v. *Hart*, 4 V. L. R. Eq. 125; *Fullwood* v. *Fullwood* (1), W. N. 1873, pp. 93, 185; *Hostetter* v. *Adams*, 20 Bl. C. C. 326; *Carbolic Soap Co.* v. *Thompson*, 25 Fed. Rep. 625; *Moxie Nerve Co.* v. *Baumbach*, 32 Fed. Rep. 205; *Grezier* v. *Lutran*, 13 P. R. 1; *Cook & Bernheimer Co.* v. *Ross*, 73 Fed. Rep. 203.

(*f*) *Rose* v. *Henley*, Dig. 551; *Allen* v. *Richards*, 26 Sol. J. 658; *Hostetter* v. *Anderson*, 1 V. R. Eq. 7; *Hostetter Co.* v. *Brueggeman Reinert Distillery Co.*, 46 Fed. Rep. 198; *Hostetter Co.* v. *Becker*, 73 Fed. Rep. 297.

(*g*) *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Barber* v. *Manico*, 10 P. R. 93.

(*h*) *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450; 12 Amer. Rep. 401; *Perks* v. *Hall & Co.* W. N. 1881, p. 111; *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215; *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601; *William Rogers Manufacturing Co.* v. *Rogers & Spurr Manufacturing Co.*, 11 Fed. Rep. 495; *Edge* v. *Harrison*, 8 P. R. 74; and see cases at p. 261, note (*a*).

(*i*) *Croft* v. *Day*, 7 Beav. 84 (Day & Martin); *Moët* v. *Clybouw*, Dig. 533 (M. & C.). And see *Schweitzer* v. *Atkins*, 37 L. J. Ch. 847; *Hallett* v. *Cumston*, 110 Mass. 29; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888; *Rendle* v. *Rendle & Co.*, 63 L. T. N. S. 94; *Edge* v. *Harrison*, 8 P. R. 740.

(*k*) *Churton* v. *Douglas*, Johns. 174; *Fullwood* v. *Fullwood* (1), W. N. 1873, pp. 93, 185; *Holt* v. *Smith*, 4 Times L. R. 329; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888; *Devlin* v. *Devlin*, 69 N. Y. 212; *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416. And see *Godillot* v. *American Grocery Co.*, 71 Fed. Rep. 873. Cf. *Duryea* v. *National Starch Manufacturing Co.*, 79 Fed. Rep. 651.

(*l*) *Holt* v. *Smith*, 4 Times L. R. 329. And see *National Folding Box and Paper Co.* v. *National Folding Box Co.*, 43 W. R. 156.

(*m*) *Lee* v. *Haley*, L. R. 5 Ch. 155; *Fullwood* v. *Fullwood* (1), W. N. 1873, pp. 93, 185.

(*n*) *Rodgers* v. *Rodgers*, 31 L. T. N. S. 285.

of the defendant's relationship to the plaintiff (*a*); the claiming untruly to be the sole proprietor (*b*); the making an unfair reference to a former partnership (*b*); the making an intentional misstatement as to the date of the commencement of a business (*c*), or as to prizes gained at an exhibition (*d*); the false pretence of an appointment as purveyor to a royal personage (*d*); have all been held to afford ground for reasonable suspicion of the presence of an *animus fraudandi*.

Circumstances pointing to absence of fraud.

On the other hand, if the defendant uses, on the goods which he is alleged to be endeavouring to pass off as the plaintiff's, a distinct and obvious trade mark of his own, or if he states plainly and in fair-sized and clear type that such goods are in fact manufactured by himself, there is a strong indication that the defendant has no intention of attempting deception (*e*). So, again, if the defendant has ventured to display at a public exhibition goods bearing the mark to which exception is afterwards taken (*f*); or if he has truly stated the connection between himself and the original adopter of the trade mark (*g*); or if, when using bottles moulded with the plaintiff's name, which have come into his possession without

(*a*) *Gouraud* v. *Trust*, 10 N. Y. Sup. Ct. 627. And see *Otard Dupuy & Co.* v. *Otard de Montebello Cognac Co.*, 9 Times, L. R. 295; 10 *ib.* 67.

(*b*) *Wolfe* v. *Alsop*, 10 V. L. R. (E.) 41.

(*c*) *Fullwood* v. *Fullwood* (2), 9 Ch. D. 176; *Blackwell* v. *Armistead*, 5 Amer. L. T. 85.

(*d*) *Cave* v. *Myers*, Dig. 304.

(*e*) *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 444; so, too, in *Cheavin* v. *Walker*, 5 Ch. D. 850, where the goods were stated to be manufactured by the defendants. And see *Beard* v. *Turner*, 13 L. T. N. S. 746; *Raggett* v. *Findlater*, L. R. 17 Eq. 29; *Singer Manufacturing Co.* v. *Loog* (3), 18 Ch. D. 395; *Packham & Co.* v. *Sturgess & Co.*, 15 P. R. 669; *Mages Furnace Co.* v. *Le Barron*, 127 Mass. 115; *Wolfe* v. *Goulard*, 18 How. Pr. 64; *McCartney* v. *Garnhart*, 45 Mo. 593; *Gilman* v. *Hunnewell*, 122 Mass. 139; *Ayer* v. *Rushton*, 7 Daly, 9; *Jaros Hygienic Underwear Co.* v. *Simons*, 49 Fed. Rep. 276; *Dadirrian* v. *Yacubian*, 72 Fed. Rep. 1010; *Carlsbad* v. *Schultz*, 78 Fed. Rep. 469; *Gessler* v. *Grieb*, 80 Wisc. 21; 27 Am. St. Rep. 20; *Parsons* v. *Gillespie*, 17 N. S. W. Rep. (Eq.) 227; (1898) A. C. 239. But compare *Walker-spoon* v. *Currie*, L. R. 5 H. L. 508; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; *Perry* v. *Truefitt*, 6 Beav. 66; *Braham* v. *Bustard*, 1 H. & M. 447; *Ford* v. *Foster*, L. R. 7 Ch. 611; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57; *Henderson* v. *Jorss*, Dig. 198; *Singer Manufacturing Co.* v. *Kimball & Morton*, Ct. Sess. Cas., 3rd ser. XI. 267; *Lea* v. *Wolff*, 46 How. Pr. 157; *Field* v. *Lewis*, Dig. 280; *Rose* v. *Loftus*, 47 L. J. Ch. 576; *Eno* v. *Stephens*, Dig. 609; *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Williams* v. *Johnson*, 2 Bos. 1; *Phalon* v. *Wright*, 5 Phila. 464; *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402; *Whitney* v. *Hickling*, 5 Grant. Up. Can. Ch. 605; *Hier* v. *Abrahams*, 82 N. Y. 519; *Thornton* v. *Crowley*, 47 N. Y. Super. Ct. 527; *Hegeman & Co.* v. *O'Byrne*, 9 Daly, 264; *Frese* v. *Bachof* (2), 14 Bl. C. C. 432; *Carroll* v. *Ertheiler*, 1 Fed. Rep. 688; *Fleischmann* v. *Schuckmann*, 62 How. Pr. 92; *Lewis* v. *Klapproth*, 11 Vict. L. R. 214.

(*f*) *Beard* v. *Turner*, 13 L. T. N. S. 746.

(*g*) *Emerson* v. *Badger*, 101 Mass. 82; *Gilman* v. *Hunnewell*, 122 *ib.* 139.

fraud, he places his own labels on the bottles in place of the plaintiff's (*a*).

Fraud unnecessary where mark registered.

A registered trade mark is property, and evidence of fraudulent intention is unnecessary in a case of alleged infringement of such a mark, as appears from the Patents Act, 1883, § 76 (*b*), in accordance with which the registration of a person as proprietor of a trade mark is *primâ facie* evidence of his right to the *exclusive use* of such trade mark, and, after the expiration of five years from the date of such registration, conclusive evidence of his right to the exclusive use of such trade mark, subject to the provisions of the Act.

Where mark registered, infringement must be of mark as registered.

But when infringement of a registered trade mark is in question, the point is, not whether there has been infringement of the mark which the plaintiff has used in his business, but whether there has been infringement of the mark which he has actually registered. Thus, Jessel, M. R., said, in *Ellis & Sons* v. *Ruthin Soda Water Co.* (*c*), "As I understand the Trade Marks Act, if you come for trade mark and not for actual fraud, you can only sue in respect of what you had registered as a trade mark." And in considering whether there has been infringement of the registered mark, it is necessary to see whether the essential particular in that registered mark has been imitated. Thus it was held by Jessel, M.R., in *In re Horsburgh* (*d*), that there was no conflict between two marks which combined substantially the same descriptive word with different devices, since the essential particulars, the devices, being different, it was immaterial that the marks resembled each other in a non-essential feature.

Burden of proof.

When a defendant has taken the material and essential part of the plaintiff's trade mark, the burden is upon the defendant to disprove the probability of deception, not upon the plaintiff to prove it (*e*).

(*a*) *Rose* v. *Loftus*, 47 L. J. Ch. 576; *Barrett* v. *Gomm*, 74 L. T. (Journal) 388; *Barrett* v. *White*, North, J., May 12th, 1883.

(*b*) This re-enacts § 3 of the Trade Marks Registration Act, 1875. See *Jarrett* v. *British North Borneo Cigar Co.*, 37 Sol. J. 116.

(*c*) Jessel, M.R., Nov. 21st, 1879. And see *Nuthall* v. *Vining*, C. A., Jan. 21st, 1880; *Lamplough* v. *Beedzler*, C. A., Nov. 12th, 1880; *Russell & Sons, Ld.* v. *Smith*, Jessel, M. R., June 18th, 1880; *In re Lyndon*, 32 Ch. D. 109; *Crawford* v. *Bernard*, 11 P. R. 580.

(*d*) 53 L. J. Ch. 227. And see *Lucke* v. *Webster*, Jessel, M. R., April 4th, 1879; *In re Loftus*, (1894) 1 Ch. 193; *Harris Drug Co.* v. *Stucky*, 46 Fed. Rep. 624.

(*e*) *Ford* v. *Foster*, L. R. 7 Ch. 611; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434.

Infringement of names as old marks.

With respect to trade marks used before the passing of the Trade Marks Registration Act, 1875, and consisting of a name printed or stamped in ordinary characters, which might be the case independently of the Act, and which may still be protected if registered as old marks (*a*), it has been held that it is not necessary, in order to obtain an injunction, to prove the *scienter* where the infringer does not bear the name he has assumed (*b*), but that, on the other hand, where he does bear that name, such evidence must be produced (*c*); and, in the same way, where two firms have become entitled to use the same trade mark or firm name, it is only in a case of fraud that an injunction will be granted; and an allegation that the defendants use the mark on inferior goods is not sufficient, since, if they have the right to use it, they can use it as they please (*d*).

Infringement of names as new marks.

With respect to names first used as trade marks after the passing of the Act of 1875, the requirement that they shall be "printed, impressed, or woven, in some particular and distinctive manner" (*e*), renders the mere use of the same name no infringement, unless the particular and distinctive manner is also copied, in which case evidence of actual intentional fraud will be unnecessary, whatever may be the name of the infringer. Similarly, the registration by a trader of a facsimile of his own signature will not prevent another trader of the same name from using, as a trade mark, a facsimile of his signature (*f*).

Colour.

In the same way, where a trade mark consisting of the coloured threads which form the heading to a piece of stuff (*g*), or of the representation of a coin (*h*), or of any other mark in which colour

(*a*) *In re Hopkinson*, (1892) 2 Ch. 116.

(*b*) *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *McLean* v. *Fleming*, 96 U. S. 245.

(*c*) *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Turton & Sons, Ld.* v. *Turton*, 42 Ch. D. 128; *Valentine* v. *Valentine*, 31 L. R. Ir. 488; *Jamieson & Co.* v. *Jamieson*, 15 P. R. 169; *McLean* v. *Fleming*, 96 U. S. 245. And see *Saunders* v. *Sun Life Assurance Company of Canada*, (1894) 1 Ch. 537; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

(*d*) *Rogers* v. *Taintor*, 97 Mass. 291; *Emerson* v. *Badger*, 101 *ib.* 82. See *Carlsbad* v. *Tibbetts*, 51 Fed. Rep. 852.

(*e*) Patents Act, 1883, § 64, amended by Act of 1888. And see *In re Gianaclis*, 6 P. R. 467; *In re Hannay*, 7 P. R. 46; *In re Edge*, 8 P. R. 207.

(*f*) *Crawford* v. *Bernard*, 11 P. R. 580.

(*g*) *Mitchell* v. *Henry*, 15 Ch. D. 181.

(*h*) *In re Robinson*, 29 W. R. 31. And see *In re Horsburgh*, 53 L. J. Ch. 237. In America it has been held that where the identical form, size, colour, and style of a numeral registered as a trade mark had been copied, an infringement had been committed, although it would have been no infringement to have used the numeral without copying those peculiarities: *Kinney* v. *Allen*, 1 Hughes, 106.

is essential, and which would lose its distinctiveness by being registered in the ordinary way, has been registered by deposit, it will not be infringed unless the colour and arrangement have been imitated. But, where the trade mark does not substantially consist in colour, and has been registered in the ordinary way, then, though the mark has been registered in colour, the exclusive right to use the mark in any colour is now given to the registered proprietor (*a*).

Mode of comparing uncoloured marks.

When it is alleged that a trade mark registered without colour has been infringed, it has been said that the proper manner of comparing the two trade marks is to compare their designs in the same size and free from colour, and that similarities in respect of colour in actual use should only be regarded in order either to prove fraud or to turn the scale when the question of infringement, leaving colour out of sight, is very difficult to decide (*b*). Where the plaintiffs had used a label for coffee, coloured red, white and blue, and containing the words "red, white and blue label," and had registered it without colour, the use by others of labels similarly coloured and containing the words was restrained (*c*). Another mode of comparing two trade marks is to compare the designs in the same colour (*d*), but this is more appropriate to cases of opposed registration.

What is infringement.

The real question which the Court has to try in a case of alleged infringement of trade mark, is whether what the defendant has done is calculated to deceive, whether there is so much imitation that goods bearing the one mark may be readily mistaken for goods bearing the other, and whether a careful inspection is necessary to distinguish the mark and appearance of the former goods from those of the latter (*e*).

*Croft* v. *Day*.

In *Croft* v. *Day* (*f*), it was remarked by Lord Langdale, M. R., that two things were necessary for the accomplishment of a fraud such as was there contemplated: "First, there must be such a general resemblance of the forms, words, symbols, and accompani-

(*a*) Patents Act, 1883, § 67.

(*b*) *Per* Ct. of App. in *Nuthall* v. *Vining*, C. A., Jan. 21st, 1880. Cf. *In re La Société Anonyme des Verreries de l'Etoile*, (1894) 2 Ch. 26; *In re Turney*, 11 P. R. 37; *Jarrett* v. *British North Borneo Cigar Co.*, 37 Sol. J. 116.

(*c*) *Hanson* v. *British Tea and Trading Association, Ld.*, Bacon, V.-C., April 9th, 1884; C. A. June 19th, 1884. The same trade mark was afterwards refused registration under the Patents Act, 1883: *In re Hanson*, 37 Ch. D. 112.

(*d*) *In re Worthington*, 14 Ch. D. 8.

(*e*) See *per* Bynum, J., in *Blackwell* v. *Wright*, 73 N. Car. 310.

(*f*) 7 Beav. 84.

ments 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 was 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 was improperly sought to be sold. For the accomplishment of such a fraud it was 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" (*a*). In that case, however, a deliberate attempt was made to represent the defendant's establishment as the plaintiff's, and the injury done to the plaintiff by the sale of goods bearing the spurious marks instead of his genuine goods is ordinarily sufficient to entitle him to his remedy, independently of any habit induced in the customer to resort to the defendant instead of to the plaintiff.

Tests of infringement.

By what test, then, has it to be determined whether there is such a degree of similarity as to require the interference of the Court?

Actual deception.

In the first place, where one person has adopted the trade mark of another, or a mark nearly resembling it, and there is evidence of actual deception—that is to say, that any one has in fact been thereby induced to buy the defendant's goods as being the goods of the plaintiff—the question of resemblance has been decided by the test of facts, and the Court will restrain the defendant without further inquiry (*b*), unless it is clearly of opinion that the resemblance is so slight that no rational person ought to have been deceived (*c*). It is not, indeed, necessary that there shall have been actual deception (*d*), or damage sustained (*e*); but since, unless that can be proved, the case which the Court has to try is a

(*a*) And see *Edelsten* v. *Vick*, 11 Hare, 78; *Rowley* v. *Houghton*, 2 Brews. 303; R. Cox, 486; *Enoch Morgan's Sons' Co.* v. *Schwachhofer*, 55 How. Pr. 37.

(*b*) *Cope* v. *Evans*, L. R. 18 Eq. 138. And see *Woollam* v. *Ratcliff*, 1 H. & M. 259; *McLean* v. *Fleming*, 96 U. S. 245; *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392; *Kinney* v. *Basch*, Dig. 542.

(*c*) *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512.

(*d*) *Abbott* v. *Bakers & Confectioners' Tea Association*, W. N. 1871, p. 207; *Field* v. *Lewis*, Dig. 280. And see *Filley* v. *Fassett*, 44 Mo. 173; R. Cox, 530; *Dixon Crucible Co.* v. *Guggenheim*, 2 Brews. 321; R. Cox, 559; and *India Rubber Comb Co.* v. *Rubber Comb & Jewellery Co.*, 45 N. Y. Super. Ct. 258; *Liggett & Myers' Tobacco Co.* v. *Reid Tobacco Co.*, 104 Missouri, 53; 24 Am. St. Rep. 313; *Listman Mill Co.* v. *William Listman Milling Co.*, 88 Wisc. 334; 43 Am. St. Rep. 907; *Von Mumm* v. *Frash*, 56 Fed. Rep. 830; *Taendsticksfabrik Aktiebolaget Vulcan* v. *Myers*, 65 N. Y. Sup. Ct. 161.

(*e*) *Braham* v. *Beachim* (1), 7 Ch. D. 848.

hypothetical case, in which honest evidence as to the likelihood of deception can in all probability be procured on both sides (*a*), it is always safer for a plaintiff to obtain proof of actual deception if possible, and a certain degree of delay to enable him to obtain such proof will be excused (*b*).

Probable deception.

In most cases, however, there is not produced any evidence of actual deception, and the plaintiff then has to satisfy the Court or jury that the defendant has used a mark either identical with, or only colourably differing from, his own (*c*). It is not sufficient for the plaintiff to produce evidence tending to show that in the opinion of the witnesses deception may occur: he has to convince the Court or jury that there is such reasonable probability of deception as to justify interference with the defendant (*d*); and if

(*a*) As a rule, not much weight is given to expert evidence on questions of similarity. See *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392; *Popham* v. *Wilcox*, 66 N. Y. 69; but there may be circumstances in which much weight will be given to it: *Mitchell* v. *Henry*, 15 Ch. D. 181; *In re Worthington*, 14 Ch. D. 8; *In re Christiansen*, 3 P. R. 54; *Williams* v. *Brooks*, 50 Conn. 278. In *Wallace & Co.* v. *King & Co.*, Bomb. High Ct., April 30th, 1879, it was held in the High Court of Bombay that evidence given by European witnesses in Bombay and Manchester as to the probability of deception, was not admissible under the Indian Evidence Act, the witnesses not being experts, and the question not being one of science or art.

(*b*) *Lee* v. *Haley*, L. R. 5 Ch. 155; *Cave* v. *Myers*, Dig. 304.

(*c*) See *Cartier* v. *Carlile*, 31 Beav. 292; and *Cope* v. *Evans*, L. R. 18 Eq. 138.

(*d*) *Blackwell* v. *Crabb*, 36 L. J. Ch. 504; *Bass* v. *Dawber*, 19 L. T. N. S. 626; *Cope* v. *Evans*, L. R. 18 Eq. 138; *Snowden* v. *Noah*, Hopk. 347; R. Cox, 1; *Colladay* v. *Baird*, 4 Phila. 139; R. Cox, 257; *Colton* v. *Thomas*, 2 Brews. 308; R. Cox, 507; *Falkinburg* v. *Lucy*, 35 Cal. 52; R. Cox, 448; *Bell* v. *Locke*, 8 Paige, 75; R. Cox, 11; *Ledger* v. *Ray*, Dig. 550; *Stephens* v. *De Conto*, 30 N. Y. Sup. Ct. 343; R. Cox, 442; *Wylam* v. *Clarke*, W. N. 1876, p. 68; *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Wilson* v. *Maxfield*, L. J. N. of C. 1875, p. 51; *Ellis* v. *Zeilen & Co.*, 42 Ga. 91; *Blackwell* v. *Wright*, 73 N. Car. 310; *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392; *Degraves* v. *Whiteman*, 5 V. L. R. Eq. 304; *Lamplough* v. *Beedzler*, C. A., Nov. 12th, 1880; *Enoch Morgan's Sons' Co.* v. *Troxell*, 89 N. Y. 292; *American Grocer Publishing Association* v. *Grocer Publishing Co.*, 51 How. Pr. 402; *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; *In re Imbs*, 10 U. S. Pat. Gaz. 463; *Dawes* v. *Davies*, Dig. 426; *Prince Metallic Paint Co.* v. *Carbon Metallic Paint Co.*, Dig. 573; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *Chinn* v. *Thomas*, 5 V. L. R. Eq. 138; *Goodwin* v. *Venning*, 24 Sol. J. 690; *Amoskeag Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Hurricane Patent Lantern Co.* v. *Miller & Co.*, 56 How. Pr. 234; *Talbot* v. *Webley*, 3 P. R. 276; *Beddow & Sons* v. *Boyd*, 4 P. R. 310; *Vogeler Co.* v. *Middleton*, 84 L. T. (Journal) 45 (where the plaintiffs sold "St. Jacob's Oil," and the defendants sold "St. Joseph's Oil"); *Waterman* v. *Ayres*, 39 Ch. D. 29; *Great Tower St. Tea Co.* v. *Smith*, 6 P. R. 165; *Goodall* v. *Wilkinson*, 90 L. T. (Journal) 357; 91 *ib.* 29; *Rugby Portland Cement Co.* v. *Rugby & Newbold Portland Cement Co.*, 8 P. R. 241; 9 P. R. 46; *Leahy* v. *Glover*, 10 P. R. 141; *Smith* v. *Carron*, 13 P. R. 108; *Cowie* v. *Herbert*, 14 P. R. 436; *California Fig Syrup Co.* v. *Taylor's Drug Co.*, 14 P. R. 564; *Parsons* v. *Gillespie*, (1898) A. C. 239; *Clark* v. *Sharp*, 15 P. R. 141; *Lever* v. *Bedingfield*, 16 P. R. 3; *Gail* v. *Wackerbarth*, 28 Fed. Rep. 286; *Liggett & Myers' Tobacco Co.* v. *Finzer*, 128 U. S. 182; *Newhaven Patent Rolling Spring Bed Co.* v. *Farren*, 51 Conn. 324; *Rogers* v. *Rogers*, 53 Conn. 121; *Morse* v. *Martin*, Can. Sup. Ct. Cas. Dig. 509; *Marshall* v.

he "cannot allege and prove that the public are deceived, or that there is a reasonable probability of deception, he has no right to interfere with the use of the mark by others" (*a*). But where this burden is discharged, the defendant's conduct "cannot be justified by showing that the device or inscription upon the imitated mark is ambiguous, and capable of being understood by different persons in different ways" (*b*), or by showing that the infringing mark, when taken in connection with its surroundings or get-up, is not an imitation (*c*).

If it is shown that both marks have been used for a number of years and no case of actual deception can be produced, it is strong to show that deception is not probable; and where this circumstance existed, and it was further proved to the satisfaction of the judge that the one mark was not copied from the other, but had an independent origin, and fraud on the part of the defendant was negatived, no injunction was granted, the defendant undertaking to discontinue a doubtful detail in his mark (*d*); and where the only probability of deception arose from the use of the words "guinea gold," which were contained in two labels registered by the plaintiff and defendant respectively in the same year, and both marks had been used for fourteen years before action brought, an injunction was refused (*e*).

When is deception probable.

It is obvious that in these cases questions of considerable nicety may arise; and in the language of Lord Cranworth, C., in *Seixo* v. *Provezende* (*f*), "it is hardly necessary to say that, in order to

*Hawkins*, 4 N. Z. L. R. Sup. Ct. 59; *Desmond's Appeal*, 103 Penn. St. 126; *Singer Manufacturing Co.* v. *Riley*, 11 Fed. Rep. 706; *Adams* v. *Heisel*, 31 Fed. Rep. 279; *Evans* v. *Von Laer*, 32 Fed. Rep. 153; *Radam* v. *Capital Microbe Destroyer Co.*, 81 Tex. 122; 26 Am. St. Rep. 783; *Putnam Nail Co.* v. *Ausable Horse Nail Co.*, 53 Fed. Rep. 390; *Hostetter Co.* v. *Bower*, 74 Fed. Rep. 235 (where observations were made upon the testimony of witnesses hired by the plaintiff to secure evidence of infringement); *J. C. Hubinger Bros.' Co.* v. *Eddy*, 74 Fed. Rep. 551. Cf. *Von Mumm* v. *Frash*, 56 Fed. Rep. 830, where the converse proposition was stated, viz., that if the Court is satisfied as to the probability of deception by a comparison of the articles themselves, evidence as to likeness is not necessary. And see *Martell* v. *Paarl Berg Wine & Spirit Co.*, 12 Cape Good Hope, 326.

(*a*) *Per* Lord Watson in *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 39. And see *Collins' Chemical & Manufacturing Co.* v. *Capitol City Manufacturing Co.*, 42 Fed. Rep. 64.

(*b*) *Per* Lord Selborne, C., in *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. 18. So in *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888.

(*c*) *Jarrett* v. *British North Borneo Cigar Co.*, 37 S. J. 116.

(*d*) *Baker* v. *Rawson*, 45 Ch. D. 519; see 60 L. J. 519. And see *Phillips* v. *Ogden*, 12 P. R. 325; *In re Talbot*, 11 P. R. 77, *per* Stirling, J.

(*e*) *Phillips* v. *Ogden*, 12 P. R. 325.

(*f*) L. R. 1 Ch. 192.

entitle a party to relief, it is by no means necessary that there should be absolute identity (*a*). What degree of resemblance is necessary, is, from the nature of things, a matter incapable of definition *à priori* (*b*). 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 (*c*).

(*a*) As to this, see *per* Lord Chelmsford in *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; and *per* Malins, V.-C., in *Anglo-Swiss Condensed Milk Co.* v. *Swiss Condensed Milk Co.*, W. N. 1871, p. 163. Also *McCann* v. *Anthony*, 21 Mo. App. 83. And see *post*, p. 137, notes (*e*) and (*f*).

(*b*) What will constitute infringement is not to be defined. See *per* Stawell, C. J., in the Sup. Ct. of Victoria in *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216.

(*c*) As to this criterion, see *Archbold* v. *Sweet*, 1 Mo. & Rob. 162; *Shrimpton* v. *Laight*, 18 Beav. 164; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523 (*per* Lord Cranworth); *Barnard* v. *Pillow*, W. N. 1868, p. 94; *Anglo-Swiss Condensed Milk Co.* v. *Swiss Condensed Milk Co.*, W. N. 1871, p. 163; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Abbott* v. *Bakers & Confectioners' Association, Ld.*, W. N. 1872, p. 31; L. J. N. of C. 1871, p. 199; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376, 392, 394; *London & County Banking Co.* v. *Hampshire & North Wilts Bank*, Dig. 618; *Moses* v. *Sargood*, Dig. 636; *In re Worthington*, 14 Ch. D. 8; *Liebig's Extract of Meat Co.* v. *Anderson*, W. N. 1883, p. 185; *In re Christiansen*, 3 P. R. 54; *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454; *Lever* v. *Goodwin*, 36 Ch. D. 1; *Steinway & Sons* v. *Henshaw*, 5 P. R. 77; *Upper Assam Tea Co.* v. *Herbert & Co.*, 7 P. R. 183; *Jarrett* v. *British North Borneo Cigar Co.*, 37 Sol. J. 116; *Eno* v. *Dunn*, 10 P. R. 261; *Liebig's Extract of Meat Co.* v. *Chemists' Co-operative Society*, 13 P. R. 736; *Powell* v. *Birmingham Vinegar Brewery Co.* (1896) 2 Ch. 54; (1897) A. C. 710; *Clark* v. *Sharp*, 15 P. R. 141; *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216; *Hennessy* v. *Hogan*, *ib.* 225; *Partridge* v. *Menck*, 1 How. App. Cas. 558; R. Cox, 72; *Walton* v. *Crowley*, 3 Bl. C. C. 440; R. Cox, 166; *Clark* v. *Clark*, 25 Barb. 76; R. Cox, 206; *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416; R. Cox, 210; *Swift* v. *Dey*, 27 N. Y. Sup. Ct. 611; R. Cox, 319; *Rowley* v. *Houghton*, 2 Brews. 303; R. Cox, 486; *Colton* v. *Thomas*, 2 Brews. 308; R. Cox, 507; *Lockwood* v. *Bostwick*, 2 Daly, 521; R. Cox, 555; *Dixon Crucible Co.* v. *Guggenheim*, 2 Brews. 321; R. Cox, 559; *Blackwell* v. *Wright*, 73 N. Car. 310; *Gilman* v. *Hunnewell*, 122 Mass. 139; *Popham* v. *Wilcox*, 66 N. Y. 69; *Tallcott* v. *Moore*, 13 N. Y. Sup. Ct. 106; *Brown* v. *Mercer*, 37 N. Y. Super. Ct. 265; *McLean* v. *Fleming*, 96 U. S. 245; *Dawes* v. *Davies*, Dig. 426; *Colman* v. *Crump*, 70 N. Y. 573; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Wolfe* v. *Hart*, 4 V. L. R. Eq. 125; *Ex parte Caire*, 15 U. S. Pat. Gaz. 248; *Robertson* v. *Berry*, 50 Md. 591; *Glen Cove Manufacturing Co.* v. *Ludeman*, 23 Bl. C. C. 46; *McCann* v. *Anthony*, 21 Mo. App. 83; *Avery & Sons* v. *Meikle & Co.*, 27 U. S. Pat. Gaz. 1027; *Liggett & Myers' Tobacco Co.* v. *Hynes*, 20 Fed. Rep. 883; *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417; *Ex parte Kennedy*, 9 V. L. R. (L.) 335; *Brill* v. *Singer Manufacturing Co.*, 41 Ohio St. 127; *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601; *Metcalfe* v. *Brand*, 86 Ky. 331; 9 Am. St. Rep. 282; *Liggett & Myers' Tobacco Co.* v. *Reid Tobacco Co.*, 104 Mo. 53; 24 Am. St. Rep. 313; *Solis Cigar Co.* v. *Pozo*, 16 Col. 388; 25 Am. St. Rep. 279; *Columbia Mill. Co.* v. *Alcorn*, 150 U. S. 460; *Tuerk Hydraulic Power Co.* v. *Tuerk*, 99 N. Y. Sup. Ct. 65; *Weinstock, Lubin & Co.* v. *Marks*, 109 Cal. 529; 50 Am. St. Rep. 57; *Battle & Co.* v. *Finlay*, 45 Fed. Rep. 796; 50 Fed. Rep. 106; *N. K. Fairbank Co.* v. *R. W. Bell Manufacturing Co.*, 77 Fed. Rep. 869; *Fischer* v. *Blank*, 138 N. Y. 244. In *Singer Manufacturing Co.* v. *Loog* (3) (8 App. Cas. 18), Lord Selborne, C., says, "The imitation of a man's trade mark, in a manner liable to mislead the unwary, cannot be justified by showing either that the device or inscription upon the imitated mark is ambiguous, and capable of being understood by different

"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 (*a*). 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 farther. 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* (*b*), may be as much a violation of the rights of that rival as the actual copy of his device."

persons in different ways, or that a person who carefully and intelligently examined and studied it might not be misled."

(*a*) See *Moses* v. *Sargood*, Dig. 636; *Read* v. *Richardson*, 45 L. T. N. S. 54; *Ascough* v. *Johnson & Co.*, 3 Times L. R. 735; *Sohl* v. *Geisendorf*, 1 Wils. (Ind.) 60; *Alleghany Fertiliser Co.* v. *Woodside*, 1 Hughes, 115; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601; *Liggett & Myers' Tobacco Co.* v. *Hynes*, 20 Fed. Rep. 883; *Pinto* v. *Badman*, 8 P. R. 181, 189; *Cochrane* v. *McNish*, (1896) A. C. 225; *Mitchell* v. *Joshua Bros.*, 17 V. L. R. 736.

(*b*) Thus, where the plaintiff's yarn had become known as "Bhe Hathi," or "two elephant" yarn, from the representation of two elephants on the trade mark, the defendants were restrained from using two different elephants (*Orr-Ewing & Co.* v. *Johnston & Co.*, 7 App. Cas. 219); where the plaintiff's beer was known as "Dog's Head Beer," the defendants were restrained from using on their beer the head of a different kind of dog from that used by the plaintiffs (*Read* v. *Richardson*, 45 L. T. N. S. 54); where the plaintiff's clothing was known as "Crown Clothing," from the use of a royal crown, the defendants were restrained from using an imperial crown between two standards (*Moses* v. *Sargood*, Dig. 636). So, in *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185, where the plaintiff's wire had acquired the name of "Anchor Wire" because of his trade mark being an anchor, the defendant was restrained from using an anchor in conjunction with a crown. See *Cartier* v. *Carlile*, 31 Beav. 292; *Cartier* v. *Westhead*, Dig. 199; *Cartier* v. *May*, Dig. 200 ("Cross Cotton"); *In re Jelley, Son & Jones*, 51 L. J. Ch. 639 ("Dog brand Files"); *In re Whiteley*, 43 L. T. N. S. 627 ("Globe Steel"); *In re Rabone*, Dig. 643 ("Lion" edge tools); *In re Worthington*, 14 Ch. D. 8 ("Triangle Beer"); *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454 ("Milkmaid" or "Dairymaid Brand"); *In re Baschiera & Co.*, 33 Sol. J. 469 ("Lion" matches); *Wilkinson* v. *Griffiths*, 8 P. R. 370 ("Red Medal" Polish); *In re Société Anonyme des Verreries de l'Etoile*, (1894) 2 Ch. 26 ("Star Brand" glass); *In re Deichurst & Sons, Ld.*, (1896) 2 Ch. 137 ("Golden Fan" cotton); *Hodgson* v. *Kynoch, Ld.*, 15 P. R. 465 ("Lion" soap); *London Road Car Co.* v. *Era Omnibus Association*, Times, June 23, 1898; *ib.* April 28, 1899 ("Flag" omnibuses); *Taylor* v. *Virasami*, Ind. L. R. 6 Mad. 108 ("Talwar" shirtings); *Smith* v. *Fair*, 14 Ont. Rep. 729 ("Red Seal" cigars); *Johnson* v. *Bauer*, 82 Fed. Rep. 954 ("Red Cross" plasters). And see *Hutchinson* v. *Blumberg*, 51 Fed. Rep. 829; *Hutchinson* v. *Covert*, 51 Fed. Rep. 833; *Reiners, Von Laer & Co.* v. *Fehr*, 9 Cape Good Hope, 145. In the U. S. Patent Office there was held to be a fatal conflict between two trade marks for hams, of which the one consisted of the word "Bouquet," the other of a bouquet of flowers: *Schrauder*

Deception of ultimate purchaser.

The natural consequence of marking goods so as to cause them to bear the same name in the market as those of a well-known firm is to deceive the ultimate purchaser, and such deception will be restrained, even though the original purchaser is not deceived (*a*). "No man is entitled to represent his goods as being the goods of another man, and no man is permitted to use any mark, sign or symbol, device, or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer" (*b*). "If a man does that, the natural consequence of which (although it does not deceive the person with whom he deals, and is therefore no misrepresentation to him) is to enable that other person to deceive and pass off his goods as somebody else's, for that he is answerable. But this is confined to those things which in their necessary or natural uses accompany the things sold. For instance, the corks of champagne bottles marked 'Moet and Chandon' must be in the bottles sold, and must accompany the bottles. They must necessarily accompany the thing to the retail buyer, and so must labels to be put on the bottles. The very reason for their existence is that they must be put on the bottles, and if they are deceptive and fraudulent, then the person who prepares them is answerable for it. Such things must not be used if their natural and legitimate consequence is, not to deceive the person to whom

v. *Beresford & Co.*, U. S. Patent Office, June 27th, 1872; and in *In re American Lubricating Oil Co.*, 9 U. S. Pat. Gaz. 687, registration was refused to the word "Star" for oil, the device of a star having already been registered for that article. But in *Curtis, Harvey & Co.* v. *Kraft, Meyer & Co.*, Chitty, J., June 16th, 1882, it was thought that the German words "Diamant Pulver" were not likely to be mistaken for the English words "Diamond Powder." And see *In re Wills*, (1893) 2 Ch. 262. See also *McLean* v. *Fleming*, 96 U. S. 245; *Morrison* v. *Case*, 9 Bl. C. C. 548; *In re Weaver*, 10 U. S. Pat. Gaz. 1; *In re Pratt & Farmer*, *ib.* 866; *In re Park*, 12 *ib.* 2; *Barsalou* v. *Darling*, 9 Can. Sup. Ct. 677; *Price's Patent Candle Co.* v. *Everitt*, 11 Cape Good Hope, 213; *Pittsburgh Crushed Steel Co.* v. *Diamond Steel Co.*, 85 Fed. Rep. 647.

(*a*) See *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. 15; *Orr-Ewing & Co.* v. *Johnston & Co.*, 7 App. Cas. 219; *In re Christiansen*, 3 P. R. 54; *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454; *Wilkinson* v. *Griffith*, 8 P. R. 370; *Edge* v. *Johnson*, 9 P. R. 134; *Brinsmead* v. *Brinsmead*, 12 Times L. R. 631; 13 *ib.* 3; *Reddaway* v. *Banham*, (1896) A. C. 199; *Grezier* v. *Autran*, 13 P. R. 1; *Cochrane* v. *McNish*, (1896) A. C. 225; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710; *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417; *Manockji Petit Manufacturing Co., Ld.* v. *Mahalaxmi Spinning & Weaving Co., Ld.*, Ind. L. R. 10 Bomb. 617; *Von Mumm* v. *Frash*, 56 Fed. Rep. 830; *Sparks* v. *Harper*, 3 Queens. L. J. 158, 201.

(*b*) *Per* James, L. J., in *Singer Manufacturing Co.* v. *Loog* (3), 18 Ch. D. 412; adopted by Lord Macnaghten in *Reddaway* v. *Banham*, (1896) A. C. 179.

they are sold, but to enable the purchaser to pass off the goods as being the goods of other persons" (*a*).

Deception by get-up of goods.

And the same principle of preventing that which would deceive the ultimate purchaser is observed where the probability of deception arises, not from the imitation of a trade mark proper, but from copying the peculiar get-up of the plaintiff's goods or from some similar act. In *Lever* v. *Goodwin* (*b*) the plaintiffs' soap was got up in a special manner, which had been copied somewhat nearly by the defendants; and Chitty, J., said, "The law applicable to the case is plain: it is founded on fraud. The simplest case is where the seller misrepresents to the buyer that the goods which are being offered for sale are the goods, not of the person who made them, but of some other manufacturer. That is a case merely between the buyer and the seller. Then comes the case where the manufacturer, by devices which are to accompany the goods on their sale in the market, gets them up in such a form as to be calculated to deceive the ultimate buyer into the belief that the goods which he, the manufacturer, is putting on the market are the goods of some other maker. Here, generally speaking, a double fraud is committed: first, there is the fraud which is perpetrated on the ultimate buyer; and, secondly, there is a fraud perpetrated on the other manufacturer, who loses part of his trade. In this class of cases the trade is seldom deceived; the retail dealers know from whom they are buying, and if there is a fraudulent device, they are rarely taken in by it. But in such a case the manufacturer puts an instrument of fraud into their hands. Now, it has been said more than once in this case, that the manufacturer ought not to be held liable for the fraud of the ultimate seller—that is, the shopkeeper or the shopkeeper's assistant; but that is not the true view of the case. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchasers (*c*).

(*a*) *Per* Cotton, L. J., in S. C., 18 Ch. D. 422.

(*b*) 4 P. R. 492 (Chitty, J.); 36 Ch. D. 1 (C. A.). And see *J. J. Colman, Ld.* v. *Farrow & Co.*, 15 P. R. 198; *Payton & Co., Ld.* v. *Snelling, Lambard & Co., Ld.*, 16 P. R. 283; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Wellman & Dwire Tobacco Co.* v. *Ware Tobacco Works*, 46 Fed. Rep. 289; *Hostetter Co.* v. *Brueggeman Reinert Distillery Co.*, 46 Fed. Rep. 188; *Hostetter Co.* v. *Becker*, 73 Fed. Rep. 297; *Hildreth* v. *McDonald*, 164 Mass. 16; 49 Am. St. Rep. 440; *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154; 60 Am. St. Rep. 377.

(*c*) And see *Grezier* v. *Autran*, 13 P. R. 1; *Bayer* v. *Baird*, 15 P. R. 615; *Hostetter Co.* v. *Brueggeman Reinert Distillery Co.*, 46 Fed. Rep. 188; *Hostetter Co.* v. *Becker*, 73 Fed. Rep. 297. Cf. *Hostetter Co.* v. *Van Vorst*, 62 Fed. Rep.

So, in another case (*a*), Kekewich, J., said "The plaintiffs are entitled to have their trade mark protected; and, further than that, they are entitled to have their business protected to this extent, that if any person has used the words which they employ, so as to pass off, or so as to tend to pass off, the goods of that other person as the goods of the plaintiffs, then the plaintiffs are entitled, apart from their trade mark, to insist that that should be restrained." And in *Barlow & Jones, Ld.* v. *Johnson & Co.* (*b*), Bowen, L. J., said, "It is an injury to take a name understood in the trade as connoting a particular maker, and to sell goods under it which are not that maker's make; and it is an injury none the less because the immediate vendee is not deceived. If the probable and natural result is that the immediate vendee, though not deceived himself, will use the name so as to deceive others—his ulterior vendees—it is an injury to take the name and use it in that way, and it is a fraud in equity if it is known by the person who takes it that that will be the ultimate and probable result" (*c*).

Infringement of essential part, or of combination.

The infringement of a trade mark may consist in the adoption of the essential part of the plaintiff's trade mark by the defendant, as the word "Eureka" (*d*), or "Glenfield" (*e*), or "Apollinaris" (*f*).

600; *Rogers* v. *Rogers' Manufacturing Co.*, 70 Fed. Rep. 1019; *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154; 60 Am. St. Rep. 377.

(*a*) *Sanitas Co., Ld.* v. *Condy*, 4 P. R. 530. And see, *per* Kay, J., in *In re Sanitas Co., Ld.*, 4 P. R. 533.

(*b*) 7 P. R. 395, 419.

(*c*) And see *Wilkinson* v. *Griffith*, 3 P. R. 370; *Edge* v. *Johnson*, 9 P. R. 134; *Singer Manufacturing Co.* v. *Spence*, 10 P. R. 297; *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 75 U. S. Pat. Gaz. 1703.

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

(*e*) *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508. And see *Jamieson & Co.* v. *Jamieson*, 15 P. R. 169.

(*f*) *Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 242. And see *Filley* v. *Fassett*, 44 Mo. 173; R. Cox, 530 ("Charter Oak" stoves); *Siegert* v. *Ehlers*, Dig. 432; and *Siegert* v. *Findlater*, 7 Ch. D. 801 ("Angostura Bitters"); *Eno* v. *Stephens*, Dig. 609 ("Fruit Salt"); *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57 ("Family Salve"); *Berliner Brauerei Gesellschaft Tivoli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70 ("Tivoli" beer); *Slazenger* v. *Malings*, W. N. 1885, p. 124 ("The Lawford" racquet); *Compania General de Tabacos* v. *Rehder*, 5 P. R. 61 ("Cavite" cigars); *Lawrie* v. *Baker*, 2 P. R. 213 ("Patent cups"); *Grezier* v. *Ziemer & Co.*, 89 L. T. (Journal) 117 ("Grande Chartreuse" liqueur); *Cochrane* v. *McNish*, (1896) A. C. 225 ("Club" soda water); *Dunbar* v. *Glenn*, 42 Wisc. 118 ("Bethesda" water); *Blackwell* v. *Armistead*, 5 Am. L. T. 85 ("Durham" tobacco); *In re Coggin, Kidder & Co.*, 11 U. S. Pat. Gaz. 1109 ("Haxall"); *Rillet* v. *Carlier*, 61 Barb. S. C. 435 ("Grenado Syrup"); *Davis* v. *Kennedy*, 13 Grant Up. Can. Ch. 523 ("Pain-killer"); *Crawford* v. *Shuttock*, *ib.* 149 ("Imperial" soap); *Carroll* v. *Ertheiler*, 1 Fed. Rep. 688 ("Lone Jack" tobacco); *Fleischmann* v. *Schuckmann*, 62 How. Pr. 92 ("Vienna Bread"); *Lauferty* v. *Wheeler*, 63 *ib.* 488; 11 Daly, 194 ("Alderney" oleomargarine); *Listman Mill Co.* v. *William Listman Milling Co.*, 88 Wisc. 334; 43 Am. St. Rep. 907 ("Marvel" flour); *Pennsylvania Salt Manufacturing Co.* v. *Myers*, 79 Fed. Rep. 87 ("Saponifer" lye). See also, *per* Cotton, L. J., in *In re Leonard &*

And where there is no imitation of the essential part, a resemblance in particulars common to the trade does not constitute an infringement (*a*). But, on the other hand, the infringement may consist in the imitation of the general appearance of the plaintiff's mark, and where both trade marks are of a composite character, it is possible that, though no one particular mark has been exactly imitated, or the principal mark which has been reproduced cannot, for some reason or other, be protected as a trade mark, the combination may be very similar and likely to deceive, and will therefore be restrained by injunction (*b*).

Infringer's mark need not

"For the purpose of establishing a case of infringement it is not

*Ellis*, 26 Ch. D. 288; *Vulcan Match Co.* v. *Jebsen & Co.*, 1 Kyshe, 650; *Humphreys' Specific Homœopathic Medicine Co.* v. *Wenz*, 14 Fed. Rep. 250; *Priestley* v. *Adams*, 66 N. Y. Sup. Ct. 380.

(*a*) *Lucke* v. *Webster*, Jessel, M. R., April 4th, 1879; *In re Horsburgh*, 53 L. J. Ch. 237; *Rugby Portland Cement Co.* v. *Rugby & Newbold Portland Cement Co.*, 8 P. R. 241; 9 *ib.* 46; *Leahy* v. *Glover*, 10 P. R. 141; *Lever* v. *Bedingfield*, 16 P. R. 3; *Wallace & Co.* v. *King & Co.*, Bomb. High Ct., April 30th, 1879; *Tucker Manufacturing Co.* v. *Boyington*, 9 U. S. Pat. Gaz. 455; *Thornton* v. *Crowley*, 47 N. Y. Super. Ct. 527; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Stachelberg* v. *Ponce*, 128 U. S. 686; *Marshall* v. *Hawkins*, 4 N. Z. L. R. Sup. Ct. 59; *Ball* v. *Siegel*, 116 Ill. 137; *Portuondo* v. *Monne*, 28 Fed. Rep. 16; *Harris' Drug Co.* v. *Stucky*, 46 Fed. Rep. 624.

(*b*) *Abbott* v. *Bakers & Confectioners' Tea Association*, W. N. 1871, p. 207; *ib.* 1872, p. 31; *Hargreaves* v. *Smith*, Dig. 338; *Lazenby* v. *Lazenby*, Dig. 160; *In re Barker & Son*, 53 L. T. N. S. 23; *Compania General de Tabacos* v. *Rehder*, 5 P. R. 61; *Great Tower Street Tea Co.* v. *Langford & Co.*, 5 P. R. 66; *Ascough* v. *Johnson & Co.*, 3 Times L. R. 735; *Pinto* v. *Badman*, 8 P. R. 181, 183; *Rowland* v. *Michell*, 13 P. R. 457; *Liebig's Extract of Meat Co.* v. *Chemists' Co-operative Society*, 13 P. R. 635 (with which compare *Lever* v. *Bedingfield*, 16 P. R. 3); *J. J. Colman, Ld.* v. *Farrow & Co.*, 15 P. R. 198; *Raili* v. *Fleming*, Ind. L. R. 3 Calo. 417; *Brown* v. *Mercer*, 37 N. Y. Super. Ct. 265; *Godillott* v. *Hazard*, 81 N. Y. 263; *Lea* v. *Wolff* (S. T.), 13 Abb. Pr. N. S. 389; *Whitney* v. *Hickling*, 5 Grant Up. Can. Ch. 605; *Davis* v. *Reid*, 17 *ib.* 69; *Day* v. *Walls*, 12 Phila. 274; *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601; *Hostetter* v. *Adams*, 20 Bl. C. C. 326; *Conrad* v. *Joseph Uhrig Brewing Co.*, 8 Mo. App. 277; *Electro-Silicon Co.* v. *Levy*, 59 How. Pr. 469; *Royal Baking Powder Co.* v. *Davis*, 26 Fed. Rep. 293; *McCann* v. *Anthony*, 21 Mo. App. 83; *Green* v. *Woodhouse*, 38 U. S. Pat. Gaz. 1491; *Williams* v. *Brooks*, 50 Conn. 278; *Hop Bitters Manufacturing Co.* v. *Wharton*, 10 V. L. R. (L.) 377; *Pierce* v. *Guittard*, 68 Cal. 68; *Leclanche Battery Co.* v. *Western Electric Co.*, 21 Fed. Rep. 538; *Carbolic Soap Co.* v. *Thompson*, 25 Fed. Rep. 625; *Foster* v. *Blood Balm Co.*, 77 Ga. 216; *Wellman & Dwire Tobacco Co.* v. *Ware Tobacco Works*, 46 Fed. Rep. 289; *G. G. White Co.* v. *Miller*, 50 Fed. Rep. 277; *California Fig Syrup Co.* v. *Improved Fig Syrup Co.*, 51 Fed. Rep. 296; 54 Fed. Rep. 175; *Cleveland Stone Co.* v. *Wallace*, 52 Fed. Rep. 431; *Kerry* v. *Toupin*, 60 Fed. Rep. 272; *Pillsbury* v. *Pillsbury Washburn Flour Mills Co.*, 64 Fed. Rep. 841; *Cuervo* v. *Owl Cigar Co.*, 68 Fed. Rep. 541; *Genesee Salt Co.* v. *Burnap*, 67 Fed. Rep. 534; 73 Fed. Rep. 818; *Garrett* v. *T. H. Garrett & Co.*, 78 Fed. Rep. 472; *Hiram Walker & Sons* v. *Mikolas*, 79 Fed. Rep. 955; *Kinney Tobacco Co.* v. *Maller*, 60 N. Y. Sup. Ct. 340; *Fischer* v. *Blank*, 138 N. Y. 244; *Keller* v. *Goodrich Co.*, 117 Ind. 556; 10 Am. St. Rep. 88; *Martell* v. *Paarl Berg Wine & Spirit Co.*, 12 Cape G. Hope, 326; *Badische Anilin & Soda Fabrik* v. *Maneckji Shapurji Katrak*, Ind. L. R. 17 Bomb. 584; *California Fig Syrup Co.* v. *E. Worden & Co.*, 86 Fed. Rep. 212. But see *Blackwell* v. *Crabb*, 36 L. J. Ch. 504; *Blackwell* v. *Wright*, 73 N. Car. 310; *Handy* v. *Commander*, 49 La. Ann. 1119; *Hiram Walker & Sons* v. *Hocksteader*, 85 Fed. Rep. 776; and *Von Mumm* v. *Wittemann*, 85 Fed. Rep. 966.

be identical with mark infringed.

Colourable differences.

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" (*a*). It is seldom that the mark employed by the infringer does correspond in all respects with that of the person whose rights he is attacking; the usual practice is to introduce some colourable variation, which may supply the infringer with a plausible excuse for his fraud. "In every case," however, "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, excepting for the purpose of misleading, it will infer that the resemblance is adopted for the purpose of misleading" (*b*).

Examples.

Thus, it was held that "Cacaotine" was a colourable imitation of "Cocoatina" (*c*), "Steel pens" of "Stephens" (*d*), "Tung's"

(*a*) *Per* Lord Chelmsford in *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508. And see *Moses* v. *Sargood*, Dig. 636; *In re Farina* (2), 27 W. R. 456; *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216; *Hennessy* v. *Hogan*, *ib.* 225; *McLean* v. *Fleming*, 96 U. S. 245; *Alleghany Fertiliser Co.* v. *Woodside*, 1 Hughes, 115; *Barrows* v. *Knight*, 6 R. I. 434; *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392; *Brown* v. *Mercer*, 37 N. Y. Super. Ct. 265; *Shaver* v. *Shaver*, 54 Iowa, 208; *Godillot* v. *Hazard*, 81 N. Y. 263; *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29; *Colman* v. *Crump*, 70 N. Y. 573; *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298; *Wolfe* v. *Hart*, 4 V. L. R. Eq. 125; *Actien Gesellschaft Apollinaris Brunnen* v. *Somborn*, 14 Bl. C. C. 380; *Hegeman & Co.* v. *O'Byrne*, 9 Daly, 264; *Leidersdorf* v. *Flint* (2), 50 Wisc. 401; *Atlantic Milling Co.* v. *Robinson*, 20 Fed. Rep. 217; *Avery & Sons* v. *Meikle & Co.*, 27 U. S. Pat. Gaz. 1027; *Liggett & Myers' Tobacco* v. *Hynes*, 20 Fed. Rep. 883; *Heyde* v. *Wittkowski*, 5 N. S. W. Rep. (E.) 74; *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72; *Pierce* v. *Guittard*, 68 Cal. 68; *Ball* v. *Siegel*, 116 Ill. 137; *Lorillard* v. *Wight*, 15 Fed. Rep. 383; *Dreydoppel* v. *Young*, 14 Phila. 226; *Taendsticksfabrik Aktiebolaget Vulcan* v. *Myers*, 65 N. Y. Sup. Ct. 161; *Société Anonyme de la Liqueur Bénédictine de l'Abbaye de Fécamp* v. *Western Distilling Co.*, 43 Fed. Rep. 416; *N. K. Fairbank Co.* v. *R. W. Bell Manufacturing Co.*, 77 Fed. Rep. 869.

(*b*) *Per* Wood, V.-C., *Taylor* v. *Taylor*, 23 L. J. Ch. 255; and in the case of a prosecution for obtaining money by false pretences, see *per* Erle, J., in *R.* v. *Dundas*, 6 Cox, 380.

(*c*) *Schweitzer* v. *Atkins*, 37 L. J. Ch. 847.

(*d*) *Stephens* v. *Peel*, 16 L. T. N. S. 145.

of "Tonge's" (*a*), "Leopoldsalt" of "Leopoldshall" (*b*), "Lactopepsine" of "Lactopeptine" (*c*), "Cocoine" of "Cocoaine" (*d*), "Bovina" of "Bovilene" (*e*). Again, a beehive was held to be a colourable imitation of a bell of a similar shape, similarly printed on a label (*f*). Where dealers in condensed milk had adopted, for "Black Diamond," *ib.*; "Seamless" with a flourish, for "Shawknit," with a flourish, *Shaw Stocking Co.* v. *Mack*, 21 Bl. C. C. 1; "Dr. Morse's Improved Yellow Dock and Sarsaparilla Compound" for "Morse's Compound Syrup of Yellow Dock Root," *Alexander* v. *Morse*, 14 R. I. 153; "Chatterbook" for "Chatterbox," *Estes* v. *Leslie* (2), 29 Fed. Rep. 91; "Sawin's Soluble Blue and Pepper Box" for "Sawyer's Crystal Blue and Safety Box," *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601; "Maizharina," with a device, for "Maizena," with a device, *Glen Cove Manufacturing Co.* v. *Ludeman*, 23 Bl. C. C. 46; "Cottolco" for "Cottolene," *N. K. Fairbank Co.* v. *Central Lard Co.*, 64 Fed. Rep. 133; "Mojava" for "Momaja" Coffee, *American Grocery Co.* v. *Sloan*, 68 Fed. Rep. 539; "Curative" for "Cuticura," *Potter Drug & Chemical Co.* v. *Miller*, 75 Fed. Rep. 656; "Germania" for "German," the latter word being used as signifying a man's name, *Walter Baker & Co.* v. *Baker*, 77 Fed. Rep. 181; "Nickel-saved" for "Nickel-In," *Schendel* v. *Silver*, 70 N. Y. Sup. Ct. 330. On the other hand, "Puddine" was held not infringed by "Pudding," *Clotworthy* v. *Schapp*, 44 Fed. Rep. 62; nor "Hostetter" by "Host-Style," *Hostetter Co.* v. *Becker*, 73 Fed. Rep. 297; nor "No-tobac" by "Baco-curo" for a cure for the tobacco habit, *Sterling Remedy Co.* v. *Eureka Chemical & Manufacturing Co.*, 80 Fed. Rep. 105.

(*a*) *Tonge* v. *Ward*, 21 L. T. N. S. 480.
(*b*) *Raade* v. *Norman*, L. R. 14 Eq. 348.
(*c*) *Carnrick* v. *Morson*, L. J. N. of C. 1877, p. 71.
(*d*) *Burnett* v. *Phalon*, 9 Bos. 192; R. Cox, 376.
(*e*) *Lockwood* v. *Bostwick*, 2 Daly, 521; R. Cox, 555. Other instances are:—"Schrewsbury-Marchal Patent Thread" put for "Shrewsbury, Marshall & Co. Patent Thread," *Marshall* v. *Ross*, L. R. 8 Eq. 651; "Burgiss" for "Burgess," *Burgess* v. *Hills*, 26 Beav. 244; "Genuine" for "Guinness," *Guinness* v. *Heap*, Dig. 617; "Derwent" for "Derby," *Derby Photographic Dry Plate Co.* v. *Pollard, Graham & Co.*, 2 Times L. R. 276; "Condisanitas" for "Sanitas," *Sanitas Co., Ld.* v. *Condy*, 4 P. R. 195, 530; "Apollinis" for "Apollinaris," *Apollinaris Co., Ld.* v. *Herrfeldt*, 4 P. R. 478; "Steinberg" for "Steinway," *Steinway & Sons* v. *Henshaw*, 5 P. R. 77; "Demotic" for "Demon," *Slazenger & Sons* v. *Feltham & Co.*, 6 P. R. 531; "El Divino" and "El Destinacion" for "El Destino," *Pinto* v. *Trott*, 8 P. R. 173; *Pinto* v. *Badman*, 8 P. R. 181; "Margarita" for "Flor de Margaretta," *Benedictus* v. *Sullivan, Powell & Co.*, 12 P. R. 25; "Stafford" for "Trafford," *Smith* v. *Carron Co.*, 13 P. R. 108; "Holsteter & Smyto" for "Hostetter & Smith," *Hostetter* v. *Vowinkle*, 1 Dill. 329; "Rogers & Son" for "J. Rodgers & Sons," *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29; "Andrew Coe's Superphosphate of Lime" for "Coe's Superphosphate of Lime," *Coe* v. *Bradley*, 9 *ib.* 541; "Star" for "Stark," *Gardner* v. *Bailey*, Dig. 365; "Wamyesta" for "Wamsutta," *Wamsutta Mills* v. *Allen*, 12 Phila. 535; "Electric-Silicon" for "Electro-Silicon," *Electro-Silicon Co.* v. *Trask*, 59 How. Pr. 189; "Pride of Syracuse" for "Pride," *Hier* v. *Abrahams*, 82 N. Y. 519; "South-Western, St. Louis" for "Southern Company, St. Louis," *Southern White Lead Co.* v. *Carey*, 25 Fed. Rep. 125; "Cellonite" for "Celluloid," *Celluloid Manufacturing Co.* v. *Cellonite Manufacturing Co.*, 32 Fed. Rep. 94; "Willoughby Ridge" for "Willoughby Lake," *Pike Manufacturing Co.* v. *Cleveland Stone Co.*, 35 Fed. Rep. 896; "Diamond Gem" for

(*f*) *Bell, Black & Co.* v. *Bell & Co.*, Dig. 514. Other instances are:—A crown with "B. B. S." in italics put for a crown with "B. B. H." in Roman characters, *Barrows* v. *Felsall Coal & Iron Co.*, Dig. 530; a volcano with a man coming out of it and the words "Volcanic Paraffin Matches" for a volcano with the words "The Vulcan Paraffin Matches," *Vulcan Match Manufacturing Co.* v. *Knos & Co.*, Pearson, J., June 22nd, 1883; a device of a diamond with a K in the centre for a device of a plain diamond, *Curtis & Harvey* v. *Pape*, 5 P. R. 146; "Rottgen" with two crosses for "Rodgers" with a star and a cross, *Rodgers & Sons, Ld.* v. *Rottgen*, 5 Times L. R. 678; a pelican with an inscription in gold on a green ground for a crane with an inscription in gold on a

what they called their "Standard" brand, a trade mark which consisted of a representation of a standard divided into four quarters, which respectively contained four well-known trade marks of other firms in the same trade, the use of the composite mark was restrained on motion by the owners of two of the marks copied (*a*).

*Seixo* v. *Provezende.*

In *Seixo* v. *Provezende* (*b*) the plaintiff, a Portuguese nobleman and wine grower, sold his wine in casks branded on the head with a crown and eagle, and the letters "B. S.," and also at the bung-hole with a crown, the word "Seixo," and the year of vintage. This wine had acquired a reputation as "Crown Seixo Wine," when the defendant began to sell wine which he called "Seixo de Cima," and placed in casks branded in a somewhat similar manner to the plaintiff's. The injunction was granted and affirmed, although the defendants contended that parts of their own vineyards were called "Seixo," and that the name was an ordinary Portuguese adjective, signifying "stony."

*Wotherspoon* v. *Currie.*

In *Wotherspoon* v. *Currie* (*c*) the plaintiffs manufactured starch, which, under the name of "Glenfield Starch"—a name derived from a small place near Paisley, where it was made—acquired a great reputation. They subsequently removed their works to Paisley, and there continued to make "Glenfield Starch." The defendants, also starch manufacturers at Paisley, bought a small plot of land at Glenfield, and began selling "Glenfield Starch." It was held by V.-C. Malins and the House of Lords that the use of the word "Glenfield" in connection with starch had the effect of inducing people to buy the defendants' manufacture, under the impression that it was the plaintiffs', and that there was a colourable imitation of the mark to which the plaintiffs were entitled (*d*).

green ground, *Balfour & Co.* v. *Kilburn & Co.*, 1 Hyde, 270; an orb rising over a piece of water with the words "Rising Moon Stove Polish" for an orb with rays rising over a piece of water with the words "Rising Sun Stove Polish," *Morse* v. *Worrell*, 10 Phila. 168; a sprig of grape vine for a sprig of hop vine, *Hop Bitters Manufacturing Co.* v. *Wharton*, 10 V. L. R. (L.) 371; a unicorn's head for a horse's head similarly arranged, *Barsalou* v. *Darling*, 9 Can. Sup. Ct. 677; three Rs arranged triangularly in a triangle for three Bs similarly arranged in a diamond, *Frankau* v. *Pope*, 11 Cape Good Hope, 209. But in *McCartney* v. *Garnhart*, 45 Mo. 593, it was held that two picks with a pair of scales, and the words "J. H. Garnhart's Old Bourbon," were not too similar to two anchors and the initials "S. McC." Where the infringement consisted in a general resemblance between labels on "Old Bachelor" tobacco and "Old Coon" tobacco, it was held that the wrong was not remedied by printing across the former the words "Not Old Coon"; *McCann* v. *Anthony*, 21 Mo. App. 83.

(*a*) *Schnitzer & Co.* v. *Piggott, Cockson & Co.*, and *Anglo-Swiss Condensed Milk Co.* v. *Same*, Bacon, V.-C., July 12th, 1884. See Grocer for 1884, p. 37.

(*b*) L. R. 1 Ch. 192.

(*c*) L. R. 5 H. L. 508.

(*d*) See also *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217; *Grezier* v. *Autran*, 13 P. R. 1; *Bewlay & Co.* v. *Hughes*, 15 P. R. 290; and the American cases, *Coffeen* v. *Brunton*, 4 McLean, 516; R. Cox, 82; *Amoskeag Manufacturing Co.*

Similarity of packing or get-up.

Where the goods of one manufacturer are so packed or arranged as externally to resemble those of others engaged in the same trade, as where starch was put up commonly in the trade in packets of a certain colour and appearance, the similarity common to all does not of itself expose the manufacturer to an action, but it makes it incumbent upon him to take care that his distinguishing mark is really distinguishing (*a*). And where a plaintiff has been in the habit of packing or getting up his goods in a peculiar and distinctive manner (*b*), he will be entitled to restrain another from imitating his packages (*c*), even though his actual trade mark is bad (*d*); and the imitation of bottles (*e*) or barrels (*f*) of a peculiar design, such as is used only by the plaintiff, will afford a strong presumption that fraud is intended. As Cotton, L. J., said in *Lever* v. *Goodwin* (*g*), "there may be no monopoly at all in the

v. *Spear*, 2 Sand. S. C. 599; R. Cox, 87; *Davis* v. *Kendall*, 2 R. I. 566; R. Cox, 112; *Williams* v. *Johnson*, 2 Bos. 1; R. Cox, 214; *Bradley* v. *Norton*, 33 Conn. 157; R. Cox, 331; *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402; R. Cox, 490; *Gillis* v. *Hall*, R. Cox, 596; *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450; 12 Amer. Rep. 401; *Burke* v. *Cassin*, 45 Cal. 467; 13 Amer. Rep. 204.

(*a*) See *per* Lord Hatherley, C., *Wotherspoon* v. *Currie*, 5 H. L. 508; also *J. J. Colman, Ld.* v. *Farrow & Co.*, 15 P. R. 198; *Enoch Morgan's Sons' Co.* v. *Troxell*, 89 N. Y. 292; *Gail* v. *Wackerbarth*, 26 Fed. Rep. 286; *Babbit* v. *Brown*, 75 N. Y. Sup. Ct. 515; *Fischer* v. *Blank*, 138 N. Y. 244; *Hoyt* v. *Hoyt*, 143 Pen. St. 623; 24 Am. St. Rep. 869; *N. K. Fairbank Co.* v. *R. W. Bell Manufacturing Co.*, 77 Fed. Rep. 181; *Hoeb* v. *Bishop*, 49 U. S. Pat. Gaz. 1845; *Philadelphia & Novelty Manufacturing Co.* v. *Rouss*, 50 U. S. Pat. Gaz. 1594.

(*b*) See *Packham & Co.* v. *Sturgess & Co.*, 15 P. R. 669, 673, as to the importance of the get-up being special and peculiar.

(*c*) *Frese* v. *Bachof* (2), 14 Bl. C. C. 432; *Enoch Morgan's Sons' Co.* v. *Schwachhofer*, 55 How. Pr. 37; *Great Tower St. Tea Co.* v. *Langford & Co.*, 5 P. R. 66; *Ascough* v. *Johnson & Co.*, 3 Times L. R. 735; *Edge* v. *Harrison*, 8 P. R. 74, 79; *Liebig's Extract of Meat Co.* v. *Chemists' Co-operative Soc.*, 13 P. R. 737; *Knott* v. *Marshall*, W. N. 1894, p. 214; *Jones* v. *Hallworth*, 14 P. R. 225; *J. J. Colman, Ld.* v. *Farrow & Co.*, 15 P. R. 198; *Hodgson* v. *Kynoch, Ld.*, 15 P. R. 465; *Payton & Co., Ld.* v. *Snelling, Lambard & Co., Ld.*, 16 P. R. 283; *Landreth & Sons* v. *Landreth*, 22 Fed. Rep. 41; *Southern White Lead Co.* v. *Carey*, 25 Fed. Rep. 135; *Anheuser Busch Brewing Association* v. *Clarke*, 26 Fed. Rep. 410; *Pierce* v. *Guittard*, 68 Cal. 68; *Moxie Nerve Food Co.* v. *Baumbach*, 32 Fed. Rep. 205; *Miller Tobacco Manufactory* v. *Commerce*, 45 N. J. Law, 123; *Trask Fish Co.* v. *Wooster*, 28 Mo. App. 408; *Walter Baker & Co.* v. *Baker*, 77 Fed. Rep. 181; *Simmons' Medicine Co.* v. *Simmons*, 81 Fed. Rep. 163; *Hildreth* v. *McDonald*, 164 Mass. 16; 49 Am. St. Rep. 440; *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154; 60 Am. St. Rep. 377.

(*d*) *Lever* v. *Goodwin*, 36 Ch. D. 1; *Sawyer* v. *Horn*, 4 Hughes, 239; *McCall* v. *Theal*, 28 Grant Up. Can. Ch. 48; *Carbolic Soap Co.* v. *Thompson*, 25 Fed. Rep. 625; *Smith* v. *Fair*, 14 Ont. Rep. 729; *Sparks* v. *Harper*, 3 Queensland L. J. 158, 201; *Mitchell* v. *Joshua*, 17 V. L. R. 736.

(*e*) *Henry* v. *Price*, 1 Leg. Obs. 364; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Fullwood* v. *Fullwood* (1), W. N. 1873, p. 185; *Grezier* v. *Autran*, 13 P. R. 1; *Wolfe* v. *Goulard*, 18 How. Pr. 64; *Laird* v. *Wilder*, 9 Bush, 131; *Congress Co.* v. *High Rock Co.*, 45 N. Y. 291; *Wilder* v. *Wilder*, Dig. 372; *Hostetter* v. *Adams*, 20 Bl. C. C. 326; *Carbolic Soap Co.* v. *Thompson*, 25 Fed. Rep. 625; *Moxie Nerve Food Co.* v. *Baumbach*, 32 Fed. Rep. 205; *Moxie Nerve Food Co.* v. *Beach*, 33 Fed. Rep. 248; *Mitchell* v. *Joshua*, 17 Vict. L. R. 736.

(*f*) *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392. See *Moorman* v. *Hoge*, 2 Sawy. 78.

(*g*) 36 Ch. D. 1. And see *Bayer* v. *Baird*, 15 P. R. 615; *Von Mumm* v. *Frash*, 56 Fed. Rep. 830; *Hostetter Co.*

individual things, but if they are so combined by the defendants as to pass off the defendants' goods as the plaintiffs', then the defendants have brought themselves within the old Common Law doctrine, in respect of which Equity will give to the aggrieved party an injunction, in order to restrain the defendants from passing off their goods as those of the plaintiffs." It has been held in America (*a*) that a label, on which is a representation of a box filled with cakes of soap, wrapped in variously coloured paper wrappers and arranged in a particular way, is not infringed by offering for sale boxes containing cakes of soap so wrapped and arranged.

Not conclusive.

However, where a defendant had, in obedience to express directions, put up his silk in imitation of the plaintiff's bundles, his execution of the order was held not to be conclusive against him (*b*). So, too, where a defendant packed inferior brandy in the plaintiff's cases at the express request of an agent of the plaintiff, who was seeking to entrap him, Malins, V.-C., refused the injunction with costs (*c*).

Sale over counter.

Where a manufacturer, *e.g.*, of beer or whiskey, sets up a case against a retail dealer of having sold the product of another manufacturer over the counter in response to a request for the plaintiff's goods, and the defendant shows that he took reasonable precautions to avoid mistakes, it has been held in Scotland that it is not sufficient to prove that one or two mistakes have occurred, but that a course of fraudulent dealing must be made out (*d*).

User in circulars.

It has also been held in Scotland that a word registered as a trade mark is not infringed by its being used in circulars and advertisements in a properly descriptive sense (*e*).

Infringement must be by use on same class of goods.

The use by one manufacturer of a trade mark resembling or even identical with that used by another, is not an infringement of that other's rights, unless the class of goods on which the two

v. *Becker*, 73 Fed. Rep. 297; *Fischer* v. *Blank*, 138 N. Y. 244; *Hilson Co.* v. *Foster*, 80 Fed. Rep. 896; *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154; 60 Am. St. Rep. 377.

(*a*) *Davis* v. *Davis*, 27 Fed. Rep. 490.

(*b*) *Woollam* v. *Ratcliff*, 1 H. & M. 259. And see *Frese* v. *Bachof* (1), 13 Bl. C. C. 234; *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601.

(*c*) *Hennessy* v. *Kennett*, Dig. 556. But in the Indian case of *Orr-Ewing* v. *Chooneeloll Mullick*, Cor. 150, the defendant was restrained, though there was no evidence of his having sold the spurious goods (which he had bought ready marked) to any one but the plaintiff's agent.

(*d*) *Bass, Ratcliff & Gretton, Ld.* v. *Laidlaw*, Ct. Sess. Cas. 4th Ser. XIII. 898; *Thomson & Co.* v. *Robertson*, Ct. Sess. Cas. 4th Ser. XV. 880. Cf. *Edge & Sons* v. *Gallon*, 15 P. R. 689; and *Enoch Morgan's Sons' Co.* v. *Wendover*, 43 Fed. Rep. 420, where an injunction was granted.

(*e*) *Stuart & Co.* v. *Scottish Val de Travers Paving Co., Ld.*, Ct. Sess. Cas. 4th Ser. XIII. 1.

marks are used is the same (*a*), or, at least of so similar a description that they may fairly be supposed to be of the same manufacture as the goods to which the mark is properly applied (*b*).

No infringement where registration wider than user.

And where a trader has registered a trade mark for an extensive class of goods, but has only used it for a small part of the goods in the class, another person does not infringe his rights by using a somewhat similar mark on goods also in the class, but substantially different from the goods on which the registered proprietor has used it. This was so laid down by the Court of Appeal in *Edwards* v. *Dennis* (*c*), in which Cotton, L. J., said, "no doubt the intention of the Trade Marks Act of 1875 is to give a right to what is on the register so as to enable a person who has been registered for five years as the proprietor of a trade mark to maintain an action against any other person taking or infringing that trade mark; but when the alleged infringement consists in using, not the exact thing upon the register, but something similar to it, the Court must, in considering whether there has been an infringement or not, proceed upon the old principle, which prevailed both at law and in equity before the Act, that a man is not to pass off his goods as the goods of another. At common law the man thus injured might obtain damages, and in equity the more effectual protection of an injunction."

Rights of agent of foreign firm.

In the case of *Apollinaris Co., Ld.* v. *Scherer* (*d*) the plaintiffs, an English company, had obtained from one Saxlehner, the proprietor of a spring in Hungary, called the "Hunyadi Janos" spring, the exclusive right to export the water to the United States and to use the name there. Saxlehner sold the water in Europe

(*a*) *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Moses* v. *Sargood*, Dig. 636; *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Whiteley*, 43 L. T. N. S. 627; *In re Rabone*, Dig. 643; *In re Ashton*, Hall, V.-C., Feb. 26th, 1881; *Colman* v. *Crump*, 70 N. Y. 573; *Société Anonyme des Mines, &c.* v. *Baxter*, 14 Bl. C. C. 261; *Chadwick* v. *Covell*, 151 Mass. 190. In *Hecht* v. *Porter*, 9 Pac. C. L. J. 569, it was held that leather boots and india-rubber boots were so far distinct that a trade mark for the former was not infringed by user in respect of the latter.

(*b*) *Wamsutta Mills* v. *Allen*, 12 Phila. 535; *Carroll* v. *Ertheiler*, 1 Fed. Rep. 688; *Collins Co.* v. *Ames & Sons*, 20 Bl. C. C. 542; *Celluloid Manufacturing Co.* v. *Read*, 47 Fed. Rep. 712. See *Eno* v. *Dunn*, 15 App. Cas. 252; *Eastman Photographic Materials Co.* v. *Griffiths' Cycle Corp.*, 15 P. R. 105; *Premier Cycle Co., Ld.* v. *Premier Tube Co., Ld.*, 12 Times L. R. 481; *Dunlop Pneumatic Tyre Co., Ld.* v. *Dunlop-Truffault Cycle Co., Ld.*, 40 Sol. J. 544; *Same* v. *Dunlop Lubricant Co.*, 16 P. R. 12; *Godillot* v. *American Grocery Co.*, 71 Fed. Rep. 873.

(*c*) 30 Ch. D. 454. And compare *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454; *Hargreave* v. *Freeman*, (1891) 1 Ch. 39; *Phillips* v. *Ogden*, 12 P. R. 325; *In re Batt & Co.*, (1898) 2 Ch. 432.

(*d*) 23 Bl. C. C. 459. And see *In re Apollinaris Co.*, (1891) 2 Ch. 186, 226, 230.

under a label which stated that it was not meant for export to America, and the plaintiffs sold the water in the United States under a label which stated that they were the sole exporters. The defendant bought genuine water in Europe under labels bearing Saxlehner's caution, and sold it in the United States as "Hunyadi Janos" water; and it was held that the Apollinaris Co. was entitled to no relief against him, the Court being of opinion that genuine water, rightfully bought, might be sold under its proper name anywhere, and that the arrangement between the Apollinaris Co. and Saxlehner was not binding on persons who were no parties to it.

Rights of lessee of spring.

On the other hand, it has been held (*a*) that the concessionnaire of a spring for a term is not entitled, at all events during the term, to open another spring in the same neighbourhood, and sell the water derived therefrom under the same name as the water derived from the first spring, and in competition with that water.

Sale of materials under name.

Where the plaintiff's article was known as "Hostetter's Stomach Bitters," and the defendants sold materials which they alleged could be used in the production of that article, no relief was granted, there being no allegation that the defendants had done more than this, or that they were engaged with others in a scheme of fraud (*b*).

Infringement of disused mark.

It has been held in America that the use by a manufacturer of a mark previously used by another manufacturer, but discontinued by him for a year, is an infringement of the rights of the latter (*c*); but it is no infringement to use in an honest way a mark which has failed to obtain protection in the hands of another trader by reason of that trader's misstatements; and an infringer of the mark as subsequently used by the honest trader cannot escape by setting up the prior user of the dishonest trader (*d*).

Infringement by use of a registered mark.

Registration of a trade mark which resembles a prior trade mark which is registered, so nearly as to be calculated to deceive, does not, at all events for five years from the date of registration, prevent the owner of the prior mark from obtaining an injunction to restrain its use (*e*); and since registration is, for the first five years,

(*a*) *Hill* v. *Lockwood*, 32 Fed. Rep. 389.

(*b*) *Hostetter* v. *Fries*, 21 Bl. C. C. 339.

(*c*) *Lemoine* v. *Ganton*, 2 E. D. Smith, 343; R. Cox, 142. But see *Symonds* v. *Greene*, 28 Fed. Rep. 834.

(*d*) *Parlett* v. *Guggenheimer*, 67 Md. 542, with which compare *O'Rourke* v. *Central City Soap Co.*, 26 Fed. Rep. 576.

(*e*) *Read* v. *Richardson*, 45 L. T. N. S. 54; *Goodwin* v. *Venning*, 24 Sol. J. 690. Compare *Phillips* v. *Ogden*, 12 P. R. 325. And in New South Wales the use of a registered mark has been restrained: *Harris* v. *Ogg*, 5 N. S. W. Rep. (E.) 114; *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72.

only a qualification for bringing an action (*a*), it would seem that if the second of two registered marks had been used first, the owner of that mark would, by virtue of his prior user, be entitled to restrain the owner of the mark which was used later, but registered first, from using that mark. Where the plaintiffs' mark had been registered for an extensive class of goods, and the defendant's mark had been registered for a class which overlapped the plaintiffs' but had been used only for goods distinct from theirs, on the defendant beginning to use his mark on goods included in his registration, but similar to those for which the plaintiffs' mark had been registered and used, his registration was rectified by limiting it to the distinct goods, and an injunction was granted as to the goods on which he was newly using it (*b*). Again, where the proprietors of a mark registered for coffee in 1876 began, in 1889, to apply it to tea, they were restrained from so doing on motion by the proprietor of a similar mark registered for tea in 1877 (*c*).

**Infringement by improper use of genuine mark.**

It is an infringement to use a genuine trade mark of a manufacturer upon goods not of his production (*d*); and it is no less an infringement to use it upon goods of a quality to which he did not intend it to be applied, even though the goods upon which the infringer uses it are of the make of the owner of the mark (*e*). But where goods have been purchased in bulk, the purchaser is entitled to resell them retail under the name given to them by the manufacturer (*f*).

**Moulded bottles.**

In some cases a rather difficult question has arisen with respect to the use of bottles moulded with the plaintiff's name or trade mark. Where such bottles have been systematically bought up and refilled with spurious waters, &c., so as to pass them off as being of the plaintiff's manufacture, an injunction will be granted to restrain the continuance of the fraud (*g*); but where the bottles

(*a*) *Nuthall* v. *Vining*, C. A. Jan. 21st, 1880; *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398; *Hart* v. *Colley*, 44 Ch. D. 193; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 405.

(*b*) *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454.

(*c*) *Upper Assam Tea Co.* v. *Herbert & Co.*, 7 P. R. 183.

(*d*) *Barnett* v. *Leuchars*, 13 L. T. N. S. 495 (boxes for "Pharaoh's Serpents"); *Richards* v. *Williamson*, 30 L. T. N. S. 746 (gun stamps); *Hennessy* v. *Rohmann*, 36 L. T. N. S. 51; *Hennessy* v. *Cooper*, Dig. 549 (cases for brandy).

(*e*) *Hennessy* v. *Kennett*, Dig. 556; *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216; *Hennessy* v. *Hogan*, *ib.* 225 (cases intended for brandy of superior quality used for brandy of inferior quality); *Gillott* v. *Kettle*, 3 Duer, 624; R. Cox, 148 (labels indicating superior pens placed on boxes of inferior ones).

(*f*) *Condy & Mitchell* v. *Taylor & Co.*, 56 L. T. N. S. 891.

(*g*) *Rose* v. *Henley*, Dig. 551; *Allen* v.

have been bought by the defendant in the ordinary course of his business they have become his property, though they bear the plaintiff's trade mark (*a*), and it does not appear that he will be restrained from using what he has bought, merely because the bottles are moulded, so long as he uses them in a fair manner, and places on them his own adhesive labels (*b*). There does not, indeed, seem to be a clear decision on the point, as the question has not been raised free from complications. Thus, in *Barrett* v. *Gomm* (*c*), the Court of Appeal held that no injunction could be granted against soda-water manufacturers whose labels were found to be placed on two bottles of soda-water moulded with the plaintiff's name and trade mark, but in this case there was no evidence to show that the soda-water in the bottles was of the defendants' manufacture, or that the defendants had filled or sold them. The Master of the Rolls (Sir G. Jessel), however, stated that if some of the plaintiff's engraved bottles had come fairly into the defendants' possession, they would have been entitled to refill and sell them, at all events if they had placed on them their own adhesive labels, so as to cover the plaintiff's name and trade mark. And this opinion appears to have been adopted by North, J., in *Barrett* v. *White* (*d*).

**Infringement by engraver.**

It is an infringement for an engraver to prepare and supply to one person printing-blocks engraved with the trade mark, or an important part of the trade mark of another, inasmuch as the piracy would be impossible without the blocks; and Shadwell, V.-C. of England, went so far as to say that if a thing contained twenty-five parts, and one only was taken, such an imitation would be sufficient to contribute to a deception, and the law would hold those responsible who had contributed to the fraud (*e*). The principle is the same where the engraver, though retaining the blocks in his own possession, yet facilitates fraud by the dissemination of labels bearing pirated trade marks (*f*). Lord Cran-

*Richards*, 26 Sol. J. 658; *Hostetter* v. *Anderson*, 1 V. R. Eq. 7; *Sawyer Crystal Blue Co.* v. *Hubbard*, 32 Fed. Rep. 388; *Evans* v. *Von Laer*, 32 Fed. Rep. 153. And see *Hostetter Co.* v. *Brueggeman Reinert Distillery Co.*, 46 Fed. Rep. 188; *Hostetter Co.* v. *Becker*, 73 Fed. Rep. 297.

(*a*) *Idris & Co.* v. *Ward*, C. A. Feb. 4th, 1889.

(*b*) *Welch* v. *Knott*, 4 K. & J. 747; *Rose* v. *Loftus*, 47 L. J. Ch. 576. See, however, *Wood* v. *Burgess*, 24 Q. B. D. 162, a case under the Merchandise Marks Act, 1887.

(*c*) 74 L. T. (Journal) 388.

(*d*) North, J., May 12th, 1883.

(*e*) *Guinness* v. *Ullmer*, 10 L. T. O. S. 127.

(*f*) *Farina* v. *Silverlock*, 1 K. & J. 509; 6 De G. M. & G. 214; 4 K. & J. 650; *De Kuyper* v. *Witteman*, 23 Fed. Rep. 871;

worth, C., thought, however, that a man who had A.'s goods, but none of his labels, might rightfully employ a printer or engraver to supply him with imitated labels, and that A. could have no ground of complaint against the sale of his goods with something on them to represent his trade mark, though not his genuine mark (*a*).

Untrue allegation of registration.

It does not appear that the position of a defendant in an action for infringement is altered for the worse by the fact of his having alleged his trade mark to be registered, before it in fact was so (*b*); but by so doing he will expose himself to penalties under § 105 of the Patents Act, 1883 (*c*).

Use by a trade-mark owner of his mark upon another's goods.

It seems that a trader is entitled to place his trade mark on articles not of his own make, unless there is some trade custom or contract that he shall not do so, and to remove the maker's mark for the purpose of substituting his own, and that such a course would not be actionable (*d*). Nor is there any reason why it should be so. The maker's mark has already performed its function when the goods are sold, and when it is removed from the goods the maker ceases to be responsible for the guarantee implied by its presence on them. The purchaser, by substituting his own mark, undertakes the responsibility for the quality of the goods, which are, in effect, selected and guaranteed by him (*e*).

*Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183; *Holt* v. *Menendez*, 128 U. S. 182.

(*a*) *Farina* v. *Silverlock*, 6 De G. M. & G. 214.

(*b*) *Ellis & Sons* v. *Ruthin Soda Water Co.*, Jessel, M. R., Nov. 21st, 1879.

(*c*) See also § 3 (1) (e) of the Merchandise Marks Act, 1887.

(*d*) See *Johnson* v. *Raylton*, 7 Q. B. D. 438. Compare *Starey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90.

(*e*) See *Hirsch* v. *Jonas*, 3 Ch. D. 584; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Apollinaris Co.*, (1891) 2 Ch. 186, 225, 230, 235; *Leahy* v. *Glover*, 10 P. R. 141; *In re Wills*, (1893) 2 Ch. 262; *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183.

# CHAPTER V.

## THE CRIMINAL PROSECUTION.

Remedies for fraudulent imitations.

"In cases like the present" (*i.e.*, in cases of imitation of a wrapper imprinted with a trade mark), "the remedy," said Willes, J., "is well known. The prosecutor may, if he pleases, file a bill in equity to restrain the defendant from using the wrappers, or he may bring an action at law for damages, or he may indict him for obtaining money under false pretences" (*a*).

Infringement of trade mark not forgery at Common Law.

At Common Law the imitation of a trade mark or of a trade wrapper is not a forgery. "A forgery must be of some document or writing" (*b*); "it is the forging of a false document to represent a genuine document" (*c*). In a case in which the prisoner had imitated the label used on Borwick's baking powder, and was indicted for forgery (*d*), the Court of Crown Cases Reserved, consisting of Pollock, C. B., Willes and Byles, JJ., and Bramwell and Channell, BB., decided that the conviction for forgery was not sustainable, though an indictment for false pretences would have been good. The grounds of the decision are thus stated by Bramwell, B.: "I think that this was not a forgery. Forgery supposes the possibility of a genuine document, and that the false document is not so good as the genuine document, and that the one is not so 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 one gets improperly used. But the question is whether the document itself is a false document. It is said that the wrapper is so like one used by somebody else, that it may mislead; but that is not material to the question we have to decide. The prisoner may have committed a gross fraud in using the wrappers for that

(*a*) *R.* v. *John Smith*, D. & B. 566; 8 Cox, 32. This was in 1858, before the Merchandise Marks Act of 1862.

(*b*) *Per* Cockburn, C. J., *R.* v. *Closs*, D. & B. 460; 7 Cox, 494.

(*c*) *Per* Willes, J., *R.* v. *John Smith*, *ubi supra*.

(*d*) *R.* v. *John Smith*, *ubi supra*.

which was not the genuine powder, and may possibly be indicted for obtaining money by false pretences, but I think he cannot be convicted of forgery" (*a*).

Not even if the mark consists of a signature.

It might be thought that where the trade mark consisted of a signature, an imitation of this would amount to forgery; but this has been decided not to be so, in the case of *R.* v. *Closs* (*b*), in which the prisoner imitated the signature of the artist, J. Linnell, in the corner of a spurious picture. Cockburn, C. J., in delivering the judgment of the Court of Crown Cases Reserved, said that the stamp was merely in the nature of a mark put upon the painting with a view to identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the painting being his; and in the course of the argument he expressed a similar opinion with respect to the imitation of a signature stamped on a gun.

The Merchandise Marks Act, 1862.

Under the Merchandise Marks Act, 1862 (*c*), the forgery of trade marks was made a misdemeanour, and the Criminal Law made to cover such offences as those committed in *R.* v. *John Smith* (*d*) and *R.* v. *Closs* (*e*). And this is so now under the new Merchandise Marks Act, 1887 (*f*).

What offences are punishable under the Merchandise Marks Act, 1887.

By that Act (*g*) the following offences are made punishable:—

1. Forging a trade mark registered in the United Kingdom or protected in any British possession or foreign state to

(*a*) Taking the same view, Pollock, C. B., said that the real offence was the enclosing the false powder in the false wrappers; that the issuing of the wrappers without the stuff within them would be no offence; but that the real offence was the issuing them with the fraudulent matter in them.

(*b*) D. & B. 460; 7 Cox, 494. 25 & 26 Vict. c. 68, § 7, now provides for spurious pictures with a forged signature.

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

(*d*) D. & B. 566; 8 Cox, 32.

(*e*) D. & B. 460; 7 Cox, 494. See *R.* v. *Lloyd* (Recorder of Birmingham, Oct. 13th, 1881), in which the infringement of a gunmaker's trade mark was punished under the Merchandise Marks Act, 1862, with six months' imprisonment. In *R.* v. *Willis*, C. C. C., September 21st, 1885, Hawkins, J., inflicted six years' penal servitude on a person who had offered for sale watches of base metal thinly coated with gold and bearing a forged Goldsmiths' Hall mark. In *R.* v. *Boyes*, C. C. C., April 6th, 1886, the Recorder of London inflicted four months' imprisonment without hard labour for imitation of the prosecutor's perfumes, bottles, and labels. In *R.* v. *Pemberton*, 20 Iron, 110, the defendant had forged the "Low Moor" trade mark on iron tubes not of the Low Moor Co.'s material or manufacture, and Day, J., inflicted three months' imprisonment without hard labour. See *Cooper* v. *Hamilton*, 6 N. Z. L. R. 598, as to the practice in New Zealand.

(*f*) 50 & 51 Vict. c. 28. And see notes to this Act, *infra*.

(*g*) As to this Act generally, see *Gridley* v. *Swinborne*, 5 Times L. R. 71; *Wood* v. *Burgess*, 24 Q. B. D. 162; and *Starey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90; *R.* v. *Lipton*, 32 L. R. Ir. 115; *Kirshenboim* v. *Salmon & Gluckstein*, (1898) 2 Q. B. 19; *Coppen* v. *Moore*, (1898) 2 Q. B. 300; *ib.* 306; and the notes to the Act in Appendix F.

which § 103 or 104 of the Patents Act, 1883, has been made applicable (*a*).

2. Falsely applying to goods any trade mark as above, or any mark so nearly resembling such a trade mark as to be calculated to deceive (*b*).
3. Making any die, block, machine, or other instrument for the purpose of forging or of being used for forging a trade mark as above (*c*),
4. Applying to goods any false trade description—*i.e.*, any description, statement, or other indication, direct or indirect—
   (a) As to the number, quantity, measure, gauge or weight of any goods; or
   (b) As to the place or country in which any goods were made or produced; or
   (c) As to the mode of manufacturing or producing any goods; or
   (d) As to the material of which any goods are composed; or
   (e) As to any goods being the subject of an existing patent, privilege, or copyright;
   (f) As to the person or firm who manufactured any goods, which is false in a material respect as regards the goods to which it is applied (*d*).
5. Disposing of or having in possession any die, block, machine, or other instrument for the purpose of forging a trade mark as above (*e*).
6. Causing any of the above things to be done (*f*).
7. Selling, or exposing for or having in possession for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark as above or false trade description is applied, or to which any trade mark as above

(*a*) §§ 2 (1) (a), 3 (1) and 4.

(*b*) §§ 2 (1) (b), 3 (1), 5 and 6. And see *Copley* v. *Kirk*, 84 L. T. (Journal) 140.

(*c*) §§ 2 (1) (c), 4 and 6.

(*d*) §§ 2 (1) (d), 3, 5, and 6. Compare § 18. As to 4 (a) see *R.* v. *Sherwood*, 7 Cox, 270; *R.* v. *Ragg*, 8 Cox, 265; *R.* v. *Lee*, 9 Cox, 460; *R.* v. *Ananiadi*, Manchester Police Court, July 30th, 1889; *R.* v. *Manoukion*, Manchester Police Court, May 10th, 1898. As to 4 (b) see § 7, with respect to watches; and see *R.* v. *Lipton*, 32 L. R. Ir. 115; *Bischop* v. *Toler*, 65 L. J. M. C. 1; *Coppen* v. *Moore* (1), (1898) 2 Q. B. 300. As to 4 (c) see *R.* v. *Lipton*, 32 L. R. Ir. 115; *Kirshenboim* v. *Salmon & Gluckstein*, (1898) 2 Q. B. 19. As to 4 (e) see § 105 of the Patents Act, 1883; and *R.* v. *Wallis*, 3 P. R. 1; *R.* v. *Crampton*, 3 P. R. 367; and *R.* v. *Morris*, Great Marlborough Street Police Court, December 16th, 1886. And see *post*, Appendix F.

(*e*) §§ 2 (1) (e), 3 (1) and 4.

(*f*) §§ 2 (1) (f) and 6.

or mark so nearly resembling such a trade mark as to be calculated to deceive, is falsely applied (*a*).

8. Procuring, counselling, aiding, abetting, or being accessory to, from within the United Kingdom, the commission without the United Kingdom of any such act as above (*b*).
9. Falsely representing that any goods are made by a person holding a Royal warrant, or for the service of Her Majesty, or of any of the Royal Family, or any Government department (*c*).

Additions to and alterations of trade marks.

By § 4 (b) it is made forgery of a trade mark to falsify a genuine trade mark, whether by alteration, addition, effacement, or otherwise.

Forgery at Common Law.

At Common Law "it is forgery to alter a material part of a true instrument" (*d*). Thus, where in a bill of exchange "0" was added to "8" and "y" to "eight," so as to make it appear to be for £80 (*e*). And "the making of any false instrument which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing person, is as much a forgery as if it had been made in the name of one who was known to exist, and to whom it was due" (*f*). "An exact resemblance, or facsimile, is not required to constitute the crime of forgery, for if there be a sufficient resemblance to show that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient" (*g*).

Defences.

The defences to a charge of one of the above offences are set out, as to Nos. 1 to 6, in § 2 (1) (*h*); as to No. 7, in § 2 (2). A special defence is also provided by § 6 for persons who are charged with having committed offences 2, 3, 4 or 6, when they were in fact employed in the ordinary course of their business.

Penalties.

The penalties for offences Nos. 1 to 8 are set out in § 2 (3); as to No. 9, in § 20.

Expressions generally understood

It is not an offence for persons to use any trade description lawfully and generally applied, at the passing of the Act, to goods

(*a*) § 2 (2). See *Christie* v. *Foster Brewing Co., Ld.*, 18 V. L. R. 292, where it was held that a corporation might be guilty of offences under the corresponding Victorian Act, and the meaning of "having goods in possession for sale" was discussed.

(*b*) § 11.

(*c*) § 20. And see § 106 of the Patents Act, 1883, as to wrongful assumption of the Royal Arms.

(*d*) 2 East, P. C. 978.

(*e*) *R.* v. *Elsworth*, 2 East, P. C. 986.

(*f*) *Ib.* 957. And see *R.* v. *Lewis*, Foster, Cr. Cas. 116; *R.* v. *Avery*, 8 C. & P. 596; *R.* v. *White*, 72 C. C. C. Sessions Papers, 222.

(*g*) *Per* Grose, J., in *R.* v. *Collicott*, 2 Leach, 1048, a Stamp case.

(*h*) See *Copley* v. *Kirk*, 84 L. T. (Journal) 140.

may be employed.

of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods (*a*), when the description is so applied. Thus, patent leather, patent thread (*b*), patent pins (*c*), patent isinglass (*d*). But there is a special requirement, when the name of a place or country is stated in a misleading way, that the place of origin shall be stated (*e*).

By the Merchandise Marks Act, 1891 (*f*), the customs entry relating to imported goods is, for the purposes of the Act of 1887, to be a trade description applied to the goods (*g*); and provision is made for official prosecutions by the Board of Trade (*h*), and by the Merchandise Marks Act, 1894 (*i*), the powers conferred by the Act of 1891 upon the Board of Trade may be exercised by the Board of Agriculture in certain cases.

Civil remedy not affected by conviction.

A conviction under these Acts does not relieve the defendant from any civil proceedings (*k*).

Where deception succeeds, indictment for false pretences will lie.

While, apart from the Merchandise Marks Acts, the fraudulent imitation of a trade mark is not forgery, such an imitation, when it has been intended to be and has been the means of inducing persons to part with their money, in the belief that they were buying one thing, when in fact they were buying another, is sufficient to support a conviction on an indictment for obtaining money by false pretences. This affords sufficient protection to the innocent purchaser of goods falsely marked; the Act gives protection to the manufacturer who has suffered in his custom and in his reputation by piracies.

Convictions.

"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" (*l*); and it is established that the fraudulent imitation of a trade mark will be punished in the same way, where the necessary circumstances exist. Thus, in *R.* v. *Dundas* (*m*), the prisoner, who asserted his own name to be Everett, sold blacking in bottles labelled "Everett's Premier," in a similar manner, with only trifling variations, to the bottles of a well-known

(*a*) § 18.
(*b*) *Marshall* v. *Ross*, L. R. 8 Eq. 651.
(*c*) *Edelsten* v. *Vick*, 11 Hare, 78.
(*d*) *Gridley* v. *Swinborne*, 5 Times L. R. 71.
(*e*) § 18.
(*f*) 54 & 55 Vict. c. 15.
(*g*) § 1.
(*h*) § 2.
(*i*) 57 & 58 Vict. c. 19.
(*k*) § 19 of the principal Act.
(*l*) *Per* Kelly, C. B., in *R.* v. *Suter & Coulson*, 10 Cox, 577.
(*m*) 6 Cox, 380.

manufacturer of that name. Erle, J., told the jury that "with respect to the difference between the labels, the jury should consider whether it was a small and colourable difference only, and intended to deceive. It was of little consequence whether the man's name was Everett, as he had stated, or not; for even if it were, and he went about the country and offered blacking for sale as 'Everett's Premier,' representing it to be the well-known article of that name, knowing that it was not so, and intending to cheat the prosecutor by passing upon him a spurious article as the true one, his conduct was equally fraudulent" (*a*). The prisoner was convicted. In *R.* v. *Smith* (*b*), the conviction for forgery being quashed, the prisoner afterwards pleaded guilty to an indictment for false pretences (*c*). In *R.* v. *Suter & Coulson* (*d*), it was held by the Court of Crown Cases Reserved that a representation that a mark of "18" on a watch was a genuine hall-mark of the Goldsmiths' Company was clearly a false pretence within the statute (*e*).

*R.* v. *Bryan.* Question as to misrepresentation of quality.

The case of *R.* v. *Bryan* (*f*) gave rise to some differences of opinion in respect to the Law of False Pretences. The prisoner in that case was found by the jury to have obtained money from pawnbrokers on spoons which he had fraudulently represented to have as much silver on them as Elkington's "A." spoons. They also found that he had represented the foundations to be of the best material, knowing that to be untrue, and that in consequence of this he obtained the moneys mentioned in the indictment. The Recorder of London reserved the case for the consideration of the Court of Crown Cases Reserved. Twelve judges heard the case, and of these ten held that the conviction must be quashed, Willes, J., and Bramwell, B., dissenting. The language employed by some of the judges on that occasion, and in particular by Lord Campbell, C. J. (*g*), led to an impression that in the opinion of the judges it was impossible to convict under the

(*a*) It was also held that an offer to sell on sale or return was immaterial, the actual bargain being for cash.

(*b*) D. & B. 566; 8 Cox, 32.

(*c*) 8 Cox, 37; and 48 C. C. C. Sessions Papers, 8.

(*d*) 10 Cox, 577.

(*e*) And in *R.* v. *Gray & Gosling*, Dig. 183, the imitation of Messrs. Allsopp's labels was punished; and in *R.* v. *S. Jones*, Dig. 182, the imitation of Mr. Borwick's wrappers. See, too, *R.* v. *Closs*, D. & B. 460; 7 Cox, 494.

(*f*) D. & B. 265; 7 Cox, 312.

(*g*) He said, for instance, that the conviction proceeded upon "a mere misrepresentation, during the bargaining for the purchase of a commodity, of the quality of that commodity." "If the seller were criminally liable for unduly exaggerating the value of the article, the buyer would be for unduly depreciating." He "found no case in which a mere misrepresentation at the time of sale of the quality of the goods had been held to be an indictable offence."

Statute of False Pretences, when the misrepresentation had reference only to quality and not to substance: that is to say, that where, for instance, an infinitesimal quantity of gold was found in a ring represented to be of eighteen-carat gold, the presence of that infinitesimal quantity of gold prevented the false representations from supporting a criminal charge (*a*). Where the jewellery contained no metal of the kind specified, the prisoner was convicted (*b*). Anticipating such a result, Bramwell, B., said (*c*) that the result of the decision would be that the prisoner would be indictable if Elkington's spoons had half an ounce and his none, but not if Elkington's had one ounce, and his a quarter of an ounce.

The interpretation thus put upon the decision in *R.* v. *Bryan* was unfortunate, tending, as it did, to encourage an idea of fraud being possible with impunity; and some of the judges who had decided *R.* v. *Bryan* (*c*) took opportunities of explaining what the real principle of the judgment was (*d*). It was also difficult to reconcile such a conclusion with such cases as those in which the prisoner sold a cheese by means of the representation that a taster taken from a cheese of superior quality was in fact taken from the one in question (*e*). There was, indeed, in those cases, a certain misrepresentation as to substance, but the real grievance was that a cheese was sold as being of one quality, when it was in fact of another (*f*).

*R.* v. *Ardley.* The whole question is now fully explained and set at rest by the judgment in *R.* v. *Ardley* (*g*). There the prisoner obtained money for a watch chain which he represented to be of fifteen-carat gold, stamped on every link, but which representation was untrue. In giving judgment, Bovill, C. J., said: "The case which has been most pressed upon us is *R.* v. *Bryan* (*h*). The representation in

(*a*) *R.* v. *Suter & Coulson*, 10 Cox, 577. And see *R.* v. *Lee*, 8 Cox, 233; *R.* v. *Levine & Wood*, 10 Cox, 374. Previously to *R.* v. *Bryan*, D. & B. 265; 7 Cox, 312, in *R.* v. *Hall*, 45 C. C. C. Sessions Papers, 451, the prisoner was convicted, though there was a minute quantity of gold.

(*b*) *R.* v. *Roebuck*, 7 Cox, 126; D. & B. 24. And see *R.* v. *Ball*, C. & M. 249; *R.* v. *Stevens*, 1 Cox, 83; and *R.* v. *Priestley*, 63 C. C. C. Sessions Papers, 541.

(*c*) *R.* v. *Bryan*, D. & B. 265; 7 Cox, 312.

(*d*) See, for instance, *per* Erle, C. J., in *R.* v. *Goss*, Bell, 208; 8 Cox, 262; and *per* Willes, J., in *R.* v. *Suter & Coulson*, 10 Cox, 577.

(*e*) *R.* v. *Abbott*, 1 Den. 273; *R.* v. *Dark*, 1 Den. 276; *R.* v. *Garlick*, 1 Den. 276; *R.* v. *Goss*, Bell, 208; 8 Cox, 262.

(*f*) And on this ground Lord Campbell, C. J., in *R.* v. *Roebuck*, 7 Cox, 126; D. & B. 24, dissented from *R.* v. *Abbott*.

(*g*) L. R. 1 C. C. R. 301; 12 Cox, 23. Compare *R.* v. *Foster*, 13 Cox, 393.

(*h*) D. & B. 265; 7 Cox, 312.

that case was that certain plated spoons were 'equal to Elkington's A.' *Primâ facie* that representation would seem to be a mere matter of opinion, and the Court held that it was not sufficient to support the conviction. But many of the judges expressed the opinion that there might well be cases in which misrepresentations, though as to quality, would be within the statute. Cockburn, C. J., says, 'If the prisoner had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be an entirely different thing.' Pollock, C. B., says, 'I think if a tradesman or a merchant were to concoct an article of merchandise expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, the statute would apply.' It is plain that these learned judges considered that a specific representation of quality, if known to be false, would be within the statute. Coleridge, J., expressly concurs in the observations of Pollock, C. B. Erle, J., at the close of his judgment, says: 'No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and the present case appears to me not to support a conviction, upon the ground that there is no affirmation of a definite triable fact in saying the goods were equal to Elkington's 'A,' but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale, where the vendor has in substance the article contracted for, namely, plated spoons.' Crompton, J., also considered that the statute applies 'where the thing sold is of an entirely different description from what it is represented to be.' Willes, J., who dissented from the judgment of the Court, goes the whole length of saying that a representation as to quality, if known to be false, is enough to support a conviction. And Bramwell, B., leans to the same opinion.

"Applying these observations to the present case, the statement here made is not in form an expression of opinion or mere praise. It is a distinct statement, accompanied by other circumstances, that the chain was fifteen-carat gold. That statement was untrue, was known to be untrue, and was made with intent to defraud. How does that differ from the case of a man who makes a chain of one material and fraudulently represents it to be of another? Therefore, whether we look at the whole of the evidence, or only

at that which goes to the quality of the chain, the conviction is good. The case differs from *R.* v. *Bryan* (*a*), because here there was a statement as to a specific fact within the actual knowledge of the prisoner, namely, the proportion of pure gold in the chain."

Intentional misstatement as to fact punishable.

From this case it follows that where a person has made a false statement in regard to a specific question of fact, knowing that statement to be false, with intent to defraud, and he does defraud by means of that statement, then, even though the statement have reference to the quality of the article, he will be liable to be convicted (*b*).

Wrongful user of trade marks.

Placing a forged trade mark on goods not the make of the manufacturer whom the trade mark denotes will amount to such a statement; and it seems that the shifting a genuine label from goods of superior quality to goods of inferior quality, though of the same maker, will also come within the principle of *R.* v. *Ardley* (*c*).

False pretences as to weight.

In the sale of goods by weight, if money is obtained by representing the weight sold to be greater than it really is, an indictment for false pretences will be good, and it will make no difference that the goods were sold as a whole—for instance, by the load—if the price was calculated on the assumption that the load was of the weight represented by the prisoner (*d*).

False pretences as to registration of trade marks.

By § 105 of the Patents Act, 1883, penalties are now imposed on persons untruly representing that a trade mark is registered (*e*).

False pretences without words.

Words are not necessary to constitute the false representation. Thus, where hewers at a colliery placed in their tubs of coal tokens to represent a greater weight of coal than they had in fact worked, it was held that they were properly convicted (*f*).

(*a*) D. & B. 265; 7 Cox, 312.

(*b*) On this principle, in New South Wales, a prosecution was directed against a person who had sold German cigars as Havannahs: *Heyde* v. *Wittkowski*, 5 N. S. W. Rep. (E.) 74.

(*c*) L. R. 1 C. C. R. 301; 12 Cox, 23.

(*d*) *R.* v. *Sherwood*, 7 Cox, 270; *R.* v. *Ridgway*, 3 F. & F. 838; *R.* v. *Ragg*, 8 Cox, 265; *R.* v. *Lee*, 9 Cox, 460.

(*e*) See § 3 (1) of the Merchandise Marks Act; also *Wright, Crossley & Co.* v. *Dobbin & Co.*, 15 P. R. 21; *MacSymons' Stores, Ld.* v. *Shuttleworth*, 15 P. R. 748, in which the decision of the Irish Q. B. D. was approved; and *R.* v. *Morris*, Great Marlborough Street Police Court, December 16th, 1886.

(*f*) *R.* v. *Hunter*, 10 Cox, 642; *R.* v. *Carter*, *ib.*

# CHAPTER VI.

## THE CIVIL REMEDY. I.

Common Law.

The proper remedy at Common Law for a fraud committed by means of the infringement of a trade mark belonging to a rival trader is by an action on the case for deceit. The manner in which that form of action was made applicable to cases of trade mark and developed to meet the necessities of such cases, which in some respects differ from other cases of fraudulent misrepresentation, may be well stated in the language employed by Mellish, L. J., who says (*a*): "In my opinion, all actions of this nature must be founded upon false representations. Originally, I apprehend, the right to bring an action in respect of the improper use of a trade mark arose out of the Common Law right to bring an action for a false representation, which, of course, must be a false representation made fraudulently. It differed from an ordinary action for false representation in this respect, that an action for false representation is generally brought by the person to whom the false representation is made; but in the case of the improper use of a trade mark, the Common Law Courts noticed that the false representation which is made by putting another man's trade mark, or the trade name of another manufacturer, on the goods which the wrongdoer sells, is calculated to do an injury, not only to the person to whom the false or fraudulent representation is made, but to the manufacturer whose trade mark is imitated; and, therefore, the Common Law Courts held that such a manufacturer had a right of action for the improper use of his trade mark. Then the Common Law Courts extended that doctrine one step farther; first, if I recollect rightly, in the case of *Sykes* v. *Sykes* (*b*). There it was held that, although the representation was perfectly true as between the original vendor and the original purchaser, in this

(*a*) *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 453.
(*b*) 3 B. & Cr. 541. And see *per* Lord Blackburn, in *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15.

sense, that the original purchaser knew perfectly well who was the real manufacturer of the goods, and therefore was not deceived into believing that he had bought goods manufactured by another person; yet if the trade mark was put on the goods for the purpose of enabling that purchaser, when he came to resell the goods, to deceive any one of the public into thinking that he was purchasing the goods of the manufacturer to whom the trade mark properly belonged, then that was equally a deception, a selling of goods with a false representation, which would give the original user of the trade mark a right of action. That was the Common Law right."

Action may be brought by manufacturer defrauded.

An action on the case for deceit at Common Law may then be brought, not only by the person who has been induced to purchase goods manufactured by one maker in the faith that they have been manufactured by another, but also by the maker of whose manufacture the goods in question have falsely been represented to be. It seems at least probable that this principle was recognized as early as the reign of Queen Elizabeth. In *Southern* v. *How* (*a*), a case was quoted by Doderidge, J., in which, in that reign, a clothier of Gloucester, who manufactured better cloth than any other person in the trade, had invented and applied to his cloth a special mark to denote his manufacture. Another clothier then pirated this mark and applied it to his own inferior cloth; and it was held in the Court of Common Pleas that an action on the case for deceit would lie against the fraudulent clothier. Whether the action was brought by the buyer of the cloth or by the rival clothier cannot be determined, since the reporters differ on this point; but this much is clear, that Chief Justice Popham (*b*) reported the case as establishing the right of the defrauded clothier to compensation for the injury done him.

(*a*) Cro. Jac. 471; Poph. 144; 2 Rolle, 28.

(*b*) The great weight to be given to any statement by Popham, C. J., appears from the terms applied to him in 6 Co. Rep. 75, where he is described as "the venerable and honourable Chief Justice of England, and Councillor of State to Queen Elizabeth and to our Lord the King that now is. . . . . Who was a most reverent judge, of a ready apprehension, profound judgment, most excellent understanding in the true reason of the law, and of universal and admirable experience and knowledge of all business which concerned the commonwealth; accompanied with a rare memory, with perpetual industry and labour for the maintenance of the tranquillity and public good of the realm, and in all things behaving with great constancy, integrity and patience." Eyre, C. J. (1 B. & P. 610), speaks of him as "a very able judge," and Lord Fitzgerald (14 App. Cas. 357) says "he had the reputation of being a consummate lawyer."

Right to redress.

Whatever the circumstances in that particular case may have been, the principle that a person who has suffered by reason of his trade mark being intentionally imitated by another has a right at Common Law to redress from the infringer has been repeatedly acted on, and is thus clearly stated by Coltman, J., in *Rodgers* v. *Nowill* (*a*), where after expressing his agreement with the law laid down by Williams, J., that no man had a right to sell goods of his own manufacture upon a false and deceitful representation that they were of the manufacture of another, he says: "To this I would add that an action is clearly maintainable by the party whose name is so fraudulently used, if any damage results to him from the false representation."

At Common Law, fraudulent intention must be proved.

According to the strict principles of the Common Law, for an action in respect of a trade mark to be successful, it must be proved that the defendant acted with fraudulent intention. "Proof of fraud on the part of the defendant," says Lord Westbury, C., "is of the essence of the action" (*b*). The general law on the subject of false representations is summed up by Parke, B., in *Taylor* v. *Ashton* (*c*), as being that, independently of any contract between the parties, no one can be made responsible for a representation of such a kind as there was in that case (*i.e.*, a false representation of the flourishing state of a bank, which had induced the plaintiff to take shares), unless it be fraudulently made. The law so enunciated was applied in a succession of trade mark cases at Common Law (*d*), the effect of which was stated by Lord Westbury as above. But it is not necessary that a person should sit down and say to himself: "I propose to defraud my neighbour," but if a man of common sense and intelligence, knowing his neighbour's rights, sets to work to do things which are necessarily calculated to injure him, he must be taken to be guilty of fraud—that is to say,

(*a*) 5 C. B. 109.

(*b*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.

(*c*) 11 M. & W. 415. And see *Derry* v. *Peek*, 14 App. Cas. 337.

(*d*) See, among other cases, *Singleton* v. *Bolton*, 3 Doug. 293; *Crawshay* v. *Thompson*, 4 Man. & G. 357; *Rodgers* v. *Nowill*, 5 C. B. 109; *Myers* v. *Baker*, 3 H. & N. 802. In *Crawshay* v. *Thompson*, Coltman, J., expressed himself thus: "It appears to me that an intention to deceive is a necessary ingredient in this case. The intention is for the jury; and fraud must be made out by proof of an intention existing in the mind of the party that the iron should pass as the iron of the plaintiff." And in *Hargreaves* v. *Smith*, Dig. 338, Lush, J., told the jury that an intention to divert customers from the plaintiffs to the defendant must be proved. See *per* Lord Blackburn in *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15, in the House of Lords; *Lawrie* v. *Baker*, 2 P. R. 213; *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639, *per* Lopes, L. J.

of knowingly injuring his neighbour—knowingly violating his neighbour's rights by some false pretence (*a*).

Defendant must have expected deception.

It has been held that intentional fraud cannot be inferred from the fact alone that the plaintiff has informed the defendant that in his opinion the defendant was using a trade mark calculated to deceive, nor even from the fact being that the trade mark so used is really calculated to deceive: there must be evidence that the defendant believed such deception to be probable (*b*); in other words, that the defendant has sold his goods "as and for" the plaintiff's goods (*c*). "But," said Lord Blackburn, in *Singer Manufacturing Co.* v. *Loog* (3) (*d*), "it is to my mind obvious that, though the defendants might have committed no actionable wrong whilst using the plaintiff's trade mark innocently, yet, if they persevered with the use of it after they had knowledge of the facts, they would do wrong, and there would be evidence to support a claim at law for damages for knowingly selling the defendants' goods as and for the plaintiff's." And in a Canadian case at law (*e*), it was held that the plaintiff was entitled to damages, though the defendant denied any fraudulent intention, since the mark had been registered for a year as the plaintiff's, and the defendant must be taken to have known it.

Deception of first purchaser not necessary.

It is not necessary, in order for the plaintiffs to recover, for them to show that the defendants made fraudulent representations directly to the persons to whom they sold the goods; "although they did not themselves sell them as goods of the plaintiffs' manufacture, yet if they sold them to retail dealers for the express purpose of being resold as goods of the plaintiffs' manufacture" (*f*), thus "scattering over the world the means of enabling parties to commit frauds upon the plaintiffs" (*g*), proof of that would be sufficient for the plaintiffs' case (*h*).

(*a*) *Pinto* v. *Badman*, 8 P. R. 181, 184, *per* Day, J.

(*b*) *Crawshay* v. *Thompson*, 4 Man. & G. 357.

(*c*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; *Morrison* v. *Salmon*, 2 Scott, N. R. 449; 2 Man. & G. 385; *Crawshay* v. *Thompson*, *ubi supra*. In equity, it is not necessary to prove fraudulent intention otherwise than by proving that the defendant has used a mark which is, in fact, calculated to deceive; and this was recognised by the Court of Queen's Bench in *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537. Since, by the Judicature Act of 1873, § 25, the rules of Equity are to prevail where they conflict with those of the Common Law, it appears that at least nominal damages should now be recoverable in the Queen's Bench Division on proof of such facts as would be satisfactory to a Court of Equity. See *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639, *per* Lopes, L. J.

(*d*) 8 App. Cas. 15.

(*e*) *Bondier* v. *Depatie*, 3 Dorion, 233.

(*f*) *Sykes* v. *Sykes*, 3 B. & Cr. 541.

(*g*) *Per* Wood, V.-C., in *Farina* v. *Silverlock*, 1 K. & J. 509.

(*h*) Compare the language of the Court

Questions for jury.

The question of fraudulent intention is for the jury, with whom it rests to say whether or not such intention is proved by the evidence before them (*a*). And it was held under the old practice that the plaintiff's pleadings must allege with sufficient distinctness a false representation on the part of the defendant (*b*), when it was left to the jury to say whether the defendant had adopted the particular mode of deceit charged (*c*).

As to the questions to be left to the jury in a case of passing off, it was said by Lindley, L. J., on a motion for a new trial in the case of *Reddaway* v. *Bentham Hemp Spinning Co.* (*d*), in which the plaintiffs claimed an injunction to restrain the defendants from using the words "camel hair" in connection with the sale or manufacture of belting by them so as to induce the belief that such belting was of the plaintiffs' manufacture, that "two questions at least should be left to the jury, viz.: (1) What does camel hair belting mean? Does it mean belting made by the plaintiffs as distinguished from belting made by other manufacturers, or does it mean belting of a particular kind without reference to any particular maker? (2) If it has the first of these meanings, then the next question will be, Do the defendants so describe their belting as to be likely to mislead purchasers and to lead them to buy the defendants' belting as and for the belting of the plaintiffs? The second question, if answered in the affirmative, would entitle the plaintiffs to an injunction without proof of any intent to deceive." In the subsequent action of *Reddaway* v. *Banham* (*e*), brought by the same plaintiffs against different defendants for similar relief, Collins, J., left the following questions to the jury: (1) Does "camel hair belting" mean belting made by the plaintiffs as distinct from belting made by other manufacturers? Or (2) Does it mean belting of a particular kind without reference to any particular maker? (3) Do the defendants so describe their belting as to mislead purchasers and to lead them to buy the

of King's Bench in *Pollhill* v. *Walter*, 3 B. & Ad. 114. And see *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434—442, 451—453; and *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15.

(*a*) *Crawshay* v. *Thompson*, 4 Man. & G. 357; *Rodgers* v. *Nowill*, 5 C. B. 109.

(*b*) *Morison* v. *Salmon*, 2 Scott, N. R. 449; 2 Man. & G. 385.

(*c*) *Rodgers* v. *Nowill*, 5 C. B. 109. In *Hargreaves* v. *Smith*, Dig. 338, Lush, J., left it to the jury to say (1) whether the plaintiffs' mark was a good one; (2) whether it had been imitated; (3) whether, if there was imitation, it was with intent to deceive. And see *Gillespie & Co.* v. *Marshall*, Dig. 648.

(*d*) (1892) 2 Q. B. 639.

(*e*) (1895) 2 Q. B. 286; (1896) A. C. 199.

defendants' belting as and for the belting of the plaintiffs? (4) Did the defendants endeavour to pass off their goods as and for the goods of the plaintiffs so as to be likely to deceive purchasers? The fourth question was added at the request of the plaintiffs' counsel, the learned judge considering the first three questions only to be necessary. The jury answered questions (1) (3) and (4) in the affirmative, and question (2) in the negative, and the judge thereupon gave judgment for the plaintiffs. The only material difference between the two cases was that in the latter it was admitted by the plaintiffs that the material of which the belting was made was substantially camel's hair, whereas the former case was decided on the footing that "camel hair" was a fancy name. The Court of Appeal, in reversing the judgment of Collins, J., attached great importance to this distinction, and held that none of the questions left by Collins, J., ought to have been left to the jury, inasmuch as a manufacturer could not be restrained from correctly describing his goods by reason of a rival manufacturer having sold similar goods under the same name, and there was no evidence that the defendants had attempted to pass off their goods as the plaintiffs' otherwise than by the use of the term "camel hair"; and Rigby, L. J., was of opinion that if there had been a case for the jury one of the questions which ought to have been left to them was whether upon the evidence the term "camel hair belting" was a description or a fancy name. The House of Lords, however, restored the judgment of Collins, J., and Lord Macnaghten expressly agreed with the learned judge that the fourth question which he left to the jury was unnecessary. Kekewich, J., in *Saxlehner* v. *Apollinaris Co.* (*a*), has also expressed his concurrence in this view.

**Plaintiff must be injured.**

In order to entitle the plaintiff to recover, it must be shown that the defendant's conduct has injuriously affected the plaintiff, and the plaintiff's pleadings must be so framed as to disclose a sufficient cause of action; so that where a banking business was established in London under the same name as a previously existing bank, it was held that the proprietor of the earlier bank could not recover, since he had not averred that he was a banker or had ever carried on a banking business (*b*). This case was decided on

(*a*) (1897) 1 Ch. 893.
(*b*) *Lawson* v. *Bank of London*, 18 C. B. 84. And see *per* Lord Blackburn in *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15.

the same principle on which it was held, in the Court of Chancery, that there was no infringement of trade mark unless there was actually in the market a vendible article to which the mark was in some way attached, and that no right to an injunction existed before the article had, in fact, been produced, even though it had been repeatedly advertised, and considerable outlay so incurred (*a*).

Costs incurred by defendant's fraud recovered from him.

Where A. ordered from B. a quantity of fire-bricks, marked with the name of C., who used it as his own trade mark, and the order was being executed by B. in ignorance of C.'s rights, C. filed a bill in Chancery to restrain B., who compromised the matter on paying a sum amounting in all, including costs, to over £200. On B. bringing an action against A. to recover the sum which he had so been compelled to pay, it was held by the Court of Queen's Bench that he was entitled to recover that sum, C. being entitled to an injunction in Equity on mere proof of the imitation, though at Common Law he would have had to prove fraud on the part of B. (*b*).

Innocent vendor of goods falsely marked.

It has been held in America that an innocent vendor of goods falsely marked, the genuineness of which he has not warranted, is entitled to maintain an action to recover the price of the goods from a person to whom he has sold them (*c*).

Damages.

Although it cannot be assumed by the Court, in default of evidence, that the same quantity of goods which a defendant has sold under a trade mark imitated from that of the plaintiff would have been sold by the plaintiff but for the defendant's unfair competition (*d*), yet, where the whole profit made by an infringer upon the sale of the goods wrongfully marked was awarded by the jury as damages, the American Court held that this was not excessive, and said that the fact that it was impossible to apportion the profit rendered it just that the infringer should lose the whole (*e*). And in *Taylor* v. *Carpenter* (*f*), when the defendant, against whom a verdict had been found with substantial damages, moved for a new trial, urging, among other arguments, that the

(*a*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307.

(*b*) *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537.

(*c*) *Rudderow* v. *Huntington*, 3 Sand. S. C. 252; R. Cox, 106.

(*d*) *Leather Cloth Co.* v. *Hirschfield*, L. R. 1 Eq. 299. As to damages, see cap. 7, *infra*.

(*e*) *Graham* v. *Plate*, 40 Cal. 593; 6 Amer. Rep. 639. And see *Hostetter* v. *Vowinkle*, 1 Dill. 329.

(*f*) 2 Wood. & M. 1; 9 L. T. O. S. 514; R. Cox, 32, 42.

jury should have been told that if the defendant's goods were not inferior to the plaintiffs', the latter could not recover, or at all events could recover only nominal damages, it was held that the plaintiffs were not only not debarred from recovering at all, but that they could recover substantial damages, "since the actual damage suffered by loss of sales by the plaintiffs, which was the ground of recovery, was just as great as if the thread had been inferior, though the credit of their mark and thread might not suffer as much thereby, if it did at all."

Nominal damages where right infringed.

That a plaintiff is entitled to recover some damages where his trade mark has been infringed, appears clearly from *Blofeld* v. *Payne* (*a*), in which Lord Denman, C. J., told the jury that even if the defendants' hones were not inferior, the plaintiff was still entitled to some damages, inasmuch as his right had been evaded by the fraudulent act of the defendants. The jury found a verdict for the plaintiff, with a farthing damages, and also found that the defendants' hones were not inferior to the plaintiff's. The verdict was upheld by the Court of King's Bench, Littledale, J., saying that "the act of the defendants was a fraud against the plaintiff, and that even if it occasioned him no specific damage, it was still to a certain extent an injury to his right." It is evident that in this case, although the plaintiff did not suffer in reputation by the sale of inferior hones as his, yet he suffered in another way, his custom being diminished to an undetermined extent by goods being sold as his, so as to compete with those really of his make (*b*).

Equity—*Blanchard* v. *Hill.*

The first recorded case of trade mark brought before the judicial notice of the Court of Chancery was that of *Blanchard* v. *Hill* (*c*), in 1742, which, however, resulted in a statement by Lord Hardwicke, C., that he did not know "any instance of granting an injunction in Chancery to restrain one trader from using the same mark with another," and that he thought "it would be of mischievous consequence to do it."

(*a*) 4 B. & Ad. 410.

(*b*) See *per* Erskine, J., in *Morison* v. *Salmon*, 2 Scott, N. R. 449; 2 Mun. & G. 385; and *per* Wilde, C. J., in *Rodgers* v. *Nowill*, 5 C. B. 109; also *Coffeen* v. *Brunton*, 4 McLean, 516; R. Cox, 82; *Lemoine* v. *Ganton*, 2 E. D. Smith, 343; R. Cox, 142; *Chappell* v. *Davidson*, 2 K. & J. 123; *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 442, 451, 454; *Laurie* v. *Baker*, 2 P. R. 213; and *Bondier* v. *Depatie*, 3 Dorion, 233; *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639; *Alexander & Co.* v. *Henry & Co.*, 12 P. R. 360, where damages were awarded under both heads.

(*c*) 2 Atk. 484.

Growth of jurisdiction of Chancery.

In *Day* v. *Day* (1816) (*a*), *Henry* v. *Price* (1831) (*b*), and *Gout* v. *Aleploglu* (1833) (*c*), however, injunctions were granted to restrain the infringement of the plaintiffs' trade marks, and from this time the steadily increasing number of such cases coming before the Court of Chancery shows the growing favour with which that Court was regarded by suitors, the chief incentive no doubt being the more beneficial character of the remedy awarded, by injunction and account, as compared with the Common Law remedy of damages. By degrees the Court of Chancery absorbed the jurisdiction in trade-mark cases, until such cases were rarely, if ever, tried in the Common Law Courts, except when they were remitted by a Chancery judge for trial of the Common Law right. That practice was discontinued in consequence of Sir John Rolt's Act (*d*), and the effect was, notwithstanding the extended power given to the Common Law Courts by the Merchandise Marks Act of the same year (*e*), to confine the consideration of this class of cases more strictly, if possible, than before to the Court of Chancery.

Registration Acts administered by Chancery Division.

This fact was recognised by the Chancery Division being appointed to administer the Trade Marks Registration Acts (*f*), and although the High Court of Justice generally is now substituted for the Chancery Division (*g*), trade-mark cases are still usually brought before that Division.

Board of Trade.

The comptroller appointed under the Patents Act is, however, subject to the superintendence of the Board of Trade, whose practice it is to refer all cases of difficulty, whether arising from questionable applications or from oppositions persisted in, to the Court (*h*).

Principles adopted in Equity with respect to trade marks.

The principles on which the Courts of Equity have long acted in cases where a valid trade mark has been affixed to the goods or to wrappers or vessels containing them—principles by which those

(*a*) Dig. 21.

(*b*) 1 Leg. Obs. 364.

(*c*) 5 *ib.* 495; and 6 Beav. 69. And see *Day* v. *Binning*, C. P. Cooper, 489; 1 Leg. Obs. 205.

(*d*) 25 & 26 Vict. c. 27. But in some of the American Courts cases of doubtful right are still sent for trial at law; *e.g.*, *Seltzer* v. *Powell*, 8 Phila. 296.

(*e*) 25 & 26 Vict. c. 88, § 21.

(*f*) 38 & 39 Vict. c. 91; 39 & 40 Vict. c. 33; and 40 & 41 Vict. c. 37. See the old Rule 42, and *In re Orr-Ewing* (2), 28 W. R. 412.

(*g*) § 117 of Patents Act, 1883.

(*h*) *In re Normal Co., Ld.*, 35 Ch. D. 231. And see Patents Acts, 1883—1888, §§ 62, 69. As to the position of the late Commissioners of Patents, whose functions are now transferred to the Board of Trade, see *In re Meikle*, 24 W. R. 1067; *In re Barrows*, 5 Ch. D. 353; *In re Retherham*, 14 *ib.* 585.

cases must, as it seems, be governed for the future, before whichever branch of the High Court of Justice they may come (*a*)—are thus explained by Sir G. Jessel, M. R., in *Singer Manufacturing Co.* v. *Wilson* (*b*).

"It is quite immaterial that the maker of the goods to which what I will call, for the sake of shortness, the trade mark is affixed, did not know that it was a trade mark, and had not the slightest intention of defrauding anybody. He must not put as a mark on goods, even though he intends to establish it as his own trade mark, that which is the known trade mark of other people, and he would be restrained by injunction, though he thought he himself had invented the trade mark, and *bonâ fide* intended it to designate goods of his own manufacture. And the reason is obvious: because the goods pass from hand to hand, and though he may act with the utmost *bona fides*, yet the ultimate purchasers might believe that they were the real goods, that is to say, that they were manufactured by the person entitled to the original trade mark. Therefore, in that case, knowledge that he is doing anything wrong is immaterial, even in the maker.

"Another element which is sometimes imported into these cases has also no material bearing: that is, that if the maker knows that they are not the goods of the person entitled to use the trade mark, and communicates that knowledge to the immediate purchaser, it makes, as I have said, no difference; and even if he does not know it, and tells the immediate purchaser that the goods are of his own manufacture, it will still not save him from an injunction, because, although the immediate purchaser from him is aware that the goods in question are not manufactured by any other person than the vendor, yet, as he passes them on, the representation does not necessarily pass on with them, and therefore the next purchaser, or the following or some other purchaser, or the public at large, who are the ultimate purchasers, would be as much deceived as if no such communication took place. Consequently, you have nothing more to do than to show that the trade mark has been taken" (*c*).

(*a*) See Judicature Act of 1873, § 25.
(*b*) 2 Ch. D. 434.
(*c*) And see *per* Lord Cairns, C., *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 391, and Lord O'Hagan, *ib.* 396; *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454; and *per* Bowen, L. J., in *Barlow & Jones, Ld.* v. *Johnson*, 7 P. R. 395, 419; *Cochrane* v. *McNish*, 13 P. R. 100. So, in Scotland, "on an application for an interdict it is not only not necessary to prove any pecuniary

When trade-mark cases were first brought into the Court of Chancery, they were treated on the same principle as they were at Common Law, and redress was refused where actual intentional fraud was not alleged and substantiated. The existence of anything that could be called a right of property in a trade mark was denied, and a fear expressed that, if that should be admitted, a stronger monopoly than even a patent-right would be created (*a*).

At first Equity followed the Common Law.

In the year 1838, however, when the case of *Millington* v. *Fox* (*b*) came before Lord Cottenham, C., the Lord Chancellor perceived that when goods made by one man were put upon the market bearing the trade mark of another, the same evil effects were produced, whether the mark was so affixed for fraudulent purposes or with innocent intentions, since purchasers would buy A.'s goods in the belief that they were B.'s, and B. would be deprived of the custom intended for him; so that A., whether by his own contrivance or not, would profit at the expense of B. and the public. In that case it was accordingly held by the Lord Chancellor that the plaintiffs were entitled to an injunction, although he stated in express terms that he saw no reason for thinking that there had been any fraudulent user by the defendant of the plaintiffs' mark (*c*).

*Millington* v. *Fox.*

The decision in this case gave rise to some difference of opinion among the judges, some holding that the jurisdiction of the Court of Chancery in these cases, like that of the Common Law Courts, was founded on intentional fraud, and denying any exclusive right in trade marks (*d*), while others held that, intentional fraud not being necessary for the injunction, the jurisdiction must be held

Question as to foundation of jurisdiction.

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* the Lord President, in *Singer Manufacturing Co.* v. *Kimball & Morton*, Ct. Sess. Cas. 3rd Ser. XI. 267. And in India, "it is not enough to say that there was no fraudulent intention. That is no reason why an injunction should not be granted." *Per* Phear, J., *Graham & Co.* v. *Kerr, Dods, & Co.*, 3 Beng. L. R. App. 4.

(*a*) *Blanchard* v. *Hill*, 2 Atk. 484; *Canham* v. *Jones*, 2 V. & B. 218.

(*b*) 3 My. & Cr. 338. And see the earlier case of *Gout* v. *Aleploglu*, 5 Leg. Obs. 495.

(*c*) See *per* Lord Blackburn in *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15.

(*d*) *Perry* v. *Truefitt*, 6 Beav. 66; *Croft* v. *Day*, 7 Beav. 84; *Foot* v. *Lea*, 13 Ir. Eq. 484; *Edelsten* v. *Vick*, 11 Hare, 78; *Collins Co.* v. *Brown*, 3 K. & J. 423; *Collins Co.* v. *Cowen*, 3 K. & J. 428; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; *McAndrew* v. *Bassett*, 33 L. J. Ch. 561; *Walton* v. *Crowley*, 3 Bl. C. C. 440; R. Cox, 166.

to be founded on the protection of a right of property in the trade mark (*a*).

Deference to Common Law.

In *Motley* v. *Downman* (*b*) it was laid down broadly that the jurisdiction of the Court of Chancery was merely ancillary to that of the Common Law, and that the right to redress must be determined by the rules of the Common Law; and accordingly cases were frequently referred to the Common Law Courts for the determination of the right, before the equitable remedy was awarded (*c*). That practice, however, gradually died out as the principle of interference in the absence of intentional fraud came to be recognised, and Sir John Rolt's Act (*d*) finally put an end to it.

Principle of *Millington* v. *Fox* explained by V.-C. Wood.

The explanation given by Wood, V.-C., of the decision in *Millington* v. *Fox* (*e*) and other cases in which relief was given without proof of fraudulent user, was, that it was on the principle "that although a person had used another man's trade mark perfectly innocently, yet if he continued for one moment after he

(*a*) *Farina* v. *Silverlock*, 6 De G. M. & G. 214; *Burgess* v. *Hills*, 26 Beav. 244; *Clement* v. *Maddick*, 1 Giff. 98; *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217; *Welch* v. *Knott*, 4 K. & J. 747; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Hall* v. *Barrows*, 4 *ib.* 150; *McAndrew* v. *Bassett*, 4 *ib.* 380; *Leather Cloth Co.'s case*, 4 *ib.* 137; 11 H. L. C. 523; *Cartier* v. *Carlile*, 31 Beav. 292; *Moet* v. *Couston*, 33 *ib.* 578; *Barnett* v. *Leuchars*, 13 L. T. N. S. 495; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Collins Co.* v. *Reeves*, 28 L. J. Ch. 56; *Bradbury* v. *Beeton*, 39 *ib.* 57; *Radde* v. *Norman*, L. R. 14 Eq. 348; *Hirst* v. *Denham*, *ib.* 542; *Smith* v. *Mason*, W. N. 1875, p. 62; *Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 242; *Cheavin* v. *Walker*, 5 Ch. D. 850; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; *Same* v. *Loog* (3), 8 *ib.* 15; *Grillon* v. *Guénin*, W. N. 1877, p. 14; *Ransome* v. *Graham*, 51 L. J. Ch. 897; *Cowen* v. *Hulton*, 46 L. T. N. S. 897; *Hatchard* v. *Mège*, 18 Q. B. D. 771; *Oakey & Sons* v. *Dalton*, 35 Ch. D. 700; and see *Reddaway* v. *Banham*, (1896) A. C. 199; *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893. So in Scotland—*Singer Manufacturing Co.* v. *Kimball & Morton*, Ct. Sess. Cas. 3rd Ser. XI. 267; in Ireland—*Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; in India—*Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hyde, 185; in Canada—*Walker* v. *Alley*, 13 Grant, Up. Can. Ch. 366; in the United States—*Davis* v. *Kendall*, 2 R. I. 566; R. Cox, 112; *Clark* v. *Clark*, 25 Barb. 76; R. Cox, 206; *Dale* v. *Smithson*, 12 Abb. Pr. 237; R. Cox, 282; *Woodward* v. *Lazar*, 21 Cal. 448; R. Cox, 300; *Derringer* v. *Plate*, 29 Cal. 292; R. Cox, 324; *Bradley* v. *Norton*, 33 Conn. 157; R. Cox, 331; *Gillott* v. *Esterbrook*, 47 Barb. 455; R. Cox, 340; 48 N. Y. 374; *Burnett* v. *Phalon*, 9 Bos. 192; R. Cox, 376; *Filley* v. *Fassett*, 44 Mo. 173; R. Cox, 530; *Dixon Crucible Co.* v. *Guggenheim*, 2 Brews. 321; R. Cox, 559; *Stonebraker* v. *Stonebraker*, 33 Md. 252; *State of Missouri* v. *Gibbs*, 56 Mo. 133; *Winsor* v. *Clyde*, 9 Phila. 513; *Blackwell* v. *Armistead*, 5 Am. L. T. 86; *Colman* v. *Crump*, 70 N. Y. 573; *Rillet* v. *Carlier*, 61 Barb. S. C. 435; *Gilman* v. *Hunnewell*, 122 Mass. 139; *McLean* v. *Fleming*, 96 U.S. 245; *Kidd* v. *Johnson*, 100 *ib.* 617; *Robertson* v. *Berry*, 50 Md. 591.

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

(*c*) *Perry* v. *Truefitt*, 6 Beav. 66; *Rodgers* v. *Nowill*, 6 Hare, 325; *Foot* v. *Lea*, 13 Ir. Eq. 484; *Farina* v. *Silverlock*, 1 K. & J. 509; and others. In some of the American States, *e.g.*, in Pennsylvania, the same practice is still followed: *Seltzer* v. *Powell*, 8 Phila. 296.

(*d*) 25 & 26 Vict. c. 27.

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

had been told of it to use another man's trade mark, he did so fraudulently, and if he sought to keep in his pocket profits which he had made by representing, however innocently, that his goods were another person's, after he had been told of the fact, it was fraud" (*a*).

By Lord Westbury.

From this view Lord Westbury, C., dissented (*b*), and the view which he took as to the principles which ought to govern the action of the Courts of Equity was thus stated by him in the *Leather Cloth Co.'s case* (*c*): "The representation which the defendant is supposed to make, that his goods are the goods of another person, is not actually made otherwise than by his appropriating and using the trade mark which such other person has an exclusive right to use in connection with the sale of some commodity; and if the plaintiff has an exclusive right to use any particular mark or symbol, it becomes his property for the purposes of such application, and the act of the defendant is a violation of such right of property, corresponding with the piracy of copyright or the infringement of a patent. I cannot therefore assent to the dictum that there is no property in a trade mark. 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 marks or symbols when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called 'property.' The true principle, therefore, seems 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 such property can be effectually protected.* The same things are necessary to constitute a title to relief in Equity in the case of the infringement of the right to a trade mark as in the case of the violation of any other kind of property. First, the plaintiff must prove that he has an exclusive right to use some particular mark or symbol in connection with some manufacture or vendible commodity; and, secondly, that this mark or symbol has been adopted or is used by the defendant so

(*a*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561. See *per* Lord Cairns in *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376, 391, and *per* Lord Blackburn in that case (*ib.* 400), and in *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15.

(*b*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Leather Cloth Co.'s case*, 4 *ib.* 137; *Hall* v. *Barrows*, *ib.* 150; *McAndrew* v. *Bassett*, *ib.* 380.

(*c*) 4 De G. J. & S. 137.

as to prejudice the plaintiff's custom and injure him in his trade or business" (*a*).

Lord Herschell's view.

The view taken by Lord Westbury of the existence of property in a trade mark, independently of statute, has, however, not escaped criticism in later years, and the prevailing opinion in recent times is probably in accordance with that expressed by Lord Herschell in the leading case of *Reddaway* v. *Banham* (*b*): "The principle which is applicable to this class of cases was, in my judgment, well laid down by Lord Kingsdown in *Leather Cloth Co.* v. *American Leather Cloth Co.* (*c*). It had been previously enunciated in much the same way by Lord Langdale in the case of *Croft* v. *Day* (*d*). Lord Kingsdown's words were as follows: 'The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore (in the language of Lord Langdale in the case of *Perry* v. *Truefitt* (*e*)), 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 manufacture of another person.' It is, in my opinion, this fundamental rule which governs all cases, whatever be the particular mode adopted by any man for putting off his goods as those of a rival trader, whether it is done by the use of a mark which has become his trade mark, or in any other way. The word 'property' has been sometimes applied to what has been termed a trade mark at Common Law. I doubt myself whether it is accurate to speak of there being property in such a trade mark, though, no doubt, some of the rights which are incident to property may attach to it. Where the trade mark is a word or device never in use before, and meaningless, except as indicating by whom the goods in connection with which it is used were made, there could be no conceivable legitimate use of it by another person. His only object in employing it in connection with goods of his manufacture must be to deceive. In circumstances such as these the mere proof that the trade mark of one manufacturer had been thus appropriated by another would be enough to bring the

(*a*) In *Walker* v. *Alley*, 13 Grant, Up. Can. Ch. 366, Van Koughnet, Chancellor of Upper Canada, said: "Some difficulty may be created by the use of the word 'property' in trade marks. It may be said, 'What is property, unless it be something tangible?' I take property, when used in this connection and sense, to be a means by which money or money's worth, in the shape of profit or otherwise, is created or obtained."

(*b*) (1896) App. Cas. 199, 209. And see *Chadwick* v. *Covell*, 151 Mass. 190.

(*c*) 11 H. L. C. 538.

(*d*) 7 Beav. 84.

(*e*) 6 Beav. 66.

case within the rule as laid down by Lord Kingsdown, and to entitle the person aggrieved to an injunction to restrain its use. In the case of a trade mark thus identified with a particular manufactory, the rights of the person whose trade mark it was would not, it may be, differ substantially from those which would exist if it were, strictly speaking, his property. But there are other cases which equally come within the rule that a man may not pass off his goods as those of his rival which are not of this simple character—cases where the mere use of the particular mark or device which had been employed by another manufacturer would not of itself necessarily indicate that the person who employed it was thereby inducing purchasers to believe that the goods he was selling were the goods of another manufacturer."

"The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves, without explanation or qualification, by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this, I think he would, on well-established principles, be entitled to an injunction."

In what sense fraud is required in Equity.

Still, whether it is or is not admitted that the Law of Trade Marks is based upon a right of property, fraud also is necessary to entitle the owner of the trade mark to redress (*a*). But the fraud need not necessarily consist in an intention to deceive on the part of the defendant, but may consist in an actual deception, or in the creation of a probability of deception (*b*), independently of any fraudulent intention. "Imposition on the public," says Lord Westbury (*c*), "is indeed necessary for the plaintiff's title; but in

(*a*) See *per* Mellish, L. J., in *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 453.

(*b*) Compare *per* Hall, V.-C., in *Cope* v. *Evans*, L. R. 18 Eq. 138. And see *Kinney* v. *Basch*, Dig. 542; *Bodega Co.*, *Ld.* v. *Owens*, 6 P. R. 236; *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639.

(*c*) *Hall* v. *Barrows*, 4 De G. J. & S. 150. And see *per* Lord Cranworth, C., in *Farina* v. *Silverlock*, 6 De G. M. & G.

this way only, that it is the test of the invasion by the defendant of the plaintiff's right of property; for there is no injury done to the plaintiff if the mark used by the defendant be not such as may be mistaken, or is not likely to be mistaken, by the public for the mark of the plaintiff. But the true ground of the Court's jurisdiction is property."

Intention immaterial in Equity.

The exact language in which the principle on which the Court of Chancery has acted is to be described is really immaterial, and in fact "merely a question of nomenclature" (*a*), since the important and substantial point is completely established, that in cases of trade mark nothing more has to be done "than to show that the trade mark has been taken" (*b*).

Right of property in registered mark.

The right in a trade mark registered under the Trade Marks Acts or the present Patents Acts is strictly a right of property (*c*); the person entitled to it is the proprietor (*d*); he is entitled to the exclusive use of it (*e*); and though his rights in regard to it are in some respects less unlimited than those of owners of other kinds of property—*e.g.*, the inability to transfer it except in connection with the goodwill of the business (*f*)—still, subject to the provisions of the Patents Acts, he is entitled to deal with it as he chooses.

Elements necessary to found jurisdiction.

In trade-mark cases, "in order to found the jurisdiction of the Court," says the Lord Chancellor of Ireland (*g*), "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 variations that the Court must regard them as merely colourable; and, thirdly, the fact that the imitations were made without licence (*h*) or anything that the Court could regard as acquiescence in their use." The law is the same in the three kingdoms, for, said

214; and *per* Jessel, M. R., in *Cheavin* v. *Walker*, 5 Ch. D. 850. So in the Supreme Court of Pennsylvania, *Pratt's Appeal*, 117 Penn. St. 401.

(*a*) *Per* Wood, V.-C., *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.

(*b*) Jessel, M. R., in *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434. And see *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434; *Reddaway* v. *Banham*, (1896) A. C. 199; and the cases collected at note (*a*) on p. 136, *supra*.

(*c*) See *Eno* v. *Stephens*, Dig. 609.

(*d*) §§ 3, 4, 5 of the Act of 1875; §§ 62, 66, 71, 72, 76 of the Act of 1883.

(*e*) § 3 of the Act of 1875; § 76 of the Act of 1883.

(*f*) § 2 of the Act of 1875; § 70 of the Act of 1883.

(*g*) *Kinahan* v. *Bolton*, 15 Ir. Ch. 75. See *Linde* v. *Bensel*, 29 N. Y. Sup. Ct. 601.

(*h*) It has been held in America that if the defendant is the holder of a licence from the plaintiff, he cannot contest the validity of the plaintiff's mark, but that he may set up that he was induced to enter into the agreement by fraudulent representations: *Hilsen* v. *Libby*, 44 N. Y. Super. Ct. 12. And see the observations in that case with respect to pleading.

Bacon, V.-C., in *Singer Manufacturing Co.* v. *Loog* (3) (*a*), "the law of Scotland does not in this respect (*i.e.*, with respect to trade marks) differ from the law of England." The principles which govern the one govern the other.

Proceedings in Equity.

In order to insure a full disclosure of the facts bearing upon these points, the Court will grant, if necessary, discovery and inspection (*b*), and upon the satisfactory establishment of the plaintiff's case will award its appropriate remedy of an injunction (*c*), framed in such terms as best to counteract the illicit designs of the infringer. And the injunction will be granted, even though the defendant has ceased to use the pirated trade mark (*d*), and has offered to undertake not to use any of the old labels in stock (*e*), or has actually retired from the business in which the pirated marks were used (*f*). But if a plaintiff continues the litigation after having received an offer of all he is entitled to get, he may fail to obtain his costs (*g*). The liability to account for profits is usually, as Romilly, M. R., said in *Cartier* v. *Carlile* (*h*), incident to the injunction (*i*), or the plaintiff may, at his option, have an inquiry as to damages in lieu of the account, but not both (*k*). The Court will further, where necessary, order the delivery up and destruction of the spurious labels, cards, or tickets (*l*), or the production of the goods wrongfully marked, for the purpose of the erasure and cancellation of the spurious marks (*m*).

(*a*) 18 Ch. D. 395.

(*b*) It has been held in America that a defendant is not entitled, by alleging that the plaintiff's goods possess injurious properties, to compel the plaintiff to disclose in cross-examination the ingredients of which his goods are composed, though it seems that such questions may be allowed if the plaintiff has himself led up to them. *Tetlow* v. *Savournin*, 15 Phila. 170.

(*c*) In *Glenn & Hall Manufacturing Co.* v. *Hall*, 61 N. Y. 226, a case of the class analogous to trade mark cases, an injunction was granted against the original plaintiffs on counter-claim. The injunction will be granted, notwithstanding an offer of submission by the defendants: *Geary* v. *Norton*, 1 De G. & Sm. 9; *Tonge* v. *Ward*, 21 L. T. N. S. 480.

(*d*) *Guinness* v. *Heap*, Dig. 617; *McLean* v. *Fleming*, 96 U. S. 245; *Frese* v. *Bachof* (1), 13 Bl. C. C. 234. And see *Reid* v. *Sibbald*, 18 Journ. of Jurisp. 392.

(*e*) *Guinness* v. *Heap*, Dig. 617; *American Tobacco Co.* v. *Guest*, (1892) 1 Ch. 630.

(*f*) *Weed* v. *Peterson*, 12 Abb. Pr. N. S. 178.

(*g*) See *infra*, p. 240, note (*c*).

(*h*) 31 Beav. 292. And see *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Lever* v. *Goodwin*, 36 Ch. D. 1: *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893.

(*i*) Unless the defendant can prove that he has bought and resold the improperly marked goods without being aware of the true ownership of the trade mark which he is shown to have infringed: *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578.

(*k*) *Neilson* v. *Betts*, L. R. 5 H. L. 1. See *Leidersdorf* v. *Flint* (2), 50 Wisc. 401.

(*l*) *Farina* v. *Silverlock*, 1 K. & J. 509; 6 De G. M. & G. 214; 4 K. & J. 650; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Apollinaris Co.* v. *Edwards*, Seton, 5th ed. 537; *Gravely* v. *Winchester*, *ib.* 591.

(*m*) *Dent* v. *Turpin*, 2 J. & H. 139; *Upmann* v. *Elkan*, L. R. 12 Eq. 140;

Destruction of the goods will not be ordered if it is possible without destruction to satisfactorily erase the spurious marks (*a*). In a case in the Supreme Court of Victoria (*b*) it was held that an agent, who had received from a foreign principal goods marked in imitation of the plaintiff's trade mark, could not be allowed to send back to his principal the goods as they were, since it was the plaintiff's right to have the fraudulent labels removed and destroyed.

Consideration shown for innocent infringer.

While, however, the Court will give protection where it is required, "it must not be forgotten that such protection by injunction when granted is, or may be, attended with loss to the defendant in rendering useless or depreciating in value articles to which the trade mark has already been affixed, and in compelling him otherwise to vary the mode in which he has been carrying on business" (*c*). And it has been thought that where it is proved that a defendant has adopted a trade mark in *bonâ fide* ignorance of its infringing the plaintiff's rights, the Court will be satisfied with the least amount of alteration of the defendant's mark which will effectually distinguish it from the plaintiff's (*d*).

But innocent infringement checked.

Sufficient distinction must, however, be made; and in the even harder case, where a man has not affixed the spurious mark to his own goods at all, but has bought goods already stamped with a mark which he did not know to belong to any one, he must submit to an injunction, though he may not have to account for profits if he does not delay his submission (*e*). Where, however, A. has, without notice of fraud, advanced money on goods fraudulently marked, he will not be prevented from asserting his rights by reason of the illicit mark (*f*).

Foreign fraudulent samples.

Although there is no jurisdiction in the English Courts to try a case in which a foreign subject has sent direct to another foreign

L. R. 7 Ch. 130; *Jurgensen* v. *Alexander*, 24 How. Pr. 269; R. Cox, 298. In *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450; 12 Amer. Rep. 401, it was held that goods already stamped might be sold, subject to the remedy at law.

(*a*) *Slazenger & Sons* v. *Feltham & Co.*, 6 P. R. 531.

(*b*) *Siegert* v. *Lawrence*, 11 V. L. R. 47. And in New South Wales it was said that matches packed in boxes fraudulently labelled should be repacked before exposure for sale: *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72. See *Upmann* v. *Elkan*, L. R. 7 Ch. 130.

(*c*) *Cope* v. *Evans*, L. R. 18 Eq. 138. And see *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298; *Bass* v. *Dawber*, 19 *ib.* 626; *Ransome* v. *Graham*, 51 L. J. Ch. 897.

(*d*) *Bass* v. *Dawber*, 19 L. T. N. S. 626.

(*e*) *Moet* v. *Couston*, 33 Beav. 578; *Orr-Ewing* v. *Chooneeloll Mullick*, Cor. 150; *American Tobacco Co.* v. *Guest*, (1892) 1 Ch. 630.

(*f*) *Ponsardin* v. *Peto*, 33 Beav. 642. See *Rudderow* v. *Huntington*, 3 Sand. S. C. 252; R. Cox, 106.

country, or to a British colony or dependency, goods bearing an infringement of a trade mark used by a British firm in their trade with such country, colony, or dependency, yet, if the spurious goods or samples of them have been sold in the United Kingdom, an action will lie (*a*).

Issue of writ for service in Scotland or Ireland.

In *Marshall* v. *Marshall* (*b*) there was an application by a person carrying on business in Scotland for leave to issue and serve out of the jurisdiction (viz., in Scotland) a writ in an action intended to be brought by him against another person carrying on business in Scotland, for selling his goods in England under a trade mark calculated to deceive, the object being that the action might be heard together with an application for registration of the trade mark by the defendant, which was opposed by the plaintiff; but leave was refused, on the ground that it was expedient that proceedings should be taken in Scotland, where the order of the Court could be enforced against the defendant personally, rather than in England, where it could only be enforced against his servants and agents. And similarly in *Kinahan* v. *Kinahan* (*c*), where both parties were Irish and the application pending was an application by the plaintiffs in the action to strike off the register a mark which had been registered by the defendants. However, in *Burland & Co.* v. *Broxburn Oil Co., Ld.* (*d*), where a similar application was made by an English firm, who were desirous of taking proceedings against a Scotch company, who had their registered office in Glasgow, but had branch offices also in London, Manchester, and Hull, and whom the plaintiffs alleged to have been infringing their trade mark by sending out marked goods from their English branches, and the defendants were applying in England to rectify the plaintiff's registration, it was held that it was possible to effectually enforce in England against the property of the defendants any injunction that might be granted, and that, on the balance of convenience, leave should be given.

Motion to expunge mark registered by a foreigner.

In connection with the above, it seems relevant to refer to the cases relating to service out of the jurisdiction of a motion to rectify, to which defendants to an action for infringement so often resort. This point seems first to have arisen in *In re Compagnie Générale d'Eaux Minérales et de Bains de Mer* (*e*), where an applica-

(*a*) *Rodgers & Sons, Ld.* v. *Rottgen*, 5 Times L. R. 678.
(*b*) 38 Ch. D. 330.
(*c*) 45 Ch. D. 78.
(*d*) 41 Ch. D. 542.
(*e*) (1891) 3 Ch. 451.

tion was made to expunge a mark registered in the name of a foreign company having no place of business in the United Kingdom, and it was held by Stirling, J., that there was no jurisdiction to serve notice of motion on the company, and that the proper course was to serve it on the Comptroller-General of Patents only, and, after a day had been fixed for the hearing of the motion, to send a letter to the foreign company, with a copy of the notice of motion, stating that an application would be made on the day fixed affecting their interests. A similar practice has since been adopted upon an application to register a trade mark (*a*), and upon an opposition to registration (*b*). The course suggested by Stirling, J., was approved by the Court of Appeal in *In re King & Co.* (*c*), which was, again, a case of rectification, Lindley, L. J., however, doubting whether the notice of motion might not have been properly served on the foreigner, inasmuch as the Court had jurisdiction to rectify the register independently of the service, the only object of which was to give notice to the foreigner of the nature of the proceedings; and it would appear from the last-mentioned case that, provided sufficient notice of the proceedings is given to the proprietor, it is immaterial whether the notice of motion is addressed to him as well as to the Comptroller or not, but the course now usually adopted is to address it to the Comptroller only. In that case the application was by an English firm to expunge a mark registered in the name of an Irish company having a branch office in London, and, the applicants having sent to the company's office in Ireland a letter informing them of the nature of the application, together with a copy of the notice of motion in which the name of the company had been at first inserted but afterwards struck out, the Court ordered the mark to be expunged although the company elected not to appear. So in *In re Stringer* (*d*), which was a motion to direct the Comptroller to proceed with an application to register an old mark notwithstanding the existence of a similar mark belonging to a Swedish company, where the company received notice by letter of the nature of the proceedings but sent no answer, the Court, upon proof of delivery of the letter to the company, directed the Comptroller to proceed in their absence, without prejudice to any opposition, the applicant

(*a*) *In re Stringer*, 8 P. R. 445.
(*b*) *In re Robertson, Sanderson & Co.*, 9 P. R. 213.
(*c*) (1892) 2 Ch. 462.
(*d*) 8 P. R. 445.

undertaking to give due notice to the company of the advertisement. And a similar order was made in *In re Royal Baking Powder Co.* (*a*).

Scandal and impertinence.

In asking for his remedy a plaintiff must not make scandalous and impertinent charges against the defendant. Where such charges were made exceptions for scandal and impertinence were allowed (*b*), and under the present practice the defendant would succeed on a motion to strike out such statements, under Order XIX., Rule 27.

Trial without a jury appropriate.

The appropriate mode of trial of cases in which, as in most trade-mark cases, law and fact are closely united, is by a judge without a jury; and therefore, where a defendant gave notice of trial of a trade-mark case before a judge and special jury, it was held that, notwithstanding the notice, the case must be heard without a jury (*c*). If the defendant allows the action to proceed to trial without applying for the questions at issue to be submitted to a jury, it will be too late for him to make such an application when the case comes on for trial (*d*). But where the defendants submitted to a perpetual injunction, leaving only the question of damages to be tried, the action was, on the plaintiffs' application, transferred to the Queen's Bench Division for trial with a jury (*e*). The more usual course is, however, for the damages to be ascertained by a master or official referee (*f*).

Interlocutory injunction.

It is usual for the plaintiff in trade-mark cases to apply for an interlocutory injunction at an early period. When such an application is to be made, it is the duty of the plaintiff to make it speedily (*g*), and delay on his part in coming to the Court is liable to be construed as signifying that the case is one which he does not consider to be of an urgent nature, and which, therefore, does not deserve the special favour of the Court (*h*). The plaintiff is, however, entitled to delay long enough to secure the necessary evidence to establish his case (*i*); and although no interlocutory injunction is asked for—as, for instance, where it is rendered

(*a*) 14 P. R. 425.

(*b*) *Christie* v. *Christie*, L. R. 8 Ch. 499.

(*c*) *Spratt's Patent* v. *Ward & Co.*, 11 Ch. D. 240; *Singer Manufacturing Co.* v. *Loog* (2), *ib.* 656.

(*d*) *Thomas* v. *Williams*, 14 Ch. D. 864.

(*e*) *Fennessy* v. *Rabbits & Sons*, 56 L. T. N. S. 138.

(*f*) *E.g.*, *Alexander* v. *Henry*, 12 P. R. 360.

(*g*) *Per* Romilly, M. R., in *Chubb* v. *Griffiths*, 35 Beav. 127.

(*h*) *Pickford* v. *Grand Junction Rail. Co.*, 3 Rail. Cas. 538; *Flavel* v. *Harrison*, 10 Hare, 467; *Isaacson* v. *Thompson*, 20 W. R. 196; *Mallan* v. *Davis*, 3 Times L. R. 221; *Evans* v. *Smith*, *ib.* 290.

(*i*) *Lee* v. *Haley*, L. R. 5 Ch. 155; *Cave* v. *Myers*, Dig. 304.

unnecessary by reason of the defendant having discontinued the acts of which the plaintiff is complaining—the plaintiff is not precluded from his right to a perpetual injunction, if in other respects he has such a right (*a*), nor from his right to state, if true, that the defendant is acting without authority in what he is doing (*b*).

When granted.

In the older cases (*c*), the tendency of the Court was to refuse to grant an injunction on an interlocutory application, unless the clearest evidence of the plaintiff's right was producible, but rather to send that right to be tested at Common Law. That course of proceeding being now extinct (*d*), some relaxation has taken place, and, in particular, where there is reason to suspect intentional deceit on the part of the defendant, much less absolute proof of the plaintiff's title is required (*e*); and it occasionally happens that after an interlocutory injunction has been granted, it is held at the hearing that the evidence is insufficient to justify any relief being given (*f*). The interlocutory injunction will, however, not be granted where the defendant has innocently infringed, and has withdrawn the offending articles from sale and offered an undertaking immediately on being served with the writ (*g*), nor where there is any considerable conflict (*h*), nor where the plaintiff has

(*a*) *Collins Co.* v. *Walker*, 7 W. R. 222.

(*b*) *Anderson* v. *Liebig's Extract of Meat Co., Ld.*, 45 L. T. N. S. 757.

(*c*) *E.g.*, *Spottiswoode* v. *Clarke*, 2 Ph. 154; *Stevens* v. *Keating*, 2 Ph. 333; *Motley* v. *Downman*, 3 My. & Cr. 1; *Merrimack Manufacturing Co.* v. *Garner*, 2 Abb. Pr. 318.

(*d*) Since Sir John Rolt's Act (25 & 26 Vict. c. 27).

(*e*) *Radde* v. *Norman*, L. R. 14 Eq. 348. And see *National Folding Box & Paper Co.* v. *National Folding Box Co.*, 43 W. R. 156. See also *Jarrett* v. *British North Borneo Cigar Co.*, 37 Sol. J. 116, where the infringement was innocent. It has been held in America that a defendant, who demurs on the ground that the two marks are so different as to negative the probability of deception, will be held to admit for the purposes of the demurrer any charges of fraud in the plaintiff's pleadings, and that an injunction will therefore be granted against him: *Enoch Morgan's Sons' Co.* v. *Hunkele*, 16 U. S. Pat. Gaz. 1092. And if a defendant's defence and counter-claim contain any allegations of fact which the plaintiff does not desire to admit, he must deal specially with them: *Benbow* v. *Low* (2), 13 Ch. D. 553.

(*f*) *E.g.*, in *Degraves* v. *Whiteman*, 5 V. L. R. Eq. 304.

(*g*) *Caruncho* v. *Highmoor*, 27 Sol. J. 199.

(*h*) *Green* v. *Rooke*, W. N. 1872, p. 49; L. J. N. of C. 1872, p. 54; *Farina* v. *Cathery*, L. J. N. of C. 1867, p. 134; *Hennessy* v. *Rohmann*, 36 L. T. N. S. 51; *Mitchell* v. *Henry*, 15 Ch. D. 181; *Coventry Machinists' Co.* v. *Helsby*, 13 Times L. R. 92; *ib.* 161; *American Grocer Publishing Association* v. *Grocer Publishing Co.*, 51 How. Pr. 402; *Witthaus* v. *Braun*, 44 Md. 303; *Leclanche Battery Co.* v. *Western Electric Co.*, 21 Fed. Rep. 538; *Goodyear Rubber Co.* v. *Day*, 22 Fed. Rep. 44; *American Cereal Co.* v. *Eli Pettijohn Cereal Co.*, 72 Fed. Rep. 903; 76 Fed. Rep. 372; *French* v. *Alter & Julian Co.*, 74 Fed. Rep. 788; *Somervell Bros.* v. *Cuthbert & Co.*, 12 Cape Good Hope, 255; and other cases. If an interlocutory injunction is asked for on the ground that the defendant claims a right to use the plaintiff's trade mark, but there is evidence that he is not in fact using the mark or threatening an immediate exercise of his alleged right of user, the motion will be ordered to

been guilty of delay (*a*); and if it is granted the plaintiff will be required to give an undertaking as to damages (*b*).

Where application for registration pending.

Where, on the plaintiff moving for an injunction to restrain an alleged infringement of a trade mark registered in 1886, it appeared that the defendant had used the mark since 1884, and was himself then applying for registration thereof, the motion was ordered to stand over generally in order that the question of the defendant's right to registration might be first decided (*c*).

Liberty given to move to dissolve.

Where an injunction was granted on motion, but the defendant alleged that he had not had sufficient time to answer the affidavits on the other side, Lord Langdale, M. R., directed that the order should be prefaced by a statement to that effect, and giving the defendant leave to move to dissolve the injunction (*d*).

Submission not relieved against.

In *Elsas* v. *Williams* (*e*) the defendant having consented, on the hearing of a motion for injunction, to submit to a perpetual injunction to restrain him from infringing a trade mark for buttons, a subsequent application by him, before the order was drawn up, to be relieved from his consent, on the ground that his German manufacturers had sold buttons bearing the mark in England before the plaintiff had done so, was refused, on the ground that there had not been such a mistake as to entitle the defendant to be relieved.

Stay of proceedings after submission.

Where an action was brought to restrain the use of the word "Diamond" and a diamond-shaped device, and the defendant consented, on motion, to a perpetual injunction as to the word, and subsequently, after the plaintiff had delivered his statement of claim, to a perpetual injunction as to the device, and the plaintiff waived damages or an account, it was ordered, on the defendant's motion, that, the defendant submitting and paying costs, further proceedings should be stayed, except for the purpose of enforcing the order (*f*).

stand to the hearing, as in *Linoleum Manufacturing Co.* v. *Nairn*, Dig. 536, or refused, with costs, as in *Davis* v. *Tylor*, Jessel, M. R., July 27th, 1877 ("Ferndale" coal).

(*a*) *Isaacson* v. *Thompson*, 41 L. J. Ch. 101; *Chinn* v. *Thomas*, 5 V. L. R. Eq. 188. In the Scotch case of *Green* v. *Shepherd*, Ct. of Sess. Cas. 3rd Ser. IV. 1028, the plaintiff having by his summons asked for damages and an interdict, the Court refused a motion for an interim interdict, on the ground that the summons was framed on the footing that there was no case for an interim interdict, and that the plaintiff must first establish his right by recovering damages.

(*b*) In *Actien Gesellschaft Apollinaris Brunnen* v. *Somborn*, 14 Bl. C. C. 380, an American case, a bond was given to secure the possible damages.

(*c*) *Edwards* v. *Elkan*, 5 P. R. 70.

(*d*) *Holloway* v. *Holloway*, 13 Beav. 209.

(*e*) 54 L. J. Ch. 336.

(*f*) *Curtis & Harvey* v. *Pape*, 5 P. R. 146. But stopping the infringement at

Form of injunction.

The injunction may be granted in such a form as to restrain the imitation of the general style of the plaintiff's mark, while not interfering with the use of particular features (*a*), or, if granted so as to restrain the use of particular features, it may be limited so as not to interfere with the use of them absolutely and in all events (*b*); or, again, it may be granted in such terms as to restrain any imitation of a composite mark as a whole, or of any of the elements of which it is composed (*c*). And it seems that in cases where the plaintiff's trade is confined to particular parts of the Empire, the injunction may be limited correspondingly (*d*).

Appeal.

In the case of an appeal delay is no less fatal than in the proceedings in the Court below (*e*); but no appeal ought to be brought from a refusal to grant an interlocutory injunction if the defendant, while refusing to submit to an injunction or to give an undertaking, removes the cause of complaint (*f*). Where an injunction had been granted to restrain the sale by the defendant of "The Original Lazenby's Harvey's Sauce," an appeal against the decision was ordered to be advanced, on the ground of the irreparable damage the continuance of the injunction would occasion (*g*). It seems that when the Court of Appeal has overruled a demurrer or objection on a point of law, it will not stay the further hearing of

the commencement of the action has been held in America no ground for withholding an injunction where the defendant put the plaintiff to proof: *Hutchinson* v. *Blumberg*, 51 Fed. Rep. 829.

(*a*) *Compagnie Laferme* v. *Hendrickx*, Dig. 512; *Wolfe* v. *Hart*, 4 V. L. R. Eq. 125; *Wolfe* v. *Alsop* (2), 12 V. L. R. (E.) 421.

(*b*) *Ford* v. *Foster*, L. R. 7 Ch. 611; *Braham* v. *Beachim* (1), 7 Ch. D. 848; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Dence* v. *Mason* (1), Dig. 534; *Orr-Ewing* v. *Johnston*, 7 App. Cas. 219; *Montgomery* v. *Thompson*, (1891) A. C. 217; *Thompson* v. *Bent's Brewery Co.*, 8 P. R. 479; *Grezier* v. *Autran*, 13 P. R. 1; *In re Thompson*, 13 P. R. 35; *Brinsmead* v. *Brinsmead*, 12 Times L. R. 631; 13 *ib.* 3; *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 P. R. 194; *Reddaway* v. *Banham*, (1896) A. C. 199, 221, where Lord Macnaghten thought that in all cases where the defendant was to be restrained from using unfairly words or marks which he was at liberty to use provided he used them fairly, the form of injunction in *Orr-Ewing* v. *Johnston* (7 App. Cas. 219) ought to be adopted; *Bewlay & Co.* v. *Hughes*, 15 P. R. 290; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *Whitstable (Free Fishers & Dredgers of)* v. *Elliott*, W. N. 1888, p. 27; *Hill* v. *Lockwood*, 32 Fed. Rep. 389. As to the difference in the form of the injunction to restrain the defendant from using the plaintiff's name where it is also the defendant's name and where it is not, see *Pinet* v. *Maison Pinet* (1), 14 P. R. 933; and *Pinet* v. *Maison Pinet* (2), (1898) 1 Ch. 179; 15 P. R. 65.

(*c*) See *India Rubber Comb Co.* v. *Rubber Comb and Jewelry Co.*, 45 N. Y. Super. Ct. 258.

(*d*) *Barber* v. *Manico*, 10 P. R. 93; *Carver* v. *Bowker*, Dig. 581; *Rodgers & Sons, Ld.* v. *Rottgen*, 5 Times L. R. 678; *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434, 464; 7 App. Cas. 219, 227; and see *Lee* v. *Haley*, L. R. 5 Ch. 155; and *Cowie* v. *Herbert*, 14 P. R. 436. Cf. *In re Paine* (2), (1893) 2 Ch. 567; and *In re Société Anonyme des Verreries de l'Etoile* (2), (1894) 1 Ch. 61.

(*e*) See *per* Knight-Bruce, L. J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 896.

(*f*) *Dale* v. *Smith*, W. N. 1882, p. 145.

(*g*) *Lazenby* v. *White*, L. R. 6 Ch. 89.

the case with the evidence until after an appeal to the House of Lords from this decision on the point of law is decided (*a*). And where the Court of Appeal ordered a new trial in an action to restrain the defendants from passing off their goods as the plaintiffs', the Court declined to stay the new trial pending an appeal to the House of Lords (*b*).

Committal for contempt.

Where a defendant in a trade-mark action continues to use the prohibited trade mark, or a mark insufficiently altered from it (*c*), after an injunction has been issued against him, he renders himself liable to committal (*d*). In order to support the motion to commit, "it should appear clearly that the ordinary mass of customers, paying that attention which persons usually do in buying the article in question, would be easily deceived" (*e*). It was said by Lord Langdale, M. R., in *Croft* v. *Day* (*f*), that "if the defendants were willing to make a proper distinction, and the plaintiffs refused to attend to their proposal, the Court would itself determine whether the proposed distinction was sufficient." If the defendant sets up acquiescence on the part of the plaintiff, he must make out a case amounting almost to such a licence as to entitle him to proceed against other infringers—such acquiescence, in fact, as to

(*a*) See *In re Palmer* (2), 22 Ch. D. 88. In that case the question was with reference to an application to strike a mark off the register.

(*b*) *Edge* v. *Johnson*, 9 P. R. 134.

(*c*) *Devlin* v. *Devlin*, 69 N. Y. 212; *Daniel* v. *Whitehouse* (2), 16 P. R. 71, where North, J., thought that, though the Court had power to commit any person who assisted another in committing a breach of an injunction, a mere servant acting under his master's orders ought not to be joined as a respondent to a motion to commit.

(*d*) *Rodgers* v. *Nowill*, 3 De G. M. & G. 614; *Gillis* v. *Hall*, R. Cox, 596. On August 8th, 1877, V.-C. Malins made an order to commit the defendant in *Dence* v. *Mason* (Dig. 534), who had, notwithstanding the injunction, continued to sell goods and issue labels using the name "Brand" thus—"Frank Mason & Co.'s ('Brand's') Essence of Beef," and so on. He was discharged on December 18th, on undertaking not to use the name "Brand" until the hearing of the action: Dig. 570. In *Devlin* v. *Devlin*, 69 N. Y. 212, the Supreme Court of New York imposed a fine. In *U. S.* v. *Roche*, 1 M'Crary, 385, it was held that the declaration that the U. S. Statute of 1870 was invalid did not affect the validity of an injunction granted independently of the Act, and that an attachment must issue against a defendant who had committed breaches of the injunction.

(*e*) *Swift* v. *Dey*, 27 N. Y. Super. Ct. 611; R. Cox, 319, 324; and see *per* Lord Langdale, M. R., in *Croft* v. *Day*, 28 Leg. Obs. 378. In *Braham* v. *Beachim* (1), 7 Ch. D. 848, an injunction was granted to restrain the defendants from calling themselves "The Radstock Colliery Proprietors," or saying that they were the proprietors of collieries at Radstock; and it was afterwards held (*Braham* v. *Beachim* (2), Dig. 633) that the defendants [illegible] mitted no breach of the injun[illegible] styling themselves "The Ra[illegible]oal and Waggon Co., Colliery P[illegible]rs, Radstock, Somerset." In [illegible] v. *Brand*, W. N. 1881, p. 31, it was held that the defendant had not committed a breach of an injunction restraining him from representing that he was the original inventor of essence of beef by stating that he was the original manufacturer of that article.

(*f*) 28 Leg. Obs. 378.

create a new right in him; and in default of such a licence, the order for committal will be made, unless the defendant satisfies the Court of his intention to use a trade mark which will not interfere with the plaintiff's rights (*a*). Where the contempt committed has not been gross, it is usual not to make an actual order for committal, but only to order the person in contempt to pay the costs of the motion for committal: *e.g.*, where an auctioneer, in contempt of an injunction, offered for sale "Vanity Fair" cigarettes, supposing the notice of motion served on him not to be properly authenticated, but did not actually effect any sale, V.-C. Malins made no order for committal, on his apologising, submitting to the injunction, and paying all the costs (*b*). But a defendant can only be ordered to pay the costs of a motion for committal, if his conduct has been such that a committal might have been ordered (*c*). Where an injunction had been granted to restrain the infringement of a mark on cotton, in which a conspicuous feature consisted of a cross, from which the cotton had become known as "Cross Cotton," and the defendant adopted an altered label, containing the words "Cross Cotton," and otherwise calculated to deceive, Wood, V.-C., refused to order a committal, on the ground that the defendant had ingeniously avoided committing a breach of the injunction, and that the plaintiff had delayed to enforce his right for fifteen months; but he enlarged the terms of the injunction so as to effectually put a stop to the new fraud, and ordered the defendant to pay all the costs (*d*). Sometimes an application is made to commit the editor or publisher of a newspaper on the ground that he has published something prejudicial to the fair trial of a pending action for infringement; but such a motion in *Singer Manufacturing Co.* v. *Loog* (*e*), based on a newspaper paragraph stating that further proceedings would be taken on the conclusion of the action, was refused, on the ground that the paragraph would have no influence on the trial of the action. Again in *Coats* v. *Chadwick* (*f*), it was laid down by Chitty, J., that the plaintiff, in an impending action for infringement of trade mark, is at liberty to warn the trade by circular against infringement; but if the warning contains matter which will prejudice the defence of the action, that is a contempt; and an injunction was granted, the defendants not asking for a committal.

(*a*) *Rodgers* v. *Nowill*, 3 De G. M. & G. 614.

(*b*) *Marcovitch* v. *Bramble, Wilkins & Co.*, Dig. 595; and see *Daniel* v. *Whitehouse* (2), 16 P. R. 71.

(*c*) *Dence* v. *Brand*, W. N. 1881, p. 31.

(*d*) *Cartier* v. *May*, Dig. 200.

(*e*) Dig. 635.

(*f*) (1894) 1 Ch. 347.

An action to restrain the infringement of a trade mark is an action to protect property, and if the plaintiff dies, his representatives are entitled to continue it (*a*). On the other hand, when an injunction had been granted, without opposition by the defendant, the Superior Court of New York refused a motion by the defendant's administratrix to have the action continued against her, 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 (*b*). Revivor.

It has sometimes happened that more marks than one have been used by a person on his goods, the infringement of either of which would be visited by the Court with the penalties at its command. Thus, where A.'s soft soap was denoted, not only by a specific device, but also by the name "Excelsior," it was held that the infringement of the latter alone was punishable by the Court, the Vice-Chancellor remarking that he could not hold it to be any justification for a defendant to say that the plaintiff had two ways of identifying the goods, and he (the defendant) had only stolen one (*c*). And so in *Wheeler* v. *Johnson* (*d*), the V.-C. of Ireland said that "a man may have two, or three, or more trade marks, which he may put on his goods as he likes." But where it was shown that the goods to which a certain mark was affixed were known by a distinct name, and not by the mark, and the mark was not commonly used by the plaintiff before bill filed, the injunction was refused (*e*). Where two marks used.

Moreover, the habitual use of his own name in combination with his verbal trade mark by the manufacturer of the "Eureka" shirts was held not to disentitle him to relief against defendants who had made use of the word "Eureka" though in combination with the name of their own firm (*f*). But where the name is the only distinctive part of the mark, and that is not taken, no injunction will be granted in respect of the use by the defendant of a non-distinctive part of the mark. There has, in fact, been no infringement (*g*). Name used with trade mark.

(*a*) *Oakey & Sons* v. *Dalton*, 35 Ch. D. 700.

(*b*) *Republic of Peru* v. *Reeves*, 40 N. Y. Super. Ct. 316.

(*c*) *Braham* v. *Bustard*, 1 H. & M. 447.

(*d*) 3 L. R. Ir. 284.

(*e*) *Wilson* v. *Maxfield*, L. J. N. of C. 1875, p. 51. This was before the Trade Marks Registration Act, 1875, was passed.

(*f*) *Ford* v. *Foster*, L. R. 7 Ch. 611. So in *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57; and *Hoby* v. *Grosvenor Library Co.*, 28 W. R. 386.

(*g*) *E.g.*, it was held in Scotland that the fact that one firm called their goods "Wotherspoon's Victoria Lozenges," could not prevent another firm from styling theirs "Gray's Victoria Lozenges": *Wotherspoon* v. *Gray*, Ct. Sess. Cas. 3rd Ser. II. 38. So in the United States

*Singer Manufacturing Co.* v. *Wilson.*

Where, however, a manufacturing company affixed their special device to their machines, and also their name, the Master of the Rolls and Court of Appeal declined to restrain another company who manufactured similar goods bearing their own mark and name, but did not affix to them the plaintiffs' name, from using the plaintiffs' name as descriptive of the principle on which the machines were constructed (*a*); and this part of the decision was not disapproved by the House of Lords when they remitted to the Court below the question whether the name was in fact descriptive of the principle of the machines, which was afterwards decided against the plaintiffs in *Singer Manufacturing Co.* v. *Loog* (*b*).

Questions of title to trade marks.

Courts of Equity have sometimes had to decide somewhat nice questions as to who should be recognised as having a right to protection in equity in respect of a trade mark, such questions being usually raised by the right of the plaintiff in an action to restrain infringement being contested.

Between landlord and tenant of iron works.

In *Motley* v. *Downman* (*c*), Lord Cottenham, C., was of opinion that a trade mark habitually applied to the iron manufactured at certain works could not be sold with the business by the tenants of the works, so as to give the purchasers an exclusive right as against the landlord of the works, or as against tenants of the works who had leased them after the purchasers of the business and trade mark had removed from those works and gone elsewhere.

Successive lessees of brick works.

In another case (*d*) A., having for some time leased certain brick works, and also certain mines, from which fire-clay was taken for manufacture at the works, removed his business elsewhere, whereupon B. commenced business at the brick works in question, but did not lease the same mines. A. having filed a bill against B., as fraudulently representing (in effect) that the latter had succeeded to his business, Vice-Chancellor Wood, in the course of his judgment in favour of the plaintiff, took occasion to intimate that it would have been almost a matter of course to have granted an injunction

Patent office, it was held that the use of the words "Pfeiffer's Egg Macaroni," before the United States Act of 1870, did not entitle the applicants to sever the mark and register the descriptive words "Egg Macaroni" alone, without the name, as having been a lawful trade mark at that time: *In re Dole Brothers*, 12 U. S. Pat. Gaz. 939; and see *Pirie* v. *Goodall*, (1892) 1 Ch. 35.

(*a*) *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434. Cf. *Singer Manufacturing Co.* v. *Spence*, 10 P. R. 297.

(*b*) 8 App. Cas. 15.

(*c*) 3 My. & Cr. 1. See *Dickson* v. *McMaster & Co.*, 18 Ir. Jur. 202; *Atlantic Milling Co.* v. *Robinson*, 20 Fed. Rep. 217.

(*d*) *Harper* v. *Pearson*, 3 L. T. N. S. 547. And see *Carmichel* v. *Latimer*, 11 R. I. 395, and *Armstrong* v. *Kleinhaus*, 1 Ky. L. Rep. 112; 82 Ky. 303.

to the owner of the mines of fire-clay used by A. but not by B., if he had made application for it. This was, indeed, rather a case of fraudulent misrepresentation than of trade mark.

Owner and lessee of a spring.

If A. is the owner of a natural spring, and B. is the concessionaire for a term of years, it seems that the name of the spring is the property of A., even though it was given to the spring by B., and that B. is not entitled to sell water from another spring under the same name nor, if his concession is limited as to sales in specified countries, to interfere with the sale in those countries, under the name of the spring, of genuine water from the spring, though not imported by him (*b*).

Manufacturer and printer of cotton goods.

Where manufacturers of cotton cloths, which were afterwards printed elsewhere, sought to restrain other manufacturers who made and printed similar cloths, and marked them similarly to the goods made by the plaintiffs, it was held that the marks on the plaintiffs' goods were indicative of the printer and not of the manufacturer (*c*). And in *Wamsutta Mills* v. *Allen* (*d*) it was held that muslin manufacturers were entitled to restrain the use of a colourable imitation of their mark on shirts made from inferior muslin, which might, from the mark, have been identified with their manufacture.

Principal and agent.

Where a London tradesman, who dealt in goods supplied to him by a foreign manufacturer, had invented a trade mark for those goods which stated the name of the foreign manufacturer, but made no reference to the London vendor, it was held by the Master of the Rolls that the latter could not restrain the use of the mark by a subsequent consignee of the same goods, though if

(*a*) *Hill* v. *Lockwood*, 32 Fed. Rep. 389.

(*b*) *Apollinaris Co., Ld.* v. *Scherer*, 23 Bl. C. C. 459; and see *In re Apollinaris Co., Ld.*, (1891) 2 Ch. 181.

(*c*) *Amoskeag Manufacturing Co.* v. *Garner*, 55 Barb. 151; R. Cox, 541; and see *In re Sykes*, 43 L. T. N. S. 6[illegible]. But see *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298. And compare *Goodfellow* v. *Prince*, 35 Ch. D. 9, as to the difference between manufacturer and importer. See also *Krauss* v. *Peebles' Sons' Co.*, 58 Fed. Rep. 535, where the sale of whiskey in bulk by a distiller under a trade mark was held not to justify the purchaser in placing the same trade mark on his bottles, it being proved that the distiller used the same mark on bottles prepared by himself for the retail trade, and the converse case of *Low* v. *Wood*, 56 Fed. Rep. 1016; 61 Fed. Rep. [illegible], where a retail dealer purchasing ordered cigars under a particular trade mark which he originated, and having refused to take them, the manufacturer was held not entitled to sell them under that name; and an injunction has been obtained by one retail dealer against another in respect of the get-up of an article purchased in bulk by both parties from the same manufacturer: *Knott* v. *Marshall*, W. N. 1894, p. 214.

(*d*) 12 Phila. 535.

the trade mark had referred to the goods having been of his selection, the case might have been different (*a*).

Manufacturer and importer.

In *In re Apollinaris Co.* (*b*) it was held by the Court of Appeal that an importer of foreign goods cannot register or claim as his own the trade mark of the foreign producer, whether the goods are produced by a course of manufacture or by a process of nature; nor whether the importer has or has not an exclusive contract for this country; nor whether the producer does or does not consent; and further that whether an importer can or cannot register as his own the producer's trade marks after the importer has acquired the control of the producer's entire output (which was not distinctly decided), the registration by the importer in his own name, while only having a lesser right, of trade marks belonging to the producer, cannot be rendered valid by the subsequent acquisition by the importer of the right to the whole output. And as an importer cannot register the foreign producer's trade mark, so neither can he, without registration, sue for an infringement (*c*). It follows that where an importer registers as his own the mark of a foreign producer without his authority, the mark will be ordered to be struck off the register (*d*); but it has been held in America that an exclusive consignee from a foreign manufacturer may affix a trade mark of his own to the foreign goods, and after ceasing to import such goods may use his trade mark for other similar goods without infringing the rights of the foreign manufacturer, provided that he uses distinctive labels (*e*).

Manufacturer and exporter.

In another case (*f*), a combination mark, which was used on cotton goods manufactured by Ward, and consigned through Robinson, the exporting agent, to Galbraith, the merchant, at Rangoon, consisted of five separate stamps or labels, of which three had been used separately by Robinson, one (in a slightly different form) by Robinson and Galbraith, and the remaining one was

(*a*) *Hirsch* v. *Jonas*, 3 Ch. D. 584. See *Dence* v. *Mason* (1), Dig. 534; *Swift* v. *Peters*, 11 U. S. Pat. Gaz. 1110; *McLean* v. *Fleming*, 96 U. S. 245; *Thomson & Co.* v. *Robertson*, Ct. Sess. Cas. 4th Ser. XV. 880.

(*b*) (1891) 2 Ch. 186, 226, 230.

(*c*) *Richards* v. *Butcher* (1), 7 P. R. 288.

(*d*) *In re European Blair Camera Co.*, 13 P. R. 600.

(*e*) *Société des Huiles d'Olive* v. *Rorke*, 5 App. D. N. Y. 175; *Saxlehner* v. *Graef*, 81 Fed. Rep. 704.

(*f*) *Robinson* v. *Finlay*, 9 Ch. D. 487. In this case, Bacon, V.-C., had held that the mark belonged to the exporter, and it seems that this may be so in a proper case. In *Godillot* v. *Hazard*, 81 N. Y. 263, the importer was recognised as the proprietor of the mark.

used for the first time by the three on the goods which passed through the course of dealing above stated; and it was held on appeal that neither Ward nor Robinson had such an exclusive right to the combination as to be entitled to restrain the other from using it. And there are other cases in which both parties have been held to be entitled by long user to use the same mark (*a*); but for this to be so the user must have been substantial (*b*).

Exporter and merchant.

A question of a somewhat similar character arose in *In re Jones* (*c*). In that case cotton goods were habitually exported by Jones of Manchester to Manilla, for sale there on commission, through Andrews & Co., of Manchester and Manilla, one of the partners in which firm, named Rotschke, was resident at Manilla; and two trade marks were designed and used for the goods which passed through this course of trade. Each of the marks contained a representation of Andrews & Co.'s house of business in Manilla, and, besides this, one of the marks had the name "Andrews & Co.," and the other had that name and also the name "Robert Jones of Manchester" and Rotschke's crest, with a statement that it was Rotschke's trade mark. It was held by Chitty, J., and the Court of Appeal that there was no contract that, after the joint adventure came to an end, either party was to be entitled, as against the other, to use or register the trade marks, and that if there had been such a contract it could not have been enforced, since, having regard to the composition of the marks, the result would be to deceive the public.

Manufacturer and merchant.

The construction of an agreement between two parties with respect to a mark on brandy had to be determined by the Court in *In re Rivière* (*d*), in which it was held by Pearson, J., and the Court of Appeal that the true purport of the arrangement was that the mark in question, which had been used and registered by Rivière & Co., the French manufacturers, in France, before it was adopted by McDowell & Co., wine and spirit merchants, in Madras, was to be used exclusively by McDowell & Co. so long

(*a*) *Day* v. *Neale*, Bacon, V.-C., May 24th, 1881; *Benbow* v. *Low* (4), 44 L. T. N. S. 875; and other cases cited at p. 108, note (*d*).

(*b*) *In re Hodson & Co.*, 26 Sol. J. 43. And see *Levy* v. *Waitt*, 61 Fed. Rep. 1008.

(*c*) 53 L. T. N. S. 1.

(*d*) 53 L. T. N. S. 237. See *In re Roger* (2), 12 P. R. 149; *Freeman Bros.* v. *Sharpe Bros. & Co., Ld.*, 16 P. R. 205; *Lavergne* v. *Hooper*, Ind. L. R. 8 Mad. 149; *Société des Huiles d'Olive* v. *Rorke*, 5 App. D. N. Y. 175.

only as they took their brandy from Rivière & Co., and was only to be used by them on such brandy; and that on McDowell & Co. ceasing to take their brandy from Rivière & Co. the original right of the latter to the mark was to revive.

Shipper and shipowner.

In *Winsor* v. *Clyde* (*a*), it was held that a firm who had 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 had denominated each line of vessels used by them and plying in a particular direction by the name of "The Keystone Line for ———," had acquired a right of property in the name, and were entitled to restrain the use of the name by another firm who owned the ships employed by the former firm for a certain period on one of their lines, after the termination of the connection, the latter firm having had at best a revocable licence to use the name.

Master and servant.

A different point occurred in another case (*b*), in which, after the plaintiff company had for some two years been selling cigars of their own manufacture marked with the name "Grand Master," and paying all the expenses of the manufacture and marking, a member of the company, who was also their superintendent, registered the mark as his own, and sought to justify himself by alleging that he had invented the name, selected the tobacco for the brand of cigars, devised the shape for them, made the first ones himself, and personally affixed the first labels to the boxes; but it was held that in all these matters he had been simply acting as the servant of the company, and that the mark belonged to them.

Secret recipe.

Again, in *Cotton* v. *Gillard* (*c*), it was decided by the Master of the Rolls that a man had no right to use a trade mark applied to a sauce with the composition of which he was unacquainted, even though he had, as he believed, bought that right from the person entitled to the same; it followed that he could not prevent its use by the person acquainted with the secret, of which he had in fact been the inventor. But it has been held in America (*d*) that a person who has been accustomed to manufacture for another, in

(*a*) 9 Phila. 513.

(*b*) *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183.

(*c*) 44 L. J. Ch. 90. Compare *Coffeen* v. *Brunton*, 5 McLean, 256; R. Cox, 132; *Taylor* v. *Bemis*, 4 Biss. 406.

(*d*) *Witthaus* v. *Braun*, 44 Md. 303. See *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453.

accordance with the latter's instructions, may receive an assignment of the trade mark which has been habitually used on the goods so manufactured. And it seems that where an article known by a particular name or mark has been manufactured by partners, of whom one has been acquainted with the secret of the process and the other not, the former cannot, after the dissolution of the partnership, restrain the other from using the name or mark, for the right therein of the one partner is equal to that of the other (*a*).

Registered trade marks.

With respect to registered trade marks, such difficulties can seldom arise in the future, since it is the registered proprietor who has, *primâ facie*, the exclusive right to the mark, and after five years has that right conclusively (*b*), subject only to the possibility of a rectification of the register (*c*). It is, therefore, of great importance that the registration should be effected in a form which will recognise all existing rights. Thus, in *Ex parte Hemming & Son* (*d*), in which recent occupiers of a needle mill were registering the name of the mill as their trade mark, a note was appended to the entry on the register, stating that the registered proprietors did not claim the exclusive right to the use of the name so as to prevent the owner or occupier for the time being from using the name for any legitimate purpose.

More than one proprietor.

It occasionally happens that a trade mark becomes vested in more than one person. The question then arises whether either of these is entitled to succeed in a suit against an infringer, to which the other person entitled is not a party. In a case of this description, Shadwell, V.-C., gave it as his opinion, that whether the plaintiff had the right in himself, or jointly with some other persons, he still had sufficient right to bring forward the case (*e*). In *Dent* v. *Turpin* (*f*), Wood, V.-C., decided in accordance with

(*a*) *Weston* v. *Ketcham* (1) and (2), 39 N. Y. Super. Ct. 54; 51 How. Pr. 455. And see *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218.

(*b*) Patents Act, 1883, § 76. In the Scotch case of *Dunnachie* v. *Young & Sons*, Ct. Sess. Cas. 4th Ser. X. 874, the name "Glenboig" was used and registered by two companies trading as brickmakers on the Glenboig estate for the bricks made there, and a third firm carrying on the same business in the neighbourhood of the Glenboig estate began to use the name, alleging that it was descriptive of all bricks made of the seam of clay which ran through the Glenboig estate, and which they alleged that they were working. The Court of Session, however, decided against this contention, and granted an interdict at the suit of the two companies. See also *Montgomerie* v. *Donald & Co.*, Ct. Sess. Cas. 4th Ser. XI. 506.

(*c*) *Edwards* v. *Dennis*, 30 Ch. D. 454.

(*d*) Jessel, M. R., April 27th, 1881.

(*e*) *Hine* v. *Lart*, 10 Jur. 106. See *Pratt's Appeal*, 117 Penn. St. 401.

(*f*) 2 J. & H. 139. Compare *In re Ehrmann*, (1897) 2 Ch. 495.

this view, saying that the plaintiff had a clear right to an injunction and the erasure of the spurious marks, without making the other person interested a party, while as to the account, only the plaintiff's share having been prayed for, that, though it might be difficult to ascertain, was yet ascertainable. In any case, the wrong-doer had no right to complain of any technical difficulty arising from his own wrongful act, though the result was to involve him in two suits instead of one. In *Southorn* v. *Reynolds* (*a*), he decided in the same way, saying that his previous decision had not been interfered with (*b*). So, in the Scotch case of *Dunnachie* v. *Young & Sons* (*c*), the name "Glenboig" was used and registered as the trade mark of one company, and as part of the trade mark of another company, and an interdict was granted in an action in which the two companies were co-plaintiffs, to restrain the use of the name by a third company.

Partnership trade mark.

It seems that where the use of a trade mark is improperly secured for himself by one member of a partnership, he being bound to obtain it for the partnership, he will be held to be a trustee of it for the benefit of the partnership (*d*).

*Delondre* v. *Shaw*.

In *Delondre* v. *Shaw* (*e*) it was held that, inasmuch as one of the plaintiffs had no interest in the account (*f*), he was improperly joined as a co-plaintiff, the Court thus treating the injunction as ancillary to the account. In *Farina* v. *Silverlock* (*g*) the same question was raised, but without success, and no such objection would prevail at the present day (*h*).

(*a*) 12 L. T. N. S. 75.

(*b*) And see *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; and *Newman* v. *Alvord*, 49 Barb. 588; R. Cox, 404; 51 N. Y. 189. And consider *Robinson* v. *Finlay*, 9 Ch. D. 487.

(*c*) Ct. Sess. Cas. 4th Ser. X. 874.

(*d*) *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54. And see *Ex parte Lawrence Bros.*, 44 L. T. N. S. 98; *In re Rust & Co.*, *ib.* 98; and *In re Farina* (4), *ib.* 99.

(*e*) 2 Sim. 237. And see *Page* v. *Townsend*, 5 Sim. 395.

(*f*) It should be observed that the reason given by Mr. Bickersteth (afterwards Lord Langdale and M. R.), who argued the case, for the joinder of Pelletier as a co-plaintiff, was that, though having no interest in the medicine, he yet was entitled to prevent his name being used. It is further to be observed, that the subsequent decision of Lord Langdale, in *Clark* v. *Freeman*, 11 Beav. 112, does not conflict with the position taken up by him in *Delondre* v. *Shaw*, since Pelletier not only manufactured the medicine, but supplied it to Delondre, so that he had a pecuniary interest in the maintenance of his reputation. *Clark* v. *Freeman* (as to which see p. 276, *infra*) was decided on the point that the plaintiff did not manufacture or sell pills.

(*g*) 1 K. & J. 509; 6 De G. M. & G. 214; 4 K. & J. 650.

(*h*) In *Millington* v. *Fox*, 3 My. & Cr. 338, the account was waived. And see *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Leather Cloth Co.* v. *American Leather Cloth Co.*, *ib.* 137; *Barnett* v. *Leuchars*, 13 L. T. N. S. 495; *Symonds* v. *Greene*, 28 Fed. Rep. 834; and many other cases. In fact, this is a common incident.

Prize medallist.

In *Batty* v. *Hill* (*a*), an attempt was made by a prize medallist at the exhibition of 1862 to restrain the use by the defendant, who had not been awarded a medal, of a label which had been prepared before the award, bearing the words "Prize Medal, 1862." The Vice-Chancellor was, however, of opinion that he could not interfere merely on the ground of a misrepresentation, and that the plaintiff was not entitled to claim the label as a trade mark for various reasons, among which was the fact that whatever rights the plaintiff could have must be shared with all those who had been awarded medals (*b*).

Infringement by servants.

The person sought to be enjoined in a trade mark case is commonly a rival manufacturer, who is using the spurious mark to promote the sale of his own commodities. The fact that the fraud has been committed by a servant of the trader makes no difference, for principals "are bound to know what their agents do, and if they do not know, they are responsible exactly as if they did know." Hence, where a defendant's manager had affixed to his master's goods, without the knowledge of the latter, as he alleged, a ticket infringing the rights of the plaintiff, an injunction was granted against the master, with costs (*c*). And, similarly, where a clerk had sold goods in a spurious wrapper, with a verbal representation that the goods and wrapper were genuine (*d*). But if there has been only a single instance of passing off by a servant, who has since left his master's employment, the case is not one in which an injunction ought to be granted against the master (*e*). Nor does any liability of the employer relieve the servant or agent from his personal responsibility (*f*).

Agents.

And English agents of foreign traders will be restrained from selling goods received from their principals falsely marked, to the injury of other manufacturers (*g*). And similarly in America

(*a*) 1 H. & M. 264.

(*b*) See Exhibition Medals Act, 1863 (26 & 27 Vict. c. 119); also *Taylor* v. *Gillies*, 59 N. Y. 331; and *Roper's &c. Co.* v. *Copeman's, &c. Association, Ld.*, 28 Sol. J. 218. But representations of prize medals have been registered as parts of old combination marks, both in England (see *In re Brook*, 26 W. R. 791, and *In re Farina* (2), 27 W. R. 456) and in America (see *In re Bush & Co.*, 10 U. S. Pat. Gaz. 164).

(*c*) *Tonge* v. *Ward*, 21 L. T. N. S. 480. And see *Twentsche Stoom Bleekery Goor* v. *Ellinger & Co.*, 26 W. R. 70; *Atkinson* v. *Atkinson*, 85 L. T. (Journal) 229.

(*d*) *Low* v. *Hart*, 90 N. Y. 457. And see *Enoch Morgan's Sons' Co.* v. *Wendover*, 43 Fed. Rep. 420.

(*e*) *Leahy* v. *Glover*, 10 P. R. 141.

(*f*) *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601; *Estes* v. *Worthington* (2), 30 Fed. Rep. 465.

(*g*) *Farina* v. *Cathery*, L. J. N. of C. 1867, p. 134; *Siegert* v. *Findlater*, 7 Ch.

with American agents of foreign manufacturers (*a*), and in the colonies (*b*). So, too, commission merchants, selling with the knowledge that the goods they sell are so marked as to deceive (*c*).

Engravers.

The remedy will, however, not only be awarded against such persons as are to profit directly by the perpetration of a fraud, but also against all who connect themselves with and assist in the same. Thus, persons who engrave or print a trade mark for one not entitled to use it may be restrained.

*Guinness* v. *Ullmer*.

In *Guinness* v. *Ullmer* (*d*), where the defendants had supplied to one Taylor blocks engraved with the main part of the plaintiffs' trade mark, including their names, from which blocks Taylor had printed labels similar to the plaintiffs', the Vice-Chancellor of England, Sir L. Shadwell, was of opinion that, as the matter complained of could not have happened without the prints which had been made from the blocks, the defendants had made themselves ancillary to the piracy, and he accordingly granted the injunction. It had been contended for the defendants that it was with a part only of the plaintiffs' mark that they had been concerned; but the Vice-Chancellor thought that if a thing contained twenty-five parts, and only one was taken, such an imitation would be sufficient to contribute to a deception, and that the law would hold those responsible who had contributed to the fraud. In *Farina* v. *Shaw* (*e*), and *Farina* v. *Silverlock* (*f*), injunctions were granted to restrain the printing of labels similar to those used by the plaintiff. In the latter case, on appeal (*g*), Lord Cranworth, C., dissolved the injunction, and sent the right to be tried at law (*h*); but this can no longer be done (*i*).

Spurious goods in innocent hands.

A different combination of circumstances arises when the goods improperly marked are in the charge of an innocent third party, for purposes of conveyance, storage, or the like. In such a case,

D. 801. And see *Siegert* v. *Ehlers*, Dig. 432; *Dadirrian* v. *Gullian*, 79 Fed. Rep. 784.

(*a*) *Roberts* v. *Sheldon*, 8 Biss. 398; *Carbolic Soap Co.* v. *Thompson*, 25 Fed. Rep. 625.

(*b*) *Siegert* v. *Lawrence*, 11 V. L. R. 47.

(*c*) *Coats* v. *Holbrook*, 2 Sandf. 586; R. Cox, 20.

(*d*) 10 L. T. O. S. 127.

(*e*) Decided by V.-C. Parker, and referred to in *Farina* v. *Silverlock*, 1 K. & J. 509, 512. See 3 Eq. Rep. 886, 890.

(*f*) 1 K. & J. 609.

(*g*) 6 De G. M. & G. 214. And so as to box-makers who supplied cigar boxes got up and marked in imitation of the plaintiff's boxes to other cigar manufacturers: *Cuervo* v. *Jacob Henkel Co.*, 50 Fed. Rep. 471. And see *Hostetter Co.* v. *Brueggeman Reinert Distillery Co.*, 46 Fed. Rep. 188.

(*h*) Where the plaintiff obtained a verdict. See 4 K. & J. 650.

(*i*) 25 & 26 Vict. c. 27.

although that person be merely a carrier receiving goods, which, though fraudulently marked, are not for his own use, nor to be sold by him for his own benefit, but have been received by him merely for the purposes of transmission to the persons to whom they are consigned, yet an injunction will issue to restrain him from parting with the goods spuriously marked (*a*). "It is the duty of the person in charge of the marked goods at once to give all the information required, and to undertake that the goods shall not be removed or dealt with, unless the spurious brand has been removed, and to offer to give all facilities to the person injured for that purpose." He should also, on discovering the fraud, at once inform his correspondent abroad (*b*). If, on the other hand, the carrier declines to give information required by the injured party for the purpose of an action against the author of the fraud, even after the marked goods have passed out of his control, it was formerly held that the person injured is entitled to succeed in an action brought against him to compel discovery (*c*). Supposing the carrier, &c., to give the required information and undertaking, and to seek to facilitate the proceedings, then, "if after that the person injured files a bill, though he will be entitled to all that he seeks in the shape of relief, as he might have got it all without suit, he will not get from the defendants the costs of the suit, and he may have to pay them (*d*). On the fact of the fraudulent mark being discovered, it is no redress for the carrier, &c., to send back the goods, or to offer to do so, for that would only put it in the power of the consignor to repeat his fraud; but if the carrier, &c., offers as an alternative to erase the mark, he has done all he can be reasonably required to do" (*e*).

Innocent mortgagee.

Where wines bearing a spurious trade mark were in the custody of a dock company, and an innocent third party had advanced money on the security of the wines, it was ordered by Romilly, M. R.,

(*a*) *Upmann* v. *Elkan*, L. R. 12 Eq. 140; L. R. 7 Ch. 130. And see *Rivero* v. *Norris*, Seton, 5th ed. 536; *Del Valle* v. *Mayer*, *ib.*; *Moet* v. *Pickering*, 8 Ch. D. 372.

(*b*) *Per* Romilly, M. R., and Lord Hatherley, C., in *Upmann* v. *Elkan*, L. R. 12 Eq. 140; and L. R. 7 Ch. 130.

(*c*) *Orr* v. *Diaper*, 4 Ch. D. 92.

(*d*) *Upmann* v. *Elkan*, L. R. 12 Eq. 140. See *Moet* v. *Pickering*, 8 Ch. D. 372; *Upmann* v. *Forester*, 24 Ch. D. 231; *Upmann* v. *Currey*, 29 Sol. J. 735.

(*e*) *Per* Lord Hatherley, C., in *Upmann* v. *Elkan*, L. R. 7 Ch. 130. See, also, *Siegert* v. *Lawrence*, 11 V. L. R. 47, in Victoria; and *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72, in New South Wales.

that the wines should be delivered to the mortgagee, on the spurious brands being removed and destroyed (*a*).

Wharfinger's lien.

In *Moet* v. *Pickering* (*b*) wharfingers were in possession of wines spuriously branded, but they had no knowledge that the brand was spurious, and they offered to act with respect to the wine as the Court should direct, upon having their charges and costs paid or provided for. The Court of Appeal held that they were entitled to a lien on the wine for their charges, and that, even if the plaintiffs in the action for infringement were entitled to any lien on the wine for their costs, which was doubted, that lien must, at all events, be postponed to that of the wharfingers; and the Court also held that the latter had not done anything to disentitle them to their costs, which must be paid in both Courts by the plaintiffs.

Warehousemen.

In *Hunt* v. *Maniere* (*c*), where warehousemen, at the request of the owners of a certain brand on wines, refused to deliver (*d*) to the indorsee of the dock warrants wines improperly marked with that brand, Romilly, M. R., restrained the indorsee from proceeding with an action at law against the warehousemen for their refusal. The jurisdiction of the old Court of Chancery to restrain actions at law is now gone, but the warehousemen would have a good defence in the Common Law Divisions to an action there commenced (*e*).

Questions of contract.

In exercising its jurisdiction to restrain breach and enforce specific performance of contract, the Court has sometimes had to deal with questions of trade mark, or akin thereto. Thus, where an injunction was granted to restrain the use of a man's name (*f*) otherwise than in accordance with a contract into which he had

(*a*) *Ponsardin* v. *Peto*, 33 Beav. 642.

(*b*) 6 Ch. D. 770; 8 *ib.* 372.

(*c*) 34 Beav. 157.

(*d*) On the same day, but subsequently, an injunction was granted to restrain them from doing so.

(*e*) Judicature Act, 1873, § 24.

(*f*) *Ainsworth* v. *Bentley*, 14 W. R. 630; *Ward* v. *Beeton*, L. R. 19 Eq. 207; *Probasco* v. *Bouyon*, 1 Mo. App. 241; *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306; *Frazer* v. *Frazer Lubricator Co.*, 121 Ill. 147; *Brewer* v. *Lamar*, 69 Ga. 656, where, in the sale of the good-will of the business of "Brewer's Lung Restorer," the vendor agreed not to use his name on any preparation for the same purpose, and he was restrained from selling a preparation as "Brewer's Sarsaparilla Syrup," and it was held that such a contract did not involve any restraint of trade. And see *Waukesha Hygeia Mineral Springs Co.* v. *Hygeia Sparkling Distilled Water Co.*, 63 Fed. Rep. 438, 443; *Chattanooga Medicine Co.* v. *Thedford*, 66 Fed. Rep. 544, reversing 58 Fed. Rep. 347, and overruling 49 Fed. Rep. 949; *Oakes* v. *Tonsmierre*, 49 Fed. Rep. 447, where a *bonâ fide* purchaser without notice was held not bound by the terms of the contract under which the use of the plaintiff's name was assigned to the vendor.

entered, or of an initial (*a*), or of the name of a business (*b*), or of a singer's voice (*c*), or of a publication (*d*).

*Steinthal* v *Samson.*

Where, among other symbols, the arms, crest, and motto (the latter being the word "Excelsior") of one of the partners were used as trade marks of a partnership, and on dissolution of the partnership it was agreed that the other partner might use all the trade marks of the firm except such private arms, crest, and motto, it was held that no breach of the agreement had been committed by the continuing partner in using the word "Excelsior," apart from the arms and crest, on some of his goods, since it had been so used alone previously as a trade mark, and it was not then used as a motto, but as a trade mark (*e*).

Other cases.

Where, on a dissolution of partnership, it was agreed that neither partner should continue to use the firm's trade mark, which consisted of the letters "P. & O." within a scroll bearing an inscription, one of the members of the late firm was restrained from using a mark very similar to the old mark, the only practical difference being that the letters "P. S. & Co." were substituted for "P. & O." (*f*). And in a case of the same character, where, on a dissolution of partnership, one of the partners had assigned to the other his interest in the firm's stock of labels, which contained his name, and the other had covenanted not to print any more, except in a form expressive of the change in the firm, the latter was not allowed to register the old labels in Victoria, without alteration (*g*).

Name of cigarettes.

Where a tobacco manufacturer agreed to pay a royalty for the use of a patent for improvements in the manufacture, and he proposed and the patentee assented to his using as the name for the cigarettes to be made from the tobacco the words "Sweet Caporal," "Caporal" alone having been previously used by the manufacturer on other cigarettes, it was held that after the manufacturer had discontinued the use of the patent he was under no contract not to use the name "Sweet Caporal" on other cigarettes (*h*).

(*a*) *Tudor* v. *Tudor*, W. N. 1873, p. 72; *Fullwood* v. *Fullwood*, 9 Ch. D. 176.

(*b*) *Hagg* v. *Darley*, 47 L. J. Ch. 567 ("Old Government Sanitary Company"). And see *McGowan Bros.' Pump & Machine Co.* v. *McGowan*, 2 Cinc. 313.

(*c*) *Lumley* v. *Wagner*, 5 De G. & Sm. 485; 1 De G. M. & G. 604. And see *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518, as to a singer's voice.

(*d*) *Clowes* v. *Hogg*, W. N. 1870, p. 268.

(*e*) *Steinthal* v. *Samson*, Dig. 546.

(*f*) *Osborne, Garrett & Co.* v. *Parton, Son & Co.*, Bacon, V.-C., July 25th, 1884.

(*g*) *Ex parte Grist & Bowring*, 11 V. L. R. 630.

(*h*) *Hornbostel* v. *Kinney*, 52 N. Y. Super. Ct. 41.

*Barrows* v. *Pelsall Coal & Iron Co.*

In *Barrows* v. *Pelsall Coal & Iron Co.* (*a*), the plaintiffs used a trade mark consisting of the letters "B. B. H." in Roman type, with a crown, and the defendants, who had compromised a suit commenced for the purpose of restraining them from using the letters "B. B. S." also in Roman type, with a crown, by undertaking to discontinue the use of the mark, were restrained by injunction from committing a breach of the contract by applying to register the letters "B. B. S." in italics, with a crown.

Fraudulent agreement.

The Court will not specifically enforce an agreement the object of which is to defraud the public by putting goods spuriously marked on the market (*b*), nor will it protect a person who has used his trade mark on spurious as well as on genuine goods (*c*), or has intended to commit fraud by buying the right to stamp on his own goods the name of another person who has acquired a reputation in the trade (*d*). And where an action for damages was brought against a person who had filled with inferior seed seed-bags which he had bought from the plaintiffs, marked with their labels, it was held on demurrer that the plaintiffs, having knowingly been parties to a fraud upon the public, were not entitled to recover (*e*).

Contract with trade-mark owner for purchase of goods.

"Where the manufacture of a person or firm," said Cotton, L. J., in *Johnson* v. *Raylton* (*f*), "has acquired with the public a name or reputation, as Broadwood's or Erard's pianos, Purdey's or Lancaster's guns, a purchaser from them of articles of which they are the makers is entitled to refuse any not made by the firm with whom he contracts. In such a case the purchaser relies on reputation or public opinion that the maker to whom he goes supplies good articles. In other cases, where a man contracts with a particular firm of makers for goods such as they make, in the absence of evidence that in the particular trade, or as regards particular goods, there is a known practice that a maker of whom the goods are ordered is at liberty, in the absence of such a stipulation, to supply goods of the kind, though made by other firms, I should come to the conclusion that the purchaser is induced to go to the particular firm of manufacturers by his reliance, in part at

(*a*) Dig. 530.

(*b*) *Oldham* v. *James*, 13 Ir. Ch. 393; 14 *ib.* 81.

(*c*) *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218.

(*d*) *Samuel* v. *Berger*, 24 Barb. 163; R. Cox, 178. See *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29; *In re Tolle*, 2 *ib.* 415.

(*e*) *Bloss* v. *Bloomer*, 23 Barb. 604; R. Cox, 200.

(*f*) 7 Q. B. D. 438.

least, on the opinion which he forms, either on his own experience or from information of others, as to the average or general excellence of the goods which are manufactured by them. He is trusting to his own experience, or to that of his friends, as a purchaser who goes to a firm which has acquired a public reputation trusts to the opinion of the public." So that where a manufacturer has contracted to sell goods of his own manufacture and bearing his trade mark, the purchaser is justified in refusing to accept other goods, though of the same quality. But it seems that if what is wanted is the particular manufacturer's trade mark on the goods as a guarantee of quality, the proprietor of the mark is justified in placing that mark on goods not of his own make, since by so doing he makes himself responsible for the quality of them, just as if he had made them himself (*a*).

Contract for purchase of goods with a specified mark.

Where a contract has been entered into for the purchase of goods of a particular stamp, the question arises whether the stamp was specified as indicative of a particular quality, or as possessing some value in itself, so that the goods would be of less value if stamped differently. Thus, in *Hopkins* v. *Hitchcock* (*b*), where iron stamped with "S. & H." and a crown had been contracted for, and iron stamped with "H. & Co." and a crown was supplied, the firm having become differently constituted, and having consequently marked their iron of the quality originally denoted by the former brand with the latter stamp in substitution for the former, it was decided that the contract turned upon the quality of the iron, and not upon the brand (*c*); if, however, the brand had possessed a special value, and the object of the purchase had been to resell the iron at a price which would have had to be lowered in the absence of the special mark, or even if it had been clear that the defendant had contracted for the brand for its own sake, and not as indicative of quality, it seems that the decision would have been the other way. Such questions must, however, depend in each case upon the terms in which the intention of the contracting parties is expressed; and it seems that a contract to supply goods bearing a particular trade

(*a*) See *per* Brett, L. J., in S. C. But compare Merchandise Marks Act, 1887, § 3 (2).

(*b*) 14 C. B. N. S. 65.

(*c*) Compare *Nichol* v. *Godts*, 10 Ex. 191. Similarly, in *Gillespie & Co.* v. *Marshall*, Dig. 648, the question was discussed whether a contract to supply "Marshall's Canada Plates" was performed by the delivery of plates such as were usually supplied by Marshall, but which were not "Canada Plates" in the strict commercial sense.

mark may be implied from that trade mark being printed at the head of the order form (*a*).

Painter's name on paintings.

In the case of paintings, described in a catalogue as being the work of Claude Lorraine and Teniers, it was held by Lord Kenyon, C. J., that the description was merely an expression of the vendor's opinion, and not a warranty of the authenticity of the paintings (*b*); in a similar case, however, where the painter was said to be Canaletto, it was held by the Court of King's Bench to be for the jury to say whether or not the description amounted to a warranty (*c*). The paintings being so much more modern, it was more reasonable in this case to suppose that the vendor intended to make an assertion as to the fact of their authenticity, as within his own knowledge.

Merchandise Marks Act.

By the Merchandise Marks Act, 1887, any person selling or contracting to sell any goods bearing a trade mark, or trade description, is to be deemed to warrant the genuineness of the trade mark, or the correctness of the trade description, unless he expresses the contrary in signed writing, delivered to and accepted by the vendee (*d*).

By § 19 the punishment of an offender under that Act does not take away the civil remedy to which any person aggrieved by his conduct is entitled.

Risks incurred by infringement.

That under some circumstances an infringement of another person's trade mark may expose the infringer to liabilities even beyond those involved in an action brought to restrain the wrong, appears from the Victorian case of *In re Brebner* (*e*), in which an insolvent, who had wasted his means in litigation occasioned by his having infringed a trade mark, had his certificate suspended for a year.

(*a*) *Johnson* v. *Raylton*, 7 Q. B. D. 438.
(*b*) *Jeudwine* v. *Slade*, 2 Esp. N. P. C. 572.
(*c*) *Power* v. *Barham*, 4 Ad. & E. 473.
(*d*) 50 & 51 Vict. c. 28, § 17.
(*e*) 2 W. & W. (I. E. & M.) 12.

# CHAPTER VII.

## THE CIVIL REMEDY. II.

DEFENCES—DISCOVERY AND INSPECTION—ACCOUNT—DAMAGES—COSTS.

### Defences.

Defences.

THE possible defences to an action to restrain an infringement of trade mark are numerous, some being of a somewhat special character. The following are some of the more important:—

#### 1. *Non-Infringement.*

1. Non-infringement.

The first and usual defence is that the conduct on the part of the defendant, of which the plaintiff complains, has not been, in fact, such as to have for its object or its result the appropriation by the defendant of what was the plaintiff's due, the fruits of his enterprise and reputation: shortly, that the defendant has not infringed (*a*).

#### 2. *No Registration or Certificate of Non-Registration.*

2. No registration or certificate.

The trade mark, so called, may present some one or more of the essential particulars required by the Acts, and may not be objectionable in itself; but yet the fact of non-registration under the Acts will, if it is a mark capable of registration, whether it was or was not used before the 13th August, 1875, effectually debar the person who has used it from obtaining the injunction, which would otherwise be awarded as a matter of course (*b*). And this is so,

(*a*) *E.g.*, *Crawshay* v. *Thompson*, 4 Man. & G. 357; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Blackwell* v. *Crabb*, 36 L. J. Ch. 504; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Blackwell* v. *Wright*, 73 N. Car. 310.

(*b*) See Patents Act of 1883, § 77; also *Goodfellow* v. *Prince*, 35 Ch. D. 9; *Hart* v. *Colley*, 44 Ch. D. 193; and *Hargreave* v. *Freeman*, (1891) 3 Ch. 39. Registration is a "condition precedent to suing." *Per* Chitty, J., in *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398; and in *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 405. It does not appear that in America it is equally essential to have obtained registration. See *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29.

even though the trade-mark owner has taken all steps in his power to protect his rights, and the Patent Office is responsible for the delay (*a*). If, being incapable of registration, it is an old mark, a certificate of refusal to register will preserve the existing right to protection (*b*). If, being incapable of registration, it is a new mark, the Acts of 1883—1888 do not appear to deprive the mark of protection for want of registration (*c*); but the definition is now wider than it was in the Act of 1875, and there can be but few, if any, marks which would be capable of protection at Common Law, and yet be incapable of registration. However, it does not at all appear that, when a case of actual intentional fraud can be proved, there is anything in the Acts to prevent proof of imitation of marks, though unregistered, &c., being given as corroborative evidence of the fraud (*d*). In such a case, the state of things would be similar to that in which it is a mode of packing that has been imitated (*e*). The injunction which would not be granted to restrain the infringement of the unregistered and uncertified trade mark would, as it seems, be granted to restrain the intentional fraud, in which the imitation of marks was a mere incident.

### 3. *The Plaintiff not the Registered Proprietor.*

3. Plaintiff not the registered proprietor.

The provision contained in § 77 of the Act of 1883 disabling trade-mark owners from obtaining protection for their marks, unless they have been registered in pursuance of the Acts (*f*), does not appear to prevent such owners from suing, so long as the mark is registered, whether it stands in their name or not; and this has in effect been so held in a case where a trade mark

(*a*) *Hazzopulo* v. *Kaufmann*, 23 Sol. J. 819.

(*b*) Patents Act, 1883, § 77. See *per* Lord Blackburn in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 498. In *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434, a certificate of registration or of refusal to register does not appear to have been called for.

(*c*) Patents Act, 1883, § 77.

(*d*) Jessel, M. R., has intimated from the bench that this view is correct. And see *per* Pearson, J., in *In re Riviere & Co.*, W. N. 1884, p. 75; and *per* Kay, J., in *In re Sanitas Co., Ld.*, 4 P. R. 533; and *per* Cotton, L. J., in *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 411; also *Hart* v. *Colley*, 44 Ch. D. 193; and the Canadian case of *Smith* v. *Fair*, 14 Ont. Rep. 729.

(*e*) *Woollam* v. *Ratcliff*, 1 H. & M. 259; *Edelsten* v. *Vick*, 11 Hare, 78; *Frese* v. *Bachof* (2), 14 Bl. C. C. 432; *Orr* v. *Diaper*, 4 Ch. D. 92; *Lever* v. *Goodwin*, 36 Ch. D. 1.

(*f*) See *Richards* v. *Butcher* (1), 7 P. R. 288, in which it was held that an importer of foreign goods could not sue in respect of an infringement of trade marks which belonged to and were registered in the name of the foreign producer, even though he had an exclusive contract in the United Kingdom.

had been registered in the name of a firm, and a new firm took over the business and goodwill, and commenced an action for infringement before the trade mark had been transferred into their names (*a*). It is, however, provided by § 76 that "the registration of a person as proprietor of a trade mark shall be *primâ facie* evidence of his right to the exclusive use of the trade mark, and shall, after the expiration of five years from the date of the registration, be conclusive evidence of his right to the exclusive use of the trade mark, subject to the provisions of this Act." So that, at all events after a trade mark has been registered for five years, and the registration has become conclusive evidence of the exclusive title of the registered proprietor, it would seem very difficult for a person who, though really entitled to the mark, was not the registered proprietor, to sue in respect of an infringement, without his first getting his name placed on the register as the proprietor, for which purpose it may be necessary first to rectify the register by the removal of the name already there.

The intention of the Act appears to be, that when a trade mark has been duly registered, the objection which formerly prevailed, by which a trade mark was excluded from protection when there were no vendible goods in the market stamped therewith (*b*), is no longer to be available to a defendant, for application for registration is to be deemed to be equivalent to public use of the mark (*c*). But it would be dangerous to rely on this in view of such decisions as *Edwards* v. *Dennis* (*d*).

### 4. *Plaintiff's Trade Mark bad in itself.*

4. Plaintiff's trade mark bad.

This defence must for the future be founded mainly on the definition of a trade mark in the Act under which the mark was registered. Thus, marks registered or tendered for registration between August 13th, 1875, and December 31st, 1883, must comply with the definition in § 10 of the Trade Marks Registration Act, 1875; marks registered or tendered for registration between January 1st, 1884, and December 31st, 1888, must comply with

(*a*) *Ihlee* v. *Henshaw*, 31 Ch. D. 323. And see *Reveliere* v. *Gateley*, 89 L. T. (Journal) 314.

(*b*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307.

(*c*) § 17 of Act of 1888, substituted for § 75 of Act of 1883. This is so also in the United States: *In re The Dutcher Temple Co.*, U. S. Pat. Comm. Decis. 1871, p. 248.

(*d*) 30 Ch. D. 454; *Hargreave* v. *Freeman*, (1891) 3 Ch. 39. And see *In re Batt*, (1898) 2 Ch. 432.

the definition in § 64 of the Patents Act, 1883; marks registered or tendered for registration on or after January 1st, 1889, must comply with the last-mentioned definition as modified by § 10 of the Patents Act, 1888. If the mark sued on is a new mark and incapable of registration, so that § 77 of the Act of 1883 leaves its owner free to sue for an infringement without registration, the validity of the mark will be determined by the general law as to distinctiveness, &c. (*a*). But such cases cannot be numerous, and in the great majority of cases the point will be whether a mark which has been registered was rightly registered (*b*). Then the question arises whether the contention, that the mark does not comply with the conditions imposed upon marks tendered for registration, can be set up by way of defence, or whether a motion to rectify the register is necessary. That such a contention may be set up by way of defence when the mark has been registered for less than five years seems clear, since by § 76 registration is only *primâ facie* evidence during the first five years, and to disallow the setting up of such a contention by way of defence within the five years would be to make the registration conclusive evidence from the outset. This was, in effect, so held by the Court of Appeal in *Pinto* v. *Badman* (*c*).

When the case relates to a trade mark which has been registered for upwards of five years, the question seems much more difficult. The Court of Appeal seems to have suggested in one case (*d*) that registration is conclusive after five years, in the absence of a motion to rectify, and there is no doubt that the more prudent course is to apply for rectification. If this is granted, the plaintiff's action will fail, as his previous wrongful registration will afford no foundation for it (*e*). But it appears to be very doubtful whether, on the wording of the Acts of Parliament, a motion to rectify is required, where the defence is that the mark claimed is not within the definition section in the Act under which it was registered. Both in § 3 of the Act of 1875 and in § 76 of the Act of 1883, the exclusive right for which provision is made relates to the use of a "trade mark," and it can hardly be that that which

(*a*) See Chap. II., *supra*.

(*b*) If the registered mark, being a new mark, is held to be incapable of registration and to have been wrongly registered, the question of validity at Common Law may arise.

(*c*) 8 P. R. 181, 189, 193.

(*d*) *Apollinaris Co. Ld.* v. *Herrfeldt*, 4 P. R. 478.

(*e*) *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288, and many subsequent cases.

the Act, by excluding it from the definition of "a trade mark," declares not to be a trade mark for the purposes of the Act, can yet participate in the privileges which are conferred on trade marks which the Act recognises. The process of registration, whether for five years or for any shorter period, can hardly make that "a trade mark" which does not contain at least one of the elements declared by the definition section to be essential, unless that section is to be entirely disregarded. This view was upheld by the Court of Appeal in *In re Palmer* (1) (*a*), in which Jessel, M. R., fully discussed the point, and Lindley, L. J., said that "after careful examination of §§ 3, 5, and 10 of the Trade Marks Registration Act, 1875, I am satisfied that a mark which is not a trade mark, and which therefore ought never to have been registered, does not become a trade mark by being on the register for five years." The Vice-Chancellor of Ireland has taken the same view (*b*), and the same principle has been followed in Victoria (*c*). In America also the same conclusion has been arrived at, under the United States Statute (*d*).

### 5. *Trade Mark severed from Goodwill.*

5. Trade mark severed from goodwill.

It is a good defence to an action for infringement of trade mark to prove that the plaintiff is not the owner of the business and goodwill concerned in the particular goods or classes of goods in respect of which the trade mark is registered (*e*).

### 6. *Licence.*

6. Licence.

The defendant may plead a licence from the plaintiff (*f*), or from

(*a*) 21 Ch. D. 47. See also *In re Carter Medicine Co.*, (1892) 3 Ch. 472.

(*b*) *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236.

(*c*) *Lewis* v. *Klapproth*, 11 V. L. R. (E.) 214; *Wolfe* v. *Alsop* (2), 12 V. L. R. (E.) 421; *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752.

(*d*) *Moorman* v. *Hoge*, 2 Sawy. 78.

(*e*) See §§ 65 and 70 of Act of 1883. There can be no trade mark in gross: *Cotton* v. *Gillard*, 44 L. J. Ch. 90. See *In re Wellcome*, 32 Ch. D. 213; *Pinto* v. *Badman*, 8 P. R. 181; *Witthaus* v. *Braun*, 44 Md. 303; *Taylor* v. *Bemis*, 4 Biss. 406; *Weston* v. *Ketcham* (1), (2), 39 N. Y. Super. Ct. 54; 51 How. Pr. 555; *Skinner* v. *Oakes*, 10 Mo. App. 45; *Morgan* v. *Rogers*, 19 Fed. Rep. 596; *Smith* v. *Fair*, 14 Ont. Rep. 729; *Brower* v. *Boulton*, 53 Fed. Rep. 289; 58 Fed. Rep. 888; 20 U. S. App. 166; *Chadwick* v. *Covell*, 151 Mass. 190; *Covell* v. *Chadwick*, 153 Mass. 263; 25 Am. St. Rep. 625.

(*f*) See Patents Act, 1883, § 87. It does not appear that this section can be intended to authorise the user of a trade mark on goods not being the goods of the trade mark owner, or, at least, equivalent to them. See *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 31 Fed. Rep. 776; 138 U. S. 537. Cf. *Martha Washington Creamery Buttered Flour Co. of U. S.* v. *Martien*, 44 Fed. Rep. 473.

a co-proprietor of the mark (*a*). In one American case (*b*) it was held that the plaintiffs, who had received an exclusive licence from the owner of a trade mark, were entitled to an injunction against the successors in business of persons who had been partners in business with the licensor, but had tacitly acquiesced in his retaining the sole right in the mark. However, the Court would not allow a licensee to defraud the public by the sale of goods under a mark which was similar to that on the licensor's own goods, while the goods themselves were not the goods or goods equivalent to the goods of the licensor (*c*).

It has been held in India (*d*) that plaintiffs, who had led the defendant to believe that they did not claim a certain trade mark, and that he was at liberty to use it, and had allowed him to build up a trade under it, were estopped by their own conduct from denying the defendant's right to use it.

### 7. *Delay and Acquiescence.*

7. Delay and acquiescence.

A man may by his own *laches* lose his right to that protection which he would have obtained at once, had he come to the Court with reasonable promptitude (*e*). In fact, that which has originally been a valid trade mark, the property of an individual or firm, entitled to protection, may become *publici juris*—that is to say, the use of it may be thrown open to the public—by its proprietor allowing his right to be so habitually infringed that the trade mark no longer conveys to those who see it the impression that the goods to which it is attached are of his manufacture (*f*). That

(*a*) *Marshall* v. *Pinkham*, 52 Wisc. 572.

(*b*) *Kidd* v. *Johnson*, 100 U. S. 617. See *Kidd & Co.* v. *Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337.

(*c*) *Oldham* v. *James*, 13 Ir. Ch. 393; 14 *ib.* 81; *Bloss* v. *Bloomer*, 23 Barb. 604; R. Cox, 200; *Samuel* v. *Berger*, 24 Barb. 163; R. Cox, 178; *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29; *In re Tolle*, 2 *ib.* 415.

(*d*) *Lavergne* v. *Hooper*, Ind. L. R. 8 Mad. 149.

(*e*) *Motley* v. *Downman*, 3 My. & Cr. 1; *Morison* v. *Moat*, 9 Hare, 241; *Flavel* v. *Harrison*, 10 Hare, 467; *Wason* v. *Waring*, 15 Beav. 151; *Attorney-General* v. *Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 327; *Burgess* v. *Burgess*, *ib.* 896; *Farina* v. *Gebhardt*, 3 Eq. Rep. 891; *Chappell* v. *Sheard*, 2 K. & J. 117; *Coles* v. *Sims*, 5 De G. M. & G. 1; *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Hovenden* v. *Lloyd*, 18 W. R. 1132; *Isaacson* v. *Thompson*, 41 L. J. Ch. 101; *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276; *Amoskeag Manufacturing Co.* v. *Garner*, 55 Barb. 151; R. Cox, 541; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Marshall* v. *Pinkham*, 52 Wisc. 572; *Sanche* v. *Electrolibation Co.*, 60 U. S. Pat. Gaz. 1189; *Prince Metallic Paint Co.* v. *Prince Manufacturing Co.*, 57 Fed. Rep. 938; 17 U. S. App. 145; and other cases cited below.

(*f*) *Ford* v. *Foster*, L. R. 7 Ch. 611; *Wheeler & Wilson* v. *Shakespeare*, 39 L. J.

this must necessarily be so, the reasoning of the Supreme Court of Victoria, in *Neva Stearine Co.* v. *Mowling* (*a*), appears convincing. "Great stress," said Holroyd, J., "has been laid on this: that a person who is entitled to a distinctive trade name or mark is said to have acquired property in it, and that the property once acquired cannot be lost. But what is the nature of the property, if that be the right designation to give it? It is that, when an article has become known to the public generally by a particular name or mark, no other person has a right to simulate that name or mark so as to induce the public to believe that his goods are the goods of the inventor. If that be the reason, then the right, if it be acquired in that way, must be lost when the reason for it ceases. If the use of the name by another person will no longer induce that belief, then the right to the property must be gone." Thus, in *In re Hyde & Co.* (*b*), it was held that the words "Bank of England" had long ceased to be a trade mark in respect of sealing-wax, by reason of the user for six years of those words on sealing-wax by persons other than those who had originally adopted it, without interference by the latter, and the registration of the lapsed trade mark was accordingly rescinded.

Principle of this defence.

The principle on which the Court allows the plaintiff's delay to be pleaded by way of defence is thus stated by Wood, V.-C., in *Beard* v. *Turner* (*c*): "By not complaining at the time when you might complain (I do not say that it is your intention, we must judge of the intention by the necessary result), you are lying by, the man continuing to use your property, with the hope (and such is the prayer of your bill filed two or three years afterwards) of obtaining those profits which you stood by allowing him to make under this designation, without apprising him of your intention to make any such use of it. On that ground it falls within the principle enunciated by Lord St. Leonards in the Irish case referred to, in which it is stated that it is a fraud to allow a plaintiff to avail himself of delay to obtain benefit for himself. In that case you will not grant him relief."

On motion for injunction.

In the case of a motion for an injunction "the argument as to

Ch. 36; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *National Starch Manufacturing Co.* v. *Munn's Patent Maizena & Starch Co.*, (1894) A. C. 275; *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29; *Filley* v. *Child*, 16 Bl. C. C. 376.

(*a*) 9 V. L. R. (E.) 98.

(*b*) 7 Ch. D. 724.

(*c*) 13 L. T. N. S. 746. And see *Neva Stearine Co.* v. *Mowling*, 9 Vict. L. R. (E.) 98.

acquiescence is no doubt very important. A short acquiescence may properly induce the Court not to interfere *ex parte*. A longer acquiescence may, under the circumstances, throw serious doubt upon the right of the plaintiff, and induce the Court not to interfere by any interlocutory order, even when applied for on notice" (*a*). And it is not sufficient for the plaintiff to commence proceedings promptly: if he wishes for an interlocutory injunction he must bring on his motion at once, or the Court will hold that he has shown by his own conduct that he does not consider such interference to be imperative (*b*).

At the hearing.

Where, however, the case has arrived at the hearing, the degree of delay or acquiescence must be much greater; there must be such an acquiescence as to amount, not only to a positive licence, but to an implication of an actual grant, before the parties can be for ever deprived of their rights (*c*). In *Fullwood* v. *Fullwood* (2) (*d*), Fry, J., laid down that mere lapse of time, short of the statutory period fixed for the limitation of actions, would not deprive a plaintiff in an action for infringement of a trade mark, which is an action for the assertion of a legal right, of his right to the injunction. And in an American case (*e*), while it was held that a delay of twenty-five years effectually disentitled the plaintiffs to relief as against an innocent vendor of goods falsely marked, the

(*a*) *Per* Lord Langdale, M. R., in *Gordon* v. *Cheltenham Rail. Co.*, 5 Beav. 233. And see *Isaacson* v. *Thompson*, 41 L. J. Ch. 101; *Flavel* v. *Harrison*, 10 Hare, 467; *Evans* v. *Smith*, 3 Times L. R. 390; *Mallan* v. *Davis*, 3 Times L. R. 221; *Chinn* v. *Thomas*, 6 V. L. R. Eq. 188; *Estes* v. *Worthington* (1), 23 Bl. C. C. 165. But compare *Heyde* v. *Wittkowski*, 5 N. S. W. Rep. (E.) 74.

(*b*) *Pickford* v. *The Grand Junction Rail. Co.*, 3 Rail. Cas. 53b.

(*c*) *Patching* v. *Dubbins*, Kay, 11; *Gordon* v. *The Cheltenham Rail. Co.*, 5 Beav. 233; *Rodgers* v. *Rodgers*, 31 L. T. N. S. 285. And see *Lazenby* v. *White*, 41 L. J. Ch. 354; *Weaver* v. *Sanitary, &c. Co.*, L. J. N. of C. 1887, p. 144 (where the defendants had used the word for eleven years, to the plaintiff's knowledge); *Weaver* v. *Stiff*, L. J. N. of C. 1887, p. 144 (where the defendants had so used the mark for ten years); *Gillott* v. *Esterbrook*, 47 Barb. 455; R. Cox, 340; 48 N. Y. 374; *Filley* v. *Fassett*, 44 Mo. 173; R. Cox, 530; *McLean* v. *Fleming*, 96 U. S. 245; *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601; *Gamble* v. *Stephenson*, 10 Mo. App. 581; *Julian* v. *Hoosier Drill Co.*, 75 Ind. 408; *Holt* v. *Menendez*, 128 U. S. 182; *Lea* v. *Deakin*, 11 Biss. 23 (where the plaintiffs had previously failed in England in an action against the defendant's principal); *Collins Co.* v. *Ames & Sons*, 20 Bl. C. C. 542; *Funke* v. *Dreyfus*, 34 La. Ann. 80; *Blackwell* v. *McElwee*, 100 N. C. 150; *Cleveland Stone Co.* v. *Wallace*, 52 Fed. Rep. 431; *Clark Thread Co.* v. *Armitage*, 67 Fed. Rep. 896; 74 *ib.* 936; *Noera* v. *Williams Manufacturing Co.*, 158 Mass. 110. The same was formerly the case on demurrer.

(*d*) 9 Ch. D. 176.

(*e*) *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29. And see *Wolfe* v. *Barnett*, 24 La. Ann. 97; *Sanders* v. *Jacob*, 20 Mo. App. 96; *El Modello Cigar Manufacturing Co.* v. *Gato*, 25 Fla. 886; 23 Am. St. Rep. 537. Cf. *Prince Metallic Paint Co.* v. *Prince Manufacturing Co.*, 57 Fed. Rep. 938; 17 U. S. App. 145.

question as to the rights of a trade mark owner, after a similar delay, against a guilty manufacturer, was left open. In Victoria also it has been said that "in cases of fraud a much longer period of acquiescence would be necessary than where there was no fraud" (*a*). But a long delay may be regarded as rendering harmless that which might at an earlier period have been regarded as a misrepresentation (*b*).

Rights must be actively defended.

It is not a sufficient answer to a plea of delay on the part of the plaintiff for the plaintiff to allege continued assertions of his right. He must take some more decided measures. "What the plaintiffs mainly relied on was the continual claim on their part," says Turner, L. J. (*c*), "and no doubt they have not ceased to assert their claim; but I cannot agree to a doctrine so dangerous as that the mere assertion of a claim, unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded" (*d*).

No delay where no knowledge.

But where a trade mark has been infringed, and the owner has not been aware that this has been the case, he has been guilty of no delay in taking no steps to put an end to the fraud, and he will, therefore, not be deprived of his rights by reason of his having taken no proceedings while he was ignorant of the infringement (*e*). Hence, where a defence of delay is set up, the evidence must go to show, not merely that the plaintiff might have been aware of the infringement which was going on, but that he actually was so, and that it was with such knowledge that he remained quiescent (*f*).

Delay by retiring partner.

It has been held in America that if a member of a partnership retires therefrom without setting up any claim to an interest in the

(*a*) *Neva Stearine Co.* v. *Mowling*, 9 V. L. R. (E.) 98; but compare *In re Heaton*, 27 Ch. D. 570.

(*b*) *Marquis of Londonderry* v. *Russell*, 3 Times L. R. 360.

(*c*) *Clegg* v. *Edmonton*, 8 De G. M. & G. 810.

(*d*) This dictum was approved and followed by Wood and Selwyn, L. JJ., in *Lehmann* v. *McArthur*, L. R. 3 Ch. 496. And see *Ripley* v. *Bandey*, 14 P. R. 591. But see *Attorney-General* v. *Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 327; and *Kinahan* v. *Bolton*, 15 Ir. Ch. 75.

(*e*) *Weldon* v. *Dicks*, 10 Ch. D. 247; *In re Farina* (2), 27 W. R. 456; *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398; *Apollinaris Co.* v. *Herrfeldt*, 4 P. R. 478; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 419; *In re La Société Anonyme des Verreries de l'Etoile* (2), (1894) 2 Ch. 26; *Rowland* v. *Michell*, (1897) 1 Ch. 71; *Williams* v. *Adams*, 8 Biss. 452; *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601; *Celluloid Manufacturing Co.* v. *Cellonite Manufacturing Co.*, 32 Fed. Rep. 94; *G. G. White Co.* v. *Miller*, 50 Fed. Rep. 277; *Gilka* v. *Mihalovitch*, *ib.* 427; *Cuervo* v. *Jacob Henkell Co.*, *ib.* 471; *El Modelio Cigar Manufacturing Co.* v. *Gato*, 25 Fla. 886; 23 Am. St. Rep. 537. Compare *In re Heaton*, 27 Ch. D. 570.

(*f*) *Siegert* v. *Findlater*, 26 W. R. 462.

trade mark, and makes no objection to its being used by the continuing partner, he must be taken to acquiesce in its being appropriated by the latter (*a*); but that if, on the other hand, a partner submits to the appropriation of the firm trade mark by his partner, at a time when he is, in a measure, in the latter's power, by reason of the latter being in sole possession of an important secret used in the business, he will be held not to have lost his right (*b*); and that a continued user of the mark by the retiring partner, even on a spurious article, is evidence that he does not intend to give up his rights therein (*c*).

**Delay for purpose of securing evidence.**

Inasmuch as in a case where no proof of actual deception is produced, the Court has to try a hypothetical case, turning on the probabilities of deception, as to which witnesses could probably be brought forward by both sides, it has been held that a person who believes others to be infringing his trade mark is entitled to wait until he can collect a sufficient number of cases to prove to the Court that the proceedings of which he complains do actually deceive the public; and that his right to protection is not gone by reason of such delay (*d*). It seems that in *Rodgers* v. *Rodgers* (*e*), and *Estcourt* v. *Estcourt Hop Essence Co.* (*f*), the delay would have been condoned had it resulted in the production of satisfactory evidence of deception. On the other hand, where a plaintiff delayed his motion until December, having been in possession of sufficient evidence in May, the delay was fatal to the motion (*g*).

**Delay in regard to motion to commit.**

Where an injunction has been granted by the Court, there must, in order to deprive the party who has obtained the injunction of his 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 entitle him to maintain an action against others for doing that act (*h*).

**Indulgence to defendant, plaintiff having delayed.**

Even if the delay has not been such as to disentitle the plaintiff to his injunction, it may yet obtain some indulgence for the

(*a*) *Kidd & Co.* v. *Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337; *Simpson* v. *Wright* (1), 15 *ib.* 248; *Holt* v. *Menendez*, 128 U. S. 182.

(*b*) *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54.

(*c*) *Wright* v. *Simpson*, 15 U. S. Pat. Gaz. 968.

(*d*) *Lee* v. *Haley*, L. R. 5 Ch. 155; *Cave* v. *Myers*, Dig. 304.

(*e*) 31 L. T. N. S. 285.

(*f*) L. R. 10 Ch. 276.

(*g*) *Isaacson* v. *Thompson*, 41 L. J. Ch. 101.

(*h*) *Per* Turner, L. J., in *Rodgers* v. *Nowill*, 3 De G. M. & G. 614. In *Cartier* v. *May*, Dig. 200, a delay of eighteen months was one of the grounds on which the motion to commit was refused.

defendant; as, for instance, the permission to dispose of the wares on which he expended money in consequence of the plaintiff's delay (*a*).

Or, the injunction may be granted and the account of profits or damages, by which it is usually accompanied, withheld (*b*). Account or damages withheld.

Lastly, the delay of the plaintiff may be punished by his being left to pay his own costs, though successful in his main contention (*c*). On the other hand, a defendant who has only defeated the plaintiff's claim by pleading the latter's delay, may fail to obtain thereby the costs of the proceedings occasioned by his own fraud (*d*). Costs not given.

### 8. *Plaintiff's Misrepresentation.*

"The administration of Equity is founded on perfect truth" (*e*), and "when the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade mark, or in the business connected with it, be himself guilty of any false or misleading representation; for if the plaintiff makes any material false statement in connection with the property which he seeks to protect, he loses, and very justly, his right to claim the assistance of a Court of Equity. He must come there with clean hands" (*f*). 8. Plaintiff's misrepresentation.

(*a*) *Clowes* v. *Hogg*, W. N. 1870, p. 268; S. C. on appeal, W. N. 1871, p. 40; *Anglo-Swiss Condensed Milk Co.* v. *Swiss Condensed Milk Co.*, W. N. 1871, p. 163.

(*b*) *Harrison* v. *Taylor*, 11 Jur. N. S. 408; *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298; *McLean* v. *Fleming*, 96 U. S. 245; *Carver* v. *Bowker*, Dig. 581; *Holt* v. *Menendez*, 128 U. S. 182; *Low* v. *Fells*, 35 Fed. Rep. 361. And see *Beard* v. *Turner*, 13 L. T. N. S. 746.

(*c*) See *Millington* v. *Fox*, 3 My. & Cr. 338; *Beard* v. *Turner*, 13 L. T. N. S. 746; *Day* v. *Neale*, Bacon, V.-C., May 24th, 1881; *Perks* v. *Hall & Co.*, W. N. 1881, p. 111; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298.

(*d*) *Rodgers* v. *Rodgers*, 31 L. T. N. S. 285.

(*e*) *Per* Lord Romilly, M. R., in *Cocks* v. *Chandler*, L. R. 11 Eq. 446.

(*f*) *Per* Lord Westbury, C., in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137. And see *Edelsten* v. *Vick*, 11 Hare, 78; *Post* v. *Marsh*, 15 Ch. D. 395; *Talbot* v. *Judges*, 3 Times L. R. 398; *Lewis's* v. *Goodbody*, 67 L. T. N. S. 194; *In re Hill*, 10 P. R. 113; *Fetridge* v. *Wells*, 13 How. Pr. 385; R. Cox, 180; *Palmer* v. *Harris*, 60 Penn. 156; R. Cox, 523; *Laird* v. *Wilder*, 9 Bush. 131; 15 Amer. Rep. 707; *Wolfe* v. *Burke*, 56 N. Y. 115; *Consolidated Fruit Jar Co.* v. *Dorflinger*, 6 Am. L. T. N. S. 511; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Seabury* v. *Grosvenor*, 14 Bl. C. C. 262; *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453; *Connell* v. *Reed*, 128 Mass. 477; *Burton* v. *Stratton*, 12 Fed. Rep. 696; *McNair* v. *Cleave*, 10 Phila. 155; *Koehler* v. *Sanders*, 55 N. Y. Sup. Ct. 48; *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752; *Clotworthy* v. *Schapp*, 42 Fed. Rep. 62; *Krauss* v. *Peebles Sons' Co.*, 58 *ib.* 585; *Prince Metallic Paint Co.* v. *Prince Manufacturing Co.*, 57 *ib.* 938; *Prince Manufacturing Co.* v. *Prince Metallic Paint*

It is impossible to define what misrepresentation will disentitle the plaintiff to relief; all that can be said is, that "he that hath committed iniquity shall not have equity" (*a*).

Trade mark wrongfully adopted.

According to the American decisions (*b*), if it is proved that a plaintiff adopted his trade mark while an identical or similar trade mark was in use by another firm, he will himself be held to have acted wrongfully, and the trade mark so adopted will be refused protection.

Misstatements in plaintiff's marks.

The trade marks, labels, &c., of the plaintiff, who is complaining of fraud on the part of another, may themselves contain statements calculated to mislead and defraud the public, who are induced by such statements to buy goods which otherwise they would not buy. Thus, in *Pidding* v. *How* (*c*), the plaintiff sold tea which he termed "Howqua's Mixture," and which he put up in packets labelled with extravagant and false statements as to its origin and quality. Shadwell, V.-C. of England, declined to protect the plaintiff until he had established his title in a Court of law, saying that it was a clear rule laid down by Courts of Equity not to extend their protection to persons whose case was not founded in truth.

*Perry* v. *Truefitt*.

In *Perry* v. *Truefitt* (*d*), the plaintiff sold "Perry's Medicated Mexican Balm," the secret of which he had bought from a Mr. Leathart. On his show-cards he falsely stated that the hair-mixture in question was made from a recipe of Von Blumenbach, and he also alleged in the same way that it was compounded from Mexican plants, which was not in the least borne out by evidence at the trial. Lord Langdale, M. R., agreeing with the observa-

*Co.*, 135 N. Y. 24; *Alaska Packers' Association* v. *Alaska Imperial Co.*, 60 Fed. Rep. 103; *Californian Fig Syrup Co.* v. *Putnam*, 66 *ib.* 750; 69 *ib.* 740; *Same* v. *Stearns*, 67 *ib.* 1008; 73 *ib.* 812; *Royal Baking Powder Co.* v. *Raymond*, 70 *ib.* 376; 85 *ib.* 231; *Koehler* v. *Sanders*, 122 N. Y. 65; *Kenny* v. *Gillett*, 70 Md. 574; *American Cereal Co.* v. *Eli Pettijohn Cereal Co.*, 72 Fed. Rep. 903; 76 *ib.* 372; *Messer* v. *Fadettes*, 168 Mass. 140; 60 Am. St. Rep. 371. As to whether the plaintiff's misrepresentation will afford an answer to his Common Law claim for damages, see *per* Williams, L. J., in *Jamieson & Co.* v. *Jamieson*, 15 P. R. 169, 191. Words which would be disentitled to protection in a court of justice by reason of their being calculated to deceive, are not to be registered under the Patents Act, 1883, s. 73.

(*a*) *Palmer* v. *Harris*, 60 Penn. St. 156; R. Cox, 523. See *Blackwell* v. *Armistead*, 5 Am. L. T. 85; and *Kenny* v. *Gillett*, 70 Md. 574, where it was laid down that if the misrepresentation was calculated to deceive, the intention to deceive was not necessary.

(*b*) *O'Rourke* v. *Central City Soap Co.*, 26 Fed. Rep. 576; *Parlett* v. *Guggenheimer*, 67 Md. 542; *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 31 Fed. Rep. 776; 138 U. S. 537; *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460; *Wagner* v. *Daly*, 74 N. Y. Sup. Ct. 477; *Goldstein* v. *Whelan*, 62 Fed. Rep. 124.

(*c*) 8 Sim. 477. And see *Kenny* v. *Gillett*, 70 Maryland, 574.

(*d*) 6 Beav. 66.

tions of the Vice-Chancellor of England in *Fidding* v. *How* (*a*), did not think it a favourable case for the interposition of the Court, and ordered the matter to stand over, with liberty to bring an action.

*Leather Cloth Co.'s case.*

In *Leather Cloth Co.* v. *American Leather Cloth Co.* (*b*), the House of Lords sustained the judgment of Lord Westbury, C. (*c*), and declined to protect the plaintiffs, who used a label or advertisement containing false statements as to the character and manufacture of their goods. Lord Westbury, C. (*c*), remarked that he "could not receive it as a rule either of morality or of equity, that the plaintiffs were not answerable for a fraud because it might be so gross and palpable that no one was likely to be deceived by it. If there was a wilfully false statement he would not stop to inquire whether it was too gross to mislead."

*Cases in tobacco trade.*

The tobacco trade has been fruitful in cases of this description. Thus in *Wood* v. *Lambert* (*d*), John Wood & Son of London sold their English-made cigarettes sometimes in boxes labelled "cigarettes of the finest selected Turkish tobacco, manufactured by Jancal Tachta, Constantinople," sometimes in boxes labelled "St. Petersburg—P. Mavrogordato & Co.—cigarettes"; and it was held that the word "Eton," which had been used upon the boxes so labelled was disentitled alike to registration and protection. So in *Newman* v. *Pinto* (*e*), where the plaintiff sold cigars in boxes branded with the Spanish words "La Pureza—Habana—Ramon Romnedo," and bearing labels on which appeared the words "La Pureza," the written signature of Ramon Romnedo (who was in fact a non-existent personage), and the arms of Spain and Havannah, and it was proved that the cigars, though made of Havannah tobacco, were imported from Bremen, and no evidence was given by the plaintiff as to the actual place of manufacture, it was held that the get-up of the goods was such as to represent that the cigars were manufactured in Havannah by Ramon Romnedo, and that the plaintiff, having failed to prove that this representation was true, he was disentitled to sue in respect of his label, which was only used as part of the fraudulent get-up, which Bowen, L. J., de-

(*a*) 8 Sim. 477. And see *Kenny* v. *Gillet*, 70 Md. 574.

(*b*) 11 H. L. C. 523.

(*c*) 4 De G. J. & S. 137.

(*d*) 32 Ch. D. 247. The same principle applies in the United States, *Palmer* v. *Harris*, 60 Penn. St. 156; *Schumacher & Ettlinger* v. *Schwenke* (2), 36 U. S. Pat. Gaz. 457; *Solis Cigar Co.* v. *Pozo*, 16 Col. 388; 25 Am. St. Rep. 279; *Hilson & Co.* v. *Foster*, 80 Fed. Rep. 896; in Canada, *Labbatt* v. *Trester*, 2 St. Dig. 726; and in New South Wales, *Heyde* v. *Wittkowski*, 5 N. S. W. Rep. (E.) 74.

(*e*) 4 P. R. 508. Cf. *In re Fuente*, (1891) 2 Ch. 166.

scribed as "an elaborate concatenation of pictorial lies." It is, however, to be noticed that in *In re Wills* (*a*), where Messrs. W. D. and H. O. Wills had used their registered trade mark as part of a label containing the name of an imaginary Spanish firm and the word "Habana" upon boxes of cigars manufactured for them by an English firm, Wright, J., held that Messrs. Wills, by their mark, simply represented that the cigars were sold by them, and that the misrepresentation as to the manufacture of the cigars did not deprive the mark of its distinctive character so as to disentitle them to protection, and *Wood* v. *Lambert* (*b*) was further distinguished on the ground that the user by Messrs. Wills of their trade mark for cigars was not general or extensive and had ceased for several years.

Puffing.

In short, the Court will not protect a trade mark, label, &c., which contains, or has attached to it, a serious misstatement calculated to deceive (*c*). Mere puffing, however, or exaggerated statements as to the value, &c., of patent medicines, and similar preparations, will not disentitle their owners, since every one knows how to estimate the value of such statements correctly (*d*). Thus, in *Holloway* v. *Holloway* (*e*), the assumption of the title of "Professor" was disregarded. In *Metzler* v. *Wood* (*f*) it was held that the plaintiffs were not disentitled either by a representation that the publication was the 600th edition of the work, it being shown to be a trade custom to call 250 copies an edition; or by a statement that the work was specially revised by the author, the fact being that a previous edition which the present one followed had been so revised. In *Hogg* v. *Kirby* (*g*), the defendant, who had brought out what he intended to be taken for a continuation of the

(*a*) (1893) 2 Ch. 262.

(*b*) 32 Ch. D. 247.

(*c*) In *Raggett* v. *Findlater*, L. R. 17 Eq. 29, costs were given against the plaintiff mainly on account of a misstatement by him.

(*d*) *Holloway* v. *Holloway*, 13 Beav. 209; *Comstock* v. *White*, 18 How. Pr. 421; R. Cox, 232; *Smith* v. *Woodruff*, 46 Barb. 438; R. Cox, 373; *Clark Thread Co.* v. *Armitage*, 67 Fed. Rep. 896; 74 *ib.* 936. In America puffing has frequently been treated somewhat more severely: *Fowle* v. *Spear*, 7 Penn. L. J. 176; R. Cox, 67: *Heath* v. *Wright*, 3 Wall. Jr. 1; R. Cox, 154; *Fetridge* v. *Wells*, 13 How. Pr. 385; R. Cox, 180; *Fetridge* v. *Merchant*, 4 Abb. Pr. 156; R. Cox, 194; *Hobbs* v. *Français*, 19 How. Pr. 567; R. Cox, 287; *Phalon* v. *Wright*, 5 Phila. 464; R. Cox, 307; *Laird* v. *Wilder*, 9 Bush, 131; 15 Amer. Rep. 707; *Wolfe* v. *Burke*, 56 N. Y. 115; *Siegert* v. *Abbott*, 79 N. Y. Sup. Ct. Rep. 243; *Kohler Manufacturing Co.* v. *Beeshore*, 59 Fed. Rep. 573, where the Court expressed its reluctance to interfere by injunction in disputes between the owners of quack medicines. But see *Ellis* v. *Zeilen & Co.*, 42 Ga. 91.

(*e*) 13 Beav. 209.

(*f*) 8 Ch. D. 606.

(*g*) 8 Ves. 215.

plaintiff's magazine, set up in his defence the fact that the plaintiff's magazine untruly professed to be by "William Granger, Esq." Lord Eldon granted the injunction; and it is certainly improbable that any one could be injured by the use of a name previously unknown (*a*).

*Melachrino v. Melachrino.*

Again, in *M. Melachrino & Co.* v. *R. Melachrino & Co.* (*b*), it was held that the plaintiffs were not disentitled, either because they placed the word "registered" on their trade mark as used, though it differed from the registered trade mark in having what were blank spaces in the latter filled in with coats-of-arms, nor because they sold their cigarettes as "Egyptian cigarettes," whereas on one occasion they had re-made in England with Egyptian tobacco a small quantity of cigarettes which had been damaged on the voyage from Egypt to England. And it has been held in America that the use of the word "imported" in connection with goods of home-manufacture does not disentitle the plaintiff, if the word is used without intention to deceive and does not produce that effect (*c*).

False statement in foreign language.

If the misrepresentation is in other respects such as to disentitle, the fact of its being made in a foreign language does not necessarily save the plaintiff from losing the rights which he would have had if no such statements had been made (*d*).

Use of predecessor's name.

The use of the name of his predecessor by one who has succeeded him in business, when such use will not lead to any other supposition than that the business is the same (*e*), or the use of his own name, without more, by one whose name happens to be the same as that of another manufacturer (*f*), is not such a misrepresentation as to disentitle such a person to relief against fraud. But where a trader has been in the habit of labelling his goods (*e.g.*, a particular

(*a*) And see *Dale* v. *Smithson*, 12 Abb. Pr. 237; R. Cox, 282; *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450; 12 Amer. Rep. 401.

(*b*) Chitty, J., May 29th, 1888.

(*c*) *Funke* v. *Dreyfus*, 34 La. Ann. 80.

(*d*) *Palmer* v. *Harris*, 60 Penn. St. 156; R. Cox, 523.

(*e*) *Leather Cloth Co.'s Case*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. C. 523; *Churton* v. *Douglas*, Johns. 174; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Fulton* v. *Sellers*, 4 Brews. 42; *Pepper* v. *Labrot*, 8 Fed. Rep. 29; *Société, &c. de la Benedictine* v. *Micalovitch*, 36 Alb. L. J. 364. But see *Sherwood* v. *Andrews*, 3 Am. L. Reg. N. S. 588; *Partridge* v. *Menck*, 2 Sandf. Ch. 622; *Carmichel* v. *Latimer*, 11 R. I. 395; *Horton Manufacturing Co.* v. *Horton Manufacturing Co.*, 18 Fed. Rep. 816.

(*f*) *Holloway* v. *Holloway*, 13 Beav. 209; *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Turton* v. *Turton*, 42 Ch. D. 128; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Saunders* v. *Sun Life Assurance Co. of Canada*, (1894) 1 Ch. 537; *Crawford* v. *Bernard*, 11 P. R. 580; *Jamieson & Co.* v. *Jamieson*, 15 P. R. 169; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *American Cereal Co.* v. *Eli Pettijohn Cereal Co.*, 72 Fed. Rep. 903; 76 *ib.* 372.

medicine) with statements which refer to himself personally, and his successor in business continues to use the same statements, "a Court of Equity will extend no aid to sustain a claim to a trade mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine" (*a*).

Collateral misrepresentations.

Collateral misrepresentations made by the plaintiff, as, for instance, in an advertisement in the newspapers, do not necessarily disentitle him to protection (*b*). Nor do misstatements of so trifling a character as not to mislead purchasers (*c*), or statements not made till after the institution of the action (*c*). And it seems that the effect of a misrepresentation, though material, may be cured by discontinuance for a long period before action brought (*d*).

Fraudulent speculation.

It is not the province of the Court, however, to protect speculations which aim at inducing the public to buy one thing when they think they are buying another; and therefore, where both plaintiffs and defendant were engaged in speculations of that character, although the Court refused, on the ground of the plaintiffs' delay, to grant the injunction they prayed, it declined to give costs to the defendant, who was *in pari delicto* (*e*). And on similar grounds relief will be refused to a plaintiff who has used his trade mark on goods of inferior quality to those with which the mark has become associated (*f*), or who has used the mark beyond

(*a*) *Per* U. S. Supreme Court in *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218. And see *Hazard* v. *Caswell*, 93 N. Y. 259; *Siegert* v. *Abbott*, 61 Md. 276; *Stachelberg* v. *Ponce*, 23 Fed. Rep. 430.

(*b*) *Curtis* v. *Bryan*, 2 Daly, 212; R. Cox, 434. And see *Ford* v. *Foster*, L. R. 7 Ch. 611; *Davis* v. *Rogers*, 89 L. T. (Journal) 292.

(*c*) *Siegert* v. *Findlater*, 7 Ch. D. 801 (but this case was questioned in *Siegert* v. *Abbott*, 61 Md. 276); *Alexander* v. *Morse*, 14 R. I. 153; *Moxie Nerve Food Co.* v. *Baumbach*, 32 Fed. Rep. 205; *Blackwell* v. *Armistead*, 5 Am. L. T. 85; *Société Anonyme de la Distillerie de la Liqueur Bénédictine de l'Abbaye de Fécamp* v. *Western Distilling Co.*, 43 Fed. Rep. 416; *Cleveland Stone Co.* v. *Wallace*, 52 *ib.* 431; *Clark Thread Co.* v. *Armitage*, 67 *ib.* 896; 74 *ib.* 936; *Carlsbad* v. *Kutnow*, 71 *ib.* 167; *Klotz* v. *Hecht*, 73 *ib.* 822; *Tarrant & Co.* v. *Hoff*, 76 *ib.* 959.

(*d*) *In re Wills*, (1893) 2 Ch. 262; *Benedictus* v. *Sullivan, Powell & Co.*, 12 P. R. 25; *Symonds* v. *Jones*, 82 Maine, 302. Cf. *Alaska Packers' Association* v. *Alaska Imperial Co.*, 60 Fed. Rep. 103, where a discontinuance after action brought was held to be inoperative.

(*e*) *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276. And see *In re Saunion & Co.*, Dig. 625; *Newman* v. *Pinto*, 4 P. R. 508; *Samuel* v. *Berger*, 24 Barb. 163; R. Cox, 178; *Bloss* v. *Bloomer*, 23 Barb. 604; R. Cox, 200; *In re American Sardine Co.*, 3 U. S. Pat. Gaz. 495; *In re Dole Bros.*, 12 *ib.* 939; *In re Warburg & Co.*, 13 *ib.* 44; *Ex parte Marsching & Co.*, 15 *ib.* 294; *Ex parte Knapp*, 16 *ib.* 318; *Fairbanks* v. *Jacobus*, 14 Bl. C. C. 337; with which compare *In re Green*, 8 U. S. Pat. Gaz. 729.

(*f*) *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218.

the limits to which he was confined on the assignment of it to him (*a*), or who adopted it in infringement of the rights of another (*b*).

*Hogg* v. *Maxwell*.

In *Hogg* v. *Maxwell* (*c*) the plaintiff registered, under the Copyright Acts, the title of an intended magazine in 1863, but did not bring out the work. In June 1866 the defendant registered the same name. The plaintiff discovered this in August. He then hastened on his own publication, which was first announced on September 24th, and published next day. In the meantime the plaintiff had, on the 19th, undertaken to advertise the defendant's intended magazine, but retracted the undertaking, and gave the defendant notice of his claim to the title on the 25th. Proceedings were taken by both parties with a view to an injunction, which was refused in both cases, the Court being of opinion, in *Hogg* v. *Maxwell*, that the plaintiff had got beforehand by improper means, which disentitled him to relief.

Short weight.

The Court will not protect persons in carrying on a trade in which short measure is given systematically and knowingly (*d*). And in *Hennessy* v. *Wheeler* (*e*), the New York Court of Common Pleas refused relief to brandy merchants who sold their brandy in bottles containing quarts and pints of nominal measure, but really considerably less. But this decision was reversed on appeal, on the ground that the bottles were not bought on the faith of their containing any particular quantity of brandy, and that no one was proved to have been deceived or was likely to be so. Similarly, where the plaintiff admitted that his medical preparation was "sold only in quart bottles," and the bottles, though such as were commonly known in the trade as quart bottles, really contained substantially less, it was held that the misstatement was not such as to deprive the plaintiff of his right to protection (*f*).

### 9. *Word "Patent" improperly used by Plaintiff.*

9. Improper use of word "patent."

"It is impossible not to see," says Mellish, L. J., "that persons do try to use their right in trade marks for the purpose of getting

(*a*) *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218.

(*b*) *O'Rourke* v. *Central City Soap Co.*, 26 Fed. Rep. 576; *Parlett* v. *Guggenheimer*, 67 Md. 542; *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 31 Fed. Rep. 776; 138 U. S. 537. And see *In re Heaton*, 27 Ch. D. 570.

(*c*) L. R. 2 Ch. 316.

(*d*) See *per* Giffard, L. J., in *Lee* v. *Haley*, L. R. 5 Ch. 155.

(*e*) 51 How. Pr. 457; 69 N. Y. 271.

(*f*) *Alexander* v. *Morse*, 14 R. I. 153.

a monopoly in particular articles, just as if they had a patent for the goods which they manufacture" (*a*). A special form of misrepresentation consists in the use by persons in their trade marks of words inducing the belief that they have a patent for the articles to which those trade marks are affixed; and the tendency which the use of such words has to procure for the persons using them an unfair monopoly, or to prolong a monopoly granted only for a limited time, causes it to be regarded with special disfavour. The importance of the point is forcibly pointed out by Wood, V.-C., in *Morgan* v. *McAdam* (*b*). He says: "All those who are induced to buy these crucibles thus described as 'Patent Plumbago Crucibles,' are to a certain extent deceived, because they are led to believe that the article is protected by a patent, and thus may be induced to purchase it from the plaintiffs, under the belief that there is a patent, and that the plaintiffs, or at least some limited number of persons, are the only persons authorized to sell it; and further, they are led to believe that if they should be minded to set up any manufactory of the same kind for themselves, they would be unable to do so in consequence of the plaintiffs being the possessors, either by way of licence or ownership, of a patent preventing the world at large from imitating the article which is sold by them under this particular designation" (*c*).

**Plaintiff disentitled.**

Where, therefore, the plaintiff has used in his trade mark the word "patent," or words to that effect, although, in point of fact, he has never had a patent for the goods to which the mark is applied, the Court will refuse to extend to him the protection which he has forfeited. Previously to Sir John Rolt's Act (*d*), liberty was given to the plaintiff to bring an action at law (*e*); but since then the action has been simply dismissed, with or without costs (*f*). And the course would be the same if the words were

(*a*) *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 456.

(*b*) 36 L. J. Ch. 228.

(*c*) And see *per* the same learned judge, in *Flavel* v. *Harrison*, 10 Hare, 467.

(*d*) 25 & 26 Vict. c. 27.

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

(*f*) *Morgan* v. *McAdam*, 36 L. J. Ch. 228; *Lamplough* v. *Balmer*, W. N. 1867, p. 293; *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 352; *Nixey* v. *Roffey*, W. N. 1870, p. 227. And see *Ford* v. *Foster*, L. R. 7 Ch. 611; *In re Adams*, 9 P. R. 174 (where the Court refused to alter a mark by striking out the word "patent"); *Meaby & Co.* v. *Triticine, Ld.*, 15 P. R. 1. In *Stewart* v. *Smithson*, 1 Hilt. 119: R. Cox, 175, the Court of C. P. of New York refused to recognise this as a defence; but the word "patent" has been refused registration in America in connection with an article made under an expired patent: *In re Richardson*, 3 U. S. Pat. Gaz. 120; and in *In re Consolidated Fruit Jar Co.*, 14 *ib.* 269, the name of a patentee was refused registration. But see *Ex parte Consolidated Fruit Jar*

first inserted in the trade mark after the expiration of a patent which had existed (*a*). In *Sykes* v. *Sykes* (*b*), a patent had been taken out by the plaintiff's father. That patent was held to be invalid, on account of a defect in the specification, but the use of the word "patent" was not held to disqualify the plaintiff from recovering at law. The question does not seem, however, to have been fairly raised in that early case, and it has been held in America that marks containing a reference to a patent declared to be invalid could not be protected by injunction (*c*).

Retention of word after expiration of patent.

There has been some apparent difference of opinion in regard to the case in which the word "patent" has been inserted in the trade mark while the article was still patented, and has been retained there after the patent has run out. In such a case (*d*), Wood, V.-C., held that the plaintiffs were entitled to recover, the blocks for the labels having been made during the existence of the patent, when the representation was perfectly true. Lord Kingsdown, in discussing this judgment (*e*), said that he agreed with it if the word "patent" were only used as part of the designation of an article, but that he could not do so if the trade mark represented the article as protected by an existing patent. In a subsequent case (*f*), the Vice-Chancellor explained his meaning as being in harmony with that of Lord Kingsdown. "If originally you have a patent, and the article is in the market as a patent article, and you stamp all your goods which are sent out with these words 'patent pins,' or 'patent wire,' or whatever the particular article might be, at the end or the expiration of the patent it is not necessary, as I thought, to call in the whole of the previous stamps, and remodel the whole of your stamps, and have a new form of packing your article in order that you may inform the world that the patent, which did exist, has expired. Of course it would be better, and those who are inclined to act with scrupulous honesty would take care to put the date of their patent, which would obviate all difficulty (*g*), upon the articles which they designate as patented."

*Co.*, 16 *ib.* 679; *Fleischmann* v. *Fleischmann*, 7 App. Div. N. Y. 280.

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

(*b*) 3 B. & Cr. 541.

(*c*) *Consolidated Fruit Jar Co.* v. *Dorflinger*, 6 Am. L. T. N. S. 511.

(*d*) *Edelsten* v. *Vick*, 11 Hare, 78. And see *Leather Cloth Co.* v. *Hirschfeld* (1), 1 N. R. 551.

(*e*) *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523.

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

(*g*) See *Consolidated Fruit Jar Co.* v. *Dorflinger*, 6 Am. L. T. N. S. 511; *Wilson* v. *Singer Manufacturing Co.*, 16 U. S. Pat. Gaz. 1091; *Fairbanks* v. *Jacobus*, 14 Bl. C. C. 337.

In a later case (*a*), it was clearly established by the Court of Appeal that the principle enunciated by Lord Kingsdown is the rule of the Court, and that the use of the word "patent," so as to indicate an existing patent, is equally fatal, whether there has never been a patent for the article in question, or the patent which did exist has expired (*b*).

Word so used as not to deceive.

As has been seen, Lord Hatherley, when V.-C. (*c*), and Lord Kingsdown (*d*), were of opinion that when the word "patent" formed part of the name of an article, and did not operate so as to induce a belief in the existence of a patent, the trade mark in which the word appeared might be protected. A distinct decision to this effect was pronounced by James, V.-C., in *Marshall* v. *Ross* (*e*), where "patent thread" was compared by the learned judge to "patent leather boots" (*f*). And where the plaintiffs had described themselves as "patentees" of an article of which they had secured the exclusive manufacture by registration, though not by letters patent, it was held that they were not disentitled (*g*). In *Lauferty* v. *Wheeler* (*h*), it was held that the plaintiff was not disentitled by reason of having described his goods as "Patent, Sept.," after being officially informed that his application for a patent had been allowed, but before the actual issue of letters patent. Similarly, it seems that a statement that a trade mark is registered before it in fact is so, does not disentitle the proprietor to sue, after registration has been effected (*i*), though it exposes the proprietor to a penalty (*k*), and may affect the costs of the action (*l*). Nor is the proprietor of a registered trade mark disentitled by the fact that he places the word "registered" on his trade mark when in use, though spaces left blank in the mark as registered are filled in when it is in use (*m*).

(*a*) *Cheavin* v. *Walker*, 5 Ch. D. 850. And see *Fairbanks* v. *Jacobus*, 14 Bl. C. C. 337; *New York Consolidated Card Co.* v. *Union Playing Card Co.*, 46 N. Y. Sup. Ct. 611.

(*b*) The penalties inflicted under § 105 of the Patents Act, 1883, for the improper use of the word "patent," are not, however, incurred by the continued use of the word upon goods for which a patent has previously been possessed.

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

(*d*) *Leather Cloth Co.'s Case*, 1 H. L. C. 523.

(*e*) L. R. 8 Eq. 651.

(*f*) See the observations on this case in *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345. And see, too, *Ransome* v. *Graham*, 51 L. J. Ch. 897.

(*g*) *Cave* v. *Myers*, Dig. 304.

(*h*) 63 How. Pr. 488; 11 Daly, 194.

(*i*) See *per* Brett, L. J., in *Read* v. *Richardson*, 45 L. T. N. S. 54.

(*k*) See Patents Act, 1883, § 105; *R.* v. *Morris*, Great Marlborough St. Police Court, Dec. 16th, 1886; *Wright, Crossley & Co.* v. *Dobbin*, 15 P. R. 21; *McSymons' Stores, Ld.* v. *Shuttleworth*, *ib.* 748.

(*l*) *Harris* v. *Ogg*, 5 N. S. W. Rep. 114.

(*m*) *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888.

When validity of patent doubtful.

A patentee is not bound to decide a doubt as to the validity of his patent adversely to himself, and consequently the plaintiff, in an action for infringement of a trade mark for boot-tips, was held not to be disentitled to relief by the fact that the word "patentee" appeared in his trade mark, he being the owner of an existing patent, notwithstanding that it had been shown that questions might be raised as to the validity of the patent, and the plaintiff had himself admitted that he had some doubt as to the validity (*a*).

Grossness of misrepresentation no excuse.

The fact that the misrepresentation is so gross as hardly to be capable of deceiving will not exonerate the person making it from the consequences. Thus, the use on untanned leather cloth of the words "tanned patented" was a ground for refusing assistance (*b*).

"Manufacturer and patentee."

Where a plaintiff described himself on his labels as "manufacturer and patentee," it was held that this was equivalent to describing the article as "patent," and the bill was dismissed, without costs (*c*). And in *Consolidated Fruit Jar Co.* v. *Dorflinger* (*d*), it was held that certain trade marks consisting of the words "Mason's Patent, November 30th, 1858," "Mason's Improved," and "The Mason Jar of 1858," were bad, the patent of 1858 being invalid by judicial decision.

*Lamplough* v. *Balmer.*

When a plaintiff used on his stopper labels with the words "Royal Letters Patent," the explanation that he had for twenty-five years paid the stamp duty on "patent medicines," and that he was only continuing to use the labels he had had on hand when he discovered his medicines did not belong to that class, was not accepted as satisfactory, and his motion for an injunction to restrain an imitator was refused (*e*).

Collateral use of word.

If, however, the plaintiff's trade is a perfectly honest trade, and the trade mark is a perfectly honest trade mark, the fact that the plaintiff has committed a purely collateral misrepresentation, by describing himself, though not in the trade mark itself, as "patentee," will not disentitle him to his remedy (*f*). And where a registered label for soda water contained the words "manufactured by Royal Letters Patent," which were explained by the plaintiff to mean "manufactured by means of patented machinery," the Privy Council

(*a*) *Blakey* v. *Latham*, 85 L. T. (Journal) 47.

(*b*) *Leather Cloth Co.'s Case*, 4 De G J. & S. 137; 11 H. L. C. 523.

(*c*) *Nixey* v. *Roffey*, W. N. 1870, p. 227. And see Patents Act, 1883, § 105.

(*d*) 6 Am. L. T. N. S. 511.

(*e*) *Lamplough* v. *Balmer*, W. N. 1867, p. 293.

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

being of opinion that the plaintiff's trade was an honest trade, held that he was not disentitled to relief "by reason of some words not designed to mislead, and at most equivocal" (*a*).

### 10. *Words "Registered" or "Trade Mark" improperly used by Plaintiff.*

On the same principles on which the deceptive use of the word "patent" has been held to disentitle a plaintiff to relief, so a misrepresentation as to a trade mark being registered which is not so, or a misrepresentation as to what it is that is the trade mark, may similarly disentitle to relief.

Patents Act, 1883.

By § 105 of the Patents Act, 1883 (*b*), it is provided that "any person who represents that any article sold by him is a patented article, when no patent has been granted for the same, or describes any design or trade mark applied to any article sold by him as registered, which is not so, shall be liable for every offence on summary conviction to a fine not exceeding £5." And it is also provided that "a person shall be deemed, for the purposes of this enactment, to represent that an article is patented, or a design or a trade mark is registered, if he sells the article with the word 'patent,' 'patented,' 'registered,' or any word or words expressing or implying that a patent or registration has been obtained for the article, stamped, engraved, or impressed on, or otherwise applied to the article." It has been held under this section that a person is subject to a penalty who represents an article to be patented,

(*a*) *Cochrane* v. *McNish*, (1896) A. C. 225. And see *National Starch Manufacturing Co.* v. *Munn's Patent Maizena & Starch Co.*, (1894) A. C. 275.

(*b*) This replaces § 7 of 5 & 6 Will. IV. c. 83. See *Myers* v. *Baker*, 3 H. & N. 802. In America a penalty is similarly assigned for the use of the word "Patented" on an unpatented article: U. S. Rev. St. § 4901. See *Wilson* v. *Singer Manufacturing Co.*, 16 U. S. Pat. Gaz. 1091; *Stimpson* v. *Pond*, 2 Curtis, 502. And an article which, together with patented elements, contains new and valuable unpatented elements, ought not, as a rule, to be termed "patented": *Deverall* v. *Banker*, 45 U. S. Pat. Gaz. 591. But the penalty is only incurred if there is an attempt to defraud (*Tompkins* v. *Butterfield*, 25 Fed. Rep. 556), and that question is for the jury (*Walker* v. *Hawkshurst*, 5 Bl. C. C. 494; *Deverall* v. *Banker*, 45 U. S. Pat. Gaz. 591); who are justified in convicting if they are reasonably satisfied upon the evidence as to the material facts, and proof beyond a reasonable doubt is not required (*Hawloetz* v. *Kass*, 25 Fed. Rep. 765); a corporation is responsible for the act of its superintendent in wrongfully describing an unpatented article as "patented," and will be liable to a penalty if he knew or should have known that the article was not patented, but not if he *bond fide* believed it was so: *Tompkins* v. *Butterfield*, 25 Fed. Rep. 556. In *U. S.* v. *Morris*, 2 Bond, 23, Leavitt, J., held that the statute did not apply unless the goods were patentable; but in *Oliphant* v. *Salem Flouring*

after he has applied for a patent and obtained provisional protection, but before the actual grant (*a*); and, similarly, where a person represents a trade mark to be registered, after he has applied for registration, and the application has been advertised in the "Trade Marks Journal," but before the actual registration (*b*). So, too, where a trade mark has been registered but has been expunged before the date of the representation (*c*); and where goods of foreign manufacture were sold in the United Kingdom under a label containing the word "registered," the use of that word was held to amount to a representation that the label was registered as a trade mark in the United Kingdom notwithstanding that the name of the foreign place where, in point of fact, the goods were manufactured appeared in small type on a different part of the label (*d*).

Use of word "trade mark" without registration.

The question whether the use by a trader upon his goods of the word "trade mark," without the word "registered," in connection with a word or device which has not been registered, amounts to a representation that the word or device has been registered, so as to expose the trader to the penalties of sect. 105, or to disentitle him to relief in an action brought by him to restrain passing off, is a question which must depend upon the facts of the particular case. The use of the word "trade mark" does not necessarily imply registration, for a trade mark can exist perfectly well without registration, though it cannot in most cases be protected without it, and in *Sen-Sen Co.* v. *Britten* (*e*), Stirling, J., considered that the word was not there used so as to convey any misrepresentation, and granted relief. On the other hand, in *Lewis's* v. *Goodbody* (*f*), it seems to have been thought that the word was there used so as to convey a misrepresentation. But the case was substantially decided on other grounds.

Use of word "trade mark" in wrong place.

The word "*trade mark*" may be misused in another way: by being placed in such a position as to indicate that a particular part of a registered mark is alone claimed, and not the mark as a whole, so as to lead persons to suppose that the remainder of the mark is

*Mills*, 5 Sawy. 128, Deady, J., held that it applied whether the goods were patentable or not.

(*a*) *R.* v. *Wallis*, 3 P. R. 1; *R.* v. *Crampton*, *ib.* 367.

(*b*) *R.* v. *Morris*, Great Marlborough St. Police Court, Dec. 16th, 1886.

(*c*) *Wright, Crossley & Co.* v. *William Dobbin & Co.*, 15 P. R. 21.

(*d*) *Wright, Crossley & Co.* v. *William Dobbin & Co.*, 15 P. R. 21; *McSymons' Stores, Ld.* v. *Shuttleworth*, *ib.* 748. And see *Pneumatic Rubber Stamp Co.* v. *Lindner*, *ib.* 525.

(*e*) (1899) 1 Ch. 692.

(*f*) 67 L. T. N. S. 194.

open to the public. In such a case the person so using the word may be disentitled to bring an action, and his mark may be expunged (*a*). But here, again, it is a question of fact in each case whether the word is used to mislead (*b*). On the same principle, the wrongful use of the word "registered" has been held to be a ground for depriving a successful defendant of his costs (*c*).

Merchandise Marks Act, 1887.

By the Merchandise Marks Act, 1887, § 3 (1), a statement "as to any goods being the subject of an existing patent, privilege, or copyright," is, if untrue, a "false trade description" punishable under the Act. Under § 18, however, the provisions of the Act with respect to false trade descriptions are not to apply to the use of a trade description which "is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods." This will protect such combinations as "patent thread," in *Marshall* v. *Ross* (*d*), or "patent leather" boots.

## Inoperative Defences.

Among the defences which have occasionally been set up in actions for infringement of trade mark, but without success, are the following:

Ignorance.

Ignorance of the plaintiff's rights. This will not suffice to prevent the issue of the injunction (*e*); although it may have the effect of relieving the defendant from the necessity of accounting (*f*).

No intention to sell.

Absence of intention to sell the goods bearing the spurious mark is no defence (*g*).

(*a*) *In re Apollinaris Co.*, (1891) 2 Ch. 186, 233—235. And see *In re Wills*, (1893) 2 Ch. 262.

(*b*) *Hammond* v. *Malcolm, Brunker & Co.*, 9 P. R. 301. And see *Benedictus* v. *Sullivan, Powell & Co.*, 12 P. R. 25.

(*c*) *In re Bradley*, 9 P. R. 205; *In re Paine* (2), 10 *ib.* 71. And see the observations of the L. JJ. in the same case, (1893) 2 Ch. 567. See also *Winser & Co. Ld.* v. *Armstrong & Co.*, 16 P. R. 167. Cf. *Read* v. *Richardson*, 45 L. T. N. S. 54; and *Solis Cigar Co.* v. *Pozo*, 16 Col. 388; 25 Am. St. Rep. 279, where the improper use of the word "copyrighted" was held no bar to relief.

(*d*) L. R. 8 Eq. 651.

(*e*) *Burgess* v. *Hills*, 26 Beav. 244; *Geary* v. *Norton*, 1 De G. & S. 9; *Cartier* v. *Carlile*, 31 Beav. 292; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578; *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hyde, 185; *Weed* v. *Peterson*, 12 Abb. Pr. N. S. 178; *Upmann* v. *Forester*, 24 Ch. D. 231; *Curtiss* v. *Messler*, 13 A. L. T. 127; and other cases.

(*f*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578; *Rose* v. *Loftus*, 47 L. J. Ch. 576.

(*g*) *Upmann* v. *Forester*, 24 Ch. D. 231. See *Upmann* v. *Currey*, 29 Sol. J. 735.

Absence of proof of actual deception or fraudulent intention is no defence, if in the opinion of the Court or jury there is such imitation as to be calculated to deceive (*a*). No actual deception or fraud.

It is no defence to prove that all the persons who bought from the defendant goods bearing the plaintiff's mark were well aware that they were not of the plaintiff's manufacture (*b*). Immediate purchasers not deceived.

Nor to say that the marks used indicate quality or pattern, if they also indicate a particular manufacturer or merchant (*c*). Indication of quality as well as manufacturer.

Nor to show that the words, of the use of which the plaintiff complains, are ambiguous and capable of being understood by different persons in different ways (*d*). Words ambiguous.

Nor to say that the plaintiff's entire mark has not been copied (*e*). Only part of mark taken.

Nor to say that the name, to the use of which by the defendant the plaintiff objects, is the defendant's own, if he has used it so as to deceive (*f*). Name used is defendant's own.

Nor to say that the words, to the use of which by the defendant the plaintiff objects, form an accurate description of the goods which the defendant is selling, if the use is calculated to deceive (*g*). Name inaccurate in secondary meaning only.

Nor to produce a colourable authority to use the name of a Colourable authority.

(*a*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Cope* v. *Evans*, L. R. 18 Eq. 138; *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236; *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hyde, 185; *Coats* v. *Holbrook*, 2 Sandf. Ch. 586; R. Cox, 20; *Taylor* v. *Carpenter*, 11 Paige, 292; 2 Sandf. Ch. 603; R. Cox, 45; *Coffeen* v. *Brunton*, 4 McLean, 516; 5 *ib.* 256; R. Cox, 82, 132; *Davis* v. *Kendall*, 2 R. I. 566; R. Cox, 112; *McLean* v. *Fleming*, 96 U. S. 245; *Shaver* v. *Shaver*, 54 Iowa, 208; *Williams* v. *Brooks*, 50 Conn. 278. And see Ch. IV. on Infringement.

(*b*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Rose* v. *Loftus*, 47 L. J. Ch. 576; *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15; *Balfour & Co.* v. *Kilburn & Co.*, 1 Hyde, 270; *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454. And cases at p. 132, *supra*.

(*c*) See cases at p. 63, *supra*.

(*d*) *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15, *per* Lord Selborne, C.; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888.

(*e*) *Ford* v. *Foster*, L. R. 7 Ch. 611; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Shaver* v. *Shaver*, 54 Iowa, 208. And see cases at pp. 137-8, *supra*. Cf. *Rugby Portland Cement Co.* v. *Rugby & Newbold Portland Cement Co.*, 8 P. R. 241; *Barber* v. *Manico*, 10 P. R. 93.

(*f*) *Churton* v. *Douglas*, Johns. 174; *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Pullar* v. *Pullar*, Fry, J., April 9th, 1883; *Nicholls* v. *Kimpton*, 3 Times L. R. 674; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888; *Warner* v. *Warner*, 5 Times L. R. 359; *Army & Navy Co-operative Soc., Ld.* v. *Army & Navy & Civil Service Co-operative Soc. of India, Ld.*, 8 P. R. 426, 472; *Otard, Dupuy & Co.* v. *Otard de Monte Bello Cognac Co.*, 9 Times L. R. 295; 10 *ib.* 67; *Brinsmead* v. *Brinsmead*, 12 *ib.* 631; 13 *ib.* 3; *Shaver* v. *Shaver*, 54 Iowa, 208; *India-Rubber Comb Co.* v. *Rubber Comb & Jewelry Co.*, 45 N. Y. Super. Ct. 258; *Rogers Manufacturing Co.* v. *Rogers & Spurr Manufacturing Co.*, 11 Fed. Rep. 495; *Russia Cement Co.* v. *Le Page*, 147 Mass. 206; *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306. And see *Bayer* v. *Baird*, 15 P. R. 651 (a case of initials). See also cases at p. 125.

(*g*) *Reddaway* v. *Banham*, (1896) A. C. 199; *Rockingham Rail. Co.* v. *Allen*, 12 Times L. R. 345.

person having the same name as that used by the plaintiff in his business (*a*).

Goods plaintiff's own of different quality.

Nor to say that the goods which the defendant is selling under the mark in question are goods manufactured by the plaintiff, if they are of a different quality from that of which the defendant represents them to be (*b*).

Equality in quality.

Nor to say that the spurious goods are equal in quality to the genuine ones, for the plaintiff's right is equally invaded (*c*).

Addition of defendant's name.

The defendant will not escape by showing that he has used his own name in conjunction with the mark or word which is alleged to be used in infringement of the plaintiff's rights (*d*).

(*a*) *Perry* v. *Truefitt*, 6 Beav. 66; *Croft* v. *Day*, 7 Beav. 84; *Moet* v. *Clybouw*, Dig. 533; *Dence* v. *Mason* (1), Dig. 534; 41 L. T. N. S. 573; *Melachrino & Co.* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215; *Birmingham Vinegar Brewery Co., Ld.* v. *Liverpool Vinegar Co., Ld.*, W. N. 1888, p. 139; *Rendle* v. *Rendle & Co.*, 63 L. T. N. S. 94: *Edge* v. *Harrison*, 8 P. R. 74; *Williams* v. *Johnson*, 2 Bos. 1; *Phalon* v. *Wright*, 5 Phila. 464; *Perks* v. *Hall & Co.*, W. N. 1881, p. 111; *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601; *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450; 12 Amer. Rep. 401; *Wolfe* v. *Barnett*, 24 La. Ann. 97; 13 Amer. Rep. 111; *Williams* v. *Brooks*, 50 Conn. 278; *William Rogers Manufacturing Co.* v. *Rogers & Spurr Manufacturing Co.*, 11 Fed. Rep. 495. But see *Beard* v. *Turner*, 13 L. T. N. S. 746; *Hallett* v. *Cumpston*, 110 Mass. 29; *Ayer* v. *Rushton*, 7 Daly, 9; *Dence* v. *Brand*, W. N. 1881, p. 31.

(*b*) *Hennessy* v. *Kennett*, Dig. 556; *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216; *Hennessy* v. *Hogan*, *ib.* 225; *Gillott* v. *Kettle*, 3 Duer, 624.

(*c*) *Blofeld* v. *Payne*, 4 B. & Ad. 410; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185 (*per* Lord Westbury, C., "It is not necessary, for the injunction, to prove . . . . that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by loss of custom is sufficient to support his title to relief"); *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15, *per* Lord Blackburn; *Coats* v. *Holbrook*, 2 Sandf. Ch. 586; R. Cox, 20; *Taylor* v. *Carpenter*, 11 Paige, 292; 2 Sandf. Ch. 603; R. Cox, 45; *Partridge* v. *Menck*, 2 Barb. Ch. 101; 1 How. App. Cas. 558; R. Cox, 72; *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392; *Shaver* v. *Shaver*, 54 Iowa, 208; *Coffeen* v. *Brunton*, 5 McLean, 256; R. Cox, 132; *Cleveland Stone Co.* v. *Wallace*, 52 Fed. Rep. 431; *Carlsbad* v. *Thackeray*, 57 *ib.* 18; *Keller* v. *Goodrich Co.*, 117 Ind. 556; 10 Am. St. Rep. 88.

(*d*) *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Braham* v. *Bustard*, 1 H. & M. 447; *Ford* v. *Foster*, L. R. 7 Ch. 611; *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Eno* v. *Stephens*, Dig. 609; *Rose* v. *Loftus*, 47 L. J. Ch. 576; *Field* v. *Lewis*, Dig. 280; *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57; *Berliner Brauerei Gesellschaft Tivoli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70; *Eno* v. *Dunn*, 10 P. R. 261; *Grezier* v. *Autran*, 13 P. R. 1; *Birmingham Vinegar Brewery Co. Lim.* v. *Powell*, (1897) A. C. 710; *Daniel* v. *Whitehouse* (2), 16 P. R. 71; *Gt. North of Scotland Rail. Co.* v. *Mann*, Ct. Sess. Cas. 4th Ser. XIX. 1035; *Lea* v. *Wolff*, 15 Abb. Pr. N. S. 1; *Frese* v. *Bachof* (2), 14 Bl. C. C. 432; *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402; *Siegert* v. *Ehlers*, Dig. 432; *Davis* v. *Kennedy*, 13 Grant Up. Can. Ch. 523; *Roberts* v. *Sheldon*, 8 Biss. 398; *Hier* v. *Abrahams*, 82 N. Y. 519; *Hegeman & Co.* v. *O'Byrne*, 9 Daly, 264; *Carroll* v. *Ertheiler*, 1 Fed. Rep. 688; *Fleischmann* v. *Schuckmann*, 62 How. Pr. 92; *Battle & Co.* v. *Finlay*, 45 Fed. Rep. 796; 50 *ib.* 106; *Hohner* v. *Gratz*, 52 *ib.* 871: *N. K. Fairbank Co.* v. *Central Lard Co.*, 64 *ib.* 133; *N. K. Fairbank Co.* v. *R. W. Bell Manufacturing Co.*, 77 *ib.* 869. And see *Pillsbury* v. *Pillsbury-Washburn Flour Mills Co.*, 64 *ib.* 841, where a statement that the defendant's goods were not the same as the plaintiff's was held not a good defence. But compare *Chearin* v. *Walker*, 5 Ch. D. 850; *Barrett* v. *Gomm*, 74 L. T.

Addition of address.

Nor by showing that he has always placed his own address on the goods (*a*).

Addition of word "Improved."

Nor by showing that he has used the word "Improved" in connection with his goods (*b*).

User by others.

Nor by showing that the same mark has been used by other persons on goods of another class (*c*), or by less than three firms besides the plaintiff on goods of the same class (*d*), or by different firms abroad, if not in England (*e*).

Fraudulent anticipation.

Nor by showing that another trader used the mark before the plaintiff, if that other trader's right to the mark has been adjudged to be gone by reason of misrepresentations contained in it (*f*).

Infringement by others.

Nor by showing that the plaintiff's trade mark has been infringed by others without his knowledge or acquiescence (*g*).

A plurality of marks or names.

It is no defence to say that the plaintiff uses more than one trade mark on the same goods (*h*), nor that his goods have been known by a variety of names (*i*).

Additions in practice to marks as registered.

Nor that the plaintiff in practice uses devices, &c., on his trade marks which are not registered as part of them—*e.g.*, filling in blank spaces with coats-of-arms (*k*).

(Journal) 388; *Barrett* v. *White*, North, J., May 12th, 1883; *Magee Furnace Co.* v. *Le Barron*, 127 Mass. 115; *Thornton* v. *Crowley*, 47 N. Y. Super. Ct. 527; *Somerville* v. *Schembri*, 12 App. Cas. 453; *McCall* v. *Theal*, 28 Grant Up. Can. Ch. 48; *Pratt's Appeal*, 117 Penn. St. 401; *Moxie Nerve Food Co.* v. *Baumbach*, 32 Fed. Rep. 205; *Leonard & Ellis* v. *White's Golden Lubricator Co.*, 48 U. S. Pat. Gaz. 1401; *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72.

(*a*) *Gray* v. *Taper Sleeve Pulley Works*, 16 Fed. Rep. 436.

(*b*) *Russia Cement Co.* v. *Le Page*, 147 Mass. 206; *Alexander* v. *Morse*, 14 R. I. 153; *Humphreys' Specific, &c. Co.* v. *Wenz*, 14 Fed. Rep. 250; *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306; *Californian Fig Syrup Co.* v. *Improved Fig Syrup Co.*, 51 Fed. Rep. 296; 54 *ib.* 175; *Holmer* v. *Gratz*, 52 *ib.* 871; *Carlsbad* v. *Kutnow*, 68 *ib.* 794; 71 *ib.* 167.

(*c*) *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Somerville* v. *Schembri*, 12 App. Cas. 453; *Colman* v. *Crump*, 70 N. Y. 573; *Hegeman & Co.* v. *O'Byrne*, 9 Daly, 264; *Celluloid Manufacturing Co.* v. *Cellonite Manufacturing Co.*, 32 Fed. Rep. 94; *George* v. *Smith*, 52 *ib.* 830.

(*d*) *Dent* v. *Turpin*, 2 J. & H. 139; *Dunnachie* v. *Young & Sons*, Ct. Sess. Cas., 4th Ser. X. 874; and cases at p. 108.

(*e*) *Berliner Brauerei Gesellschaft Tivoli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70; *Jackson* v. *Napper*, 35 Ch. D. 162; *Newman* v. *Pinto*, 4 P. R. 508 (*per* Kekewich, J.). So in Canada; *Smith* v. *Fair*, 14 Ont. Rep. 729.

(*f*) *Parlett* v. *Guggenheimer*, 67 Md. 542.

(*g*) *Ford* v. *Foster*, L. R. 7 Ch. 611; *Taylor* v. *Carpenter*, 3 Story, 458; R. Cox. 14; *Filley* v. *Fassett*, 44 Mo. 173; R. Cox, 530.

(*h*) *Braham* v. *Bustard*, 1 H. & M. 447; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284.

(*i*) *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434.

(*k*) *Newman* v. *Pinto*, 57 L. T. N. S. 31 (*per* Kekewich, J.); *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888; *Hammond* v. *Malcolm, Brunker & Co.*, 9 P. R. 301.

Infringement in district of a licensee.

Nor that the infringement has been committed in a district in which the plaintiff has appointed a licensee (*a*).

Puffing.

Mere exaggerated statements of the merits of medical or other compounds on the part of the plaintiff, which do not amount to fraud, will not exonerate the defendant from the consequences of his own fraud (*b*). Nor will other statements by the plaintiff, which, though not absolutely correct, cannot mislead in any important respect (*c*)—*e.g.*, an allegation that the plaintiff's mark was registered before registration had actually been effected (*d*); or the putting the word "registered" on the mark as used, though spaces left blank in the mark as registered are filled in (*e*).

Slight delay.

The defendant will not escape by alleging laches on the part of the plaintiff in prosecuting his action, if no greater delay has taken place than was requisite to enable necessary evidence to be obtained (*f*).

Infancy.

Infancy is no defence, for "if an infant practises a fraud, he is liable for the consequences" (*g*), and he will be in the same position as an adult with respect to the payment of costs (*h*). And so with a married woman having separate estate (*i*).

Defendant's mark registered.

Registration of the defendant's mark at Stationers' Hall, or in the trade marks register (*d*), is no defence (*k*).

Interference with defendant's business.

Nor is it any defence to say that an injunction, if granted, would interfere with the defendant's business, or with that of other manufacturers, since they will be able to trade as they please, with the sole exception of using the plaintiff's trade mark (*l*).

## Discovery and Inspection.

Discovery.

The plaintiff in a trade mark case sometimes thinks it advisable, for the purposes of his action, to obtain from the defendant, a

(*a*) *Moxie Nerve Food Co.* v. *Baumbach*, 32 Fed. Rep. 205.

(*b*) *Holloway* v. *Holloway*, 13 Beav. 209; *Metzler* v. *Wood*, 8 Ch. D. 606; *Rowland* v. *Michell*, (1897) 1 Ch. 71; *Comstock* v. *White*, 18 How. Pr. 421. See cases at p. 210.

(*c*) *Siegert* v. *Findlater*, 7 Ch. D. 801. See cases at p. 212.

(*d*) *Read* v. *Richardson*, 45 L. T. N. S. 54; *Upper Assam Tea Co.* v. *Herbert & Co.*, 7 P. R. 183; *Goodwin* v. *Venning*, 24 Sol. J. 690.

(*e*) *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th 1888.

(*f*) *Lee* v. *Haley*, L. R. 5 Ch. 155; *Cave* v. *Mycrs*, Dig. 304. See *McLean* v. *Fleming*, 96 U. S. 245.

(*g*) *Per* Plumer, V.-C., in *Cory* v. *Gertcken*, 2 Madd. 49.

(*h*) *Chubb* v. *Griffiths*, 35 Beav. 127; *Woolf* v. *Woolf*, 43 Sol. J. 127.

(*i*) *Nicholls* v. *Kimpton*, 3 Times L. R. 674.

(*k*) *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57. And see cases at p. 142.

(*l*) *Ransome* v. *Graham*, 51 L. J. Ch. 897. See *Cope* v. *Evans*, L. R. 18 Eq. 138; *Bass* v. *Dawber*, 19 L. T. N. S. 626.

disclosure of certain particulars of his business—as, for instance, of the names of customers to whom the goods alleged to be marked with the plaintiff's trade mark have been sold, or on whose account such goods have been conveyed.

Principles on which given.

The principles on which this advantage is given or withheld are thus stated by Lord Hatherley, C. (*a*): "The Court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the question of materiality or immateriality; but where the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the Court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery which can be of use to him, on the other it is bound to protect the defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the case made by the plaintiff's pleadings, and to what will be in issue at the hearing."

Not given where oppressive.

"The more strict the Court is in compelling a full answer, the more necessary it is that the Court should be vigilant in seeing that the process of the Court is not made use of in an oppressive manner" (*b*). Where, therefore, the L.JJ. were of opinion that the discovery asked was such as the plaintiff, even if he failed at the hearing, might yet afterwards use in a manner prejudicial to the defendant, and were not satisfied that there was any real prospect of its being of material service to the plaintiff at the hearing, they reversed the order of the Vice-Chancellor of Lancaster, by whom such discovery had been granted (*c*).

*Benbow* v. *Low*.

So in *Benbow* v. *Low* (*d*) the defendants, who were also plaintiffs by counterclaim, exhibited interrogatories requiring the plaintiffs to state (*inter alia*) what quantities of soap had been sold by them bearing the name in dispute, between the dissolution of the original partnership and the date of the action, distinguishing between the quantities sold in each year, and between the quantities sold in England and in the United States and in the continent of Europe; and Bacon, V.-C., and the Court

(*a*) *Moore* v. *Craven*, L. R. 7 Ch. 94.

(*b*) *Per* Selwyn, L. J., in *Lockett* v. *Lockett*, L. R. 4 Ch. 341. And see *Piggott* v. *Anglo-American Telegraph Co.*, 19 L. T. N. S. 46.

(*c*) *Carver* v. *Pinto Leite*, L. R. 7 Ch. 90. "If the Court sees that all fair and legitimate purposes will be answered by a restricted discovery, it will so restrict it": *per* Hall, V.-C., in *Orr* v. *Diaper*, 4 Ch. D. 92, commenting on this case. The present Rules of Court favour such restrictions.

(*d*) 16 Ch. D. 93.

of Appeal held that the plaintiffs were justified in refusing to answer, as the question was framed, not for the ordinary purposes of discovery, but in order to get at the details of a part of the plaintiffs' evidence.

*In re Wills.*

In *In re Wills* (*a*), which was an application to remove a trade mark from the register, Kekewich, J., ordered the respondents to give discovery of documents after the evidence was all but completed, but restricted the order to documents relating to certain specified questions framed with a view to show that the respondents' mark was common to the trade and not distinctive; but the Court of Appeal regarded even this restricted form of order as oppressive, and discharged it upon the terms of the respondents undertaking to deliver a statement of the labels on which they intended to rely, and to produce all relevant documents in Court.

Given when necessary.

On the other hand, "the Court, while it takes care that no oppressive use is made of its forms of procedure, must take care that parties are not allowed to refuse discovery which they ought to make" (*b*). Where, therefore, a defendant who, having been the agent in London of the plaintiff, an American sewing-machine maker, continued, after dismissal, to advertise himself as the plaintiff's agent, and to sell as "the Howe Sewing Machine" machines not made by the plaintiff, and refused to give discovery of all the machines sold by him, with the prices, profits, names of purchasers, and other particulars, on the ground that he would thereby disclose the names of his customers and the secrets of his trade, Romilly, M. R., held that the discovery might be extremely material to the plaintiff, and ordered it to be given (*c*). Again, where the plaintiff obtained an injunction against the defendants, and the defendants offered to submit to an injunction and pay costs, and then moved to stay proceedings, the answer to the plaintiff's interrogatories not having yet been given, Wood, V.-C., said that the plaintiff had a right to ascertain the facts in his own way, by the answer of the defendants to his interrogatories, and that until the defendants had put in their answer, it was impossible for the

(*a*) (1892) 3 Ch. 201.

(*b*) *Per* Giffard, L. J., in *Thompson* v. *Dunn*, L. R. 5 Ch. 576. And see *Renard* v. *Levinstein*, 10 L. T. N. S. 94; *Russell* v. *Crichton*, Ct. Sess. Cas. 1st Ser. XV. 1270; *Union Paper Collar Co.* v. *Metropolitan Collar Co., Ld.*, 3 Daly, 171; *Byass* v. *Sullivan*, 21 How. Pr. 60.

(*c*) *Howe* v. *McKernan*, 30 Beav. 547.

Court to say whether or not he had done rightly in rejecting the terms offered by the defendants. The motion was refused, with costs (*a*).

*Leather Cloth Co. v. Hirschfeld.*

In *Leather Cloth Co.* v. *Hirschfeld* (*b*), a decree having been made directing the defendant to account for all goods sold by him with a particular stamp, it was decided by the same learned judge that the defendant was compellable to disclose the names of all persons to whom he had sold any such goods, and that if he could not say to which of his customers the stamped goods were sold, he was then (but not otherwise) compellable to disclose the names of all customers to whom he had sold goods which he would not swear positively were unstamped.

*Fennessy v. Clark.*

In *Fennessy* v. *Clark* (*c*), an action for an injunction to restrain an infringement of trade mark, and for damages or an account, after an order had been made for the trial of issues of fact before a judge and jury, and before the plaintiff had elected between damages and an account, the plaintiff took out a summons for a fuller statement by the defendant of the number of his sales and for inspection of his books; but the application was refused as being premature.

*Orr v. Diaper.*

In *Orr* v. *Diaper* (*d*) discovery was granted, though no other relief was sought in the action, but it is questionable whether this decision can now be relied on.

Discovery under Merchandise Marks Act, 1887.

By § 2 (2) (b) of the Merchandise Marks Act, 1887, a person who sells or exposes for sale goods having a forged trade mark or false trade description applied thereto is guilty of an offence against the Act, unless he proves, among other things, "that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained" the goods; and § 12 authorises the issue of a search-warrant (*e*).

Inspection under Judicature Acts.

In *Hennessy* v. *Rohmann* (*f*), Malins, V.-C., granted inspection of cases and bottles used by the defendants. In *Smith* v. *Harris* (*g*), the plaintiff in a trade-mark case alleged by his statement of claim that he had for many years used the word "Glenlivet" on his

(*a*) *Stephens* v. *Brett*, 10 L. T. N. S. 231.

(*b*) 1 H. & M. 295. And see *Powell* v. *Birmingham Vinegar Brewery Co.*, 14 P. R. 1.

(*c*) 37 Ch. D. 184.

(*d*) 4 Ch. D. 92.

(*e*) By sect. 6 of the Merchandise Marks Act, 1862, full information had to be given within forty-eight hours.

(*f*) 36 L. T. N. S. 51. This was under Order LII. r. 3, of the Rules of Court then in force, now Order L., r. 3.

(*g*) 48 L. T. N. S. 869.

invoices, letters, billheads, and whiskey casks, and, on the defendant's application, he was ordered to produce for inspection the invoices, letters and billheads in his possession so marked, but not the casks.

Particulars.

In the last-mentioned case the defendant alleged by his statement of defence that the plaintiff had for many years been well aware of the word "Glenlivet" being widely used in the trade in connection with other makes of whiskey; and the Court of Appeal ordered (*a*) the defendant within an appointed time to deliver particulars of the names of the persons alleged to have used the word with the plaintiff's knowledge, and the times when and the places where they had done so, and ordered that, if the defendant should not do so, the paragraph in the defence should be struck out. Again, in *Humphries* v. *Taylor Drug Co.* (1) (*b*) the plaintiff in a trade-mark action having alleged by his statement of claim that persons had been deceived, he was ordered to deliver particulars of the names and addresses of the persons alleged to have been deceived. In the same way, where a defendant has alleged that the mark has been used by traders other than the plaintiffs, particulars of such user have frequently been directed.

## Account.

Account.

A most important part of the remedy given in Equity for the infringement of the rights of the owner of a trade mark is the account of the profits, by which such profits as have been dishonestly acquired by a defendant by means of the reputation of another are restored to the plaintiff, whose they ought to have been at first. The principle is the same as where a man is made to account for the profits which he has improperly received, arising from the fraudulent manufacture of a secret medicine (*c*), or the publication of a newspaper (*d*).

Incident to injunction.

"The liability to account for the profits is incident to the injunction" (*e*), and "on authority and principle it is clear that if a man manufactures goods and knowingly marks them with the trade mark of another person, he is accountable for the profits so

(*a*) Feb. 6th, 1884.
(*b*) 39 Ch. D. 693.
(*c*) *Green* v. *Folgham*, 1 S. & S. 398.
(*d*) *Giblett* v. *Read*, 9 Mod. 459.
(*e*) *Per* Romilly, M. R., in *Cartier* v. *Carlile*, 31 Beav. 292. And see *Lever* v. *Goodwin*, 36 Ch. D. 1; and *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893.

made" (*a*), and that, whether he manufactures on his own account, or only puts up goods for others (*b*).

Wherever another's mark is placed on the goods by the defendant.

So long as the defendant is aware that he is using a trade mark, which is not his, the fact that he does not know to whom the trade mark belongs which is on the goods he is selling does not in the slightest degree affect the right of the owner to an injunction and an account of profits. And since the defendant cannot himself have placed on the goods another's trade mark, without being aware that he was infringing some one's trade-mark rights, though he may not have known exactly whose it was, he will be accountable in all cases in which he has himself placed the mark on the goods (*c*).

Not always so, where he bought goods ready marked.

But where the defendant has bought marked goods and resold them in ignorance that the trade mark on them was forged, although the plaintiff will be entitled to his injunction, he will not necessarily be entitled to an account, except in respect of any user by the defendant after he became aware of the prior ownership (*d*). On this principle, in *Ellin* v. *Slack* (*e*), a defendant who had bought and resold goods bearing a mark which infringed the plaintiff's trade mark, but without knowledge of the infringement, and who, on hearing of the infringement, had at once desisted from any further sales and offered to submit to a perpetual injunction with costs, was relieved from accounting.

Account sometimes useless.

In many cases the main object of the action is to obtain the injunction, the account being of very secondary importance (*f*); and occasionally the injury suffered by the plaintiff, and the profits received by the defendant, have been so small that the account has not formed part of the relief awarded, so that the old rule that the injunction was subordinate to the account (*g*) no longer holds good.

No account where laches.

As a plaintiff may be disentitled to his injunction by reason of

(*a*) *Per* Romilly, M. R., in *Moet* v. *Couston*, 33 Beav. 578. See *Carver* v. *Bowker*, Dig. 581. The account only extends to goods actually sold under the spurious mark, not to goods manufactured but not sold. See *Stonebraker* v. *Stonebraker*, 33 Md. 252.

(*b*) *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601.

(*c*) *Cartier* v. *Carlile*, 31 Beav. 292; *Moet* v. *Couston*, 33 Beav. 578. And see S. C. 10 L. T. N. S. 395.

(*d*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578.

(*e*) 24 Sol. J. 290.

(*f*) *Pierce* v. *Franks*, 15 L. J. Ch. 122; *Burgess* v. *Hately*, 26 Beav. 249; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137; *McAndrew* v. *Bassett*, *ib.* 380; *Barnett* v. *Leuchars*, 13 L. T. N. S. 495; *Shipwright* v. *Clements*, 19 W. R. 599, &c.

(*g*) *Delondre* v. *Shaw*, 2 Sim. 237.

his own laches, so he may be disentitled by the same reason to the account of profits. If he permits the defendant to continue his infringement for a prolonged period, he will not then be allowed to treat him as his salesman, and claim an account (*a*). But if the plaintiff has not been aware of the fact of the defendant's user, the length of that user will not deprive him of his right to an account (*b*).

Offer of submission.

Where a defendant offered, among other things, to account for profits, but the plaintiff, declining the offer of submission, insisted upon his own terms, including an account, the Court granted the account, but only upon the plaintiff's request, and at his peril in respect of costs, in case it should turn out that the account furnished by the defendant of his own accord was accurate (*c*).

Sub-divided account.

In *Dent* v. *Turpin* (*d*), where a defendant had infringed a trade mark, which had become by bequest the property of two different persons, and those persons brought distinct actions against the defendant, the prayer in each case including an account and payment of such share of the profits as should be shown to be attributable to the individual plaintiff's share, it was held that such an account and payment could be granted.

Extent of account.

As to the extent of the account, the general rule is, (though it seems possible that there may be exceptions to it,) that where goods are sent into the market under a spurious mark or name or get-up which is calculated to deceive, the account must extend to the whole of the goods so sent into the market, and will not be limited to such part of the goods as can be proved to have caused deception, nor yet so as to exclude such part of the goods as can be proved to have been sold without deception, seeing that the goods carry with them the means of deception, and ultimate or intermediate purchasers may well be deceived, even though the immediate purchaser, who is usually a wholesale or retail trader, may not be. The manufacturers of the spurious goods cannot retain the profits which they have made by putting into the hands of the retailers the means of deceiving the public, whether they have made such use of those means as to produce deception or

(*a*) *Beard* v. *Turner*, 13 L. T. N. S. 746; *Harrison* v. *Taylor*, 11 Jur. N. S. 408; *McLean* v. *Fleming*, 96 U. S. 245; *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298; *Holt* v. *Menendez*, 128 U. S. 182; *Low* v. *Fells*, 35 Fed. Rep. 361.

(*b*) *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601.

(*c*) *Nunn* v. *D'Albuquerque*, 34 Beav. 595.

(*d*) 2 J. & H. 139.

not (*a*). The account will not be given for a period of more than six years before the commencement of the action, and it will not include every species of profit made by the defendant during that period, but only so much as is properly attributable to the use of the plaintiff's trade mark (*b*). The account must extend, at all events in case of fraud, to sales prior to the plaintiff's registration, as well as to sales since then (*c*). If the defendant was at first ignorant that he was using a trade mark, the account may be made to commence from the date when he became aware of that fact (*d*); and where the plaintiff had himself been guilty of misrepresentation, and the defendant's business was carried on upon so much larger a scale than the plaintiff's as to render it impossible to suppose that the use of the plaintiff's mark had alone brought the defendant his customers, the account was only given from the date of filing the bill, and not earlier (*e*).

**Account directed at plaintiff's risk.**

An account of profits is usually directed at the plaintiff's risk (*f*). Where an account had been directed of the sale and profits of a book published in infringement of the plaintiff's rights notwithstanding an affidavit by the defendant that about half of 11,000 copies printed had been sold, and the account showed that 9,000 copies had been sold, but that instead of a profit there had been a small loss, it was held that the affidavit had been shown to be untrustworthy, and that the plaintiff was justified in requiring the account to be taken, and was entitled to the costs thereby occasioned (*g*).

**Election between account and damages.**

The acceptance of an account of profits by the plaintiff operates as a condonation of the infringement; so that a plaintiff must

(*a*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Lever* v. *Goodwin*, 36 Ch. D. 1; *Saxlehner* v. *Apollinaris Co., Ld.*, (1897) 1 Ch. 893. According to the American decisions, the defendant must account for the whole of the profits made by the sales under the wrongful mark (*Benkert* v. *Feder*, 34 Fed. Rep. 534), even though he may have sustained a loss on his business as a whole: *Atlantic Milling Co.* v. *Rowland*, 27 Fed. Rep. 24. In computing profits no deduction can be made for expenses not exclusively attributable to the wrongful venture: *Société Anonyme* v. *Western Distilling Co.*, 46 Fed. Rep. 921. And when the plaintiff elects to take an account of the profits made by the defendant, the profits which he would himself have made are immaterial: *Atlantic Milling Co.* v. *Rowland*, 27 Fed. Rep. 24.

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

(*c*) *Smith* v. *Fair*, 14 Ont. Rep. 729.

(*d*) *Moet* v. *Couston*, 33 Beav. 578; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185. But in America the state of knowledge of the infringer appears to be immaterial, and a defendant may be made to account for an inadvertent infringement: *Oakes* v. *Tonsmierre*, 49 Fed. Rep. 447.

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

(*f*) As an inquiry as to damages may be. See *Tonge* v. *Ward*, 21 L. T. N. S. 480.

(*g*) *Dicks* v. *Jackson*, Chitty, J., March 31st, 1884.

elect between the account and an inquiry as to damages, but cannot insist on both (*a*), though he may at the outset claim both, reserving his election till a later stage (*b*).

## Damages.

Damages. It is in the option of a successful plaintiff in a trade mark action to elect between an account of profits and an inquiry as to damages, although, as before stated, he cannot have both (*c*). Damages being the appropriate remedy at Common Law, while the account of profits was peculiar to Equity, the result, and probably the cause of the great majority of trade mark cases being brought into Equity, has been that an account has been frequently awarded, and not damages. This has been the case notwithstanding that the Courts of Equity have had the power of giving relief in the shape of damages (*d*), since in most cases the account forms the most convenient remedy.

When given. Some of the remarks made in reference to the account apply in respect of damages: thus, the defendant is liable in damages for the user of what he has reason to know, or suppose to be, a forged trade mark, though he may be ignorant of the owner; but not necessarily for user of a mark which he did not at all know to be forged (*e*); while, on the other hand, the plaintiff may be held to be disentitled to damages by reason of his own delay (*f*). Damages may be awarded in respect of infringements prior to the plaintiff's registration, since registration is only a condition precedent to suing (*g*).

Special damage need not be proved. For damages to be recovered it is not necessary that special damage should be proved; it is sufficient to show that the

(*a*) *Neilson* v. *Betts*, L. R. 5 H. L. 1.

(*b*) This is the usual course in England; and see *Leidersdorf* v. *Flint* (2), 50 Wisc. 401.

(*c*) *Neilson* v. *Betts*, L. R. 5 H. L. 1. See *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893; and *Leidersdorf* v. *Flint* (2), 50 Wisc. 401.

(*d*) Thus, inquiries as to damages were given in *Cheavin* v. *Walker*, 5 Ch. D. 850, 861; and *Graveley* v. *Winchester*, Seton, 5th ed. 591.

(*e*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Cartier* v. *Carlile*, 31 Beav. 292; *Moet* v. *Couston*, 33 *ib.* 578; 10 L. T. N. S. 395. Thus, in *Weed* v. *Peterson*, 12 Abb. Pr. N. S. 178, it was held that, though an injunction must be granted with costs, yet, as the defendants had acted perfectly *bond fide*, no damages could be given.

(*f*) *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298; *Holt* v. *Menendez*, 128 U. S. 182.

(*g*) *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 411.

plaintiff's right has been invaded, in which case some damages, even if only nominal, will be given (*a*). And it has been held in Scotland (*b*) and in New Zealand (*c*) that more than nominal damages may be awarded for a fraudulent imitation, even without proof of special damage.

Measure of damages.

The measure of damages which can be recovered when special damage is proved is not yet clearly settled by authority; but in *Leather Cloth Co.* v. *Hirschfeld* (*d*), it was held by Wood, V.-C., that it would not be assumed in the absence of evidence that the amount of goods sold by the defendant under the fraudulent trade mark would have been sold by the plaintiff but for the defendant's unlawful use of the plaintiff's trade mark; for the Court could not assume that the persons who bought what the plaintiff averred were inferior articles, at an inferior price, would necessarily, if they had not done so, have bought the superior articles at the higher prices. Again, in *Magnolia Metal Co.* v. *Atlas Metal Co.* (*e*), notwithstanding that the defendants had sold a large quantity of the spurious goods, Collins, J., refused to award any damages in the absence of evidence that the plaintiffs had been thereby deprived of the sale of any goods, or that the reputation of their goods had suffered, and this view was affirmed by the Court of Appeal. In America it has been said that "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" (*f*); and the usual practice in America appears to be to assess damages at the amount of the profits which the plaintiffs would have made if they had sold the same quantity of the genuine goods as the defendants had sold of the spurious

(*a*) *Blofield* v. *Payne*, 4 B. & Ad. 410. And see *Sykes* v. *Sykes*, 3 B. & Cr. 541; *Morison* v. *Salmon*, 2 Scott, N. R. 449; 2 Man. & G. 385; and cases at p. 162, n. (*b*).

(*b*) *Thomson & Co.* v. *Daily*, Ct. Sess. Cas. 4th Ser. XXIV. 1173.

(*c*) *Littlejohn & Son* v. *Mulligan*, 3 N. Z. L. R. (Sup. Ct.) 446.

(*d*) L. R. 1 Eq. 299. See *Davenport* v. *Rylands*, *ib.* 302; *Alexander & Co.* v. *Henry & Co.*, 12 P. R. 360.

(*e*) 14 P. R. 389. Cf. *Pinto* v. *Trott*, 8 P. R. 173, 179; and *Thomson & Co.* v. *Daily*, Ct. Sess. Cas. 4th Ser. XXIV. 1173.

(*f*) See *per* Crockett, J., in *Graham* v. *Plate*, 40 Cal. 593; 6 Amer. Rep. 639.

ones (*a*), or, at all events, at the amount of the actual profits reaped by the defendants from the infringement (*b*). The observation, however, seems just, that the measure of damages is really the injury done to the plaintiffs, and not the profits made by the defendants (who in *Leather Cloth Co.* v. *Hirschfeld* (*c*) were selling at lower prices than the plaintiffs) (*d*); and in an Indian case (*e*), where it was shown that the price of the plaintiff's goods had been necessarily lowered in consequence of the defendants' fraudulent competition, it was held that the amount of the reduction in price gave the measure of damages. So it was said in *Atlantic Milling Co.* v. *Robinson* (*f*) that the extent to which the defendants' infringement had interfered with the plaintiff's sales was the measure of damages. All the above elements were present in *Alexander & Co.* v. *Henry & Co.* (*g*), in which the plaintiffs recovered over 8,000*l.* by way of damages in respect of their thread having been practically driven out of the Mexican market by repeated fraudulent imitations of their trade marks, the damages being made up of (1) profits which the plaintiffs would have made if they had sold thread of their own equal in quantity to the thread sold under certain spurious tickets, they having previously had a substantial monopoly of the market; (2) damage incurred by enforced reduction of the plaintiffs' prices; (3) damage occasioned by the competition of the defendants under other tickets, which had only been rendered possible by the injury to the plaintiffs' reputation caused by the sale of inferior thread under the fraudulent tickets.

Offer of submission.

Where a defendant offered submission in terms which were rejected by the plaintiff, the latter was allowed an inquiry as to damages at his own risk (*h*).

(*a*) *Hostetter* v. *Vowinkle*, 1 Dill. 329; *Faber* v. *Hovey*, Dig. 481.

(*b*) *Graham* v. *Plate*, 40 Cal. 593; *Peltz* v. *Eichele*, 62 Mo. 171.

(*c*) L. R. 1 Eq. 299.

(*d*) *Vulcan Match Co.* v. *Jebsen & Co.*, 1 Kyshe, 650. See *Addington* v. *Cullinane*, 28 Mo. App. 238.

(*e*) *Manockji Petit Manufacturing Co.* v. *Mahalaxmi Spinning & Weaving Co., Ld.*, Ind. L. R. 10 Bomb. 617.

(*f*) 20 Fed. Rep. 217.

(*g*) 12 P. R. 360.

(*h*) *Tonge* v. *Ward*, 21 L. T. N. S. 480. See *Dicks* v. *Jackson*, Chitty, J., March 31st, 1884; *Thomson & Co.* v. *Daily*, Ct. Sess. Cas. 4th Ser. XXIV. 1173.

## Costs.

### (i.) *In Actions.*

General rule as to costs—follow event.

The same general principles on which costs are given in other cases prevail in those in which a question of trade mark is at issue. Thus, the primary rule is that costs follow the event: that is to say, that where a plaintiff succeeds, he will get his costs (*a*); where he is unsuccessful, he will have to pay costs (*b*). The fact that merely nominal damages have been awarded will not deprive a successful plaintiff of his right to his costs, since a question of his right has been involved (*c*). And where a plaintiff had registered a label containing common words, without a disclaimer, it was held that this was not such a wrongful act as to disentitle him to costs as against the defendants, who had used an identically similar label (*d*).

Relief sometimes granted without costs.

Costs, however, being in the discretion of the Court, the Court will, under some circumstances, grant the injunction, but without costs, as where the plaintiff has persisted in litigation which had become unnecessary (*e*), or where the successful plaintiff has been guilty of delay (*f*). So, again, where forwarding agents, who had been made the medium for importing spuriously-marked cigars, had not participated in the fraud, had offered to give what information they could, and had submitted to act as the Court should direct (*g*).

Relief granted, plaintiff to pay costs.

Under some circumstances the plaintiff may obtain his injunction and yet have to pay the costs of some defendants, as where a dock company was innocently in possession of spuriously-marked goods (*h*). And again, where wine bearing a spurious brand was

(*a*) *Chappell* v. *Davidson*, 2 K. & J. 123; *Farina* v. *Silverlock*, 1 K. & J. 509; 6 De G. M. & G. 214; 4 K. & J. 650; *Collins Co.* v. *Walker*, 7 W. R. 222; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *McAndrew* v. *Bassett*, 4 *ib.* 380.

(*b*) *Woollam* v. *Ratcliff*, 1 H. & M. 259; *Williams* v. *Osborne*, 13 L. T. N. S. 498; *Morgan* v. *McAdam*, 36 L. J. Ch. 228; *Bass* v. *Dawber*, 19 L. T. N. S. 626; *Lucke* v. *Webster*, Jessel, M. R., April 4th, 1879; *Watt* v. *O'Hanlon*, 4 P. R. 1.

(*c*) *Morison* v. *Salmon*, 2 Scott, N. R. 449; 2 Man. & G. 385. But in a similar case the Canadian Court gave no costs: *Bondier* v. *Depatie*, 3 Dorion, 233.

(*d*) *Per* Kekewich, J., in *Newman* v. *Pinto*, 4 P. R. 508.

(*e*) *Millington* v. *Fox*, 3 My. & Cr. 338; *Moet* v. *Couston*, 33 Beav. 578; *Hudson* v. *Bennett*, 12 Jur. N. S. 519.

(*f*) *Millington* v. *Fox*, 3 My. & Cr. 338; *Beard* v. *Turner*, 13 L. T. N. S. 746; *Perks* v. *Hall & Co.*, W. N. 1881, p. 111; *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298.

(*g*) *Upmann* v. *Elkan*, L. R. 7 Ch. 130. See *Moet* v. *Pickering*, 8 Ch. D. 372.

(*h*) *Upmann* v. *Elkan*, L. R. 7 Ch. 130.

in the possession of wharfingers, it was held by the Court of Appeal that they were entitled to their costs of being made defendants to an action for infringement, notwithstanding that they had submitted to act as the Court should direct only upon having their charges and costs paid or provided for (*a*).

Relief refused, no costs.

On the other hand, while the relief claimed by the plaintiff is refused, the defendant may still be left to pay his own costs, as where the plaintiff has lost his remedy by lapse of time (*b*), or improper use of the word "patentee" (*c*), or other similar reasons (*d*), the defendant's fraudulent intention being evident; or, more commonly, where the defendant's conduct, though not so clearly fraudulent as to entitle the plaintiff to an injunction, has yet been so suspicious and uncandid as to call for some punishment (*e*). Thus, where the Vice-Chancellor considered that the defendant had acted fraudulently, but thought himself bound by a decision of the Court of Appeal on the motion to dismiss the bill, he did so without costs (*f*). Where the defendant had filled with his own lime-juice bottles brought to him for the purpose, though they were stamped with the plaintiff's name, and the plaintiff brought an action, making charges which amounted to fraud, but which the Court did not consider to be justified, though the defendant had done that which he was not entitled to do, and the defendant gave an undertaking not to repeat the offence, no order was made, and each party was left to pay his own costs (*g*).

(*a*) *Moet* v. *Pickering*, 8 Ch. D. 372.

(*b*) *Rodgers* v. *Rodgers*, 31 L. T. N. S. 285; *Ripley* v. *Bandey*, 14 P. R. 591.

(*c*) *Nixey* v. *Roffey*, W. N. 1870, p. 227. And where a plaintiff company was held to be disentitled to an injunction by reason of the wrongful use of the word "patent," and the defendant, as having been the company's manager, was in some sense responsible for this, he was deprived of the costs which would otherwise have been given him: *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345.

(*d*) *E.g.*, *Fetridge* v. *Wells*, 13 How. Pr. 385; R. Cox, 180.

(*e*) *Edgington* v. *Edgington*, 11 L. T. N. S. 299; *Bass* v. *Dawber*, 19 *ib.* 626; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Wylam* v. *Clarke*, W. N. 1876, p. 68; *Robineau* v. *Charbonnel*, *ib.* p. 160; *Borthwick* v. *Evening Post*, *Ld.*, 37 Ch. D. 449; *Thorneloe* v. *Hill*, (1894) 1 Ch. 569. And see *Newman* v. *Pinto*, 4 P. R. 508, and *Lever* v. *Bedingfield*, 16 P. R. 3, where defendants who succeeded in the Appeal Court were left to pay their own costs of the action though allowed the costs of the appeal. See *Humphries* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820; also *Tallcott* v. *Moore*, 13 N. Y. Sup. Ct. 106; *Degraves* v. *Whiteman*, 5 V. L. R. Eq. 304; *Hop Bitters Manufacturing Co.* v. *Luke*, 10 V. L. R. (E.) 234.

(*f*) *Wotherspoon* v. *Currie*. See L. R. 5 H. L. 510.

(*g*) *Rose* v. *Loftus*, 47 L. J. Ch. 576. And see *Perks* v. *Hall & Co.*, W. N. 1881, p. 111. So in N. S. W., where the successful party had untruly marked his goods as if the mark were registered: *Harris* v. *Ogg*, 5 N. S. W. Rep. (E.) 114. As to costs where fraud is charged but not made out, see *Baker* v. *Rawson*, 45 Ch. D. 519, 536; and *Hargreave* v. *Freeman*, (1891) 3 Ch. 39.

The costs of interlocutory proceedings are usually made costs in the cause (*a*).

Apportionment of costs.

In some cases a portion only of the relief asked for has been granted, and the costs have either been apportioned in a manner corresponding to the amount of success achieved, or each party has been left to pay his own costs. Thus, where a plaintiff company succeeded on the question of imitation of labels and wrappers, but failed as to trade mark, the plaintiffs were given their costs up to the motion for injunction, each party having to bear his own after that (*b*). In *Day* v. *Neale* (*c*) no costs were given on either side, the plaintiffs having asked for an injunction in respect of several trade marks, in only two of which they had an exclusive right, and having delayed to take proceedings for more than two years, while the defendants were in the wrong as to the two marks. In *Metzler* v. *Wood* (*d*), the plaintiffs, who succeeded on the main question of imitation of the title of their publication, were deprived of half their costs, on the ground of their having made claims as to copyright which failed. Where a plaintiff succeeded in establishing a limited right in a word, and also that the defendant had acted fraudulently, but failed to show a general right in the word, and that certain labels used by the defendant were deceptive, the defendant was ordered by the Irish Court to pay the general costs of the suit, but the plaintiff was ordered to pay and set off against his own costs the costs of all the affidavits of the defendant's witnesses (except that of the defendant himself), since they had been addressed to the part of the case on which the plaintiff failed (*e*). On the other hand, where an action was brought for infringement of trade mark and for passing off, and fraud was proved on the part of the defendant, but infringement of trade mark was not proved, the defendant was ordered to pay the whole of the costs (*f*); but in another similar case the plaintiff was allowed his costs of the action except so far as they had been increased by the claim in respect of the trade mark (*g*). In a Bombay

(*a*) For example, see *Isaacson* v. *Thompson*, 41 L. J. Ch. 101; *Brook* v. *Evans*, 2 L. T. N. S. 740; *Wallis* v. *Wallis*, 4 Dr. 458.

(*b*) *Compagnie Laferme* v. *Hendrickx*, Dig. 512. And see *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; and *Baker* v. *Rawson*, 45 *ib.* 519, 536.

(*c*) Bacon, V.-C., May 24th, 1881.

(*d*) 8 Ch. D. 606.

(*e*) *Wheeler* v. *Johnston*, 3 L. R. Ir. 284.

(*f*) *Rowland* v. *Michell*, 13 P. R. 457; *Hodgson* v. *Kynoch, Ld.*, 15 *ib.* 465.

(*g*) *Lever* v. *Bedingfield*, 15 P. R. 453.

case (*a*), in which six marks were in question, and the defendants succeeded as to all but one, which they had offered to give up within six days after the commencement of the suit, it was held that the defendants must only pay their own costs with regard to that mark, and one-sixth of the plaintiffs' costs up to and including the day on which the offer was made, and that all the remaining costs of both parties must be paid by the plaintiffs. Where a defendant had untruly alleged that he was the first to use a word in dispute, and that the plaintiff had copied from him, no costs were given, though the action was dismissed (*b*).

Costs of unfounded charges, &c.

If a plaintiff makes a charge which he is unable to substantiate, he may obtain an injunction with costs, and yet have to pay all costs occasioned by the making of that charge (*c*). In the same way, if a plaintiff insists upon having an account taken, after the defendant has given full information, the plaintiff will have to pay the costs of that account if it turn out to have been unnecessary (*d*). So if he unsuccessfully persists in his claim for damages after the defendant has submitted to an injunction, he must pay the costs of such claim (*e*).

Scale of costs when defendant submits.

When a defendant in a trade mark action submits to a perpetual injunction with costs, the mere fact of his having submitted constitutes no special ground, under R. S. C., 1883, Order LXV. r. 9, for directing the costs to be taxed on the higher scale, but in such a case the Court will refuse to punish him for submitting at once, and will leave the costs to be taxed on the lower scale (*f*). But there may be cases in which costs will be given on the higher scale—*e.g.*, where the action has been fought out at great length (*g*).

Costs of motion to commit.

A motion to commit for breach of an injunction is not unfrequently made without any expectation of obtaining an order for

This case was, however, reversed on the facts, and judgment was entered for the defendants without costs. 16 P. R. 3.

(*a*) *Wallace & Co.* v. *King & Co.*, Bombay High Ct., April 30th, 1879.

(*b*) *Humphries* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820.

(*c*) *Pierce* v. *Franks*, 15 L. J. Ch. 122; *Standish* v. *Whitwell*, 14 W. R. 512; *Wylam* v. *Clarke*, W. N. 1876, p. 68; *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893; *Pneumatic Rubber Stamp Co.* v. *Lindner*, 15 P. R. 525.

(*d*) *Nunn* v. *D'Albuquerque*, 34 Beav. 595.

(*e*) *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 P. R. 389; *Hipkins* v. *Plant*, 15 *ib.* 294.

(*f*) *Hudson* v. *Osgerby*, 50 L. T. N. S. 323. But see *Grezier* v. *Ziemer*, 89 L. T. (Journal) 117.

(*g*) *Great Tower Street Tea Co.* v. *Smith*, 6 P. R. 165. But see *In re Apollinaris Co.*, (1891) 2 Ch. 186, 236.

actual committal, but the defendant can only be ordered to pay the costs of such a motion if the facts would have warranted a committal (*a*). But where an order for committal was rescinded by the Court of Appeal, no costs were given the defendant, on account of the equivocal conduct of some of his agents (*a*). Where a motion to commit was dismissed on the ground of delay, as well as that the actual terms of the injunction had not been disobeyed, though its spirit had been, Wood, V.-C., while refusing the motion, enlarged the injunction and made the defendant pay the costs (*b*). In a case in which the Supreme Court of New York had fined a defendant for contempt, the Court of Appeals, while considering itself bound by the decision of the Supreme Court as to the fact of the breach, yet thought the decision so doubtful that it gave no costs of the appeal (*c*).

Costs of appeals.

The costs of appeals are usually governed by the same principle as those in the Courts of First Instance, and follow the event. Thus, in *McLean* v. *Fleming* (*d*), in which the U. S. Circuit Court considered the plaintiff to be entitled to an injunction and an account, but the Supreme Court reversed the decision with respect to the account, on the ground of the plaintiff's own laches, it was held that the plaintiff must have his costs in the Court below, but the defendant (appellant) his costs of the appeal. The costs of an unnecessary appeal must be paid by the appellant. Thus, where a respondent appeared at the hearing of an appeal, after having received notice from the appellant that no alteration would be asked in the order in the Court below with respect to his costs, which the appellant had been ordered to pay, that respondent was left to pay the costs of such appearance (*e*). And where, in an action for imitation of the name of the plaintiffs' journal, the plaintiffs brought on an appeal from the decision of the judge directing the motion for an injunction to stand to the hearing, after the defendants had changed the name of their publication, the plaintiffs were ordered to pay the costs of the appeal, notwithstanding that the defendants had refused to submit to an injunction, or to give an undertaking as to their original title (*f*). In *Newman* v. *Pinto* (*g*) the plaintiff, who had succeeded in the Court

(*a*) *E.g.*, *Dence* v. *Brand*, W. N. 1881, p. 31.

(*b*) *Cartier* v. *May*, Dig. 200.

(*c*) *Devlin* v. *Devlin*, 69 N. Y. 212.

(*d*) 96 U. S. 245.

(*e*) *Upmann* v. *Elkan*, L. R. 7 Ch. 130.

(*f*) *Dale* v. *Smith*, W. N. 1882, p. 145.

(*g*) 4 P. R. 508. Cf. *Lever* v. *Bedingfield*, 16 P. R. 3.

of First Instance, was held by the Court of Appeal to be disentitled to relief on the ground of misrepresentations contained in his trade mark; but the defendants, who had used the same trade mark, containing the same misrepresentations, were not allowed the general costs of the action, but only the costs of the appeal.

Costs in case of compromise.

One of the main objects which the Court has in view in the exercise of its jurisdiction is "to repress unnecessary litigation, and to keep litigation within those bounds which are essential to enable the parties to vindicate and establish their rights" (*a*). Although, therefore, a plaintiff whose rights have been attacked is not bound to rely on the assurance of his assailant that the act will not be repeated, but is entitled to the protection of an injunction (*b*), yet if he, immediately after the suit is commenced, is offered and may obtain all he seeks, and still thinks proper to go on with the suit, the Court may give him his decree, but will not give him the costs of the suit so unnecessarily prosecuted (*c*). The defendant is, however, the aggressor, since the litigation has been first occasioned by his unwarrantable interference with the plaintiff's rights in respect of his trade mark, and this is equally the case whether the aggression was made with knowledge or in ignorance of those rights of the plaintiff. The defendant must therefore offer all the plaintiff has a right to obtain, and the offer must include all the costs which have been occasioned by his improper conduct (*d*). Thus, where in a patent case an injunction was granted, the defendants having previously promised to commit no further infringement and to pay the costs of preparing the bill, Knight Bruce, V.-C., gave the plaintiffs their costs at the hearing, since the defendants ought to have offered, on the injunc-

(*a*) *Per* Lord Cottenham, C., in *Millington* v. *Fox*, 3 My. & Cr. 338. See the order made in *Pinto* v. *Badman*, 8 P. R. 181, 192.

(*b*) *Geary* v. *Norton*, 1 De G. & S. 9; *Routh* v. *Webster*, 10 Beav. 561; *Tonge* v. *Ward*, 21 L. T. N. S. 480; *Coats* v. *Holbrook*, 2 Sandf. Ch. 586; R. Cox, 20; *Radway* v. *Coleman*, 15 Grant, Up. Can. Ch. 50; *Guardian Fire and Life Assurance Co.* v. *Guardian and General Insurance Co., Ld.*, 50 L. J. Ch. 252.

(*c*) *Per* Wigram, V.-C., in *Colburn* v. *Simms*, 2 Hare, 560, commenting on *Millington* v. *Fox*. And see *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Hudson* v. *Bennett*, 12 Jur. N. S. 519; *Upmann* v. *Elkan*, L. R. 12 Eq. 140; 7 Ch. 130; *Williams* v. *Osborne*, 13 L. T. N. S. 498; *Slazenger* v. *Pigott*, 12 P. R. 439.

(*d*) *Fradella* v. *Weller*, 2 R. & M. 247; *Kelly* v. *Hooper*, 1 Y. & C. Ch. 197; *Geary* v. *Norton*, 1 De G. & S. 9; *Burgess* v. *Hills*, 26 Beav. 244; *Burgess* v. *Hately*, *ib.* 249; *Wallis* v. *Wallis*, 4 Dr. 458; *Collins' Co.* v. *Walker*, 7 W. R. 222; *Moet* v. *Couston*, 33 Beav. 578; *Nunn* v. *D'Albuquerque*, 34 *ib.* 595; *Hipkins* v. *Plant*, 15 P. R. 294; *Coats* v. *Holbrook*, 2 Sandf. 586; R. Cox, 20; *Weed* v. *Peterson*, 12 Abb. Pr. N. S. 178; *Hutchinson* v. *Blumberg*, 51 Fed. Rep. 829.

tion being obtained, to pay all costs up to that time (*a*). The same result followed where a defendant, who had offered to pay the taxed costs as between party and party, but refused to pay them as between solicitor and client, put in his answer, and then, the plaintiff offering to accept the costs as between party and party, declined to pay the costs of the answer (*b*). But if an innocent infringer withdraws all marked articles from sale, and offers an undertaking immediately upon being served with the writ, and the plaintiff afterwards moves for an injunction, the motion may be refused with all costs, less the costs of the writ, which will have been incurred before the defendant's offer (*c*). On the other hand, where the infringement is not innocent the plaintiff is not bound to be satisfied with an undertaking (*d*); but where the defendant consents to an order in the terms of the writ to be obtained in chambers, the plaintiff will not be entitled to any additional costs incurred by his bringing the matter into Court (*e*).

Notice to infringer.

It has been thought that a person whose trade mark has been infringed should give notice to the infringer of his intention to take proceedings, so as to give him an opportunity of explaining his conduct or submitting (*f*); and if he does so, and a fair offer is made, he should not hasten to incur needless expense (*g*), or he may be punished in respect of costs. Lord Romilly, M. R., was, however, of opinion (*h*) that, the defendant having been the aggressor, the plaintiff would be justified in filing his bill without making any application to the defendant; and in *Upmann* v. *Elkan* (*i*) he indicated his adherence to the same view, saying that he did not mean to lay down that the person whose trade mark had been imitated might not file a bill without making any inquiry at all. In the later case of *Upmann* v. *Forester* (*k*), Chitty, J.,

(*a*) *Geary* v. *Norton*, 1 De G. & S. 9. See *Lochgelly Co., Ld.* v. *Lumphinnans Iron Co.*, Ct. Sess. Cas. 4th Ser. VI. 482.

(*b*) *Kelly* v. *Hooper*, 1 Y. & C. Ch. 197.

(*c*) *Caruncho* v. *Highmoor*, 27 Sol. J. 199.

(*d*) *Smith* v. *Carron Co.*, 13 P. R. 108; *Slazenger* v. *Pigott*, 12 *ib.* 439.

(*e*) *Slazenger* v. *Pigott*, 12 P. R. 439.

(*f*) *Chappell* v. *Davidson*, 2 K. & J. 123; *Wallis* v. *Wallis*, 4 Dr. 468; *Twentsche Stoom Bleekery Goor* v. *Ellinger & Co.*, 26 W. R. 70.

(*g*) *Williams* v. *Osborne*, 13 L. T. N. S. 498. And see the opinion of Jessel, M. R., cited in *Upmann* v. *Forester*, 24 Ch. D. 231; and *In re Kuhn & Co.*, 53 L. J. Ch. 238.

(*h*) In *Burgess* v. *Hately*, 26 Beav. 249. In *Field* v. *Lewis*, Dig. 280, Wood, V.-C., granted an injunction with costs, though no notice had been given before bill filed. And see *Coats* v. *Holbrook*, 2 Sandf. Ch. 586; R. Cox, 20; and *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601.

(*i*) L. R. 12 Eq. 140; L. R. 7 Ch. 130.

(*k*) 24 Ch. D. 231.

decided in accordance with this opinion, giving costs to a plaintiff who had moved for an injunction without giving any previous notice, though the defendant had acted perfectly innocently, and would have submitted if notice had been given him. And he stated that this was also the opinion of Jessel, M. R. (*a*). The reason assigned by Chitty, J., for this decision appears to be that, if the plaintiff were to give notice to the defendant, and the defendant were to submit, the plaintiff would lose his costs; but it might be thought that the plaintiff would be sufficiently secured in this respect by the rule above stated, that an offer of submission must, to be effectual, include an offer of all costs occasioned to the plaintiff, and that no injustice would be done to the plaintiff, but a very possible injustice to an innocent defendant might be minimised, by requiring notice to be given. And in *Upmann* v. *Currey* (*b*), a case very similar to *Upmann* v. *Forester* (*c*), the innocent defendant offered in Court to empty and deliver up or destroy the boxes in which the cigars had been sold to him, and which were labelled (but without his knowledge) in imitation of the plaintiff's boxes, and Smith, J., refused an injunction, and gave no costs on either side. So in *American Tobacco Co.* v. *Guest* (*d*), where an action was brought without any previous notice against a retail dealer who had innocently sold a small quantity of infringing goods, and the defendant submitted to an injunction, Stirling, J., made no order as to costs, and expressed his opinion that proceedings ought in the first instance to be taken against those who placed the spurious goods upon the market. In an Irish case (*e*) where the infringement was not innocent, but the defendants asked for particulars of the acts complained of, and offered to insert any reasonable notices in the newspapers to show that they had no connection with the plaintiffs' firm and to pay the costs, and the plaintiffs took no notice of the offer, it was held by the Master of the Rolls that the plaintiffs, by declining to consider the defendants' suggestions, had lost their right to relief, the defendants having in the meantime inserted advertisements in the

(*a*) See *per* Jessel, M. R., in *In re Kuhn & Co.*, 53 L. J. Ch. 238; and *Barrett* v. *Gomm*, 74 L. T. (Journal) 388. Also *Fennessy* v. *Day*, 55 L. T. N. S. 161. So *Siegert* v. *Lawrence*, 11 V. L. R. 47, in Victoria.

(*b*) 29 Sol. J. 735.

(*c*) 24 Ch. D. 231.

(*d*) (1892) 1 Ch. 630.

(*e*) *Valentine* v. *Valentine*, 31 L. R. Ir. 488.

newspaper disclaiming all connection with the plaintiffs, and the action was dismissed without costs.

A plea of infancy will not excuse an infant infringer from paying the costs which his conduct has occasioned (*a*). And so with a married woman having separate estate (*b*).

Infancy does not excuse from costs.

A person who has induced another person to manufacture for him goods marked with the trade mark of a third person is liable to repay to the person he has made the instrument of his fraud the costs of legal proceedings brought about by the infringement, including any sum which that person may have reasonably paid to compromise the matter (*c*).

Costs occasioned to a third party by defendant's fraud.

### (ii.) *In Registration Cases.*

When an application for the registration of a trade mark is opposed and brought before the Court, the costs are usually ordered to be paid by the unsuccessful party, as having been occasioned by his wrongful claim or opposition. Thus, where a claim was made to register and use a trade mark, which would have been an infringement of an existing mark, the persons who wrongly claimed the mark were ordered to pay the costs of cross-adjourned summonses, as well as of an action for an injunction which had been rendered necessary by the claim (*d*). And in *In re Rosing* (*e*), the Cutlers' Co. of Sheffield, who had opposed an application in what they believed to be the interest of the public (and whose opposition succeeded in the Court of Appeal), were ordered by V.-C. Bacon to pay the costs of their opposition, which failed before him.

Costs in registration cases.

If, on the other hand, each party is partially successful, no costs will be given on either side (*f*). And where application was made for the registration of a label containing descriptive words, and the applicants disclaimed some of the descriptive words, but not all, and conducted their case on the footing that registration would give them an exclusive right to such words, the Court of Appeal held that though the registration must be granted, and

No costs.

(*a*) *Cory* v. *Gertcken*, 2 Madd. 49; *Chubb* v. *Griffiths*, 35 Beav. 127; *Woolf* v. *Woolf*, 43 Sol. J. 127.

(*b*) *Nicholls* v. *Kimpton*, 3 Times L. R. 674.

(*c*) *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537.

(*d*) *Davis* v. *Tylor*, Jessel, M. R., April 24th, 1879. See *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *In re Grossmith*, 6 P. R. 180; *In re Burgoyne*, *ib.* 227.

(*e*) 54 L. J. Ch. 975.

(*f*) *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Rosing*, 54 L. J. Ch. 975; *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398.

would not have the effect of giving any such right, the litigation had nevertheless been caused by the applicants, and no costs could be given them (*a*). And in *In re Dunn* (*b*), in which the Court of Appeal reversed the refusal of the Court below to allow registration, they only gave costs of the appeal, and none of the hearing below.

Costs paid by successful applicant.

Where an applicant took advantage of the precise wording of the Act of 1875 to obtain registration as a part of his trade mark of words to the exclusive use of which he was not entitled, and the application was unsuccessfully opposed, Jessel, M. R., held that, notwithstanding the success of the applicant, he must still pay the costs of the application, as he was taking advantage of the Act to do that which the Act did not intend him to do (*c*).

Costs of comptroller.

Where the comptroller (formerly the registrar) is served with notice of an application to the Court, he is entitled to appear on the hearing of the application, and to receive his costs of so doing, since it is proper that he should know what order is made (*d*).

When he opposes.

Where the comptroller opposes an application, and his opposition fails, he will not usually be required to pay the costs of the successful applicant (*e*); and the rule has in fact been established that the comptroller will generally receive his costs, whether successful or unsuccessful (*f*), but where the case is a test case, each party may be left to pay his own costs (*f*). Formerly, it seems that costs might be given against him if he opposed in a case in which the Court pronounced the applicant's mark, not only to be distinct from the mark which the comptroller supposed it to resemble, but to be so distinct that the comptroller was acting wrongly in objecting (*g*). And in one case (*h*) in which the comptroller's objection succeeded no costs were given him, because he had not merely submitted the claim to the Court, but had actively disputed it and filed evidence. But no reliance can now be placed on these decisions. If the comptroller refuses to register on the ground of similarity to an earlier mark, and upon an appeal by the applicant to the Court, the proprietor of the earlier mark appears and opposes the applica-

(*a*) *In re Hudson*, 32 Ch. D. 311. And see *In re Swift Specific Co.*, 6 P. R. 352.

(*b*) 41 Ch. D. 444.

(*c*) *In re Maignen*, 28 W. R. 759.

(*d*) This has been repeatedly so laid down: *e.g.*, *In re Orr-Ewing* (2), 28 W. R. 412.

(*e*) *In re Rotherham*, 14 Ch. D. 585.

(*f*) *In re Van Duzer*, 34 Ch. D. 623; *In re Leaf, Sons & Co.*, 34 Ch. D. 632; *In re Farbenfabriken Vormals Fried. Bayer & Co.*, (1894) 1 Ch. 645.

(*g*) *In re Patent Plumbago Crucible Co.*, Jessel, M. R., August 1st, 1879.

(*h*) *In re Jones Bros.*, Hall, V.-C., July 10th, 1880.

tion, it seems that costs may be given against him if his opposition is unsuccessful (*a*).

Extent of costs.

Since, by the terms of the old Rule 16 (*b*), an opposed application did not stand for the determination of the Court until the comptroller informed the applicant that the opponent had given security, no costs incurred before that point in the proceedings, but only those incurred after it, could formerly be given by the Court or be included in an order to pay costs (*c*); and it has been held that the Court cannot even now give a successful opponent the costs of the proceedings in the Registry Office, under either § 69 or § 90 of the Patents Act, 1883 (*d*). In *In re Apollinaris Co.* (*e*), the Court of Appeal refused to give costs on the higher scale, though the case was one of unusual complexity and difficulty.

Costs of application to remove.

If a person registers as his property a trade mark to which he is not entitled, he will, as a rule, have to pay the costs of the necessary application to remove it from the register (*f*), though there may be exceptional cases in which this rule will not be followed: as if the mark was originally his property, but has become common through the common piracy of the trade, and they have delayed to apply for removal for some time after his registration, and have then done so without notice to him, he being a foreigner (*g*); or if the mark is removed from the register on the application of a person who has copied it, and who has only applied for rectification under stress of an action for infringement (*h*). Again, where a mark was removed from the register by the Court of Appeal on a ground which had not been raised in the Court below, and the applicant had acted in a fraudulent manner, no costs were given in either Court (*i*). So, also, a

(*a*) *In re Simpson*, L. J. N. of C. 1890, p. 143.

(*b*) Since repeated in § 69 of the Patents Act, 1883, as amended.

(*c*) *In re Brandreth*, 9 Ch. D. 618.

(*d*) *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278.

(*e*) (1891) 2 Ch. 186, 236.

(*f*) *In re Hyde & Co.*, 7 Ch. D. 724; *In re Palmer* (3), 24 *ib.* 504; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274; *In re Vignier*, 6 P. R. 490; *In re Edge*, 8 *ib.* 207. Where the registered proprietor had given up business, and the benefit of his trade mark was claimed by his mortgagees, and an order was made in the absence both of the registered proprietor and of the mortgagees for removal of the mark and payment of costs by the mortgagees, the registered proprietor was afterwards added at the instance of the mortgagees as one of the parties to pay costs: *In re Davis*, 14 P. R. 903.

(*g*) *In re Kuhn & Co.*, 53 L. J. Ch. 238.

(*h*) *In re Perry Davis & Son*, 5 P. R. 333; *Humphries* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820. See *In re Gianaclis*, 6 P. R. 467; and *Richards* v. *Butcher* (2), 8 *ib.* 37, 49.

(*i*) *Thompson* v. *Montgomery*, 41 Ch. D. 35. And see *In re Bradley*, 9 P. R. 205.

successful applicant has been deprived of costs on the ground of delay (*a*), and on the ground of the unsatisfactory state of the evidence (*b*). Where an application to remove a trade mark from the register was refused in the Court of First Instance (though subsequently granted on appeal) on the ground that the party applying was not aggrieved at the time of the hearing, though he had been so at the time when the application was made, and until very shortly before the hearing, when a concession was made by the registered proprietor, Kekewich, J., while declining to remove the mark from the register, gave the applicant the costs up to the hearing (*c*). As a rule, a person who fails in an application to rectify will have to pay the costs of the application (*d*). It seems doubtful whether a respondent to an application to rectify, who is served with a notice of discontinuance, can treat such notice as entitling him to get his costs taxed, and therefore the notice should be accompanied by a statement that he shall have his costs (*e*).

Security for costs.

Where a firm of shipowners had been restrained, as carriers, from parting with cases of mineral waters containing bottles alleged to bear infringements of the plaintiffs' labels, and an American resident claimed to be the owner of the goods, and applied for leave to re-ship them to Hamburg, it was held that he must give security for the costs of his application (*f*). And where an application for the registration of a trade mark was made by a foreign resident and opposed, it was held that he must give security for costs, and that, unless he did so within seven days, his application must be refused without further order (*g*). A foreign company will not be required to give security for the costs of proceedings in England with reference to the registration of trade marks, or of an appeal, if it has substantial assets in England available to answer the costs (*h*).

Costs of opposition leading to abandonment of application.

When an application for registration is abandoned after notice of opposition, the comptroller has power to award costs to the opponent (*i*).

(*a*) *In re Talbot*, 11 P. R. 77; 63 L. J. Ch. 264.

(*b*) *In re European Blair Camera Co.*, 13 P. R. 603. And see *In re Thompson*, *ib.* 35.

(*c*) *In re Apollinaris Co.*, (1891) 2 Ch. 156, 199. See 63 L. T. N. S. 162, 168.

(*d*) *In re Atkins Filter and Engineering Co., Ld.*, 3 P. R. 164.

(*e*) *In re Dyson*, 65 L. T. N. S. 488.

(*f*) *Apollinaris Co.* v. *Wilson*, 31 Ch. D. 632.

(*g*) *In re Hurter*, W. N. 1887, p. 71. But a registered proprietor residing abroad who desires to oppose a motion for rectification will not as a general rule be required to give security for costs: *In re La Société Anonyme des Verreries de l'Etoile* (1), 10 P. R. 290; cf. *In re La Compagnie Générale d'Eaux Minérales, &c.*, (1891) 3 Ch. 451.

(*h*) *In re Apollinaris Co.*, (1891) 1 Ch. 1.

(*i*) Patents Act, 1883, as amended by the Act of 1888, § 69 (5).

# CHAPTER VIII.

## CASES ANALOGOUS TO THOSE OF TRADE MARK.

Cases not strictly trade mark cases.

In addition to the cases in which there has been an infringement of trade mark properly so called, a variety of cases have been decided in which the Court has restrained the practice of fraud by one person at the expense of another, the means adopted to perpetrate the fraud resembling to some extent the infringement of a trade mark, but yet being distinguishable therefrom.

Cases of true trade mark.

A trade mark is a technical matter, and for there to be an infringement of trade mark there must be a valid trade mark in existence—that is to say, there must not only be such a device in existence as is capable of forming a trade mark, but it must be actually attached to vendible articles in the market (*a*), or must (at least, if first used since the Trade Marks Act of 1875) be properly registered under the Patents Act, 1883 (*b*).

Cases not of true trade mark.

Where, however, there has been a representation that an article made by A. is made by B.; by means of which one person has secured custom intended for another, so that both the purchaser and the genuine trader have been defrauded, there the Court will interfere and protect the right of both parties to trade freely without fraudulent deceptions, although the fraud has taken another form than that of imitating a trade mark.

The general principle is, as stated by Turner, L. J., in *Burgess* v. *Burgess* (*c*), that "no man can have any right to represent his goods as the goods of another person." "The most obvious way," said Lord Halsbury, C. (*d*), "in which a man would be infringing the rule laid down by Turner, L. J., is if he were to say in terms,

(*a*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307. See also *In re Leonard & Ellis*, 26 Ch. D. 288.

(*b*) See the Patents Act, 1883, § 77, as amended by the Act of 1888. Also *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Batt & Co.*, (1898) 2 Ch. 432.

(*c*) 3 De G. M. & G. 896.

(*d*) *Birmingham Vinegar Brewery Co.* v. *Powell*, (1897) A. C. 710. And see *Reddaway* v. *Banham*, (1896) A. C. 199, 204.

'these are the goods manufactured by' a rival tradesman; and it seems to be assumed that unless he says something equivalent to that, no action will lie. It appears to me that that is an entire delusion. By the course of trade, by the existence and technology of trade, and by the mode in which things are sold, a man may utter that same proposition, but in different words and without using the name of the rival tradesman at all. A familiar example, of course, is when, without using any name, by the identity of the form of the bottle, or the form of the label, or the nature of the thing sold in the package, he is making the statement, not in the express words, but in one of those different forms in which the statement can be made by something that he knows will be so understood by the public" (*a*).

Trade name.

An important class of cases of this description consists of cases in which there has been a wrongful assumption by one person or firm of the trade or firm name under which a reputation has been gained by another person or firm, and which has, therefore, become a very important part of the goodwill of the business of such person or firm (*b*), although when used as a name, and not as a mark on vendible goods, it is not used as a trade mark. The imitation of such a name falsely represents not merely a certain class of goods, but the entire business, to be that of one not the true proprietor.

No exclusive right in name apart from business.

"In this country," says Lord Chelmsford (*c*), "we do not recognize 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 connection 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 injunotion." But a man who has never carried on business under a particular name cannot, even though he

(*a*) And see *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Merriam* v. *Holloway Publishing Co.*, 43 Fed. Rep. 450; *Putnam Nail Co.* v. *Bennett*, *ib.* 800; and other cases. See also *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893, where this principle was applied to a case in which the reputation acquired for the plaintiff's goods was due to the exertions of the defendant.

(*b*) *Per* Wood, V.-C., in *Churton* v. *Douglas*, Johns. 174.

(*c*) *Du Boulay* v. *Du Boulay*, L. R. 2 P. C 441

has some kind of right to use that name, interfere with its being used by another. Thus, where the plaintiff was the mortgagee of the goodwill of a business, including the right to use the name under which the business was carried on, but had never exercised his right so to do (*a*).

Name by which goods identified.

There is another kind of trade name besides the trade name which is synonymous with firm name—viz., the trade name which is applied, not to the firm by whom the goods are manufactured and sold, but to the goods themselves; and it was with immediate reference to a trade name of this description (*b*), though the principles laid down by him are equally applicable to both classes of trade names, that Lord Blackburn (*c*), after referring to frauds committed by the infringement of trade marks, went on to say: "There is another way in which goods not the plaintiff's may be sold as and for the plaintiff's. A name may be so appropriated by user as to come to mean the goods of the plaintiff, though it is not, and never was, impressed on the goods or on the packages in which they are contained, so as to be a trade mark, properly so called, or within the recent statutes. Where it is established that such a trade name bears that meaning, I think the use of that name, or one so nearly resembling it as to be likely to deceive, as applicable to goods not the plaintiff's, may be the means of passing off those goods as and for the plaintiff's, just as much as the use of a trade mark; and I think the law (so far as not altered by legislation) is the same. And I think it settled by a series of cases that both trade marks and trade names are in a certain sense property, and that the right to use them passes with the goodwill of the business to the successors of the firm which originally established them, even though the name of that firm be changed so that they are no longer strictly correct."

Property in trade name questioned.

It cannot be said to be generally admitted that a right of property can be acquired in a trade name. The present Vice-Chancellor of Ireland said (*d*), "it has been repeatedly held that

(*a*) *Beazley* v. *Soares*, 22 Ch. D. 660.

(*b*) "Singer" sewing machines.

(*c*) In *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15. And see *Reddaway* v. *Banham*, (1896) A. C. 199; *Grezier* v. *Autran*, 13 P. R. 1; *Rockingham Rail. Co.* v. *Allen*, 12 Times L. R. 345; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710; *Coventry Machinists' Co.* v. *Helsby*, 13 Times L. R. 92; *ib.* 161; *Edge & Sons, Ld.* v. *Gallon*, 15 P. R. 689; *Neva Stearine Co.* v. *Mowling*, 9 V. L. R. (E.) 98; *Noera* v. *Williams' Manufacturing Co.*, 168 Mass. 110; *Cady* v. *Schultz*, 19 R. I. 193; 61 Am. St. Rep. 763.

(*d*) *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236. And see *Reddaway* v. *Banham*, (1896) A. C. 199, 209, 210, *per* Lord Herschell.

there is no property in the name of a firm, or of an individual, or of a place of business; and that the only right of an individual or firm to the sole use of a trade name, as distinguished from a trade mark, is this, that when a name has become identified, by adoption and user, with a particular trade or manufacture or business, the person who has so used or adopted it can obtain the aid of this Court to restrain the use of it by others in such a way as to lead customers or the public to think that the trade or business of the person so using it is his trade or business." And he went on to say that in a registered trade mark there is a larger right. The distinction, however, does not appear to be of much practical importance, as it is now admitted on all hands that if a trade name is so imitated as to render deception probable, relief will be granted, and the test of infringement of a trade mark, in which the right of property is undoubted, is the production of such a probability of deception (*a*).

Unregistered trade name protected.

The non-registration of trade names of the kind primarily referred to by Lord Blackburn is no bar to an action for the wrongful imitation of them (*b*); and where a trade mark consisting of the words "Stone Ale" alone had been expunged from the register as not being registrable, an injunction to restrain the use of those words was nevertheless granted (*c*), and the same thing happened with respect to the words "Yorkshire Relish" (*d*).

*Reddaway* v. *Banham.*

The recent case of *Reddaway* v. *Banham* (*e*), has established (*f*) that a name which in its primary sense is a correct description of

(*a*) *Per* Lord Westbury, in *Hall* v. *Barrows*, 4 De G. J. & S. 150. And see *Curtiss* v. *Messler*, 13 A. L. T. 127; *Crawford* v. *Bernard*, 11 P. R. 580; *Cady* v. *Schultz*, 19 R. I. 193; 61 Am. St. Rep. 763.

(*b*) *In re Sanitas Co., Ld.*, 4 P. R. 533; *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639; *Eno* v. *Dunn*, 10 P. R. 261; *Huntley & Palmer* v. *Reading Biscuit Co.*, *ib.* 277; *Reddaway* v. *Banham*, (1896) A. C. 199; *Rockingham Rail. Co.* v. *Allen*, 12 Times L. R. 345; *Daniel* v. *Whitehouse*, (1898) 1 Ch. 685; *Bewlay & Co.* v. *Hughes*, 15 P. R. 290.

(*c*) *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217; *Thompson* v. *Bent's Brewery Co.*, 8 P. R. 479; *In re Thompson*, 13 *ib.* 35. And see *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 *ib.* 389; and *In re Magnolia Metal Co.*, (1897) 2 Ch. 371; *Godillot* v. *American Grocery Co.*, 71 Fed. Rep. 873; and *Sparks* v. *Harper*, 3 Queens. L. J. 158, 201. See also *Bayer* v. *Baird*, 15 P. R. 615, where a disclaimer of the exclusive right to certain initials as part of a trade mark was held in Scotland to be no bar to an action to restrain a rival trader from using those initials in such a way as to pass off his goods as the goods of the plaintiff. But see *Rosenthal* v. *Reynolds*, (1892) 2 Ch. 301; and compare *Packham & Co.* v. *Sturgess & Co.*, 15 P. R. 669.

(*d*) In *In re Powell*, (1893) 2 Ch. 388; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710.

(*e*) (1896) A. C. 199.

(*f*) This is quite in accordance with the cases relating to geographical words, *e.g.*, "Glenfield Starch" (*Wotherspoon* v. *Currie*, L. R. 5 H. L. 508); "Stone Ale" (*Thompson* v. *Montgomery*, (1891) A. C. 217).

the goods to which it is applied, may acquire in the trade a technical signification identifying it with the goods of a particular manufacturer, so as to be entitled to protection upon the principles above stated. In that case the plaintiff had for many years manufactured a belting from yarn consisting mainly of camel's hair and sold it under the name of "camel hair belting." The defendant, who was formerly in the employment of the plaintiff, afterwards manufactured a similar belting on his own account, and sold it under the same name, and the correspondence showed that he did this *malâ fide*. The jury found that the phrase "camel hair belting" meant camel hair belting made by the plaintiff as distinguished from belting made by other manufacturers, and did not mean belting of a particular kind without reference to the maker, and that the defendant so described his belting as to be likely to mislead purchasers into buying his belting for the plaintiff's. Upon these findings, Collins, J., granted an injunction. This judgment was reversed by the Court of Appeal on the ground that a manufacturer could not be restrained from calling his goods by a name which correctly described them, but when the case came before the House of Lords the original judgment was restored. Lord Halsbury, C., after referring to the principle of law laid down by Turner, L. J., in *Burgess* v. *Burgess* (*a*), said: "How far the use of particular words, signs, or pictures, does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence, and the more simple the phraseology, the more like it is to be a mere description of the article sold, the greater becomes the difficulty of proof (*b*); but if the proof establishes the fact the legal consequences appear to follow." Lord Herschell dealing with the same point said: "The name of a person or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer, would deceive a purchaser into the belief that he was getting the goods of A., when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name,

(*a*) 3 De G. M. & G. 896. See *ante*, p. 247.

(*b*) See *Cellular Clothing Co.* v. *Riley*, 15 P. R. 581, affirmed by the House of Lords, Times, April 28th, 1899.

word, or device which he had adopted to distinguish his goods would not entitle him to any relief (*a*). He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this, I think he would, on well established principles, be entitled to an injunction. In my opinion, the doctrine on which the judgment of the Court of Appeal was based, that where a manufacturer has used as his trade mark a descriptive word, he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are getting the goods of the manufacturer who has theretofore employed it as his trade mark, is not supported by authority, and cannot be defended on principle." Lord Herschell then dealt with the view taken by the Court of Appeal, that the defendants could not be liable to an action because in using the words "camel hair" in connection with their belting they were simply telling the truth. As to that he said: "I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it, and be known and intended to understand it in its secondary sense, it will none the less be a falsehood that in its primary sense it may be true." But it seems that where a name primarily descriptive is accepted by the majority of the trade as a trade name for the goods of a particular manufacturer, but is known to a respectable minority solely in its primary sense, it may be considered no presumption will be raised against a trader from the mere use of the name as descriptive of the goods which he offers for sale (*b*).

Fraud not necessary to be proved.

It was formerly sometimes supposed, and was held by Sir G. Jessel, M. R., and the Court of Appeal, in *Singer Manufacturing Co.* v. *Wilson* (*c*), that for an action to restrain the use of a trade name to be successful fraud must be proved, on the ground that, when a trade mark was once affixed to the goods, it passed with the goods from hand to hand, thus silently repeating to each successive purchaser the original misrepresentation of the original

(*a*) See *Parsons* v. *Gillespie*, (1898) A. C. 239; *Cellular Clothing Co.* v. *Riley*, 15 P. R. 581; affirmed by the House of Lords, Times, April 28th, 1899; *Winser & Co., Ld.* v. *Armstrong & Co.*, 16 P. R. 167; *A. W. Gamage, Ld.* v. *H. E. Randall, Ld.*, *ib.* 185.

(*b*) *Cellular Clothing Co.* v. *Riley*, 15 P. R. 581; affirmed by the House of Lords, Times, April 28th, 1899.

(*c*) 2 Ch. D. 434.

infringer, while the improper use of a name not affixed to the goods was not the necessary consequence of being in possession of marked goods, but was the individual act of each person who used it in respect of the goods; so that there might be held to be an infringement of a trade mark when, in analogous circumstances, there would be no infringement of a trade name. And when the case of *Singer Manufacturing Co.* v. *Wilson* was remitted by the House of Lords to the Court of First Instance (*a*), on the ground of insufficiency of evidence, some of the law peers seem to have thought that different principles of law might possibly be applicable to trade marks and trade names. But Lord Cairns, C. (*b*), said: "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 wi 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." And in *Singer Manufacturing Co.* v. *Loog* (*c*), Lord Blackburn took the view that the law of trade marks and trade names when not affected by legislation was the same.

False representation sufficient.

Whether there is or is not property in a trade name, as Lord Blackburn suggested (*d*), it is a fraud on the part of one person to attract to himself the custom intended for another by a false representation, direct or indirect, that the business carried on by himself is identical with that of the other person by whose ability and exertions the name has acquired the reputation it possesses (*e*). The question is not whether the defendant's business is represented as being similar to the plaintiff's, but whether it is represented as being that very identical business (*f*). If such a false representa-

(*a*) 3 App. Cas. 376.

(*b*) *Ib.* 389. And see *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236; 7 *ib.* 31; and *Reddaway* v. *Bentham Spinning Co.*, (1892) 2 Q. B. 639; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710.

(*c*) 8 App. Cas. 15. See *Bowman* v. *Floyd*, 85 Mass. 76; *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154; *Cady* v. *Schultz*, 19 R. I. 193; 61 Am. St. Rep. 763.

(*d*) And see *per* the Court of Session in *Singer Manufacturing Co.* v. *Kimball & Morton*, Ct. of Sess. Cas. 3rd Ser. XI. 267; also *Boulnois* v. *Peake*, 13 Ch. D. 513.

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

(*f*) *Cruttwell* v. *Lye*, 17 Ves. 335;

tion has been made, whatever may have been the motive of the persons making it, when proceedings are taken in consequence of it, "all the Court requires is to be satisfied that the names are so similar as to be calculated to produce confusion between the two—so calculated to do it that, when it is drawn to the attention of those adopting the name complained of that that would be the result, it is not honest for them to persevere in their intention, though originally the intention might not have been otherwise than honest" (*a*).

Act originally innocent may become fraudulent.

"The question is this," said Cotton, L. J., in the Court of Appeal (*b*),—"whether the defendant has represented that the goods manufactured by him were manufactured by the plaintiffs, or whether he has done anything calculated so to represent. I quite agree that it is unnecessary that a fraudulent intention in issuing the circulars complained of should be established. If the natural consequence of those things, even in circumstances not known to him, is that they will represent the goods to be those of another person, it is wrongful, and, as this Court says, a fraud in him, to continue the user after those circumstances are brought to his knowledge. We must consider whether he has represented, or done that which is reasonably calculated to give that misrepresentation." In the same spirit, Wood, V.-C., had laid down long previously (*c*) that if the plaintiffs had represented to the defendants that the course which the latter had been taking was calculated to deceive the public, and, "after such representation, the defendants persisted in continuing the use of the name in the same manner, then, on the plaintiffs' bringing the case before the Court, the Court would be justified in saying that that which was not fraudulent at first became so by the defendants' persisting in

*Churton* v. *Douglas*, Johns. 174; *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512; *Hirsch* v. *Hirsch & Co.*, 80 L. T. (Journal) 283; *Magnolia Metal Co.* v. *Tandem Smelting Co.*, 15 P. R. 701. See *Manchester Brewery Co.* v. *North Cheshire & Manchester Brewery Co.*, (1898) 1 Ch. 539, where an injunction was granted restraining the defendant company from using a name which suggested that the plaintiff company had been amalgamated with them.

(*a*) *Per* James, L. J., in *Hendriks* v. *Montagu*, 17 Ch. D. 638. And see *Manchester Brewery Co.* v. *North Cheshire & Manchester Brewery Co.*, (1898) 1 Ch. 539; *Bayer* v. *Baird*, 15 P. R. 615.

(*b*) In *Singer Manufacturing Co.* v. *Looy* (3), 18 Ch. D. 417.

(*c*) In *Williams* v. *Osborne*, 13 L. T. N. S. 498. And see *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236; *Huntley & Palmer* v. *Reading Biscuit Co.*, 10 P. R. 277; *In re Paine* (2), (1893) 2 Ch. 567; *Pinet* v. *Maison Pinet* (2), (1898) 1 Ch. 179; *Bayer* v. *Baird*, 15 P. R. 615; *Magee Furnace Co.* v. *Le Barron*, 127 Mass. 115; and *Holt* v. *Menendez*, 128 U. S. 182.

the same course, and that therefore the plaintiffs would be entitled to the relief they claimed."

But deception must be probable.

The circumstances must, however, be such as to satisfy the Court that deception is probable, and where that is not adequately made out, relief will be refused. Thus, in *Goodfellow* v. *Prince* (*a*), a London wine merchant agreed with a firm of French wine growers to import from them a particular growth of champagne under a label bearing the assumed name "Le Court et C^ie^, Reims," and sold considerable quantities of wine in England under the label, and another London wine merchant began to import champagne from a different French grower and to sell it in England under a label also bearing the assumed name of "Le Court et C^ie^"; and it was held by the Court of Appeal that, whether the use of the name by the defendant might or might not represent that his wine was manufactured by the same French grower who manufactured the plaintiff's wine, there was nothing to show that it represented that the wine was imported by the same importer. And in *Bodega Co., Ld.* v. *Owens* (*b*), the V.-C. of Ireland held on motion that, there being in Ireland only one establishment of the plaintiff company known as a Bodega, which was in Dublin, there was no such probability of deception, if the defendant were allowed to open a "Bodega" in Belfast, as to call for an injunction to prevent the latter from so doing. But at the hearing of the action, on further evidence, an injunction was granted.

This may be affected by lapse of time.

Lapse of time may be material in considering whether deception is probable. Thus, where the Marquis of Londonderry and his predecessors in title, owners of the Londonderry collieries in the county of Durham, had for many years been in the habit of selling their coal in London, wholesale but not retail, and the defendant, a coal merchant, had, with the knowledge of the Marquis and his predecessors in title, been in the habit, since 1861, of selling retail a particular quality of coal, not obtained from the Londonderry collieries, under the name of "Londonderry Wallsend," or "Londonderry W. E.," and the Marquis had begun in February, 1885, to sell retail in London coal got from a particular seam under the name of "Londonderry Wallsend," an injunction to restrain the defendant from selling his coal by the names which he had been accustomed

(*a*) 35 Ch. D. 9. And see *California Fig Syrup Co.* v. *Taylor Drug Stores*, 14 P. R. 664; *Attenborough* v. *Jay*, 14 Times L. R. 439. Cf. *Richards* v. *Butcher* (1), 7 P. R. 288.

(*b*) 6 P. R. 236; 7 *ib.* 31.

to use was refused, on the ground that, having regard to the lapse of time, there was no misrepresentation, notwithstanding that the plaintiff's title formed part of the names, and that he was the owner of the Londonderry collieries (*a*).

Evidence of intention to deceive, when superfluous.

If in an action to restrain the use of a trade name the defendant's goods, on the face of them, and having regard to the surrounding circumstances, are calculated to deceive, "no evidence is required to prove the intention to deceive, nor ought time and money to be expended on any such defence. The sound rule is that a man must be taken to have intended the reasonable and natural consequences of his acts, and no more is wanted. If, on the other hand, a mere comparison of the goods, having regard to the surrounding circumstances, is not sufficient, then it is allowable to prove from other sources that what is or may be apparent innocence was really intended to deceive" (*b*).

Name of company.

When the name which is alleged to have been imitated is that of a company, and is composed of such words as are in ordinary use in the language, very clear evidence indeed of probability of deception will be required for an action for infringement to be successful. Thus, where a bill was filed by the London and Provincial Law Assurance Society against the London and Provincial Joint Stock Life Assurance Company (*c*), the injunction was refused, an action at law being directed; and in suits by the Colonial Life Assurance Company against the Home and Colonial Assurance Company, Limited (*d*), and by the London Assurance Company against The London and Westminster Assurance Corporation, Limited (*e*), the injunction was simply refused. In *Lee* v. *Haley* (*f*) the plaintiffs were coal merchants, trading under the name of The Guinea Coal

(*a*) *Marquis of Londonderry* v. *Russell*, 3 Times L. R. 360. And see *Ford* v. *Foster*, L. R. 7 Ch. 611, 628, *per* Mellish, L. J.

(*b*) *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893, *per* Kekewich, J. And see *Von Mumm* v. *Frash*, 56 Fed. Rep. 830; *Martell & Co.* v. *Paarl Wine & Spirit Co.*, 12 Cape Good Hope, 326.

(*c*) *London & Provincial Law Assurance Society* v. *London & Provincial Joint Stock Life Assurance Co.*, 17 L. J. Ch. 37. In *Purser* v. *Brain*, 17 L. J. Ch. 141, it was held that the circulars of "The London Patent Manure Co." were clearly fraudulent imitations of those of "The London Manure Co.," but the case was sent to a jury for the purpose of deciding whether the plaintiffs' user of their title had been sufficiently long. And in *Lawson* v. *Bank of London*, 18 C. B. 84, a case at Common Law, the plaintiff was defeated on the ground of a want of averment in the declaration that he was a banker or had ever carried on that business; but Willes, J., remarked that "he was not prepared to say that the defendant would not be liable if the cause of complaint were properly alleged."

(*d*) *Colonial Life Assurance Co.* v. *Home & Colonial Assurance Co.*, 33 Beav. 548.

(*e*) *London Assurance Co.* v. *London & Westminster Assurance Corporation*, 32 L. J. Ch. 664.

(*f*) L. R. 5 Ch. 155.

Company, and having their business premises at No. 22, Pall Mall. The defendant had been in their service as manager, and on leaving them set up in business at Beaufort Buildings, Strand, under the name of the Pall Mall Guinea Coal Company. From Beaufort Buildings he removed to No. 48, Pall Mall. In that case fraud was held to be proved, and the injunction was granted; but the Court being of opinion that the only reasonable chance of successful deceit depended upon the residence of the defendant in Pall Mall, the injunction against the user by the defendant of his trade name as above was restricted to Pall Mall. In a case (*a*) where

(*a*) *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416; R. Cox, 210. And see *Churton* v. *Douglas*, Johns. 174. In *Hendriks* v. *Montagu*, 17 Ch. D. 638, an injunction was granted at the instance of "The Universal Life Assurance Society" to restrain the use of the name "The Universe Life Assurance Association, Ld.," on the ground of similarity; in *Simpson* v. *Anglo-Indian Tea Co., Ld.*, Bacon, V.-C., May 4th, 1883, the defendant company was not allowed to trade under the name which it had taken, which was the same as that under which the plaintiff was trading; in *Guardian Fire & Life Assurance Co.* v. *Guardian & General Insurance Co., Ld.*, 50 L. J. Ch. 252, it was held that the defendant company's name was likely to deceive, but that the name of "The Guardian Horse, Vehicle and General Insurance Co." might fairly be taken; in *Capital & Counties Bank, Ld.* v. *Capital & County Deposit Bank*, Chitty, J., Feb. 9th, 1884, an injunction was granted to restrain the use of the latter name; in *Accident Insurance Co., Ld.* v. *Accident, Disease & General Insurance Corporation, Ld.*, W. N. 1884, p. 191, Pearson, J., granted an injunction, and on appeal an order was taken by consent, the defendants agreeing to place some other word than "Accident" at the head of their title; in *Thompson* v. *Improved French Dye-Cleaning & Dyeing Co., Ld.*, 30 Sol. J. 753, the plaintiff was carrying on business at Brixton as "The French Dyeing & Cleaning Co.," and the defendants were carrying on business in Great Portland Street under the name above, and using the address "Brixton" on their trade papers, and an injunction was granted. So, also, in *Sanitas Co., Ld.* v. *Condy*, 4 P. R. 195, 533, in which the plaintiffs were "The Sanitas Co., Ld.," and the defendant began to trade as "The Condisanitas Co." Injunctions were also granted in *Rendle* v. *Rendle & Co., Ld.*, 63 L. T. N. S. 94; *Army & Navy Co-operative Society, Ld.* v. *Army & Navy Civil Service Co-operative Society of India, Ld.*, 8 P. R. 426, 472; *Premier Cycle Co., Ld.* v. *Premier Tube Co., Ld.*, 12 Times L. R. 481; *Brinsmead* v. *Brinsmead, ib.* 631; 13 *ib.* 3; *Dunlop Pneumatic Tyre Co., Ld.* v. *Dunlop-Truffault Cycle & Tube Manufacturing Co.*, 40 Sol. J. 544; *Same* v. *Dunlop Lubricant Co.*, 16 P. R. 12; *Eastman Photographic Materials Co.* v. *Griffiths' Cycle Co.*, 15 P. R. 105, where the Kodak Cycle Co. were restrained from using "Kodak," which had become identified with the plaintiff company; *National Folding Box & Paper Co.* v. *National Folding Box Co.*, 43 W. R. 156, where the fact that the word "National" was intended to refer to different nations in the two cases was held immaterial, inasmuch as both companies sold their goods in this country; *Manchester Brewery Co.* v. *North Cheshire & Manchester Brewery Co.*, (1898) 1 Ch. 539, where the defendant company succeeded to the business of the North Cheshire Brewery Company, and the ground of the decision was that the name of the defendant company would induce the belief that it had been formed by an amalgamation of the plaintiff company with the North Cheshire Company, and that the plaintiff company had ceased to have any separate existence; in *Holmes, Booth & Haydens* v. *Holmes, Booth & Attwood Manufacturing Co.*, 37 Conn. 278, the defendants were restrained from using the names of Holmes and Booth. In *Newby* v. *Oregon Central Railway Co.*, 1 Deady, 609, it was held that the original Oregon Central Railway Co. would be entitled to restrain the assumption of its name by a new company, though a single bondholder in the former company was not entitled to sue until the company had

the plaintiff company sold white lead in kegs marked "Brooklyn White Lead Company," or "Co.," and the defendant, who had formerly marked his "Brooklyn White Lead, pure, 100 lbs.,"

refused to do so. And see *Braham* v. *Beachim*, 7 Ch. D. 848 ("Radstock Colliery Proprietors"); *Campbell* v. *Hollins*, Dig. 548 ("Minton & Co."); *Batchellors* v. *Batchellor Manufacturing Co.*, 12 Amer. Rep. 414, n.; *Gray* v. *Taper Sleeve Pulley Works*, 16 Fed. Rep. 436, where the defendants were restrained from trading under the name they had assumed, which had been previously used by the plaintiffs, though they were entitled to make and sell "taper sleeve pulleys"; *McGowan Bros.' Pump & Machine Co.* v. *McGowan*, 2 Cino. 313; *Celluloid Manufacturing Co.* v. *Cellonite Manufacturing Co.*, 32 Fed. Rop. 94; *Chas. S. Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462; 43 Am. St. Rep. 769, where the names were as above; *Myers* v. *Kalamazoo Buggy Co.*, 54 Mich. 215 ("The Kalamazoo Waggon Co.," and "The Kalamazoo Buggy Co."); *Tuerk Hydraulic Power Co.* v. *Tuerk*, 99 N. Y. Sup. Ct. 65 ("Tuerk Water Motor Co." (the popular name of the plaintiff company), and "Tuerk Water Meter Co."); *International Trust Co.* v. *International Loan & Trust Co.*, 153 Mass. 271, where the names were as above. See *Plant Seed Co.* v. *Michel Plant Seed Co.*, 23 Mo. App. 519.

In the following cases injunctions were refused:—*London & County Banking Co.* v. *Hampshire & North Wilts Bank*, Dig. 618, in which the defendant company was proposing to take the name of "The Capital & Counties Bank"; *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank, Ld.*, 9 Ch. D. 560; *Army & Navy Co-operative Society, Ld.* v. *Junior Army & Navy Stores, Ld.*, Dig. 640; *Australian Mortgage, Land & Finance Co.* v. *Australian & New Zealand Mortgage Co.*, W. N. 1880, p. 6; *Midland Electric Light & Power Co.* v. *Brush Midland Electric Light & Power Co.*, 26 Sol. J. 465; *Provident Association of London, Ld.* v. *London & Provincial Provident Association, Ld.*, 30 Sol. J. 753; *Bumsted* v. *General Reversionary Co., Ld.*, 4 Times L. R. 621, where the plaintiff sued on behalf of "The General Reversionary & Investment Co.," who carried on an extensive business in London, with country agents, and the defendants were setting up a small business at Liverpool; *Goodyear Rubber Co.* v. *Goodyear India-rubber Glove Manufacturing Co.*, 128 U. S. 598. And see *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766 ("Condy's Fluid Co."); *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748 ("Thorley's Cattle Food Co."); *Tussaud* v. *Tussaud*, 44 Ch. D. 67[illegible]; *Saunders* v. *Sun Life Assurance Co. of Canada*, (1894) 1 Ch. 537, where the Sun Life Assurance Society failed to restrain the defendants from using their full name, but succeeded in restraining them from using any abbreviated form of it; *California Fig Syrup Co.* v. *Taylor's Drug Co.*, 14 P. R. 564, where the defendants assumed the name of "American Syrup of Figs Co."; *Ottoman Calvey Co.* v. *Dane*, 95 Ill. 203, in which the plaintiff company was held not entitled to restrain the defendants from trading under the same name in Illinois, notwithstanding that the defendants were incorporated in Michigan and the plaintiffs in Illinois, the defendants having been the first to trade under the name in Illinois; *Lehigh Valley Coal Co.* v. *Hamblen*, 23 Fed. Rep. 225, in which a Pennsylvania company, doing business in Illinois and other States, was held not entitled to restrain the formation of another company in Illinois under the same name; but it was intimated that the question would remain open whether relief would be granted if the new company should be formed and should improperly take away business from the plaintiffs. So, in *Drummond Tobacco Co.* v. *Randle*, 114 Ill. 412, the plaintiff company failed to restrain the incorporation of another company as "The Drummond-Randle Tobacco Co."; in *McNair* v. *Cleave*, 10 Phila. 155, the plaintiffs, trading as the "Galaxy Publishing Co.," were held not to be entitled to the exclusive use of the name, because it represented, contrary to the fact, that they were incorporated as a company. And see *Koehler* v. *Sanders*, 122 N. Y. 65, where an unsuccessful attempt was made to monopolise the words "International Banking Co."; *Nebraska Loan & Trust Co.* v. *Nine*, 27 Nebr. 507; 20 Am. St. Rep. 686, where it was held that the name of a state could not be monopolised as against rival traders of the same state; *In re United States Mortgage Co.*, 90 N. Y. Sup. Ct. 572, where the plaintiffs were allowed to change their name to "United States Mortgage & Trust Co.," notwithstanding the opposition of the United

changed the name to "Brooklyn White Lead and Zinc Company," it was held that, though he was entitled to continue to mark his goods "Brooklyn White Lead and Zinc," he had no right to add "Company" or "Co."

Descriptive name of company.

In *Australian Mortgage, Land & Finance Co.* v. *Australian & New Zealand Mortgage Co.* (*a*), the Court of Appeal pointed out the difficulty of monopolising the exclusive use of a name which correctly described the nature of a company's business, or the locality of its operations. And in *India & China Tea Co.* v. *Teede* (*b*), it was held that a firm of tea merchants were entitled to assume the name of "The India & China Packet Tea Co." notwithstanding that the name of the plaintiff company was as above, the name assumed by the defendants being simply descriptive, and there being no evidence of deception.

The Companies Act, 1862.

By § 20 of the Companies Act, 1862 (*c*), it is enacted that "no company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except in a case where such subsisting company is in the course of being dissolved, and testifies its consent in such manner as the registrar requires; and if any company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a subsisting company is registered, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company may, with the sanction of the registrar, change its name" (*d*). This section does not authorise a company to use or register a name so nearly resembling one previously used by another company as to be calculated to deceive, even though the name of the earlier company has not itself been registered (*e*);

States Trust Co. of New York; *Employers' Liability Assurance Corporation* v. *Employers' Liability Insurance Co.*, 68 N. Y. Sup. Ct. 552; *Hygeia Water Ice Co.* v. *New York Hygeia Ice Co.*, 140 N. Y. 94, where the names were as above.

(*a*) W. N. 1880, p. 6. So, also, *per* the Supreme Court of the U. S. in *Goodyear Rubber Co.* v. *Goodyear India-rubber Glove Manufacturing Co.*, 128 U. S. 598. And see *Koehler* v. *Sanders*, 55 N. Y. Sup. Ct. 48 ("International Banking Co.").

(*b*) W. N. 1871, p. 241.

(*c*) 25 & 26 Vict. c. 89.

(*d*) See *Manchester Brewery Co.* v. *North Cheshire & Manchester Brewery Co.*, (1898) 1 Ch. 539. As to the registration of names of companies under the U. S. Trade Marks Acts, see *In re Rowe & Post*, 9 U. S. Pat. Gaz. 496; *In re India Rubber Comb Co.*, 8 *ib.* 905; *India Rubber Comb Co.* v. *Meyer*, *ib.*; *India Rubber Comb Co.* v. *Rubber Comb & Jewellery Co.*, 45 N. Y. Super. Ct. 258; *In re Rubber Clothing Co.*, 10 U. S. Pat. Gaz. 111; and Appendix I., *infra*.

(*e*) *Hendriks* v. *Montagu*, 17 Ch. D. 638. See *Tussaud* v. *Tussaud*, 44 Ch. D. 678.

and, on the other hand, since the section only affects the registration of the name of a company, the rights of a company to a name which has been registered cannot be attacked *under the section*, whatever may be the rights outside the section of another company which has previously used the name (*a*).

**Name of individual.**

If the trade name which has been imitated is that of an individual, and this has been assumed by another person of different name, little is required to prove the fraud. In fact, the assumption of another's name is almost sufficient proof if taken alone (*b*). But in *Olin* v. *Bate* (*c*), the plaintiff Olin failed to succeed in restraining the defendant Bate from carrying on the same profession (the medical) in the same town as himself under the name of Olin, the defendant having so done before the plaintiff came to the town in question. And where "Liebig's Extract of Meat" had come to be the proper designation of an article first invented by Baron Von Liebig, Field, J., affirmed by the Court of Appeal and the House of Lords, declined to restrain a manufacturer of the article from styling his preparation "Baron Liebig's Extract of Meat," and placing on the pots a photograph of the Baron (*d*).

**Assumed name.**

Sometimes the plaintiff's name is itself an assumed or fanciful one: thus the use of the name "Christy's Minstrels" has been restrained (*e*); and that of the name "The Oldfield Lane Doctor" (*f*); and in *Isaacson* v. *Thompson* (*g*) the plaintiff kept a millinery establishment, as "Madame Elise," which name being imitated by the defendant, an injunction would have been awarded, had not the plaintiff's own delay disentitled her to relief.

**Man's own name. Use not restrained unless fraudulent.**

In some cases the use of a man's own name may be such as to deceive, and where this is so the person aggrieved is entitled to

(*a*) *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank, Ld.*, 9 Ch. D. 560. In the U. S. similar statutory restrictions have been imposed upon the right to register the names of corporations, and in such cases a certificate of incorporation duly issued is held to be conclusive as to private persons of the right of the corporation to the corporate existence by the designated corporate name; *Boston Rubber Shoe Co.* v. *Boston Rubber Co.*, 149 Mass. 436; *Converse* v. *Hood*, *ib.* 471; *American Order of Scottish Clans* v. *Merritt*, 151 Mass. 558.

(*b*) *Per* Turner, L. J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 896. See *Barber* v. *Manico*, 10 P. R. 93; *Pinet* v. *Maison Pinet*, (1898) 1 Ch. 179; *Binninger* v. *Wattles*, 28 How. Pr. 206; R. Cox, 318; *Priestley* v. *Adams*, 66 N. Y. Sup. Ct. 380; *Shaw* v. *Pilling*, 175 Pa. 78.

(*c*) 98 Ill. 55; 38 Amer. Rep. 78.

(*d*) *Liebig's Extract of Meat Co.* v. *Anderson*, W. N. 1882, p. 147: *ib.* 1883, p. 185; H. L., July 16th, 1885. Cf. *Richmond Nervine Co.* v. *Richmond*, 159 U. S. 293; *Kathreiner's Malz Kaffee Fabriken, &c.* v. *Pastor Kneip Medicine Co.*, 82 Fed. Rep. 321.

(*e*) *Christy* v. *Murphy*, 12 How. Pr. 77; R. Cox, 164; *Montague* v. *Moore*, Seton, 5th ed. 539.

(*f*) *Milner* v. *Reed*, Dig. 328.

(*g*) 41 L. J. Ch. 101. And see *Davis* v. *Rogers*, 89 L. T. (Journal) 292.

obtain an injunction against such use of the name (*a*); but he must prove clearly the fraudulent intent, and "it is a question of evidence in each case whether there is false representation or not" (*b*). It is not sufficient in such cases to show that the use of the name, though honest, may cause confusion. Thus, in *Turton & Sons, Ld.* v. *Turton* (*c*) the plaintiffs carried on an old-established business in Sheffield as Thomas Turton & Sons, Ld., and the defendant John Turton, who had for some years carried on a similar business in the same town as John Turton & Co., took his two sons into partnership, and changed his trade name to John Turton & Sons; and although some confusion was proved, the Court of Appeal held that, the name adopted being a true state-

(*a*) *Churton* v. *Douglas*, Johns. 174; *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Fullwood* v. *Fullwood*, W. N. 1873, pp. 93, 185; *Fullwood* v. *Fullwood* (2), 9 Ch. D. 176; *Holloway* v. *Holloway*, 13 Beav. 209; *Pullar* v. *Pullar*, Fry, J., April 9th, 1883; *Melachrino & Co.* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888; *Nicholls* v. *Kimpton*, 3 Times L. R. 674; *Birmingham Vinegar Brewery Co., Ld.* v. *Liverpool Vinegar Co., Ld.*, 4 Times L. R. 613; *Atkinson* v. *Atkinson*, 85 L. T. (Journal) 229; *Warner* v. *Warner*, 5 Times L. R. 359; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Rendle* v. *Rendle & Co.*, 63 L. T. N. S. 94; *Edge* v. *Harrison*, 8 P. R. 74; *Otard, Dupuy & Co.* v. *Otard de Montebello Cognac Co.*, 9 Times L. R. 295; 10 *ib.* 67; *Brinsmead* v. *Brinsmead*, 12 Times L. R. 631; 13 *ib.* 3; *Pinet* v. *Maison Pinet* (1), 14 P. R. 933; *Dunlop Pneumatic Tyre Co.* v. *Dunlop-Truffault Cycle & Tube Manufacturing Co.*, 40 Sol. J. 544; *Bayer* v. *Baird*, 15 P. R. 615, 627; *Holmes* v. *Holmes*, 37 Conn. 278; 9 Amer. Rep. 324; *Gillis* v. *Hall*, R. Cox, 596; *Devlin* v. *Devlin*, 69 N. Y. 212; *Shaver* v. *Shaver*, 54 Iowa, 208; *India Rubber Comb Co.* v. *Rubber Comb & Jewellery Co.*, 45 N. Y. Super. Ct. 258; *Landreth & Sons* v. *Landreth*, 22 Fed. Rep. 41; *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306; *William Rogers Manufacturing Co.* v. *Rogers & Spurr Manufacturing Co.*, 11 Fed. Rep. 495; *Frazer* v. *Frazer Lubricator Co.*, 121 Ill. 147. See *Christie* v. *Christie*, L. R. 8 Ch. 499; *McGowan Bros. Pump & Machine Co.* v. *McGowan*, 2 Cinc. 313; *Pillsbury* v. *Pillsbury-Washburn Flour Mills Co.*, 64 Fed. Rep. 841; *William Rogers Manufacturing Co.* v. *R. W. Rogers Co.*, 70 *ib.* 1017; *Hoff* v. *Tarrant & Co.*, 71 *ib.* 163; *Walter Baker & Co.* v. *Baker*, 77 *ib.* 181; *Garrett* v. *T. H. Garrett & Co.*, 78 *ib.* 472; *Walter Baker & Co.* v. *Sanders*, 80 *ib.* 889; *Baeder* v. *Baeder*, 59 N. Y. Sup. Ct. 170; *De Long* v. *De Long Hook & Eye Co.*, 96 *ib.* 406; *El Modello Cigar Manufacturing Co.* v. *Gato*, 25 Fla. 886; 23 Am. St. Rep. 72; *Chas. S. Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462; 43 Am. St. Rep. 769.

(*b*) *Per* Turner, L. J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 896. And see *Turton & Sons, Ld.* v. *Turton*, 42 Ch. D. 128; *Reddaway* v. *Banham*, (1896) A. C. 199, 211; *Birmingham Vinegar Brewery Co.* v. *Powell*, (1897) A. C. 710; *Rogers* v. *Rogers*, 53 Conn. 121; and other cases.

(*c*) 42 Ch. D. 128. And see *Saunders* v. *Sun Life Assurance Co. of Canada*, (1894) 1 Ch. 537; *Crawford* v. *Bernard*, 11 P. R. 580; *Valentine* v. *Valentine*, 32 L. R. Ir. 488; *Jamieson & Co.* v. *Jamieson*, 15 P. R. 169; *Attenborough* v. *Jay*, 14 Times L. R. 365; *ib.* 439; *Rogers* v. *Rogers*, 53 Conn. 121; *Iowa Seed Co.* v. *Dorr*, 70 Iowa, 481; *William Rogers Manufacturing Co.* v. *Simpson*, 54 Conn. 527; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Rogers* v. *William Rogers Manufacturing Co.*, 70 Fed. Rep. 1019; *American Cereal Co.* v. *Eli Pettijohn Cereal Co.*, 72 *ib.* 903; 76 *ib.* 372; *De Long* v. *De Long Hook & Eye Co.*, 96 N. Y. Sup. Ct. 406; *Duryea* v. *National Starch Manufacturing Co.*, 79 Fed. Rep. 651; *Fish Bros. Wagon Co.* v. *La Belle Wagon Works*, 82 Wisc. 546; 33 Am. St. Rep. 72; *Chas. S. Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462; *Scott Stamp & Coin Co.* v. *Scott Co.*, 58 N. Y. Super. Ct. 380; *Stuart* v. *F. C. Stewart Co.*, 85 Fed. Rep. 778.

ment of the composition of the firm, and there being no proof or even allegation of fraud, no injunction could be granted. Lord Esher, M. R., said: "If all that a man does is to carry on the same business (as another trader), and to state how he is carrying it on, that statement being the simple truth, and he does nothing more with regard to the respective names (*a*), he is doing no wrong. He is doing what he has an absolute right by the law of England to do; and you cannot restrain a man from doing that which he has an absolute right by the law of England to do." And Cotton, L. J., added: "The Court cannot stop a man from carrying on his own business in his own name, although it may be the name of a better known manufacturer, when he does nothing at all in any way to try and represent that he is that better known and successful manufacturer." But where a person has allowed another to use his name, and acquire a reputation under it, he will not afterwards be allowed himself to use his name so as to deceive, nor to empower others to use it so as to produce that result, nor will such others be permitted so to use it. Thus, where one Holbrook, an employé of the Birmingham Vinegar Brewery Co., Ld., had allowed the company to use his name for twelve years as part of the title of their goods—*e.g.*, "Holbrook's Worcestershire Sauce," "Holbrook's London Relish," "Holbrook's Pure Pickles"—he was not allowed, on leaving their service and entering that of the Liverpool Vinegar Co., Ld., to give the latter a right to use his name as part of the same titles, nor were they allowed so to use it (*b*).

Lending name to third person.

"There is no instance," said Kay, J., in *Rendle* v. *Rendle & Co.* (*c*), "in which it has been held that a man can lend his name to a third person, and can induce that third person to start business in opposition to someone else who is using that name, and has an established business under that name. Take a well-known name—that of 'Christie' for instance—can a man whose name is Christie, who has never carried on business as an auctioneer on a large scale,

(*a*) See *Lewis's* v. *Lewis*, 45 Ch. D. 281, 284; and *Jamieson & Co.* v. *Jamieson*, 15 P. R. 169. Compare, however, *Reddaway* v. *Banham*, (1896) A. C. 199.

(*b*) *Birmingham Vinegar Brewery Co., Ld.* v. *Liverpool Vinegar Co., Ld.*, 4 Times L. R. 613. And see *Chas. S. Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462; *Le Page* v. *Russia Cement Co.*, 51 Fed. Rep. 941; *Symonds* v. *Jones*, 82 Maine, 302; 17 Am. St. Rep. 485; *Richmond Nervine Co.* v. *Richmond*, 159 U. S. 293; *Chattanooga Medicine Co.* v. *Thedford*, 73 U. S. Pat. Gaz. 2163. Cf. *Fish Bros. Wagon Co.* v. *La Belle Wagon Works*, 82 Wisc. 546; 33 Am. St. Rep. 72; *Duryea* v. *National Starch Manufacturing Co.*, 79 Fed. Rep. 651.

(*c*) 63 L. T. N. S. 94.

say to another man, not having the name of Christie, 'I will lend you my name, and then you can say the business is Christie's, and the justification for your doing so is that I have sold you my name'? As the law of England stands, that will not be allowed. And what is the difference between that—namely, lending your name to an individual—and lending your name to a joint stock company? The fraud is transparent" (*a*).

Evidence of fraud.

Evidence of fraudulent intention was supplied in one case (*b*) by a removal by the defendant into the neighbourhood in which the plaintiff was carrying on his business, and the addition of "and Co." to the name "H. Fullwood," the plaintiff's trade name being "R. J. Fullwood & Co."; and in another case (*c*), in which the same person was plaintiff, by a representation that the business of M. Fullwood and E. Fullwood, trading as "E. Fullwood & Co.," had been established in 1785, and was carried on at Hoxton, those facts being true of the business of R. J. Fullwood & Co., but not of that carried on by the defendants. In a third case (*d*), the defendant, who had sold his business and the goodwill, including the name, "John Douglas & Co.," recommenced business, and employing the three managing men of his former business, styled his new

(*a*) And see *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215; *Otard, Dupuy & Co.* v. *Otard de Montebello Cognac Co.*, 9 Times L. R. 295; 10 *ib.* 67; *Dunlop Pneumatic Tyre Co.* v. *Dunlop-Truffault Cycle & Tube Manufacturing Co.*, 40 Sol. J. 544; *Brinsmead* v. *Brinsmead*, 12 Times L. R. 631; 13 *ib.* 3; *Dunlop Pneumatic Tyre Co., Ld.* v. *Dunlop Lubricant Co.*, 16 P. R. 12; *Rogers Manufacturing Co.* v. *Rogers*, 66 Fed. Rep. 56; 70 *ib.* 1017; *American Cereal Co.* v. *Eli Pettijohn Cereal Co.*, 72 *ib.* 903; 76 *ib.* 372; *Garrett* v. *T. H. Garrett & Co.*, 78 *ib.* 472; *De Long* v. *De Long Hook & Eye Co.*, 96 N. Y. Sup. Ct. 406; *Chas. S. Higgins Co.* v. *Higgins Soap Co.*, 144 N. Y. 462. Cf. *Attenborough* v. *Jay*, 14 Times L. R. 365; *ib.* 439; *Scott Stamp & Coin Co.* v. *Scott Co.*, 58 N. Y. Super. Ct. 380.

(*b*) *Fullwood* v. *Fullwood*, W. N. 1873, pp. 93, 185. So where the plaintiff carried on business as "Newman & Co." and the defendant bought a similar business carried on as "H. Newman," and changed the name to "Newman & Co.": *Holt* v. *Smith*, 4 Times L. R. 329. And where the plaintiff dealt in "Warner's Safe Cures," and the defendant, who was also named Warner, bought the goodwill of "Ashton's Gout and Rheumatic Cure," and changed the name to "Warner's Gout and Rheumatic Cure": *Warner* v. *Warner*, 5 Times L. R. 359. And see *Valentine* v. *Valentine*, 31 L. R. Ir. 488, where the defendants set up a rival business in premises recently vacated by the plaintiffs. See, also, *Smith* v. *McBride*, Ct. Sess. Cas. 4th Ser. XVI. 36.

(*c*) *Fullwood* v. *Fullwood* (2), 9 Ch. D. 176. And see *Glen & Hall Manufacturing Co.* v. *Hall*, 61 N. Y. 226. Where Robert Minton Taylor, formerly a member of the firm of Minton, Hollins & Co., set up for himself as Robert Minton Taylor & Co., and, on being threatened with legal proceedings, undertook to trade only as Robert Minton Taylor, it was held that a purchaser of R. M. Taylor's business could not carry it on under the style of "The Minton Brick & Tile Co.": *Campbell* v. *Hollins*, Dig. 548.

(*d*) *Churton* v. *Douglas*, Johns. 174. But see the American cases of *Howe* v. *Searing*, 10 Abb. Pr. 264; R. Cox, 244; *Reeves* v. *Denicke*, 12 Abb. Pr. N. S. 92; and *Booth* v. *Jarrett*, 52 How. Pr. 169.

business "John Douglas & Co.," and sent round circulars informing the public that his business was so well known that it was unnecessary to say anything about it; thus, in fact, "representing himself to be the owner of that which he had sold." So, too, it was held to be fraud for a person who had recently come into the neighbourhood of the "Carriage Bazaar" in Baker Street, and set up a "Carriage Repository," to change that name to the "New Carriage Bazaar," with some incorrect additions (*a*). But where the plaintiff had been for eight years in the habit of engaging Dr. Richter to conduct concerts in London, which the plaintiff advertised and made popular by the name of "Richter Concerts," and in 1887 Dr. Richter declined to continue to act with the plaintiff, and agreed to conduct concerts in London for the defendant, who began to advertise them as "Richter Concerts," it was held that the name "Richter Concerts" meant concerts conducted by Dr. Richter, and was properly applied to the proposed concerts, and that no injunction could be granted (*b*).

Change of name copied.

Where the plaintiff had changed his name to Frank Leslie, and his son had, by his orders, assumed the same name, and the plaintiff had afterwards brought out "Frank Leslie's Illustrated News," and other publications of the titles of which his new name formed part, it was held that there was no ground for restraining the publication by the son of "Frank Leslie Junior's Sporting and Dramatic Times" (*c*). On the other hand, where Dr. Trust had changed his name to Gouraud, but his sons had not changed their name, the latter were restrained from selling a preparation with a statement that it was prepared by Dr. Gouraud's sons, there being a representation which, though not strictly false, was yet calculated to mislead (*d*).

Deceptive circulars.

Again, a fraudulent intention may be shown to exist by the production of deceptive circulars so framed by the defendant as to represent his business to be identical with or a continuation of that carried on by the plaintiff; and such a fraud will be restrained (*e*).

(*a*) *Boulnois* v. *Peake*, 13 Ch. D. 513. And see *Cate* v. *Myers*, Dig. 304; *Atkinson* v. *Atkinson*, 85 L. T. (Journal) 229; *Davis* v. *Rogers*, 89 *ib.* 292; and *Glen & Hall Manufacturing Co.* v. *Hall*, 61 N. Y. 226.

(*b*) *Franke* v. *Chappell*, 57 L. T. N. S. 141.

(*c*) *England* v. *New York Publishing Co.*, 8 Daly, 375.

(*d*) *Gouraud* v. *Trust*, 10 N. Y. Sup. Ct. 627.

(*e*) *Churton* v. *Douglas*, Johns. 174; *Stevens* v. *Paine*, 18 L. T. N. S. 600; *Purser* v. *Brain*, 17 L. J. Ch. 141; *Christie* v. *Christie*, L. R. 8 Ch. 499; *Burrows* v. *Foster*, 1 N. R. 156; *Graceley* v. *Winchester*, Seton, 5th ed. 591; *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191; *Rendle* v. *Rendle & Co.*, 63 L. T. N. S. 94; *Tuerk Hydraulic Power Co.* v. *Tuerk*,

Thus, in *Mogford* v. *Courtenay* (*a*), the defendant issued a circular of which the effect was to represent that he was carrying on the business which he had previously carried on in partnership with the plaintiff, although under the partnership articles the entire goodwill vested in the plaintiff on dissolution.

Opening letters.

So, too, one person will not be allowed to defraud another by opening letters addressed to him, and executing orders intended for him (*b*). Where, however, various acts of misrepresentation by the defendant were alleged, pointing to an intention to simulate the plaintiff, but only one case was made out, in which the defendant had opened a letter addressed to the plaintiff, answered it in his own name, and endeavoured to obtain the custom offered by that letter to the plaintiff, it was held that, though this raised grave suspicion of the defendant's motives, yet it was not sufficient ground for an injunction. The defendant, however, was refused his costs (*c*).

Fraudulent partnership.

Nor will fraud be permitted to be perpetrated under cover of a partnership got up for the purpose of fraud (*d*). Thus, in *Clayton* v. *Day* (*e*), an ironmonger's assistant named Day, and a general shopkeeper named Martin, were not allowed to carry on the business of blacking manufacturers under the name of "Day and Martin," though they were left free to trade as "Martin and Day." Similarly, in *Melachrino* v. *Melachrino Egyptian Cigarette Co.* (*f*), the plaintiff's cigarettes being well known as "Melachrino Cigarettes," a person named Poulides took a brother of the plaintiff into his service, under an agreement by which Poulides was to have the right to use his name, and Poulides then opened a busi-

99 N. Y. Sup. Ct. 65; *Simmons Medicine Co.* v. *Simmons*, 81 Fed. Rep. 163.

(*a*) 45 L. T. N. S. 303.

(*b*) *Scheile* v. *Brakell*, 11 W. R. 796; Seton, 5th ed. 584; *Witt* v. *Corcoran*, *ib.* 590; *England* v. *Curling*, 8 Beav. 129; *Vernon* v. *Hallam*, 34 Ch. D. 748.

(*c*) *Edgington* v. *Edgington*, 11 L. T. N. S. 299.

(*d*) *Croft* v. *Day*, 7 Beav. 84; *Moet* v. *Clybouw*, Dig. 533; *Schweitzer* v. *Atkins*, 37 L. J. Ch. 847; *Dence* v. *Mason*, Dig. 534; 41 L. T. N. S. 573; *Dence* v. *Brand*, W. N. 1881, p. 31; *Edge* v. *Harrison*, 8 P. R. 74; *Dunlop Pneumatic Tyre Co.*, *Ld.* v. *Dunlop Lubricant Co.*, 16 P. R. 12; *Smith* v. *McBride*, Ct. Sess. Cas. 4th Ser. XVI. 36; *Holmes* v. *Holmes*, 37 Conn. 278; 9 Amer. R. 24.

(*e*) 26 Sol. J. 43; 76 L. T. (Journal) 79. But in America a fictitious partnership has been permitted to give to one of two partners, who had become the successor to the partnership business, a right to use the same trade name which had been formerly used by the partnership, and which consisted of the united names of the two former partners; although, apart from the fictitious partnership, he would have been prevented from so doing by the Massachusetts Gen. Stat. c. 56, which requires the consent of a former partner, or of his personal representative, to the continued use of his name in the business, and such consent was refused: *Hallett* v. *Cumston*, 110 Mass. 29.

(*f*) 4 P. R. 215.

ness close to the plaintiffs under the name of "The Melachrino Egyptian Cigarette Co.," and used the name "Melachrino" in various ways calculated to deceive, and an injunction was granted. Again, in *M. Melachrino & Co.* v. *R. Melachrino & Co.* (*a*), Poulides, the defendant in the previous action, went to Egypt as soon as an interlocutory injunction had been granted in that action, and induced a person named Melachrino, who was not connected with the plaintiffs, but was a tobacconist in a small way of business in Alexandria, to enter into partnership with him and come to England to establish a business under the name of "R. Melachrino & Co.," the plaintiffs being "M. Melachrino & Co.," and they used various fraudulent devices. An injunction was again granted. Again, in *Edge* v. *Harrison* (*b*), where the plaintiff had taken out a patent for an invention for wrapping up soluble blue, and the defendants, R. & S. Harrison and Mrs. Edge, the mother-in-law of the latter, conspired together to take out a patent in the name of Mrs. Edge for a similar invention, and used other devices to enable them to pass off their blue as the plaintiff's, damages were awarded and an injunction granted, and an order was made for revocation of the defendants' patent (*c*).

Vendor of business may recommence business.

On the sale of the goodwill of a business, the vendor, in the absence of a special stipulation on the point, retains the right of recommencing business, even in his own name, however similar that may be to the trade name of the business the goodwill of which has been sold; provided that he scrupulously abstains from doing anything to induce the public to believe that his new business is in fact the old one which he has sold. If, however, he does anything calculated to induce the belief that his new business is not merely similar to, but is identical with, the old one, the purchaser of the old business is entitled to restrain him by injunction (*d*).

Dissolution of partnership.

On the dissolution of a partnership, if the whole concern and the goodwill are sold, the trade name is sold with them (*e*). But if the partners merely divide the partnership assets, and there are

(*a*) Chitty, J., May 29th, 1888.

(*b*) 8 P. R. 74.

(*c*) And see *Le Page Co.* v. *Russia Cement Co.*, 51 Fed. Rep. 941.

(*d*) *Cruttwell* v. *Lye*, 17 Ves. 335; *Churton* v. *Douglas*, Johns. 174; *Johnson* v. *Helleley*, 34 Beav. 63; *Hudson* v. *Osborne*, 39 L. J. Ch. 79. *Tudor* v. *Tudor*, W. N. 1873, p. 72, depended on an express stipulation in the deed under which the plaintiff retired from the business.

(*e*) *Banks* v. *Gibson*, 34 Beav. 566. See *Hoffman* v. *Duncan*, Seton, 5th ed. 589; *Witt* v. *Corcoran*, *ib.* 590.

no express stipulations in the articles as to the disposal of the trade name, then each is at liberty to use the whole name just as the partnership did before (*a*); at all events, if no injury will be thereby caused to a partner whose name the firm have used (*b*). Where there are express stipulations in a deed, the parties are of course bound. Thus, in *Day* v. *Finch* (*c*) a member of the dissolved firm of "Benjamin Finch & Co.," who had agreed to carry on business after the dissolution in his own name only, was restrained from continuing to use the words "and Co." after the name "Benjamin Finch." But where, on a dissolution of partnership, it was agreed that neither partner was to use the firm name, but that each was to be at liberty to manufacture the same articles as had been manufactured by the firm, and one of the partners set up in business on his own account and put up over his shop the name "Hodgson, late of Matthews & Hodgson," the words "late of" being in small type, it was held that no breach of the agreement had been committed (*d*); and where a business carried on as "Madame Élise" was purchased under an agreement which recited (inaccurately) that the business had been carried on as "Madame Élise & Co.," and gave the purchaser the right to use that name, it was held that the purchaser was not entitled to trade as "Madame Élise" simply (*e*).

Rights of retiring partner.

If, again, on the dissolution of partnership, one partner takes over the whole concern by arrangement, he must compensate the other partner for his interest in the trade name (*f*), and the retiring partner is at liberty to set up a similar business in his own name, even on adjoining premises (*g*).

*Scott* v. *Scott*.

In *Scott* v. *Scott* (*h*), R. & W. Scott carried on business in partnership in Nithsdale, and in Glasshouse Street, Regent Street, as "R. & W. Scott." The partnership being dissolved, the agreement for the dissolution contained no stipulation by either

(*a*) *Ib.* See *Clark* v. *Leach*, 32 Beav. 14; *Dence* v. *Mason*, Dig. 534; *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Levy* v. *Walker*, 10 Ch. D. 436; *Rogers* v. *Taintor*, 97 Mass. 291; *Caswell* v. *Hazard*, 121 N. Y. 484.

(*b*) *Scott* v. *Rowland*, 20 W. R. 508; *Levy* v. *Walker*, 10 Ch. D. 436; *Fenton* v. *Levy*, 29 Sol. J. 735; *Chappell* v. *Griffith*, 53 L. T. N. S. 459; *Gray* v. *Smith*, 43 Ch. D. 208; *Caswell* v. *Hazard*, 121 N. Y. 484. See *Chatteris* v. *Isaacson*, 57 L. T. N. S. 177.

(*c*) 25 Sol. J. 354. And see *Tudor* v. *Tudor*, W. N. 1873, p. 72; *Vernon* v. *Hallam*, 34 Ch. D. 748; *Brewer* v. *Lamar*, 69 Ga. 656.

(*d*) *Matthews* v. *Hodgson*, 2 Times L. R. 899.

(*e*) *Chatteris* v. *Isaacson*, 57 L. T. N. S. 177.

(*f*) *Banks* v. *Gibson*, 34 Beav. 566.

(*g*) *Bond* v. *Milbourn*, 20 W. R. 197; *Mogford* v. *Courtenay*, 45 L. T. N. S. 303.

(*h*) 16 L. T. N. S. 143.

party not to continue the business, but neither of the parties was to use the name of the firm, except so far as might be necessary for winding up the partnership affairs. W. Scott retiring from the business, and setting up for himself in the neighbourhood of Nithsdale, R. Scott retained the London premises of the late firm, and made them over with his business to the defendants Scott & Nixon. The inscription used by the late firm over their house at Glasshouse Street having been "R. & W. Scott of Nithsdale," the defendants replaced this by "Scott and Nixon, late R. & W. Scott of Nithsdale." Upon this W. Scott filed a bill against them, and on motion for injunction, the injunction was granted to restrain the defendants from permitting that inscription to remain, and from representing their business to be in continuance of that carried on by the late partnership of R. & W. Scott (*a*).

Representations that plaintiff has retired.

The injury caused by the defendants to the plaintiffs is even greater than in an ordinary case of misappropriation of a trade name, when the representations made by the defendants go to show that the plaintiffs have retired from business, and that the defendants have succeeded to the business formerly carried on by them. Thus, where the defendants had acquired a lease of works at which the plaintiffs had formerly manufactured bricks, but not of the mines from which the brick-clay used by the plaintiffs had been obtained, and then issued cards and circulars styling themselves "E. J. & J. Pearson (late Harpers & Moore)," and otherwise representing themselves to have succeeded to the business of the plaintiffs, who were, as a matter of fact, carrying on their business on other works, the defendants were restrained by injunction from these misrepresentations (*b*); and Wood, V.-C., expressed an opinion that, on application by the owner of the mines of fire-clay used by the plaintiffs, but not by the defendants, the issue of an injunction would have been almost a matter of course.

Former firm or employer may be stated.

A person who has been a member or employé of a firm of reputation, and who sets up in business on his own account, is

(*a*) See *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

(*b*) *Harper* v. *Pearson*, 3 L. T. N. S. 547; also *Scott* v. *Scott*, 16 L. T. N. S. 143; *Stevens* v. *Paine*, 18 L. T. N. S. 600; *Reeves* v. *Denicke*, 12 Abb. Pr. N. S. 92; *Gouraud* v. *Trust*, 10 N. Y. Sup. Ct. 627. And as to a representation of one business being a continuation of another, see *Churton* v. *Douglas*, Johns. 174; *Burrows* v. *Foster*, 1 N. R. 156; *Witt* v. *Corcoran*, Seton, 5th ed. 590; *Graveley* v. *Winchester*, *ib.* 591; *Montague* v. *Moore*, *ib.* 539; *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191; *England* v. *Curling*, 8 Beav. 129; *Vernon* v. *Hallam*, 34 Ch. D. 748; *Hoxie* v. *Chanie*, 143 Mass. 592.

entitled, unless he has contracted not to do so (*a*), to derive what benefit he may from a fair statement of the fact of his former employment (*b*), which is usually expressed by the addition after his own name of the name of his former firm or employer, with the words "late of," or "late with." But such statement must be made in an unambiguous way, and not in such a manner as to induce the belief that the tradesman in question is selling the goods of his former firm or employer. For the purposes of the plaintiff's right to relief it is a matter of indifference whether or not the defendant has acted with a fraudulent intention; if what he has done is, though unintentionally, calculated to deceive "the unwary, the heedless, the incautious portion of the public" (*c*), the plaintiff is entitled to protection just as much as if there were intentional fraud.

*Glenny* v. *Smith*.

In *Glenny* v. *Smith* (*d*) the defendant, who had been in the plaintiff's service, opened a shop in Oxford Street, where he placed his own name over the door, but on the brass plates and on the awning the words, "from Thresher & Glenny," "from" being in much smaller letters than the plaintiff's name. It further appeared that the defendant's own name over the door was quite hidden when the awning was let down. Kindersley, V.-C., granted an injunction (*e*).

*Hookham* v. *Pottage*.

In *Hookham* v. *Pottage* (*f*), the parties had been tailors in partnership at Oxford, the defendant having been formerly the plaintiff's manager, and afterwards taken into partnership by him. On the dissolution of the partnership it was arranged that the plaintiff was to continue the business, the defendant receiving from the plaintiff such an amount as should be found to be due to him. The plaintiff, in continuing the business, styled himself "Hookham & Co.," and the defendant setting up close to him

(*a*) *Wolmershausen* v. *O'Connor*, 36 L. T. N. S. 921.

(*b*) See *per* Wood, V.-C., in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; also *Clark* v. *Leach*, 32 Beav. 14; *Goodman* v. *Way*, 36 Sol. J. 830; *Emerson* v. *Badger*, 101 Mass. 82; *Boswell* v. *Mathie*, Ct. Sess. Cas. 4th Ser. XI. 1072; *Van Wyck* v. *Horowitz*, 46 N. Y. Sup. Ct. 237; *Wolfe* v. *Alsop* (1), 10 V. L. R. (E.) 41; and cases *infra*. But see *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

(*c*) V.-C. Kindersley, in *Glenny* v. *Smith*, 2 Dr. & Sm. 476. And see *Curtiss* v. *Messler*, 13 A. L. T. 127.

(*d*) 2 Dr. & Sm. 476.

(*e*) See, too, *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Dence* v. *Mason* (1), Dig. 534; *Colton* v. *Thomas*, 2 Brews. 308; R. Cox, 507; *Boswell* v. *Mathie*, Ct. Sess. Cas. 4th Ser. XI. 1072; *Wolfe* v. *Alsop*, 12 Vict. L. R. (E.) 421; *Garde* v. *Mitchell*, 17 V. L. R. 209; *Klotz* v. *Hecht*, 73 Fed. Rep. 822.

(*f*) L. R. 8 Ch. 91. And see *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

put over his shop, "S. Pottage, from Hookham & Pottage." There was some evidence of deception, and Malins, V.-C., granted an injunction, which decision was upheld by the Court of Appeal.

Other cases.

In *Foot* v. *Lea* (*a*), an older case, the Master of the Rolls in Ireland was of opinion that there was no attempt to deceive on the part of the defendant, who had used show-boards and labels on which his own name was followed by "late of Lundy, Foot & Co.," the latter name being of equal size with the defendant's, and he accordingly refused the injunction, with leave to bring an action at law. In *Williams* v. *Osborne* (*b*), Wood, V.-C., was of a similar opinion, and dismissed the bill, and, on account of the extreme haste with which it had been filed, with costs. In a more recent case (*c*), the defendants, who had been forewomen in the plaintiff's shop in Paris, used on their window blinds in Bond Street, the words "Ex 1ères de la," in small letters, followed by "Maison Boissier de Paris," in large letters, to signify their former employment; and although V.-C. Malins declined to restrain the use of those words, notwithstanding that they were not generally understood in London as equivalent to "from," he left the defendants to pay their own costs.

Name of establishment.

Deception of the same kind will be restrained when what is imitated is not a name of an individual or firm, but a designation of the place at which the business of an individual or firm is carried on, and by which it is known and recognised. Thus, "Osborne House" (*d*), "The Carriage Bazaar" (*e*), "The Bodega" (*f*), "The New York Dental Rooms" (*g*). But in such cases the plaintiff must prove that there is something distinctive in the appellation which he has given to his establishment, since no relief can be given him if that appellation is merely descriptive, as "The Antiquarian Book Store" (*h*), "The Mammoth Wardrobe" (*i*), "The Tower Palace" (*k*), "Misfits Parlours" (*l*); and

(*a*) 13 Ir. Eq. 490. And see *Matthews* v. *Hodgson*, 2 Times L. R. 899.

(*b*) 13 L. T. N. S. 498.

(*c*) *Robineau* v. *Charbonnel*, W. N. 1876, p. 160.

(*d*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79.

(*e*) *Boulnois* v. *Peake*, 13 Ch. D. 513.

(*f*) *Bodega Co., Ld.* v. *Owens*, 7 P. R. 31.

(*g*) *Sanders* v. *Utt*, 16 Mo. App. 322 (the rooms were in St. Louis, Mo.). See *Sanders* v. *Jacob*, 20 Mo. App. 96; *Cady* v. *Schultz*, 19 R. I. 193; 61 Am. St. Rep. 763.

(*h*) *Choynski* v. *Cohen*, 39 Cal. 501: R. Cox, 593. See, however, *Weinstock, Lubin & Co.* v. *Marks*, 109 Cal. 529, when the name "Mechanics' Store" was protected.

(*i*) *Gray* v. *Koch*, 2 Mich. N. P. 119.

(*k*) *Armstrong* v. *Kleinhaus*, 1 Ky. L. Rep. 112; 82 Ky. 303.

(*l*) *Cohn* v. *Kahn*, 26 Alb. L. J. 342.

he must also prove that the result of the defendant's acts is to represent that his business is identical with that carried on by the plaintiff (*a*), as in *Cave* v. *Myers* (*b*), where the defendant, whose shop was in a corner house close to the establishment of the plaintiffs, Messrs. Cave, adopted for his shop the name of "Cavendish House," and had it so painted up that "Cave" appeared on the side of the street in which was the plaintiff's shop, and the remainder round the corner, and *Genin* v. *Chadsey* (*c*), where the plaintiff was the proprietor of "The Captain's Live-and-Let-Live Oyster and Dining Saloon," and the defendant set up "G. W. Chadsey & Co.'s Great Eastern Live-and-Let-Live Dining Saloon." On the other hand, it was held (*d*) that "Great I X L Auction Company" was not likely to be mistaken for "I X L General Merchandise Auction Store," and where the defendant had put up a sign with the words "Depôt of the Cherry Pectoral Company," and inside his premises a notice, "Ayer's Cherry Pectoral, One Dollar; Rushton's Cherry Pectoral, Fifty Cents. Which will you have?" it was held that the defendant had done no more than trade in fair competition with the plaintiff, as he was entitled to do (*e*); but when fraud is proved or admitted, it will be restrained (*f*).

Signboard.

In *Walker* v. *Alley* (*g*) it was decided that the name and sign of "The Golden Lion" was so connected with the plaintiff's dry goods business that it could not be taken by another trader; and the Chancellor of Upper Canada said that "where it is clear to the Court that the defendant himself intended an advantage by the use of a particular sign or mark in use by another, and believes he has obtained it, or, in other words, that the defendant himself thought the use of it was calculated to advertise him at the expense of the plaintiff, and this was his object in using it, and where such has been the effect of the user, I think the Court should say to him, 'Remove that sign; its use by you may, as you intend, damage the plaintiff. It cannot be necessary or valuable to you

(*a*) See *Lyric Theatre, Ld.* v. *Cordingley*, 90 L. T. (Journal) 122 ("Lyric Theatre" and "Lyric Opera House").

(*b*) Dig. 304.

(*c*) Cited in *Dixon Crucible Co.* v. *Guggenheim*, R. Cox, 567. And see *Hoby* v. *Grosvenor Library Co.*, 28 W. R. 366 ("Grosvenor Library"); *Wheeler* v. *Johnston*, 3 L. R. Ir. 284 ("Cromac Springs"); and *Glen & Hall Manufacturing Co.* v. *Hall*, 61 N. Y. 226; 19 Amer. Rep. 278 ("No. 10, South Water Street, Rochester, New York").

(*d*) *Lichtenstein* v. *Mellis*, 8 Oreg. 464.

(*e*) *Ayer* v. *Rushton*, 7 Daly, 9.

(*f*) *Cohn* v. *Kahn*, 26 Alb. L. J. 342.

(*g*) 13 Grant, Up. Can. Ch. 366.

for any other purpose. You have your choice of many signs which, as a mere attraction, or to give your store a marked designation, must answer a fair business purpose equally well.'"

No right in name of private house or telegraphic address.

Apart from a business of some kind, no exclusive right can be acquired in the name of a house, any more than in the name of a person, and no right of action arises from the annoyance occasioned by a person re-naming his residence after the neighbouring residence of another householder (*a*). And where an abbreviated telegraphic address ("Street, London") had been used for many years by a business firm, and another firm of a different character afterwards adopted the same telegraphic address, it was held that the confusion which ensued was *damnum absque injuriâ*, and that no injunction could be granted (*b*).

Hotel.

The same principle which governs the names of business establishments has been extended to hotels, and a proprietor of one already established has been held entitled to protection against the setting up of hotels in the same neighbourhood under a similar title. Thus, "The Irving House" (*c*), "The What Cheer House" (*d*), "The McCardel House" (*e*), "The Palace Hotel" (*f*), and "The Columbia Hotel" (*g*), have been protected. In the last case the objection that the name was geographical was raised but was overruled.

Must be distinctive.

On the other hand, the Scotch Court of Session has held that the proprietor of "The Station Hotel" was not entitled to interfere with the use of the name "The Royal Station Hotel" for another hotel in the same neighbourhood, the plaintiff's name not being distinctive, and the defendant's name being sufficiently distinguished by the insertion of the word "Royal" (*h*).

Name goes with building.

But it seems that where a name has been attached to a building it passes with it, and cannot be retained or dealt with by the former owner apart from the building. Thus, in *Booth* v. *Jarrett* (*i*), the founder of "Booth's Theatre," who had gained a reputation for it by his skill in acting, and had named it after himself, attempted,

(*a*) *Day* v. *Brownrigg*, 10 Ch. D. 294.
(*b*) *Street* v. *Union Bank of Spain & England*, 30 Ch. D. 156.
(*c*) *Howard* v. *Henriques*, 3 Sand. S. C. 725; R. Cox, 129.
(*d*) *Woodward* v. *Lazar*, 21 Cal. 448; R. Cox, 300; *Gamble* v. *Stephenson*, 10 Mo. App. 581.
(*e*) *McCardel* v. *Peck*, 28 How. Pr. 120; R. Cox, 312.
(*f*) *Great North of Scotland Rail. Co.* v. *Mann*, Ct. Sess. Cas. 4th Ser. XIX. 1035.
(*g*) *Whitfield* v. *Loveless*, 64 U. S. Pat. Gaz. 442.
(*h*) *Charleson* v. *Campbell*, Ct. of Sess. Cas. 4th Ser. IV. 149. See *Great North of Scotland Rail. Co.* v. *Mann*, *ib.* XIX. 1035; *Crawford's Trustees* v. *Lennox Co.*, *ib.* XXIII. 747.
(*i*) 52 How. Pr. 169.

without success, to prevent the continued use of the name by a person into whose possession the theatre had subsequently come, the name having passed to the defendant with the building and goodwill. Again, in *Mason* v. *Queen* (*a*), the proprietor of the "Waverley Hotel," Glasgow, sold his premises to a railway company, who compensated him for the removal. He afterwards assigned the goodwill of his business and trade name to the plaintiff, who was carrying on another hotel in a different part of Glasgow, the name of which was thereupon changed to the "Waverley." The railway company did not require the actual site of the old hotel for their purposes, and subsequently let it to the defendant, who re-opened the hotel under the name of the "Old Waverley Hotel," and it was held that the plaintiff was not entitled to restrain the defendant from so doing. In *Woods* v. *Sands* (*b*), it was held that the founder of "Woods' Hotel," who had sold and afterwards repurchased his interest in it, had recovered by the re-assignment his exclusive right in the name, and the use of it by another person was prohibited. So, in *Armstrong* v. *Kleinhaus* (*c*), the tenant of a business house which he had called "The Tower Palace," was held to have no right in the name capable of being transferred to a different building elsewhere. And in *Pepper* v. *Labrot* (*d*) it was held that the name "Oscar Pepper's Old Crow Distillery" had become attached to the distillery, and that Oscar Pepper's son and successor in business, on whose bankruptcy the distillery was sold, was not entitled to interfere with the use by the purchaser of the name "Oscar Pepper" as part of the name of the distillery. But in one Canadian case (*e*) the purchasers of "The Western or Mason's Hotel" were protected in their exclusive right to the name, as against the vendor, who had re-occupied his former premises after the purchaser had been driven out by a fire.

Name of hotel on conveyances.

In the same way, the proprietor of the "Prescott House" Hotel was held entitled to restrain the use of the name by a coach proprietor upon his coaches, an agreement between the latter and a former owner of the hotel being treated as having been in the

(*a*) 23 Scot. L. R. 641; and see *Cowan* v. *Millar*, Ct. Sess. Cas. 4th Ser. XXII. 833.

(*b*) Dig. 467. Cf. *Vonderbank* v. *Schmidt*, 44 La. Ann. 264; 32 Am. St. Rep. 336, where it was held that the proprietor of a hotel of his own name did not, by selling the goodwill, give the right to his name as the designation of the hotel.

(*c*) 1 Ky. L. Rep. 112; 82 Ky. 303.

(*d*) 8 Fed. Rep. 26.

(*e*) *Mossop* v. *Mason*, 18 Grant, Up. Can. Ch. 453.

nature of a revocable licence, which had been revoked upon the sale of the hotel to the plaintiff (*a*). And not only the proprietors of such establishments have been protected in respect of the names by which they have been known, but other persons, who have contracted with such proprietors for the exclusive conveyance of visitors to and from their hotels, have been held entitled to restrain the use by others not so authorized upon their vehicles and servants' clothing of the name of the establishment with which they were connected (*b*).

Similar cases.

So, again, the name of a line of steamships (*c*), of collieries (*d*), and of particular waggons (*e*), has been protected.

Name not used in ordinary business.

Closely connected with the cases which concern the rights of an individual or firm in the trade name under which his or their business is carried on, are the cases in which it has been sought by one person to restrain the unauthorized use of his name by another, though he does not himself use that name over a shop, or, in fact, as a trade name usually so called.

Where articles are produced under a certain name.

Where a person produces certain articles, and a representation is made by another that articles not the production of that person are in fact produced by him, there is an injury to the right of property in the name, which has in fact, though not used as a trade mark, yet come to be the producer's means of selling the articles produced.

Author.

Thus, an author is entitled to protection for the name which sells his works for him. In *Lord Byron* v. *Johnston* (*f*), the defendant, who had advertised for sale poems which he represented to be by the plaintiff, but as to which he declined to swear to his belief in their genuineness, was restrained by injunction. And in *Besant* v. *Moffatt & Paige* (*g*), a well-known writer was protected against the use of his name in connection with a book for which he was not responsible.

Humourist.

In *Clemens* v. *Such* (*h*), a humorous writer, whose works were published under the *nom de plume* of "Mark Twain," was held to be entitled to restrain the unauthorized use of that designation by

(*a*) *Deiz* v. *Lamb*, 29 N. Y. Super. Ct. 537.

(*b*) *Stone* v. *Carlan*, 13 Mo. L. R. 360; R. Cox, 115; *Marsh* v. *Billings*, 7 Cush. 322; R. Cox, 118. And compare *Knott* v. *Morgan*, 2 Keen, 213.

(*c*) *Winsor* v. *Clyde*, 9 Phila. 513 ("Keystone Line").

(*d*) *Braham* v. *Beachim*, 7 Ch. D. 848 ("Radstock Collieries").

(*e*) *Shaver* v. *Shaver*, 54 Iowa, 208 ("Shaver Waggons").

(*f*) 2 Mer. 29.

(*g*) 84 L. T. (Journal) 152.

(*h*) Dig. 429.

another person. And in *Clemens* v. *Belford* (*a*), it was held that the name might not be connected with matter not written by the plaintiff, though it might be attached to a reprint of matter written by him and not copyrighted.

Legal writer.

So, again, a legal writer is entitled to prevent the issue as his of works or editions not of his production. In *Archbold* v. *Sweet* (*b*) the plaintiff was the author of a book on a legal subject, of which he had sold the copyright to the defendant. The plaintiff refusing to re-edit the book, the defendant had it edited by another, and the plaintiff thereupon came forward to complain of the inaccuracies which he alleged to be contained in the new edition. Lord Tenterden, C. J., after remarking on the close analogy between that case and those in which an inferior article was sold in the name of a well-known manufacturer, the injury being in the latter case to the sale of the goods, in the former to the character of the author, laid down to the jury that if the new edition, in the form in which it was put forth, would be understood by purchasers who paid reasonable attention to its contents to be by the plaintiff, their verdict must be in his favour.

Painter.
Medical man.

So, again, a painter will be protected from having exhibited as his a picture which he has not painted (*c*), and a medical man who compounds medicines from having spurious medicines sold as his (*d*).

Deception must be probable.

In all such cases the plaintiff must of course show that deception is probable, or he cannot succeed in obtaining the relief he seeks. Thus, where an artist painted a picture, and another person exhibited a diorama imitated from it, it was held that there could be no deception or injury, though if the plaintiff's picture had been a diorama the case would have been different (*e*). So where a person who wrote songs under the name of Claribel sought to restrain the publication of a song described as "written by Claribel," no mention being made of the composer's name, though the music given was not that of Claribel, it was decided that the words "written by" did not imply that the music was also composed by Claribel, and the injunction was refused (*f*).

(*a*) 11 Biss. 459.
(*b*) 1 M. & Rob. 162. Cf. *Lee* v. *Gibbings*, 67 L. T. N. S. 263.
(*c*) *Martin* v. *Wright*, 6 Sim. 297.
(*d*) *Clark* v. *Freeman*, 11 Beav. 112.
(*e*) *Martin* v. *Wright*, 6 Sim. 297.
(*f*) *Barnard* v. *Pillow*, W. N. 1868, p. 94. And see *Seeley* v. *Fisher*, 11 Sim. 581; and *Archbold* v. *Sweet*, 1 M. & Rob. 162.

*Clark* v. *Freeman.*

The decision in *Clark* v. *Freeman* (*a*) has been much discussed with respect to the right a man has in his name. In that case the plaintiff, Sir James Clark, was an eminent physician, who filed a bill to restrain the advertisement and sale by the defendant of certain pills termed by him "Sir J. Clarke's Consumption Pills," the advertisements being so framed as to be calculated to induce the public to buy the pills as being of the plaintiff's invention. Lord Langdale, M. R., refused to grant the injunction, on the ground that there was no injury to property; but apparently not without some doubt, since he gave leave for the case to be mentioned again to him if cases in support of the bill could be produced. He did not, however, think the cases mentioned to him (*b*) sufficient to warrant him in granting the injunction, but at the same time he remarked that if "Sir James Clark had been in the habit of manufacturing and selling pills, it would have been very like the other cases in which the Court had interfered for the protection of property." The principle on which Lord Langdale's decision was based was that the Court would not interfere where the name pirated by the defendant had not become known to the public in connection with a manufactured article, but was merely a name under which an individual had acquired a certain reputation (*c*). It is evident, however, that the sale of quack medicines under the name of an eminent physician would tend to destroy his reputation and the confidence of his patients in him, and thereby to cause him a far more severe pecuniary loss than would be incurred by the sale of a few boxes of pills or copies of a book being lost to him. Later judges have, therefore, been of opinion that the case in question "might have been decided in favour of the plaintiff, on the ground that he had a property in his own name" (*d*).

(*a*) 11 Beav. 112.

(*b*) *Lord Byron* v. *Johnston*, 2 Mer. 29; and *Routh* v. *Webster*, 10 Beav. 561.

(*c*) See *Delondre* v. *Shaw*, 2 Sim. 237.

(*d*) *Per* Cairns, L. J., in *Maxwell* v. *Hogg*, L. R. 2 Ch. 307. In *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 561, Malins, V.-C., went even farther. And in *In re Riviere*, 26 Ch. D. 48, 53, Lord Selborne, C., observed "that case has seldom been cited but to be disapproved; could not a professional man be injured in his profession by having his name associated with a quack medicine?" In *Williams* v. *Hodge & Co.*, 84 L. T. (Journal) 134, a very similar case, Kay, J., said that the decision in *Clark* v. *Freeman* "was rather a surprising one, and one which he had always thought was not sufficiently considered"; but he did not feel himself at liberty to disregard it on an interlocutory application, in the absence of authority to the contrary. The expressions of opinion of Lord Cairns, Lord Selborne and Malins, V.-C., had apparently not been brought to his notice. Lord Westbury, C., however, spoke of the decision at all events with-

Contracts in respect of names.

Whatever rights a man may, irrespective of contract, have in his own name, so as to be able to prevent the unauthorised use of it by another, it is always open to him to modify those rights by contract, whether by way of permitting others to use his name in a certain manner (*a*), or by way of restraining his own use of it to a certain extent (*b*). Thus, where a publisher had sold to the defendants the copyright of an annual, entitled "Beeton's Christmas Annual," he himself entering into their service, it was held that the defendants were entitled to continue the annual publication under that same name, even after the plaintiff had ceased to remain in their employ, and had become unwilling for his name to be used by them in connection with a work not of his production (*c*). But it seems that, although a contract by which a man binds himself to limit in some way his use of his own name can be enforced, a contract so binding him cannot be made by the representatives of his estate in bankruptcy, and if such a contract has been entered into, the bankrupt will be entitled to disregard it (*d*).

Name of editor.

The name of the editor of a publication, appearing upon the title page, forms no part of the title. Romilly, M. R., refused, therefore, to restrain the proprietors of a paper, who had agreed with their editor not to alter the title of their paper without mutual consent, from omitting the publication on the title page of the editor's name as such (*e*).

Where name abused so as to injure.

It is clear that a man has a right to prevent the unauthorised use of his name by another person, apart from any special manufacture, where such use of it might involve him in legal or other difficulties. Thus, in *Routh* v. *Webster* (*f*) a bill was filed to restrain the provisional directors of a joint-stock company, called "The Economic Conveyance Company," from using the plaintiff's name in their prospectuses as a trustee of their company without

out disapprobation: *Leather Cloth Co.'s case*, 4 De G. J. & S. 137. *Clark* v. *Freeman* has been again observed upon by Kekewich, J., in *Lee* v. *Gibbings*, 67 L. T. N. S. 263, in which he said, "I do not think that after the observations of Malins, V.-C., Lord Cairns, and Lord Selborne, I ought to hold or regard it as otherwise than erroneously decided."

(*a*) *Ward* v. *Beeton*, L. R. 19 Eq. 207. See *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Hallett* v. *Cumston*, 110 Mass. 29; *Weed* v. *Peterson*, 12 Abb. Pr. N. S. 178; *Coe* v. *Bradley*, 9 U. S. Pat. Cas. 541.

(*b*) *Ainsworth* v. *Bentley*, W. N. 1877, 630; *Ward* v. *Beeton*, L. R. 19 Eq. 207; *Peltz* v. *Eichele*, 52 Mo. 65; *Coe* v. *Bradley*, 9 U. S. Pat. Cas. 541.

(*c*) *Ward* v. *Beeton*, L. R. 19 Eq. 207. See *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306.

(*d*) *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 103. And see *Walker* v. *Mottram*, 19 Ch. D. 355.

(*e*) *Crookes* v. *Petter*, 6 Jur. N. S. 1131.

(*f*) 10 Beav. 561.

his authority. The defendants setting up by way of defence that what had been done had been done inadvertently, and stating their intention of discontinuing their misrepresentations, the Master of the Rolls granted the injunction, holding that the defendants were not entitled "to use the name of any person they pleased, representing him as responsible in their speculations, and to involve him in all sorts of liabilities, and then to be allowed to escape the consequences by saying they had done it by inadvertence," and also that the plaintiff was in nowise bound to surrender his right to the injunction, trusting to the assurances of the defendants as to their intentions for the future. This decision has been generally approved as an "authority for preventing the improper use of a man's name against his will; not for the restraint of a libel, for no libel was involved" (*a*).

Trade libel.

Where, however, a man's name has been used against his will in such a manner as to be libellous, or where statements have been made disparaging the goods sold under his name or trade mark, or threatening persons dealing in his goods, a more difficult question is raised, and one which has not always been answered in the same way. With respect to libels, Lord Cottenham, C., said (*b*), that the Libel Act "appointed a jury as the proper tribunal for trial of injuries to the person by libel or defamation; and that the liberty of the press consisted in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels, public or private." The principle that the publication of a libel was a crime, and that the Court of Chancery had no jurisdiction to prevent the commission of crimes, except in such cases as those relating to the protection of infants, was laid down by Lord Eldon in 1818 (*c*), and after that time the Equity judges frequently stated that it was not within the proper scope of their authority to restrain the publication of libels (*d*). There were, indeed, cases

(*a*) *Per* Lord Cairns, C., in *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142. In *Webster* v. *Webster*, 3 Swanst. 490, n., the injunction was refused because there was no injury to be apprehended. In *Tudor* v. *Tudor*, W. N. 1873, p. 72, there was an express contract. See *Bullock* v. *Chapman*, 2 De G. & Sm. 211; *Dixon* v. *Holden*, L. R. 7 Eq. 488; *Reid* v. *Sibbald*, 18 Journ. of Juris. 392; and cases *infra*.

(*b*) *Fleming* v. *Newton*, 1 H. L. C. 376. This case was a Scotch one, and the Lord Chancellor was speaking with reference to the Scotch Libel Act, but his remarks are equally applicable to cases arising in England, and under Order XXXVI. rule 2, of the Rules of 1883, a defendant in a libel case can still insist upon a jury.

(*c*) *Gee* v. *Pritchard*, 2 Swanst. 413.

(*d*) *Martin* v. *Wright*, 6 Sim. 297; *Seeley* v. *Fisher*, 11 Sim. 581; *Clark* v. *Freeman*, 11 Beav. 112; *Emperor of*

in which it was thought that where an injury was occasioned or threatened to a right of property by a libellous statement, the Court had jurisdiction to interfere to protect that right of property (*a*), but, practically speaking, cases which involved the consideration of libellous statements were left to the Courts of Common Law (*b*).

Effect of the Judicature Act, 1873.

The Judicature Act, 1873, however, introduced a new element into the discussion by enacting (§ 25, sub-s. 8) that "an injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made"; and in *Thorley's Cattle Food Co.* v. *Massam* (*c*), Vice-Chancellor Malins suggested that this enactment had conferred upon the Court more extensive powers than those which it previously possessed, and that an injunction might have been granted by virtue of those powers to restrain an injurious and unjust statement. Numerous cases have since been decided with respect to the effect of the section, in some of which expressions were employed which were calculated to lead to the belief that the power to grant injunctions where it was thought to be "just or convenient" conferred a power to grant injunctions in cases in which no legal remedy previously existed (*d*). It is now, however, settled—and this is not opposed to the observations before referred to—that the right view is that the section has enlarged the powers of the Court, not by enabling the Court to grant relief in cases where none was obtainable before in any of the Superior Courts, but by way of giving each branch of the High Court power to grant relief in cases which could previously be brought only in the same or a different form before some other

*Austria* v. *Day*, 2 Giff. 628; 3 De G. F. & J. 217 (in particular *per* Turner, L. J.); *Mulkern* v. *Ward*, L. R. 13 Eq. 619; *Browne* v. *Freeman*, W. N. 1873, p. 178; *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142; *Fisher* v. *Apollinaris Co.*, *ib.* 297. The same view has been taken in India: *Shepherd* v. *Trustees of the Port of Bombay*, Ind. L. R. 1 Bomb. 132; and in America: *Mauger* v. *Dick*, 55 How. Pr. 132.

(*a*) This was especially the view of Malins, V.-C. See *Dixon* v. *Holden*, L. R. 7 Eq. 488; *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 561; *Rollins* v. *Hinks*, L. R. 13 Eq. 355; *Axmann* v. *Lund*, L. R. 18 Eq. 330. And see also *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *James* v. *James*, L. R. 13 Eq. 421.

(*b*) For the principles by which the Courts of Common Law were guided, see *Wren* v. *Weild*, L. R. 4 Q. B. 730; *Western Counties Manure Co.* v. *Lawes' Chemical Manure Co.*, L. R. 9 Ex. 218; *Mellin* v. *White*, (1894) A. C. 154.

(*c*) 6 Ch. D. 582.

(*d*) See *Beddow* v. *Beddow*, 9 Ch. D. 89; *Quartz Hill Consolidated Gold Mining Co.* v. *Beall*, 20 Ch. D. 501.

branch of the Court (*a*); so that, as Cotton, L. J., said in the case of *North London Railway Co.* v. *Great Northern Railway Co.* (*b*), "where there is a legal right which was, independently of the Act, capable of being enforced either at law or in equity, there, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right."

Conditions necessary for injunction.

The injunction may be granted to restrain the continued publication of a libel which has been found to be so by the verdict of a jury (*c*), or it may be granted to restrain the publication of statements which have not been submitted to a jury (*d*). But where the Court is asked to grant an injunction, especially on an interlocutory application, without the assistance of a jury, the jurisdiction which it possesses so to do is one which must be exercised very carefully (*e*), and it ought not to be exercised unless the statements of which complaint is made are proved to be untrue (*f*), unless they are injurious to the plaintiff (*g*), with reference to his trade or property (*h*), and are so clearly libellous that a contrary verdict of a jury would be set aside as unreasonable (*i*), unless it is proved that the defendant intends to continue

(*a*) *Day* v. *Brownrigg*, 10 Ch. D. 294; *Ward* v. *Drat*, L. J. N. of C. 1878, p. 67; *Gaskin* v. *Balls*, 13 Ch. D. 324; *Dicks* v. *Brooks*, 15 Ch. D. 22 (*per* Bacon, V.-C.); *Mellin* v. *White*, (1895) A. C. 154, 163.

(*b*) 11 Q. B. D. 30.

(*c*) *Saxby* v. *Easterbrook*, 3 C. P. D. 339; *Hinrichs* v. *Berndes*, W. N. 1878, p. 11.

(*d*) As in *Thomas* v. *Williams*, 14 Ch. D. 864; *Collard* v. *Marshall*, (1892) 1 Ch. 571; *Pink* v. *Federation of Trades & Labour Union*, 67 L. T. N. S. 258. And see *Jarradale Timber Co.* v. *Temperley*, 11 Times L. R. 119; *ib.* 305. Cf. *Lee* v. *Gibbings*, 67 L. T. N. S. 263, and *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*, 15 P. R. 677, and on appeal 16 P. R. 217.

(*e*) *Quartz Hill Consolidated Gold Mining Co.* v. *Beall*, 20 Ch. D. 501; *Armstrong* v. *Armit*, 2 Times L. R. 887; *Coulson & Sons* v. *Coulson & Co.*, 3 *ib.* 846; *Liverpool Household Stores Association* v. *Smith*, 37 Ch. D. 170. See *Marks* v. *Conservative Newspaper Co., Ld.*, 3 Times L. R. 244; *Collard* v. *Marshall*, (1892) 1 Ch. 571; *Lipton, Ld.* v. *Duncans*, Times, Nov. 26th, 1898.

(*f*) *Halsey* v. *Brotherhood*, 15 Ch. D. 514; 19 *ib.* 386; *Burnett* v. *Tate*, 45 L. T. N. S. 743; *Anderson* v. *Liebig's Extract of Meat Co., Ld.*, *ib.* 757; *Quartz Hill, &c. Co.* v. *Beall*, 20 Ch. D. 501; *Benbow* v. *Low* (1), 23 Sol. J. 819; *Roper's, &c. Co.* v. *Copeman's, &c., Association, Ld.*, 28 *ib.* 218; *Armstrong* v. *Armit*, 2 Times L. R. 887; *Coulson & Sons* v. *Coulson & Co.*, 3 *ib.* 846; *Liverpool Household Stores Association* v. *Smith*, 37 Ch. D. 170; *Poulett* v. *Chatto & Windus*, 32 Sol. J. 24; *Nähmaschinen Fabrik Vormals Frister & Rossmann Aktiengesellschaft* v. *Singer Manufacturing Co.*, 10 P. R. 310; *Incandescent Gas Light Co.* v. *New Incandescent Gas Lighting Co.*, 76 L. T. N. S. 47, which shows that it is a good defence that the statements are substantially true. And see *Clover* v. *Royden*, L. R. 17 Eq. 190.

(*g*) *Dicks* v. *Brooks*, 15 Ch. D. 22. And see *Brook* v. *Evans*, 2 L. T. N. S. 740; *Bullock* v. *Chapman*, 2 De G. & Sm. 211.

(*h*) See *per* Lindley, L. J., in *Coulson & Sons* v. *Coulson & Co.*, 3 Times L. R. 846, with which compare the statement by North, J., in *Pollard* v. *Photographic Co.*, 40 Ch. D. 345.

(*i*) *Coulson & Sons* v. *Coulson & Co.*, 3 Times L. R. 846; *Liverpool Household Stores Association* v. *Smith*, 37 Ch. D. 170.

to make them (*a*), and that the injury will be irreparable, *i.e.*, incapable of compensation by damages (*b*), and unless (in cases of privilege) express malice is also established (*c*). Thus, in *Halsey* v. *Brotherhood* (*d*) the defendant had threatened intending purchasers from the plaintiff, alleging that the plaintiff was manufacturing in infringement of his, the defendant's, patent rights; and Jessel, M. R., and the Court of Appeal held that an injunction could not be granted unless the defendant persisted in making the statements after they had been proved to be false. In *Colley* v. *Hart* (*e*), it was held by North, J., that there was no jurisdiction to restrain the defendant from issuing a circular to the plaintiff's customers, alleging that the plaintiff was infringing his trade marks, and threatening proceedings, but at the trial of the action he appears to have been disposed to hold that such an action might properly lie if malice were proved (*f*). And in *Anderson* v. *Liebig's Extract of Meat Co., Ld.* (*g*), Chitty, J., refused to restrain the company (who were taking proceedings to stop the plaintiff from selling his goods as "Baron Liebig's Extract of Meat" and using on the pots a photograph of the Baron) from circulating letters among the plaintiff's customers, stating that he was using the name and photograph without authority, on the ground that the company was not shown to be acting otherwise than *bonâ fide*, or to be stating that which was untrue (*h*).

In *Lee* v. *Gibbings* (*i*), it was held by Kekewich, J., that an author of a book who had sold the copyright to a publisher, could not restrain him from publishing the book in a mutilated form except on the ground of injury to reputation, the remedy for which was an action for libel, and that the Court ought not, except in

(*a*) *Quartz Hill, &c. Co.* v. *Beall*, 20 Ch. D. 501.

(*b*) *Armstrong* v. *Armit*, 2 Times L. R. 887.

(*c*) *Quartz Hill, &c. Co.* v. *Beall*, 20 Ch. D. 501; *Burnett* v. *Tate*, 45 L. T. N. S. 473; *Armstrong* v. *Armit*, 2 Times L. R. 887; *Coulson & Sons* v. *Coulson & Co.*, 3 *ib.* 846; *Liverpool Household Stores Association* v. *Smith*, 37 Ch. D. 170; *Incandescent Gas Light Co.* v. *New Incandescent Gas Lighting Co.*, 76 L. T. N. S. 47.

(*d*) 15 Ch. D. 514; 19 *ib.* 386. See the New York case of *Wolfe* v. *Burke*, 56 N. Y. 115. The precise question raised in *Halsey* v. *Brotherhood* is now settled by § 32 of the Patents Act, 1883, under which numerous cases have been decided, but the general question of injunctions to restrain trade libels remains. See *Incandescent Gas Light Co.* v. *New Incandescent Gas Lighting Co.*, 76 L. T. N. S. 47.

(*e*) 6 P. R. 17.

(*f*) *Colley* v. *Hart* (2), 7 P. R. 101.

(*g*) 45 L. T. N. S. 757.

(*h*) And see *Nähmaschinen Fabrik Vormals Frister & Rossmann Aktiengesellschaft* v. *Singer Manufacturing Co.*, 10 P. R. 310. Cf. *Coats* v. *Chadwick*, (1894) 1 Ch. 347.

(*i*) 67 L. T. N. S. 263.

the case of a trade libel, to grant an interlocutory injunction to restrain a libel. In *Mellin* v. *White* (*a*), it was held by the House of Lords, that in order to maintain an action for a false statement disparaging the goods of a rival trader, proof of special damage (*b*) was necessary, and that for this purpose it was immaterial whether the remedy sought was injunction or damages; and it was doubted by Lord Herschell whether such an action could be maintained where the only disparagement consisted in vaunting the superiority of the defendant's goods either generally or in some particular respect (*c*). "In order to constitute disparagement," said Lord Watson, "which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they have occasioned special damage to the plaintiff"; though, where the statement complained of is not merely a disparagement of the plaintiff's goods but is capable of being read as a disparagement of the plaintiff in the way of his trade, it may be a trade libel (*d*), in which case proof of special damage is unnecessary (*e*). In accordance with the view above expressed by Lord Herschell, the Court of Appeal in a recent case in which the sole cause of action disclosed by the statement of claim was that the defendants, who were rivals in trade of the plaintiffs, had falsely and maliciously published a statement that their goods were superior to the plaintiffs', ordered the statement of claim to be struck out as disclosing no reasonable cause of action and dismissed the action on the ground that the statement complained of, coming from rival traders, did not constitute a cause of action, whether special damage were alleged or not (*f*).

When granted.

On the other hand, where the necessary facts are present, an injunction will be granted, as in *Thorley's Cattle Food Co.* v. *Massam* (2) (*g*), where it was established that the plaintiffs and defendants were both in possession of and entitled to use the same

(*a*) (1895) A. C. 154.

(*b*) As to the meaning of special damage, see *Ratcliffe* v. *Evans*, (1892) 2 Q. B. 524. And see *Empire Typesetting Machine Co. of New York* v. *Linotype Co.*, 79 L. T. N. S. 8.

(*c*) And see *Cohn* v. *People*, 149 Ill. 486; 41 Am. St. Rep. 304; *Covell* v. *Chadwick*, 153 Mass. 263; 25 Am. St. Rep. 625.

(*d*) *Empire Typesetting Machine Co. of New York* v. *Linotype Co.*, 79 L. T. N. S. 8.

(*e*) *South Hetton Colliery Co.* v. *North Eastern News Association*, (1894) 1 Q. B. 133.

(*f*) *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark*, (1899) 1 Q. B. 86.

(*g*) 14 Ch. D. 763. And see *Hill* v. *Hart-Davies*, 21 Ch. D. 798; *Hermann Loog, Ld.* v. *Bean*, 26 Ch. D. 306; *Hay-*

secret recipe in their respective businesses, and Malins, V.-C., and the Court of Appeal granted an injunction to restrain the defendants from publicly advertising that they alone were acquainted with the secret.

Survival of cause of action.

Where the plaintiff in an action for slander of title to a trade mark and his property therein dies, the cause of action survives to his legal personal representative (*a*).

Misrepresentations by subsequent manufacturer.

The same principle on which misrepresentations by an original manufacturer with respect to the goods and business of a subsequent manufacturer are restrained, applies with even greator force to similar misrepresentations by the latter, and while it is open to any one to manufacture an unpatented article with the process of manufacture of which he has become acquainted, and also to describe it by the name applied to it by the original inventor so soon as that name shall have become *publici juris*—that is to say, descriptive of a specific article, but not of a specific maker—yet at the same time such subsequent manufacturer is not entitled to carry on an unfair competition in trade with the original maker or his successors in business, by means of assertions or representations that his own article is the only genuine one, or that the article of the original maker or his successors is spurious (*b*).

"Original."

And where such an assertion or representation is embodied in the title of the later manufacturer's article by its being styled the "original"—an appellation which would naturally suggest the idea of the article in question being the make of the original manufacturer—such fraudulent representation will usually be restrained (*c*). But in the entire absence of evidence as to deception, Wood, V.-C., refused to grant an injunction in a similar case (*d*), and from the result of later litigation between the same parties (*e*), it is clear that the presumption against a person who styles an article of his own manufacture, but not of his invention,

*ward & Co.* v. *Hayward & Sons*, 34 Ch. D. 198; *Punch* v. *Boyd*, 16 L. R. Ir. 476.

(*a*) *Hatchard* v. *Mège*, 18 Q. B. D. 771.

(*b*) *James* v. *James*, L. R. 13 Eq. 421; *Thomas* v. *Williams*, 14 Ch. D. 864; *Liebig's Extract of Meat Co., Ld.* v. *Anderson* (2), 55 L. T. N. S. 206; *Hirsch* v. *Hirsch & Co.*, 80 L. T. (Journal) 283; *Briton Life Association, Ld.* v. *Roberts*, 2 Times L. R. 319.

(*c*) *Cocks* v. *Chandler*, L. R. 11 Eq. 446; *Lazenby* v. *White*, 41 L. J. Ch. 354. So in *M. Melachrino* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888, where the defendants had placed on their labels the words "R. Melachrino & Co. Original Egyptian cigarettes." And see *Hagg* v. *Darley*, 47 L. J. Ch. 567.

(*d*) *Browne* v. *Freeman*, 12 W. R. 305.

(*e*) *Browne* v. *Freeman*, W. N. 1873,

"the original," may be rebutted. In *Dence* v. *Mason* (1) (*a*), the defendant was restrained from styling himself the original maker of the "essence of beef," Malins, V.-C., holding that even if he had been the first to actually compound the article, which was not satisfactorily proved, he was not entitled to make such statements as those complained of, since he was in the employ of the plaintiff's predecessor in business at the time when he said he made it for the first time. In *Fullwood* v. *Fullwood* (2) (*b*), the defendants attempted to represent their business to be the original one, by assuming for it the date of establishment of the business which was really the first.

False representation of agency.

A dealer may not represent, contrary to the fact, that he is agent for a manufacturer (*c*); neither may a manufacturer represent, contrary to the fact, that a dealer is acting as agent for him (*d*). A trader who manufactures according to a particular process cannot obtain an injunction to restrain another trader from stating untruly that he manufactures according to that process, so long as the latter does not represent that his goods are the goods of the plaintiff. In civil proceedings traders can only sue in protection of their own interests and not to prevent the public from being cheated (*e*).

Deceptive labels and notices.

In other cases the attempt to deceive has been made in different forms: thus, in an early case (*f*), the defendant attempted to attract to himself the custom intended for the plaintiffs by an ingenious variation of their labels, his own labels being facsimiles of those of the plaintiffs, with only the difference that, whereas theirs contained the sentence "Manufactured by Day and Martin," his bore the words "Equal to Day and Martin's," the "Equal to" being in very small type. So, in an American case (*g*), a dentist formerly employed by the Colton Dental Association, on setting up in business for himself, described himself in his notice as

p. 178. This was, however, before the cases under the Judicature Act, 1873, which see, *supra*.

(*a*) Dig. 534; 41 L. T. N. S. 573.

(*b*) 9 Ch. D. 176. And see *Green* v. *Rooke*, W. N. 1872, p. 49; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *Whitney* v. *Hickling*, 5 Grant, Up. Can. Ch. 605; *Mossop* v. *Mason*, 18 *ib.* 453; *Blackwell* v. *Wright*, 73 N. Car. 310; *Woods* v. *Sands*, Dig. 467.

(*c*) *Howe* v. *McKernan*, 30 Beav. 547.

(*d*) *Coleman* v. *Flavel*, 12 Sawy. 220.

(*e*) *Native Guano Co., Ld.* v. *Sewage Manure Co.*, 8 P. R. 125. And see *Freeman* v. *Sharp Brothers & Co., Ld.*, 16 P. R. 205.

(*f*) *Day* v. *Binning*, C. P. Cooper, 489; 1 Leg. Obs. 205. See *Wolfe* v. *Alsop* (1) & (2), 10 V. L. R. (E.) 41; 12 *ib.* 421.

(*g*) *Collon* v. *Thomas*, 2 Brews. 308; R. Cox, 507. And see *Klotz* v. *Hecht*, 73 Fed. Rep. 822; *Garde* v. *Mitchell*, 17 V. L. R. 209. And see cases collected at p. 135.

"formerly operator at the Colton Dental Rooms," "formerly operator at the" being printed very small. And in another American case (*a*) a former partner in a firm of dentists trading as "Morgan and Schuyler," continued to carry on business at the old premises as "B. F. Schuyler, successor to Morgan and Schuyler," the words preceding the old firm name being in such small letters as to be almost invisible. In *Mallan* v. *Davis* (*b*), a dentist who had practised for several years in Praed St. with the words "Old-established dentist" over the door, left that address; and the defendant, who practised as a dentist at another house in Praed St., put up a notice stating that the old-established dentist could be consulted there; and it was held that he had acted in a way calculated to deceive, but no injunction was granted, there having been a delay of three months, and the defendant giving an undertaking to combine his own name in a conspicuous way with the description.

*Franks* v. *Weaver*.

Again, in *Franks* v. *Weaver* (*c*), the plaintiff sold a medicine which he had invented, and which he termed "Franks' Specific Solution of Copaiba," in bottles enclosed in wrappers, on which were printed directions for use, and testimonials. The defendant, an agent of the plaintiff, sold a preparation of his own, labelled "Chemical Solution of Copaiba." The label went on to state that the plaintiff had invented the "Specific Solution," and then gave the testimonials printed by the plaintiff as commendatory of the plaintiff's medicine, and also the same directions for use as those given by the plaintiff. In *Sedon* v. *Senate* (*d*), a person who had sold a medicine to another, set up a new medicine under a similar description, and in his advertisement adopted verses which had been attached to the original medicine. In all these cases, except *Mallan* v. *Davis* (*e*), injunctions were granted.

**Directions for use.**

With respect to directions for the use of the article, it seems that, as Malins, V.-C., said in *Massam* v. *Thorley's Cattle Food Co.* (1) (*f*), if the article produced by one person is the same as that produced by another, and the former is quite at liberty to produce the same article, then the directions used by the latter are the correct directions for the use of the former's article, and he can

(*a*) *Morgan* v. *Schuyler*, 79 N. Y. 490.
(*b*) 3 Times L. R. 221.
(*c*) 10 Beav. 297. And see *Siegert* v. *Findlater*, 7 Ch. D. 801; *Siegert* v. *Ehlers*, Dig. 432; *Dunbar* v. *Glenn*, 42 Wisc. 118.
(*d*) 2 V. & B. 220. And see *Wotherspoon* v. *Gray*, Ct. Sess. Cas. 3rd Ser. II. 38, where the interdict was refused.
(*e*) 3 Times L. R. 221.
(*f*) 6 Ch. D. 574, 581. And see *per* Cotton, L. J., in *In re Leonard & Ellis*, 53 L. J. Ch. 611; and *Gessler* v. *Grieb*, 80 Wisc. 21; 27 Am. St. Rep. 20.

only repeat them. In fact, if he could not give the appropriate directions for using the article which he is entitled to make, his liberty to manufacture would be unduly interfered with. The decision in the above case was, however, reversed by the Court of Appeal (*a*) on the general question of representation, the imitation of the directions being referred to as an indication of fraudulent intention, and any trader who uses the same directions as another ought to take great care to prevent the possibility of deception.

Name of patentee.

To describe articles formerly patented by the name of the former patentee is not necessarily fraudulent, since the name may be used as indicative of a principle of construction (*b*); but in an American case (*c*) an injunction was granted to restrain the defendant from marking goods of his own make as being made under the plaintiff's subsisting patent, notwithstanding an allegation by the defendant that the patent was invalid.

Mode of packing.

The imitation of a peculiar manner of making up and packing goods may, in combination with other circumstances, be held to prove a fraudulent intention; and it seems that, even in the absence of other circumstances of fraud, if the imitation is very significant, and the evidence very conclusive, an injunction will be awarded (*d*).

Imitation of line of omnibuses.

The manner in which the Court interferes by way of injunction to prevent unfair competition in trade is well illustrated by a case which has always attracted a good deal of attention—that of the omnibus companies (*e*). In that case the plaintiffs were the proprietors of a line of omnibuses painted in a particular manner, with the words "Conveyance Company" and "London Convey-

(*a*) 14 Ch. D. 748. And see *Simmons Medicine Co.* v. *Simmons*, 81 Fed. Rep. 163.

(*b*) *Wheeler & Wilson Manufacturing Co.* v. *Shakespear*, 39 L. J. Ch. 36; *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15; and other cases in Ch. 4.

(*c*) *Washburn & Moen Manufacturing Co.* v. *Haish*, 9 Biss. 141.

(*d*) See *Edelsten* v. *Vick*, 11 Hare, 78; *Woollam* v. *Ratcliff*, 1 H. & M. 259; *Anglo-Swiss Condensed Milk Co.* v. *Swiss Condensed Milk Co.*, W. N. 1871, p. 163; *Lever* v. *Goodwin*, 36 Ch. D. 1; *Edge* v. *Johnson*, 9 P. R. 134; *McLean* v. *Fleming*, 96 U. S. 245; *Frese* v. *Bachof* (1), 13 Bl. C. C. 234; S. C. (2), 14 *ib.* 432; *Cleveland Stone Co.* v. *Wallace*, 52 Fed. Rep. 431; *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154. See also *Orr* v. *Diaper*, L. R. 4 Ch. D. 92; and *Buck's Stove & Range Co.* v. *Kiechle*, 76 Fed. Rep. 758. And see cases collected at p. 139.

(*e*) *Knott* v. *Morgan*, 2 Keen, 213. See also *London General Omnibus Co.* v. *Felton*, 12 Times L. R. 213; *London Road Car Co.* v. *Era Omnibus Association*, Times, June 23rd, 1898, where the defendants were restrained on motion by the Court of Appeal from running omnibuses with a flag affixed thereto and otherwise got up like the plaintiffs' omnibuses without more clearly distinguishing their omnibuses from the plaintiffs', and at the trial the injunction was made perpetual by Cozens-Hardy, J., Times, April 28th, 1899; *Stone* v. *Carlan*, 13 Mo. L. R. 360; R. Cox, 115; *Marsh* v. *Billings*, 7 Cush. 322; R. Cox, 118; *Deiz* v. *Lamb*, 29 N. Y. Sup. Ct. 537.

ance Company" upon them. The defendant ran omnibuses similarly painted, and dressed his servants in livery imitated from that of the plaintiffs' employés. On his being required to alter this, he made some mere colourable alterations, but really left the matter as it stood at first. Lord Langdale, M. R., on the case coming before him on motion to dissolve an interlocutory injunction, said that he had not the least doubt that the defendant intended to represent his omnibuses to the public as those of the plaintiffs. He said "it was not to be said that the plaintiffs had any exclusive right to the words 'Conveyance Company' or 'London Conveyance Company,' or any other words; but they had a right to call upon that Court to restrain the defendant from fraudulently using precisely the same words and devices which they had 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, belonged to and were under the management of the plaintiffs." This case was not at all a case of trade mark, though reference has been made to it as such; the Master of the Rolls expressly denied any exclusive right in the words painted on the vehicles, and personally altered the terms of the injunction so as to avoid creating such a right. In the language of Wood, V.-C. (*a*), "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." The value of the case really consists in the example it affords of the way in which the aggregation of a number of circumstances, individually comparatively harmless, may produce a result injurious to an individual and obnoxious to the law; and also of the manner in which the law will interfere to protect the interests of honest trade.

Etchings.

Where A. had surreptitiously obtained possession of some etchings by B., and had advertised them for exhibition, and a catalogue of them, Lord Cottenham, C., held that there was a title to relief alike on the ground of injury to property and on that of breach of trust (*b*).

Trade secrets.

As to the cases which have been decided in respect of trade secrets, the general rule may be stated as being that any person

(*a*) *Woollam* v. *Ratcliff*, 1 H. & M. 259.

(*b*) *Prince Albert* v. *Strange*, 1 Mac. & G. 25. See *Pollard* v. *Photographic Co.*, 40 Ch. D. 345. And see *Lamb* v. *Evans*, (1893) 1 Ch. 218, 229, *per Bowen*, L. J.

who has, without the use of unfair means, become acquainted with the mode of compounding a secret unpatented preparation, may make and sell the compound, provided he does not lead the public to suppose that his preparation is the manufacture of the original discoverer or of his successors in business; and he may even call the compound made by himself by the same name as that given by the original discoverer to his, so long as he does not sell his own goods as and for those of another (*a*). On the other hand, where the knowledge of the secret process has been acquired by means of a breach of trust, neither the person who has committed the breach of trust, nor any one to whom he has imparted his discovery, will be allowed to make use of the information so surreptitiously acquired (*b*).

Contract not to use or divulge another's secret.

Again, "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" (*c*); and, stating it generally, where one person has entered into a contract, express or implied (*d*), with another person, to keep that other person's secret, and not to divulge it, nor to use it for his own advantage, he will be restrained by an injunction from so divulging or using the secret in question (*e*); and so will

(*a*) *James* v. *James*, L. R. 13 Eq. 421; *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298; *Condy* v. *Mitchell*, 37 *ib.* 268, 766; *Carter* v. *Goetze*, 2 Keen, 581; *Singleton* v. *Bolton*, 3 Doug. 293; *Williams* v. *Williams*, 3 Mer. 157; *Canham* v. *Jones*, 2 V. & B. 218. And see the comments on that case in *Morison* v. *Moat*, 9 Hare, 241. But, of course, when the name has become a trade mark, no one but the proprietor can use it. The question is whether the name is descriptive of the article or distinctive of the manufactory. See *Massam* v. *Thorley's Cattle Food Co.* (2), 14 Ch. D. 748.

(*b*) *Williams* v. *Williams*, 3 Mer. 157; *Youatt* v. *Winyard*, 1 Jac. & W. 394; *Tipping* v. *Clarke*, 2 Hare, 383; *Morison* v. *Moat*, 9 *ib.* 241; 21 L. J. Ch. 248; *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276; *Portal* v. *Hine*, 4 Times L. R. 330.

(*c*) *Per* Lord Cranworth, L. J., in *Morison* v. *Moat*, 21 L. J. Ch. 248. And see *Merryweather* v. *Moore*, (1892) 2 Ch. 518; *Lamb* v. *Evans*, (1892) 3 Ch. 462; (1893) 1 Ch. 218; *Little* v. *Gallus*, 4 App. Div. N. Y. 569; *Simmons Medicine Co.* v. *Simmons*, 81 Fed. Rep. 163.

(*d*) See *Tipping* v. *Clarke*, 2 Hare, 383; *Weston* v. *Hemmons*, 2 V. L. R. Eq. 121.

(*e*) *Sedon* v. *Senate*, 2 V. & B. 220; *Bryson* v. *Whitehead*, 1 S. & S. 74; *Green* v. *Folgham*, *ib.* 398; *Tipping* v. *Clarke*, 2 Hare, 383; *Morison* v. *Moat*, 9 *ib.* 241; 21 L. J. Ch. 248; *Hagg* v. *Darley*, 47 *ib.* 567; *Portal* v. *Hine*, 4 Times L. R. 330; *Merryweather* v. *Moore*, (1892) 2 Ch. 518; *Whitney* v. *Hickling*, 5 Grant Up. Can. Ch. 605; *Weston* v. *Hemmons*, 2 Vict. L. R. Eq. 121; *Peabody* v. *Norfolk*, 98 Mass. 452; *Salomon* v. *Hertz*, 40 N. J. Eq. 400, where, however, it was held that the defendant ought not to be restrained from divulging where or from whom the plaintiff bought his materials, or to whom he sold his goods, or the prices at which he bought and sold. In *Newbery* v. *James*, 2 Mer. 446, Lord Eldon declined to issue an injunction, on the ground that the Court could have no

a person who is acting in collusion with him (*a*); and a contract by which, on the sale of a trade secret, the vendor has bound himself not to use that secret, is not invalid as being in restraint of trade (*b*). Where the defendant, who had become acquainted with a trade secret, stood by and allowed the plaintiff to purchase it, without disclosing that he was acquainted with it, it was held that he was estopped from setting up his previous knowledge against the plaintiff, and an injunction was granted to restrain him from using it (*c*).

Name of secret manufacture.

Where the defendant is availing himself of a breach of faith or of contract by means of the use of a certain designation for his goods, in such a case the defendant will be restrained from the use of such designation, although the plaintiff may have no exclusive right in the same, apart from such special circumstances (*d*).

Cannot be used in ignorance of true recipe.

No one will be allowed to use the name of a well-known article, with the secret recipe of which he is unacquainted, upon goods of his own make, so as to represent the spurious goods to be genuine (*e*); nor is it a good defence to say that the purchasers of the article did not know the name of the original manufacturer, for "one man may quite well pass off his goods as the goods of another if he passes them off to people who will accept them as the manufacture of another, although they do not know that other by name at all" (*f*); but it seems that if a person has an equal right to the use of the name with the person who is acquainted with the secret in accordance with which the goods are manufactured, the latter, at all events, cannot restrain him from the use of the mark, whatever remedy may be open to the

means of judging as to its infringement: *Little* v. *Gallus*, 4 App. Div. N. Y. 569.

(*a*) *Portal* v. *Hine*, 4 Times L. R. 330; *Peabody* v. *Norfolk*, 98 Mass. 452; *Salomon* v. *Hertz*, 40 N. J. Eq. 400.

(*b*) *Bryson* v. *Whitehead*, 1 S. & S. 74; *Hagg* v. *Darley*, 47 L. J. Ch. 567; *Jarvis* v. *Peck*, 10 Paige, 118. And see *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 352; *Allsopp* v. *Wheatcroft*, L. R. 15 Eq. 59; *Brewer* v. *Lamar*, 69 Ga. 656. In *Vickery* v. *Welch*, 19 Pick. 523, the Sup. Ct. of Mass. held that a person who had agreed to sell a secret process ought to have covenanted to communicate the secret to the purchaser and to no one else.

(*c*) *Champlin* v. *Stoddart*, 37 N. Y. Sup. Ct. 300.

(*d*) *Morison* v. *Moat*, 9 Hare, 241. And see *Green* v. *Folgham*, 1 S. & S. 398; *James* v. *James*, L. R. 13 Eq. 421; *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276; *Weston* v. *Hemmons*, 2 V. L. R. Eq. 121. In *Canham* v. *Jones*, 2 V. & B. 218, and *Green* v. *Rooke*, W. N. 1872, p. 49; L. J. N. of C. 1872, p. 54, no fraud was proved.

(*e*) *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *Ansell* v. *Gaubert*, Dig. 163; *Birmingham Vinegar Brewery Co.* v. *Powell*, (1897) A. C. 710; *Daniel* v. *Whitehouse*, (1898) 1 Ch. 685.

(*f*) *Birmingham Vinegar Brewery Co.* v. *Powell*, (1897) A. C. 710, 715, *per* Lord Herschell.

public (*a*). If the person of whom complaint is made is acquainted with the secret process, and has been accustomed to use it, the objection to his use of the name does not arise (*b*), and such a person will not be restrained from using it at the suit of a person who has no right to use the recipe in the district in which the defendant trades (*c*).

Secret passes with owner's personal estate.

After the death of an inventor of a secret process, his son, who had learnt the secret in his employ, continued to make the article, but did not take out administration to the father, and it was held that without becoming his father's personal representative, he could acquire no right to prevent the use of the secret by another (*d*).

*Green* v. *Folgham.*

The manner in which the Court deals with a secret process is well exemplified by the case of *Green* v. *Folgham* (*e*). There the grandfather of the plaintiffs and defendant possessed the secret of a recipe for an ointment called "Dr. Johnson's Ointment for the Eyes." This secret he settled on his daughter at her marriage, and directed that at the death of the survivor of her and her husband it should be sold for the benefit of the children. The daughter communicated the secret to her eldest son and destroyed the recipe. On a bill being filed against the eldest son by the younger children, Leach, V.-C., decreed an account of the profits made by the defendant since his mother's death by the sale of the ointment, a reasonable allowance being made him for his time and trouble in preparing and vending the same. And the Vice-Chancellor went on to remark that if the 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 had no possible means either to communicate the secret to a purchaser with certainty, or to protect him in the enjoyment of it, a sale was, he said, impracticable (*f*). But, he continued, although the Court could not direct a sale, it had the power of taking a course which, in point of advantage, would be equivalent to the plaintiffs. It could inquire what would be the

(*a*) *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54; S. C. (2), 51 How. Pr. 455.

(*b*) *Witthaus* v. *Braun*, 44 Md. 303. And see *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453; *Chadwick* v. *Covell*, 151 Mass. 190.

(*c*) *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218.

(*d*) *Hovenden* v. *Lloyd*, 18 W. R. 1132. And see *Singleton* v. *Bolton*, 3 Doug. 293; *Chadwick* v. *Covell*, 151 Mass. 190; and *Stewart* v. *Einstein* v. *Sawhill*, 64 U. S. Pat. Gaz. 1333.

(*e*) 1 S. & S. 398.

(*f*) See *Newbery* v. *James*, 2 Mer. 446.

value of the secret to sell, provided it could be made the subject of sale; and the annual profits which had actually been made by the sale of the ointment from the death of the mother would be a fair criterion by which that value might be estimated; and the Vice-Chancellor accordingly decreed the value to be ascertained at law, as at the date of the decree.

Fraudulent secret.

In connection with this subject it should be mentioned that when, as is frequently the case, the article manufactured by the secret process is a quack medicine, or an article intended to deceive the public, the Court will not struggle to protect the secret or to punish those who invade it (*a*).

Literary production.

The rights which are possessed by the owner of a magazine, newspaper, or other literary publication, are of a very similar character to those which a person has in the goodwill of a business carried on by him. Just as a name affixed to a shop conveys to customers the idea of a certain degree of excellence, with which the articles sold by the person using that name are associated in their minds; so the title prefixed to a periodical, or its general appearance, conveys to those who take it up the impression that the contents of that publication will be found to be up to the standard to which former editions of the simulated publication have attained. Like goods bearing a trade mark, literary publications carry with them wherever they go the guarantee for their quality, and the representations conveyed by their titles are made to all into whose hands they may come, not merely to the original purchaser. With the doctrine of trade marks that of the titles of literary works has also progressed, so that in this also it has been said that "a publisher or author has either in the title of his work, or in the application of his name to the work, or in the particular marks which designate it, a species of property similar to that which a trader has in his trade mark, and may, like a trader, claim the protection of a Court of Equity against such a use or imitation of the name, mark, or designations as is likely, in the opinion of the Court, to be a cause of damage to him in respect of that property" (*b*).

The earliest of the cases with respect to the titles of publications *Hogg* v. *Kirby*.

(*a*) *Williams* v. *Williams*, 3 Mer. 157; *Estcourt* v. *Estcourt Hop Essence Co.*, L.R. 10 Ch. 276; *Kohler Manufacturing Co.* v. *Beshore*, 59 Fed. Rep. 573; *Siegert* v. *Abbott* (2), 79 N. Y. Sup. Ct. 243.

(*b*) *Per* Miller, J., in *Robertson* v. *Berry*, 50 Md. 591. See, however, *Walter* v. *Emmott*, 54 L. J. Ch. 1059.

was *Hogg* v. *Kirby* (*a*), before Lord Eldon, C., in 1803. The plaintiff was the proprietor of a monthly magazine, called "The Wonderful Magazine," which was in fact edited by the plaintiff, though the defendant's name was used as that of the publisher. At the completion of the fifth number, the defendant refused to allow the longer use of his name, and the arrangement was accordingly discontinued, and the accounts between the parties finally settled. The plaintiff then put out a notice stating that he would publish the sixth number, which he did; but on the following day a new magazine was published by the defendant, under the same title as the old one, but with the addition of "New Series Improved, printed for Kirby & Scott," and it was announced that it was intended to issue this monthly. The plaintiff then instituted a suit to check the piracy, and was able to point to several circumstances, in addition to the title, which indicated an intention of inducing the belief that the work was in fact a continuation of the plaintiff's. Lord Eldon, in his judgment, after alluding to the circumstance that the plaintiff's counsel had argued the case on the several grounds of copyright, fraud, and contract, said that he should state the question to be, "not whether the defendant's work was the same as the plaintiff's, but, in a question between those parties, whether the defendant had not represented it to be the same,"—in fact, resting the case upon fraud on the part of the defendant. His Lordship held that the defendant's intention did appear to be to represent his work as a continuation of the plaintiff's, "taking the credit which had been acquired by that to his own" (*b*), and the injunction was accordingly granted, but in such terms as to extend only to the pretence of the defendant's work being a continuation of the plaintiff's (*c*).

*Spottiswoode* v. *Clarke*.

In *Spottiswoode* v. *Clarke* (*d*), where the plaintiff published "The Pictorial Almanack," and the defendant "Old Moore's Pictorial Almanack," there being certain similarities between the wrappers

(*a*) 8 Ves. 215. And see the early Scotch cases of *In re Edinburgh Correspondent Newspaper*, Ct. Sess. Cas., 1st Ser. I. 407, n.; and *Constable & Co.* v. *Brewster*, *ib.* III. 215.

(*b*) See *Longman* v. *Winchester*, 16 Ves. 269, in which Lord Eldon explained his decision in the present case.

(*c*) In *Strahan* v. *King*, Dig. 539, the proprietors of the "Contemporary Review" sought to restrain their publishers and a former assistant editor from issuing the "Nineteenth Century," alleging among other things that the defendants were representing the latter to be the plaintiffs' Review; the Vice-Chancellor, however, held that the charges failed, and refused to grant an injunction. And see *Clowes* v. *Hogg*, W. N. 1870, p. 268; *ib.* 1871, p. 40.

(*d*) 2 Ph. 154.

of the two works, Lord Cottenham, denying that trade marks had anything to do with the case, said that it was difficult to believe that no fraud was intended, but that if such were the case, the attempt was very clumsy. And he felt so much doubt as to the legal right that, on the balance of convenience, he dissolved the injunction which had been granted by the Vice-Chancellor of England, giving the plaintiff leave to bring an action, and ordering the defendant to keep an account.

Title of periodical.

In both of the above cases fraud was the *ratio decidendi*, the actions of the defendants being examined with a view to the discovery of their motives and intentions. But at the present date the rule is that even though one person may have adopted in ignorance and *bonâ fide* a name coincident or nearly coincident with that employed by another person, yet he is bound to discontinue the use of that name so assumed as soon as he is made acquainted with the fact of its earlier employment, and the previous employer of the name is entitled to obtain an injunction against him, unless by his own laches or other default he has lost the rights which he otherwise would have had. The principle enunciated by Wood, V.-C., in *McAndrew* v. *Bassett* (*a*), would be equally applicable to the case of a title of a periodical: that is to say, that although A. may have innocently used the title employed by B., yet if he continues to trade upon B.'s reputation after being made aware of his error, he does so fraudulently.

Fraudulent intention need not be proved.

The modern doctrine was thus stated by the L.JJ. in the "Sporting Life" case (*b*): "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 in *Clement* v. *Maddick* (*c*), in which case the plaintiffs were the publishers of "Bell's Life," and the defendants the originators of a "Penny Bell's Life," it was said by Stuart, V.-C., that "This is an application in support of the right to property. It has been argued on behalf of the defendants that, unless a fraudulent intention is made out, the plaintiffs are not entitled to an injunction. That is a view of the law to which I cannot accede. Lord Cottenham, in

(*a*) 33 L. J. Ch. 561. And see *Williams* v. *Osborne*, 13 L. T. N. S. 498; and *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15 (*per* Lord Blackburn).

(*b*) *Kelly* v. *Hutton*, L. R. 3 Ch. 708.

(*c*) 1 Giff. 98.

the case of *Millington* v. *Fox* (*a*), has declared that where a trade mark has been innocently and even unconsciously made use of to the injury of another, the owner of the trade mark is entitled to the protection of this Court."—"The defendants' whole case appears to rest on the fact that they intended to commit no fraud; that they had no fraudulent intention in adopting the words 'Bell's Life,' and thought that by prefixing the word 'Penny' to the title they had sufficiently warned the public that they were not purchasing the plaintiffs' paper. But the absence of fraudulent intention is no defence against an application to the Court for an injunction by the person whose property has been injured," and where deception is probable, an injunction will be granted (*b*). In

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

(*b*) Thus, injunctions were granted in the following cases:—*Edmonds* v. *Benbow*, Dig. 33 ("The Real John Bull" imitated by "The Old Real John Bull"); *In re The Edinburgh Correspondent Newspaper*, Ct. of Sess. Cas. 1st Ser. I. (new ed.) 407, n. ("The Edinburgh Correspondent," name copied); *Constable & Co.* v. *Brewster*, Ct. of Sess. Cas. 1st Ser. III. 215 (new ed. 152) ("The Edinburgh Philosophical Journal" by "The New Series of the Edinburgh Philosophical Journal"); *Prowett* v. *Mortimer*, 2 Jur. N. S. 414 ("The John Bull and Britannia" by "The True Britannia"); *Ingram* v. *Stiff*, 5 Jur. N. S. 947 ("The London Journal" by "The London Daily Journal"); *Chance* v. *Sheppard*, Dig. 317 ("The Bedfordshire Express and General Advertiser for the Counties of Cambridge, Hertfordshire, Huntingdonshire, and Middlesex" by "The Bedfordshire Express and General Advertiser for the County"); *Corns* v. *Griffiths*, W. N. 1873, p. 93 ("The Iron Trade Circular—Ryland's" by "The Iron Trade Circular—edited by Samuel Griffiths"); *Metzler* v. *Wood*, 8 Ch. D. 606 ("Hemy's Royal Modern Tutor for the Pianoforte" by "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor"); *Hutchings* v. *Sheard*, W. N. 1881, p. 20 ("The Violin School, by J. D. Loder" by "J. D. Loder's Celebrated Violin School, edited, revised, and enlarged by T. Westrop"); *Primrose Press Agency* v. *Knowles*, L. J. N. of C. 1886, p. 43 ("Church and State" in each case); *Reuter's Telegram Co.* v. *International Guide Syndicate*, 94 L. T. (Journal) 437, 460 (unauthorised use of "Official" as applied to a guide to an exhibition); *Reed* v. *O'Meara*, 21 L. R. Ir. 216 ("The Grocer and Oil Trade Review" imitated by "The Grocer and Wine Merchant and Irish Brower and Distiller." An injunction was granted to restrain the word "Grocer," into which the plaintiffs' title was commonly abbreviated, from being used as the first and principal part of the defendants' title); *Matsell* v. *Flanagan*, 2 Abb. Pr. N. S. 459; R. Cox, 367 ("The National Police Gazette" by "The United States Police Gazette"); *Potter* v. *McPherson*, 28 N. Y. Sup. Ct. 559 ("Payson, Dunton, and Scribner's National System of Penmanship" by "Independent National System of Penmanship"); *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306 ("Beatty's Headline Copy Book" imitated by "Beatty's New and Improved Headline Copy Book"); *Carey* v. *Goss*, 11 Ont. Rep. 619 ("The Commercial Traveller and Mercantile Journal," commonly abbreviated to "The Commercial Traveller," and "The Traveller," by "The Traveller"). And see *Keene* v. *Harris*, 17 Ves. 338; *Walter* v. *Head*, 25 Sol. J. 742, 757 (imitations of "The Times"); and *American Grocer Publishing Association* v. *Grocer Publishing Co.*, 32 N. Y. Sup. Ct. 398 (imitations of "The American Grocer"); *Munro* v. *Beadle*, 62 N. Y. Sup. Ct. 312 (reversing 46 U. S. Pat. Gaz. 448), where an injunction was granted at the instance of a publisher of detective stories under the name of "The Old Sleuth Library" to restrain the use of the word "Sleuth" for similar stories (cf. *Munro* v. *Tousey*, 129 N. Y. 38; and *Munro* v. *Smith*, 62 N. Y. Sup. Ct. 419);

*Walter* v. *Emmott* (*a*), however, the Court of Appeal did not take the same view as to the jurisdiction in such cases being founded on property, and Cotton, L. J., said that "the principle upon which the Court has to decide these cases is this: It is not a question of property; it is the question whether what has been done by the defendant is in reason calculated to induce people to take his goods as those of the plaintiff, or, in other words, to pass off his goods, whatever they may be, as the goods of the plaintiff." And Bowen, L. J., said, "The principle which is involved seems to me to be the right of the Court, and the duty of the Court, to prevent damage being done to the business of a person who is lawfully carrying on his business, by acts, conduct, or representations, consisting either of acts or language, which are calculated to deceive the public, and persons who otherwise would deal with the plaintiff." However, even in this case it was not suggested that a fraudulent intention was necessary to enable relief to be given; and if that is so, the question whether property is or is not involved seems of little practical importance. Even if the theory that there is property in the name of a newspaper is admitted, that right is not invaded without a probability of deception being produced.

**But deception must be probable.**

While, however, the fact that the defendant has adopted a title calculated to deceive is sufficient to entitle the plaintiff to his remedy, without it being necessary for him to go into the defendant's motives, he must prove the probability of deception, and if he cannot do this he will fail, even though there may be circumstances pointing to a fraudulent intention. Thus, where the proprietors of the "Era," one of the principal writers in which paper used the pseudonym of "Touchstone," sought to restrain the publication of "Touchstone, or the New Era," and alleged certain further resemblances between the two papers, the Court of Appeal rescinded the injunction which had been granted, on the ground that no deception could occur (*b*). And where the plaintiff sought

*Social Register Association* v. *Howard*, 60 Fed. Rep. 270 (imitations of "Social Register" for a list of residents); *Investor Publishing Co. of Massachusetts* v. *Dobinson*, 72 Fed. Rep. 603 ("The United States Investor" and "The Investor").

(*a*) 54 L. J. Ch. 1059.

(*b*) *Ledger* v. *Ray*, Dig. 550. And no injunctions were granted in *Bradbury* v. *Beeton*, 39 L. J. Ch. 57 ("Punch" and "Punch and Judy"); *Dicks* v. *Yates*, 18 Ch. D. 76 ("Splendid Misery, or East End and West End, by C. H. Hazelwood," and "Splendid Misery, by the author of Lady Audley's Secret, Vixen, &c."); *Dale* v. *Smith*, W. N. 1882, p. 145 ("The Plumber and Decorator and Journal of Gas and Sanitary Engineering" and "The Decorator, Plumber, and Gasfitter's Journal"); *Dale* v. *General Newspaper Co.*, 1 Times

to restrain the defendant from using the name "Post Office Directory," and it was shown that the name had been used by others than the plaintiff, and that the defendant had had the assistance of post office servants, it was held that no injunction could be granted (*a*). So, where both plaintiff and defendant sold under the name of "Castle Album" albums illustrated with pictures of castles, it was held that the name was descriptive of the thing, and that, even if the name were capable of appropriation at all, no injunction would be granted to protect it, unless it were proved that it was recognised as denoting exclusively the plaintiff's albums (*b*). Even if the title is not descriptive, and has been taken without alteration by the defendant, no injunction will be granted unless the plaintiff's paper has been long enough on sale to have acquired some reputation under the name (*c*). And the plaintiff must come with clean hands (*d*).

Titles of literary works protected generally.

Although the title of a periodical publication as a newspaper, magazine, or almanack most closely resembles a trade mark, on account of its repeated and continued use from time to time upon articles of a certain class, the protection afforded by the Court is extended to the title of any kind of literary production. Thus, the publishers of "The Birthday Scripture Text Book" succeeded in obtaining an injunction against persons who had brought out

L. R. 177 (same as above, and "The Plumbing and Decorating, Sanitary, Water, and Gas Engineering Chronicle"); *Cowen* v. *Hulton*, 46 L. T. N. S. 897 ("The Newcastle Daily Chronicle" and "The Sporting Chronicle and Prophetic Bell"); *Walter* v. *Emmott*, 54 L. J. Ch. 1059 ("The Mail" and "The Morning Mail." Here the style and price of the two papers were very different); *Jaffray* v. *Emmott*, Bacon, V.-C., July 3rd, 1885 ("The Birmingham Daily Mail" and "The Morning Mail"); *Borthwick* v. *The Evening Post, Ld.*, 37 Ch. D. 449 ("The Morning Post" and "The Evening Post"); *Brett* v. *Bowles*, L. J. N. of C. 1890, p. 43; affirmed by C. A. April 30th, 1890 ("The Princess' Novelettes" and "The Princess"); *Houlston* v. *Morley*, 90 L. T. (Journal) 40 ("Enquire Within upon Everything" and "Enquire Within"); *Snowden* v. *Noah*, Hopk. 347; R. Cox, 1 ("The National Advocate" and "The New York National Advocate"); *Bell* v. *Locke*, 8 Paige, 75; R. Cox, 11 ("The Democratic Republican New Era" and "The New Era"); *Stephens* v. *De Conto*, 30 N. Y. Super. Ct. 343; R. Cox, 442 ("La Cronica" and "El Cronista"); *Osgood* v. *Allen*, 1 Holmes, 185 ("Our Young Folks, an Illustrated Magazine for Boys and Girls," and "Our Young Folks' Illustrated Paper"); *Tulcot* v. *Moore*, 13 N. Y. Sup. Ct. 106 ("The Little Red Book" and "The Red and White Book"); *Dunway Publishing Co.* v. *North-West Printing Co.*, 11 Oreg. 322 ("The New North-West" and "The North-West News"); *Stokes* v. *Allen*, 63 N. Y. Sup. Ct. 526 ("The Good Things of Life," consisting of illustrations from a serial called "Life," and "The Spice of Life," consisting of illustrations from the "Fliegende Blaetter," the refusal being based upon the different meaning of the same word in the two publications).

(*a*) *Kelly* v. *Byles*, 13 Ch. D. 682.

(*b*) *Schove* v. *Schmincke*, 33 Ch. D. 546.

(*c*) *Licensed Victuallers' Newspaper Co.* v. *Bingham*, 38 Ch. D. 139.

(*d*) *Talbot* v. *Judges*, 3 Times L. R. 398.

"The Children's Birthday Text Book," Lord Romilly, M. R., remarking that the defendants were not entitled to publish a work "with such a title, or in such form as to binding or general appearance, as to be a colourable imitation of that of the plaintiffs" (*a*). And so, where the title of a song was imitated in such a manner as to be calculated to induce the public to buy the spurious publication in mistake for the genuine, the continuance of the fraud was restrained (*b*).

Incidents of title of publication.

The right which exists in the title of a publication is a right of property (*c*), a chattel interest (*d*), capable of assignment (*e*) or bequest (*f*), passing, in the event of its proprietor's bankruptcy, to his trustee, but incapable of seizure by a sheriff (*g*), and which, in the event of a dissolution of partnership between joint proprietors, must be sold for the purpose of the proceeds of the sale being included in the assets of the partnership (*h*).

No copyright in title.

Although the term copyright has been sometimes applied to the right in the title of a publication (*i*), there "cannot in general be any copyright in the title or name of a book" (*k*), but copyright and trade mark are things "totally distinct" (*l*), and registration

(*a*) *Mack* v. *Petter*, L. R. 14 Eq. 431. See *Weldon* v. *Dicks*, 10 Ch. D. 247. Also *Estes* v. *Williams*, 22 Bl. C. 364; *Estes* v. *Belford, Clarke & Co.*, 30 U. S. Pat. Gaz. 99; *Estes* v. *Leslie* (1), 23 Bl. C. C. 476; *ib.* (2), 29 Fed. Rep. 91; *Estes* v. *Worthington* (3), 24 Bl. C. C. 371; in all of which cases the plaintiffs were the American grantees from the original English publishers of an exclusive right in the publication.

(*b*) *Chappell* v. *Sheard*, 2 K. & J. 117; *Chappell* v. *Davidson*, *ib.* 123. But in *Isaacs* v. *Daly*, 39 N. Y. Super. Ct. 511, it was held that no injunction could be granted to restrain the use of the word "Charity" as the name of a play, the word being one of general application, and the use by the defendant *bonâ fide*.

(*c*) *Clement* v. *Maddick*, 1 Giff. 98; *Kelly* v. *Hutton*, L. R. 3 Ch. 708. But this was disputed in *Walter* v. *Emmott*, 54 L. J. Ch. 1059.

(*d*) *Per* Wood, L.J. in *Kelly* v. *Hutton*, L. R. 3 Ch. 708.

(*e*) *Longman* v. *Tripp*, 2 Bos. & P. N. R. 67; *Ex parte Foss*, 2 De G. & J. 230; *Kelly* v. *Hutton*, L. R. 3 Ch. 708; *Cloves* v. *Hogg*, W. N. 1870, p. 268; *ib.* 1871, p. 40; *Ward* v. *Beeton*, L. R. 19 Eq. 207; *Snowden* v. *Noah*, Hopk. 347; R. Cox, 1.

(*f*) *Keene* v. *Harris*, 17 Ves. 338. In *McCormick* v. *McCubbin*, Ct. Sess. Cas. 1, Ser. I. 541 (new ed. 496) it was held by the Court of Session that the executors of the proprietor of a half-share in a newspaper were entitled to proceed to a sale of his share.

(*g*) *Ex parte Foss*, 2 De G. & J. 230.

(*h*) *Bradbury* v. *Dickens*, 27 Beav. 53; *Dayton* v. *Wilkes*, 17 How. Pr. 510; R. Cox, 224.

(*i*) *E.g.*, *per* Lord Romilly, M. R., in *Mack* v. *Petter*, L. R. 14 Eq. 431; *per* Malins, V.-C., in *Weldon* v. *Dicks*, 10 Ch. D. 247; *per* Bacon, V.-C., in *Dicks* v. *Yates*, 18 Ch. D. 76.

(*k*) *Per* James, L. J., in *Dicks* v. *Yates*, 18 Ch. D. 76. And see *Kelly* v. *Hutton*, L. R. 3 Ch. 708; *Correspondent Newspaper Co.* v. *Saunders*, 11 Jur. N. S. 540; *Primrose Press Agency* v. *Knowles*, L. J. N. of C. 1886, p. 43; *Schove* v. *Schmincke*, 33 Ch. D. 546; *Licensed Victuallers' Newspaper Co.* v. *Bingham*, 38 Ch. D. 139; *Osgood* v. *Allen*, 1 Holmes, 185.

(*l*) *Per* Jessel, M. R., in *Dicks* v. *Yates*, 18 Ch. D. 76. In *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306, it was said that the name of a newspaper was not a trade mark.

under the Copyright Acts gives no further right to protection than exists independently of such registration (*a*).

Must be actual user.

Just as a trade mark must, in order to be entitled to protection, be affixed to a vendible article in the market (*b*), so a title of a publication must be actually used. The mere intention, previous to publication, of using a particular name as the title of a literary work, even if followed by the registration of the proposed title as copyright, the advertisement of the forthcoming work, or the actual preparation of its contents, confers no right to protection, for, "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" (*c*). So, in one case (*d*), the defendants had registered their newspaper at Stationers' Hall on December 24th, 1885, but did not publish the first number till January 16th, 1886; while in the meantime the plaintiffs had registered on January 1st, 1886, and begun to sell on January 2nd, 1886, a newspaper under the same name, and it was held that an injunction must be granted for the protection of the plaintiffs, who had been the first to actually use the title. The user must, however, be substantial (*e*). Where, on the other hand, a book has been once published under a particular title, it seems that the right in the title remains, notwithstanding that the book has been long out of print, and has, in fact, been treated as obsolete (*f*).

(*a*) *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 399. In the American case of *Jollie* v. *Jaques*, 1 Bl. C. C. 618, it was, however, held that the right to the title of a work, the copyright of which turned out to be invalid, must fail with the copyright. See *Osgood* v. *Allen*, 1 Holmes, 185; *Isaacs* v. *Daly*, 39 N. Y. Super. Ct. 511; *Scoville* v. *Toland*, 6 West. L. J. 84; *Hirsch* v. *Jonas*, 3 Ch. D. 584; *Munro* v. *Beadle*, 62 N. Y. Sup. Ct. 312; *Munro* v. *Tousey*, 129 N. Y. 38.

(*b*) Or registered, since the Trade Marks Act of 1875.

(*c*) *Per* Turner, L. J., in *Maxwell* v. *Hogg*, L. R. 2 Ch. 307. And see *Correspondent Newspaper Co.* v. *Saunders*, 11 Jur. N. S. 540.

(*d*) *Primrose Press Agency* v. *Knowles*, L. J. N. of C. 1886, p. 43.

(*e*) *Licensed Victuallers' Newspaper Co.* v. *Bingham*, 38 Ch. D. 139.

(*f*) *Weldon* v. *Dicks*, 10 Ch. D. 247. Compare *Estes* v. *Worthington* (3), 24 Bl. C. C. 371.

# CHAPTER IX.

## GOODWILL.

Value of goodwill.

So early as the time of Lord Hardwicke (*a*) it was fully recognised that the goodwill of a trade might be of considerable value, and by the beginning of the present century it was said at the bar (*b*) to be a matter of common experience that contracts for the sale of a goodwill were enforced by actions at law at every sittings.

Connection between goodwill and trade marks.

The connection between goodwill and trade marks is very intimate. Thus, where in a suit for specific performance of a contract for sale of a business (*c*), one of the subjects of the contract was "goodwill, &c.," Romilly, M. R., said that those words united such things as were necessarily connected with and belonged to the goodwill, many of which were easily pointed out; for instance, the use of trade marks. Such things would be included in the words "et cætera," and would be included in the conveyance. The sale of a business carries with it the goodwill and trade marks (*d*), and the sale of a business and goodwill carries with it the right to the trade name (*e*), and the words "assets and effects of every kind and nature," in a bill of sale of a business, cover the trade

(*a*) *Giblett* v. *Read*, 9 Mod. 459.

(*b*) *Burn* v. *Guy*, 4 East, 190.

(*c*) *Cooper* v. *Hood*, 26 Beav. 293.

(*d*) *Shipwright* v. *Clements*, 19 W. R. 599; *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15, 33 (*per* Lord Blackburn); *Currie* v. *Currie*, 15 P. R. 339; *Merry* v. *Hoopes*, 111 N. Y. 415; *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306. And see *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Wilmer* v. *Thomas*, 74 Md. 485. But see *Young* v. *Jones Bros. & Co.*, 3 Hughes, 274. In *Churton* v. *Douglas*, Johns. 174, V.-C. Wood went so far as to say that the question of trade mark was in fact the same as the question of firm name, which, it was obvious, was an important part of the goodwill. See, too, *England* v. *Curling*, 8 Beav. 129; *In re Roger* (2), 12 P. R. 149; *Dickson* v. *McMaster & Co.*, 18 Ir. Jur. 202; *Congress & Empire Spring Co.* v. *High Rock Congress Spring Co.*, 57 Barb. 526; R. Cox, 599; *Dixon Crucible Co.* v. *Guggenheim*, 2 Brews. 321; R. Cox, 559; *Sohier* v. *Johnson*, 111 Mass. 238; *Witthaus* v. *Braun*, 44 Md. 303; *Ex parte Young*, Dig. 537; *Fulton* v. *Sellers*, 4 Brews. 42; *Hazard* v. *Caswell*, 47 N. Y. Super. Ct. 537; *Batchelor* v. *Thomson*, 86 Fed. Rep. 630.

(*e*) *Per* James, L. J., in *Levy* v. *Walker*, 10 Ch. D. 436. See *Thompson* v. *Mackinnon*, 2 Steph. Dig. 726; *Attenborough* v. *Jay*, 14 Times L. R. 439.

marks used in the business (*a*). Again, a trade mark cannot exist in gross and apart from the goodwill of the business with which it has been connected (*b*).

Connection recognised by Registration Act of 1875, and Patents Act, 1883.

This close connection was fully recognised in the Trade Marks Registration Act, 1875 (*c*), by the second section of which it was provided that a registered trade mark should be assigned and transmitted only in connection with the goodwill of the business concerned in such particular goods or classes of goods, and should be determinable with such goodwill. By the third section the right of the registered proprietor to the exclusive use of the trade mark was made subject to the provisions in respect of its connection with the goodwill. These provisions are now repeated in §§ 70 and 76 of the Patents Act, 1883 (*d*).

What constitutes goodwill.

"Goodwill, I apprehend," said Wood, V.-C., in the important case of *Churton* v. *Douglas* (*e*), "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."—"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" (*f*). And it carries with it the benefit of such matters as a covenant by a servant not to carry on a similar business within prescribed limits (*g*).

Formerly treated as always local.

Previously to the case of *Churton* v. *Douglas* (*h*), the language of various eminent judges as to what constituted "goodwill" had rather tended to connect the goodwill with the premises on which

(*a*) *Morgan* v. *Rogers*, 19 Fed. Rep. 596. And see *Russia Cement Co.* v. *Le Page*, 147 Mass. 206; *Hoxie* v. *Chaney*, 143 Mass. 592; *Mackinnon* v. *Thompson*, 5 Can. Leg. News, 396.

(*b*) *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *In re Wellcome*, 32 Ch. D. 213; *Smith* v. *Fair*, 14 Ont. Rep. 729: *Dixon Crucible Co.* v. *Guggenheim*, 2 Brews. 321; R. Cox, 559; *Derringer* v. *Plate*, 29 Cal. 292; R. Cox, 324; *Witthaus* v. *Braun*, 44 Md. 303; *Taylor* v. *Bemis*, 4 Biss. 406; *Kidd* v. *Johnson*, 100 U. S. 617; *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54; S. C. (2), 51 How. Pr. 455: *Morgan* v. *Rogers*, 19 Fed. Rep. 596.

(*c*) 38 & 39 Vict. c. 91.

(*d*) 46 & 47 Vict. c. 57.

(*e*) Johns. 174. And see *per* Hagans, J., in *McGowan Bros. Pump & Machine Co.* v. *McGowan*, 2 Cinc. 313.

(*f*) *Per* Pollock, C. B., in *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147.

(*g*) *Jacoby* v. *Whitmore*, 49 L. T. N. S. 335; *Showell* v. *Winkup*, 60 *ib.* 389.

(*h*) Johns. 174.

the business was carried on, than with the business carried on there, probably because that language, though in general terms, was directed to the circumstances of the case then in course of decision (*a*). Thus, Lord Eldon, C., in *Cruttwell* v. *Lye* (*b*), describes goodwill as "nothing more than the probability that the old customers will resort to the old place" (*c*). Leach, M. R., describes it (*d*) as "an advantage attaching to the possession of the house" in which the business had been carried on; and Lord Langdale, M. R. (*e*), as "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" (*a*). In *King* v. *Midland Railway Co.* (*f*), Giffard, V.-C., gave effect to this view by holding that the assignees in liquidation of a mortgagor, whose business premises were taken by a railway company, were entitled to no part of the purchase-money, as having been paid in respect of the goodwill of the business, as against the mortgagee of the premises, whose debt exceeded the purchase-money; but that the goodwill was incident to the mortgaged premises and passed with them.

Not so now.

The judgment in *Churton* v. *Douglas*, which has been accepted by the House of Lords in the recent case of *Trego* v. *Hunt* (*g*), has now established that the dictum of Lord Eldon in *Cruttwell* v. *Lye* (*h*) must be read as meaning that goodwill is the probability that the old customers will buy the old goods from the old firm or their successors in business, whether the means of identification be the place of business or otherwise (*i*). "It is the whole advantage, whatever it may be, of the reputation and connection of the firm" (*k*). The customers of a large wholesale house cannot be supposed to pay much attention to the exact site of the establishment; and "there may even be a species of goodwill which may be the subject of bargain and sale, although not

(*a*) See *Churton* v. *Douglas*, Johns. 174.

(*b*) 17 Ves. 335.

(*c*) In this case Sir A. Piggott, in the course of his argument, said that "goodwill" was "the advantage belonging to a house long accustomed to carry on a particular trade." See, too, *per* Plumer, V.-C., in *Harrison* v. *Gardner*, 2 Madd. 198.

(*d*) In *Chissum* v. *Dewes*, 5 Russ. 29.

(*e*) In *England* v. *Downs*, 6 Beav. 269, adopted in *Vonderbank* v. *Schmidt*, 44 La. Ann. 264; 32 Am. St. Rep. 336.

(*f*) 17 W. R. 113. See *Rutter* v. *Daniel*, 30 W. R. 724, 801; *Mitchell* v. *Read* (2), 26 N. Y. Sup. Ct. 418.

(*g*) (1896) A. C. 7, 17.

(*h*) 17 Ves. 335.

(*i*) And compare *Labouchere* v. *Dawson*, L. R. 13 Eq. 322; *Cooper* v. *Metropolitan Board of Works*, 25 Ch. D. 472.

(*k*) *Per* Lord Macnaghten in *Trego* v. *Hunt*, (1896) A. C. 7, 24.

dependent on the business being carried on in any particular place: for instance, in the case of what are called quack medicines" (*a*).

Local connection important.

While, however, there may be a species of goodwill not intimately connected with a particular spot, in many trades there can hardly be any goodwill apart from the premises on which business has been carried on. Thus, "it is quite plain that the goodwill of a public-house passes with the public-house. In such a case the goodwill is the mere habit of the customers resorting to the house. It is not what is called a personal goodwill" (*b*). Such a goodwill carries with it the public-house licences, since without them the business cannot be carried on (*c*). And wherever there is a connection between the goodwill and a particular locality it will be of great consequence; and a house of little value in itself, at a rack-rent, may have a peculiar value attached to it from the fact of a long-established business having been carried on there (*d*).

Another view of goodwill.

Looked at from another point of view, the goodwill may be said to be the money value of what has just been described as the goodwill (*e*).

Goodwill in learned professions.

While the value of most businesses is determined partly by the personal qualifications of the proprietor, partly by those of his subordinates, partly (sometimes principally) by local situation, partly, it may be, by yet other considerations, there is one class of business in which the personal character and ability of the head of the establishment are of paramount and almost exclusive importance. That class comprehends the medical and legal, or "learned" professions.

Division into personal and local.

Adverting to this distinction, Sir J. Cross, in *Ex parte Thomas* (*f*), divided goodwill into personal and local, adding that there might

(*a*) Brett, J., in *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456. The goodwill of a newspaper is another example. See *Boon* v. *Moss*, 70 N. Y. 465, and the observations of Lindley, M. R., in his work on Partnership. See, too, *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147; *Ginesi* v. *Cooper*, 14 Ch. D. 596; *Trego* v. *Hunt*, (1896) A. C. 7, 17, 24; *Donald* v. *Hodgart's Trustees*, Ct. Sess. Cas. 4th Ser. XXI. 246; *Huver* v. *Dannenhoffer*, 82 N. Y. 499; and *Barker* v. *Connecticut Mutual Life Insurance Co.*, 15 Fed. Rep. 312.

(*b*) *Per* Jessel, M. R., in *Ex parte Punnett*, 16 Ch. D. 226; *Philp's Executor* v. *Philp's Executor*, Ct. Sess. Cas. 4th Ser. XXI. 482. See *Mitchell* v. *Read* (2), 26 N. Y. Sup. Ct. 418; and *Mason* v. *Queen*, 23 Scot. L. Rep. 641.

(*c*) *Rutter* v. *Daniel*, 30 W. R. 724, 801.

(*d*) *Parsons* v. *Hayward*, 31 L. J. Ch. 666; *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456. See *Cooper* v. *Metropolitan Board of Works*, 25 Ch. D. 472, *per* Cotton, L. J.

(*e*) *Austen* v. *Boys*, 2 De G. & J. 626; *Llewellyn* v. *Rutherford* (Brett, J.), L. R. 10 C. P. 456.

(*f*) 2 Mont. D. & De G. 294. And see *Ex parte Punnett*, 16 Ch. D. 226.

be a goodwill partly personal and partly local (*a*). But the employment of the word "local" as descriptive of one of the two principal heads under which goodwill falls seems open to objection, on the ground that it tends to produce the misconception exposed and removed by Vice-Chancellor Wood in *Churton* v. *Douglas* (*b*), and to unduly narrow the meaning to be assigned to "goodwill," which, as has been seen, comprehends, not merely the advantage of local situation, but every positive advantage connected with an established trade.

Division into goodwill of profession and of trade.

The two classes of goodwill may more satisfactorily be distinguished, from the classes of pursuit to which they respectively relate, as the goodwill of a profession on the one hand, and that of a trade on the other. It is, indeed, true that the goodwill of a trade, the more usual kind, possesses so many characteristics which that of a profession has not, that the latter has been thought to be hardly entitled to the name of goodwill at all (*c*), and in *Arundell* v. *Bell* (*d*), Jessel, M. R., went so far as to say that "there is nothing analogous to the goodwill in an ordinary trade, which you can sell, in the case of a partnership of living solicitors"; but, on the other hand, there are points of resemblance in which both classes are governed by the same general rule, and there is a convenience in following an established phraseology.

Contract by attorney to transfer goodwill enforced.

In *Bunn* v. *Guy* (*e*), the Lord Chancellor (Lord Eldon) was impressed by the difference between the goodwill of a profession and that of a trade, and caused the opinion of the Court of King's Bench to be taken as to whether a contract by a practising attorney (among other things) to relinquish his business and recommend his clients to two other attorneys, for valuable consideration, and not to practise within certain limits, and to permit them to use his name for a certain time, was good at law, so that the vendor could recover in an action. The answer was that the contract was good in law.

Decision doubted.

This decision did not long remain uncriticised. In *Bozon* v. *Farlow* (*f*), Grant, M. R., refused to grant specific performance of

(*a*) This division corresponds to that of trade marks into personal and local, made by Romilly, M. R., in *Hall* v. *Barrows*, 32 L. J. Ch. 548, which, however, was not indorsed by Westbury, C. See 4 De G. J. & S. 150.

(*b*) Johns. 174.

(*c*) See *Austen* v. *Boys*, 2 De G. & J. 626; and *Bain* v. *Munro*, Ct. Sess. Cas. 4th Ser. V. 416, *per* Lord Curriehill.

(*d*) 52 L. J. Ch. 537. And see *per* Denman, J., in *James* v. *James* (2), 60 L. T. N. S. 569.

(*e*) 4 East, 190, in 1803. See the medical cases of *Rawlinson* v. *Clarke*, 14 M. & W. 187; *Smith* v. *Smith*, 4 Wend. 468; *Butler* v. *Burleson*, 16 Vt. 176.

(*f*) 1 Mer. 459.

an agreement for the sale of an attorney's business, the terms of the agreement not being sufficiently specified to enable the Court to give the purchaser the proper return for his money, and he took the opportunity of questioning the propriety of a sale of an attorney's business, which depended so much on the incumbent's own character. And in *Farr* v. *Pearce* (*a*), Leach, V.-C., strongly supported the personal character of a profession as contrasted with a commercial business.

Sale of solicitor's practice.

Where, however, a solicitor had actually sold his practice for valuable consideration, and undertaken not to practise as a solicitor in Great Britain for twenty years, Lord Langdale, M. R., granted an injunction to restrain him from so practising, and from endeavouring to induce any persons who were the clients of the former and then present firm to cease to employ that firm (*b*). But an assignment of the goodwill of a solicitor's practice does not carry with it the right to his clients' papers (*c*).

*Thornbury* v. *Bevill.*

In a case (*d*) which was "not quite a case of dissolution of partnership, but something between a dissolution of the partnership and a purchase of an attorney's business and firm name," Knight-Bruce, V.-C., having refused specific performance of the alleged contract, on the ground of non-acceptance by the plaintiff, said that, "notwithstanding the case of *Bunn* v. *Guy* (*e*), from which he did not mean to express dissent, decided as it was by judges of high authority, he was not prepared to say that it was fit that a Court of Equity should enforce an agreement between two solicitors that one on retiring from the business should permit the other to carry on the business in his name. Whether such an agreement were or were not within the strict policy of the law, it might be doubtful whether the Court of Chancery ought to assist it."

Partnership between solicitors dissolved.

But where, on a dissolution by two solicitors of a *bonâ fide* partnership between them, it was agreed that one should carry on the business under the old firm name, paying the other certain annuities, it was held by Wood, V.-C., that the agreement contained nothing illegal or contrary to the public policy (*f*).

Rights on dissolution.

Again, on a dissolution of a professional partnership, a retiring partner is not entitled to compensation in respect of his share in

(*a*) 3 Madd. 74.
(*b*) *Whittaker* v. *Howe*, 3 Beav. 383.
(*c*) *Per* Denman, J., in *James* v. *James*, 60 L. T. N. S. 569.
(*d*) *Thornbury* v. *Bevill*, 1 Y. & C. Ch. 554.
(*e*) 4 East, 190.
(*f*) *Aubin* v. *Holt*, 2 K. & J. 66.

the goodwill (*a*), and a surviving partner may continue the business (*b*).

Goodwill of deceased solicitor.

In *Spicer* v. *James* (*c*), a country attorney having died intestate, his administrator carried on the business until the intestate's son came of age, when he handed over the business to the son. The son becoming insolvent, a bill for an account of profits, and insisting that a sum was due to the intestate's estate in respect of the goodwill, was filed against the administrator by a creditor of the son, but was dismissed by Leach, M. R., on the ground that the goodwill of an attorney's business was not a subject of administration. So, in *Arundell* v. *Bell* (*d*), the Court of Appeal decided that the estate of a solicitor, who had retired from a partnership and shortly afterwards died, was not entitled to any allowance in respect of his interest in the goodwill of the business; and Jessel, M. R., said that "as a general rule there is nothing in the nature of a partnership asset to be sold which can fairly be termed goodwill in an ordinary partnership between solicitors."

Estate of professional man interested in proceeds of goodwill.

Where, however, the widow of a surgeon dentist, being one of his executors, sold the goodwill of his business with an introduction to patients, Knight-Bruce, V.-C., held that either the whole, or, at all events, some part of the price paid, belonged to the testator's estate (*e*). But in the similar Scotch case of *Bain* v. *Munro* (*f*), it was held by the Lord Ordinary and Court of Session that the price which was paid was in fact the price of the widow's recommendation, and that she was entitled to retain it for her own benefit.

Goodwill of professional business.

Recapitulation.

The goodwill of a professional business may, in short, be sold, and a breach of a contract to sell may be a ground for damages, but the authorities are against the enforcement of the specific performance of such a contract, though when the sale is complete, the terms of the sale will be carried into execution. Such a goodwill, in the case of a partnership, survives to the surviving partner, and is not a subject of compensation to an outgoing partner. Special stipulations, will, however, be enforced. Such a goodwill will not be considered in the administration of the proprietor's estate unless

(*a*) *Austen* v. *Boys*, 2 De G. & J. 626; *Farr* v. *Pearce*, 3 Madd. 74.

(*b*) *Ib.* And see *Milner* v. *Reed*, Dig. 328; *Chappell* v. *Griffith*, 53 L. T. N. S. 459.

(*c*) Collyer on Partnership, 2nd ed. p. 104.

(*d*) 52 L. J. Ch. 537.

(*e*) *Smale* v. *Graves*, 3 De G. & S. 706.

(*f*) Ct. Sess. Cas. 4th Ser. V. 416.

actually sold; but if that has been done, the price paid, or some part of it may be attributed to the estate.

Goodwill of a trade.

"The goodwill of a trade," said Tindal, C. J. (*a*), "is a subject of value and price. It may be sold (*b*), bequeathed (*c*), or become assets in the hands of the personal representatives of a trader" (*d*). A sale may be conditional (*e*), and may be effected by a mortgagee (*f*). Though incapable, by reason of its incorporeal nature, of seizure by a sheriff (*g*), goodwill is "goods and chattels within the Bankruptcy Acts (*h*), and may be dealt with by the trustee in bankruptcy just as the bankrupt's other property" (*i*). It is also "property" within the Stamp Acts (*j*).

Universally valuable.

The valuable character of goodwill is not confined to a few trades, but is recognised throughout the commercial world. Thus, among the cases on this subject which have come before the Courts, instances are to be found in which the traders were public-house keepers (*k*), brewers (*l*), bankers (*m*), tailors (*n*), mercers (*o*), dyers (*p*), milliners (*q*), upholsterers (*r*), pencil-makers (*s*), tobacco-brokers (*t*), snuff-makers (*u*), paper-makers (*v*), provision merchants (*w*), cheesemongers (*x*), glass-blowers (*y*), glass-stainers (*z*),

(*a*) In *Hitchcock* v. *Coker*, 6 Ad. & E. 438, 454.

(*b*) See *Darbey* v. *Whitaker*, 4 Dr. 139; *Churton* v. *Douglas*, Johns. 174; *Cooper* v. *Hood*, 26 Beav. 293; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Shipwright* v. *Clements*, 19 W. R. 599; *Howe* v. *Searing*, 10 Abb. Pr. 264; R. Cox, 244.

(*c*) See *Keene* v. *Harris*, 17 Ves. 338; *Robertson* v. *Quiddington*, 28 Beav. 529.

(*d*) See *Worral* v. *Hand*, Peake, 105; *Dakin* v. *Cope*, 2 Russ. 170; *Chissum* v. *Dewes*, 5 Russ. 29; *McCormick* v. *McCubbin*, Ct. Sess. Cas. 1st Ser. I. 541; *Donald* v. *Hodgart's Trustees*, Ct. Sess. Cas. 4th Ser. XXI. 246.

(*e*) *Boon* v. *Moss*, 70 N. Y. 465.

(*f*) *Ex parte Punnett, In re Kitchin*, 16 Ch. D. 226.

(*g*) *Ex parte Foss*, 2 De G. & J. 230; *Helmore* v. *Smith*, 35 Ch. D. 436.

(*h*) *Longman* v. *Tripp*, 2 Bos. & P. N. R. 67; *Ex parte Foss*, 2 De G. & J. 230.

(*i*) See *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Hammond* v. *Malcolm Brunker & Co.*, 9 P. R. 301; *In re Bolanachi's Empire Chocolate Co.*, 89 L. T. (Journal) 273; *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1; *Iowa Seed Co.* v. *Dorr*, 70 Iowa, 481.

(*j*) *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147. And see *Morgan* v. *Perhamus*, 36 Ohio St. 517.

(*k*) *Coslake* v. *Till*, 1 Russ. 376; *Spratt* v. *Jeffery*, 10 B. & C. 249; *Ex parte Thomas*, 2 Mont. D. & De G. 294; *Tweed* v. *Mills*, L. R. 1 C. P. 39; *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456; *Ex parte Punnett, In re Kitchin*, 16 Ch. D. 226; *Philp's Executor* v. *Philp's Executor*, Ct. Sess. Cas. 4th Ser. XXI. 482.

(*l*) *Cooper* v. *Watson*, 3 Doug. 413; *Wade* v. *Jenkins*, 2 Giff. 509; *Hall* v. *Hall*, 20 Beav. 139.

(*m*) *Smith* v. *Everett*, 27 Beav. 446.

(*n*) *Newling* v. *Dobell*, 38 L. J. Ch. 111; *Parsons* v. *Hayward*, 31 L. J. Ch. 666.

(*o*) *Morris* v. *Moss*, 25 L. J. Ch. 194.

(*p*) *Bryson* v. *Whitehead*, 1 S. & S. 74.

(*q*) *Shackle* v. *Baker*, 14 Ves. 468.

(*r*) *Chissum* v. *Dewes*, 5 Russ. 29.

(*s*) *Banks* v. *Gibson*, 34 Beav. 566.

(*t*) *Davies* v. *Hodgson*, 25 Beav. 177.

(*u*) *Hammond* v. *Douglas*, 5 Ves. 539.

(*v*) *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147.

(*w*) *Scott* v. *Mackintosh*, 1 V. & B. 503.

(*x*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79.

(*y*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.

(*z*) *Scott* v. *Rowland*, 20 W. R. 508.

manufacturing chemists (*a*), commission agents (*b*), iron-masters (*c*), carriers (*d*). The goodwill of a newspaper or magazine, consisting of the right to use the title under which reputation has been acquired by a publication, is another instance of valuable goodwill (*e*).

Firm name part of goodwill.

"The name of a firm," says Wood, V.-C., in *Churton* v. *Douglas* (*f*), "is a very important part of the goodwill of the business carried on by the firm. A person says, 'I have always bought good articles at such a house of business; I know it by that name, and I send to the house of business identified by that name for that purpose.' There are cases every day in this Court with reference to the use of the name of a particular firm, connected generally, no doubt, with the question of trade mark. But 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 the firm; and it becomes the known firm to which applications are made, just as much 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. You cannot put it anything short of that. That the name is an important part of the goodwill of a business is obvious, when we consider that there are at this moment large banking firms, and brewing firms, and others, in this metropolis, which do not contain a single member of the individual name exposed in the firm" (*g*).

Sale of goodwill.

Goodwill is a subject of sale (*h*), and may fetch a considerable

(*a*) *Turner* v. *Major*, 3 Giff. 442.

(*b*) *Macdonald* v. *Richardson*, 1 Giff. 81.

(*c*) *Cooper* v. *Hood*, 26 Beav. 293; *Hall* v. *Barrows*, 4 De G. J. & S. 150.

(*d*) *Cruttwell* v. *Lye*, 17 Ves. 335.

(*e*) *Giblett* v. *Read*, 9 Mod. 459; *Keene* v. *Harris*, 17 Ves. 338; *Longman* v. *Tripp*, 2 Bos. & P. N. R. 67; *Ex parte Foss*, 2 De G. & J. 230; *Marshall* v. *Watson*, 25 Beav. 501; *Bradbury* v. *Dickens*, 27 *ib.* 53; *McCormick* v. *McCubbin*, Ct. Sess. Cas. 1st Ser. I. 541; *Snowden* v. *Noah*, Hopk. 347; R. Cox, 1; *Dayton* v. *Wilkes*, 17 How. Pr. 510; R. Cox, 224.

(*f*) Johns. 174.

(*g*) And see *Lewis* v. *Langdon*, 7 Sim. 421; *Banks* v. *Gibson*, 34 Beav. 566; *Bond* v. *Milbourn*, 20 W. R. 197; *Scott* v. *Rowland*, 20 *ib.* 508; *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Levy* v. *Walker*, 10 Ch. D. 436; *Beazley* v *Soares*, 22 *ib.* 660; *Gray* v. *Smith*, 43 *ib.* 208; *Rogers* v. *Taintor*, 97 Mass. 291; *Sohier* v. *Johnson*, 111 Mass. 238; *Peterson* v. *Humphrey*, 4 Abb. Pr. 394; R. Cox, 212; and *Howe* v. *Searing*, 10 Abb. Pr. 264; R. Cox, 244. See *Currie* v. *Currie*, 15 P. R. 339, where the goodwill was sold minus the right to use the firm name.

(*h*) See, among other cases, *Bunn* v. *Guy*, 4 East, 190; *Smale* v. *Graves*, 3 De

price. There was formerly a doubt whether a contract for the sale of a goodwill would be specifically enforced in Equity (*a*), but this question was set at rest by Kindersley, V.-C., in *Darbey* v. *Whitaker* (*b*). "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." It seems, however, that there may be cases in which a contract for sale of a goodwill would be specifically enforced, the business and goodwill being included together, though there was no such dependence on the business premises (*c*). Such would be the case with the goodwill of a quack medicine or a newspaper, which is practically independent of locality (*d*). The connection between the business and the goodwill is such that the sale of the business (*e*), or of a share in the business (*f*), as a going concern, carries with it the goodwill, or the corresponding share in the goodwill, even without its being specifically mentioned, and so does the sale of a hotel or public-house (*g*). And if the goodwill is sold, the trade name goes with it (*h*).

G. & S. 706; *Cooper* v. *Hood*, 26 Beav. 293; *Bradbury* v. *Dickens*, 27 *ib.* 53; *Churton* v. *Douglas*, Johns. 174; *Ex parte Punnett, In re Kitchin*, 16 Ch. D. 226; *Buckingham* v. *Waters*, 14 Cal. 246; *Williams* v. *Wilson*, 4 Sandf. Ch. 379; *Barker* v. *Connecticut Mutual Life Insurance Co.*, 15 Fed. Rep. 312.

(*a*) *Baxter* v. *Connolly*, 1 Jac. & W. 580. And see *Coslake* v. *Till*, 1 Russ. 376; *Bozon* v. *Farlow*, 1 Mer. 459; *Cassidy* v. *Metcalf*, 1 Mo. App. 593.

(*b*) 4 Dr. 139. As to the relation between the lease of a trader's premises and the goodwill of his business, see *Dougherty* v. *Van Nostrand*, Hoff. 68.

(*c*) Thus, Romilly, M. R., says, in *Robertson* v. *Quiddington*, 28 Beav. 529: "Goodwill is never a tangible thing unless it is connected with the *business* itself, from which it cannot be separated. I never knew a case in which it has been so treated." In *England* v. *Downs*, 6 Beav. 269, and *Morris* v. *Moss*, 25 L. J. Ch. 194, the goodwill of a business was held, under the circumstances, to pass with the stock, and not with the premises. And see *Woodward* v. *Lazar*, 21 Cal. 448; R. Cox, 300. In *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456, the price of the goodwill was held to belong to the previous lessee, under the contract between him and the lessor.

(*d*) See *Bryson* v. *Whitehead*, 1 S. & S. 74; *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456 (*per* Brett, J.); *Snowden* v. *Noah*, Hopk. 347; R. Cox, 1.

(*e*) *Shipwright* v. *Clements*, 19 W. R. 599. And see *Rolt* v. *Bulmer*, W. N. 1878, p. 119; *Reynolds* v. *Bullock*, 47 L. J. Ch. 773; *Boon* v. *Moss*, 70 N. Y. 465.

(*f*) *Churton* v. *Douglas*, Johns. 174; *Currie* v. *Currie*, 15 P. R. 339.

(*g*) *Ex parte Punnett, In re Kitchin*, 16 Ch. D. 226.

(*h*) *Banks* v. *Gibson*, 34 Beav. 566; *Churton* v. *Douglas*, Johns. 174; *Levy* v. *Walker*, 10 Ch. D. 436; *Gray* v. *Smith*, 43 Ch. D. 208; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

Rights of vendor of goodwill.

After sale may set up new business.

As to the rights of the vendor after the sale of his business and goodwill, "it has been settled that there is no implied covenant of any kind" (*a*), and in the absence of any express restrictive covenant, the vendor is at liberty to set up a business of precisely the same description as that of which he had sold the goodwill, and that next door to the place where his former business was carried on, and to state his connection with that former business (*b*); but he is not entitled to represent that he is carrying on the same identical business, either by direct representations, or by assuming the trade name under which the business he has sold acquired its reputation, or the trade mark by which its goods have become known in the market (*c*); nor can he after the sale give a right to others to use the trade marks (*d*). If the trade name consisted simply of the vendor's own name, the restraint upon his continuing to use that name will have to depend upon the evidence of that user being fraudulent (*e*), but in the absence of such evidence, the *bonâ fide* use by a man of his own name will not be prohibited (*f*). But where the trade name in question consisted of the name of the defendant, John Douglas, with the addition "& Co.," it was held that the use of that was an important ingredient in the case, as proving fraudulent intention (*g*). And so where the name of the firm had been "Benjamin Finch & Co.," and on dissolution B. Finch agreed to carry on business only under his own name, he was restrained from trading as "Benjamin Finch & Co." (*h*).

(*a*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79. And see *Harrison* v. *Gardner*, 2 Madd. 198; *Churton* v. *Douglas*, Johns. 174.

(*b*) *Clark* v. *Leach*, 32 Beav. 14; *Hookham* v. *Pottage*, L. R. 8 Ch. 91; *Shipwright* v. *Clements*, 19 W. R. 599; *Cassidy* v. *Metcalfe*, 1 Mo. App. 593.

(*c*) *Shackle* v. *Baker*, 14 Ves. 468; *Cruttwell* v. *Lye*, 17 Ves. 335; *Kennedy* v. *Lee*, 3 Mer. 441, 452; *Sedon* v. *Senate*, 2 V. & B. 220; *Harrison* v. *Gardner*, 2 Madd. 198; *Churton* v. *Douglas*, Johns, 174; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Labouchere* v. *Dawson*, L. R. 13 Eq. 322; *Ginesi* v. *Cooper*, 14 Ch. D. 596; *Leggott* v. *Barrett*, 15 *ib.* 306; *Walker* v. *Mottram*, 19 *ib.* 355; *Smith* v. *McBride*, Ct. Sess. Cas. 4th Ser. XVI. 36; *Dawson* v. *Beeson*, 22 Ch. D. 504; *Mossop* v. *Mason*, 18 Grant Up. Can. Ch. 453; *Peltz* v. *Eichele*, 62 Mo. 171; *Bergamini* v. *Bastian*, 35 La. Ann. 60; *Myers* v. *Kalamazoo Buggy Co.*, 54 Mich. 215; *Hoxie* v. *Chaney*, 143 Mass. 592; *Frazer* v. *Frazer Lubricator Co.*, 121 Ill. 147; *Porter* v. *Mumford & Gorman*, 65 Ga. 11; *Batchelor* v. *Thomson*, 86 Fed. Rep. 630.

(*d*) *Sohl* v. *Geisendorf*, 1 Wils. (Ind.) 60.

(*e*) *Churton* v. *Douglas*, Johns. 174; *Holloway* v. *Holloway*, 13 Beav. 209.

(*f*) *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Bond* v. *Milbourn*, 20 W. R. 197; *Turton* v. *Turton*, 42 Ch. D. 128.

(*g*) *Churton* v. *Douglas*, Johns. 174. And see *Fullwood* v. *Fullwood* (1), W. N. 1873, p. 185; *Devlin* v. *Devlin*, 69 N. Y. 212; *Zimmerman* v. *Erhard*, 83 N. Y. 74; *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1. In *Bond* v. *Milbourn*, 20 W. R. 197 (very shortly reported), it seems that the plaintiff would have been entitled to an injunction at all events against the use of the words "& Co." by the defendant, if that had been the relief prayed.

(*h*) *Day* v. *Finch*, 25 Sol. J. 354.

Solicitation of former customers.

The rights of the vendor of a business and goodwill with respect to soliciting his former customers and dealing with them has been the subject of much difference of judicial opinion. In *Labouchere* v. *Dawson* (*a*) Lord Romilly, M. R., laid down a stringent rule, saying that when the vendor of a goodwill has established a new firm for the purpose of carrying on a business similar to that which has been sold, "the new firm 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 (*b*). And Jessel, M. R., was of opinion that this doctrine should be extended so as to entitle the purchaser of the goodwill of a business to restrain the vendor from having any dealings with his former customers, irrespective of whether he had solicited their custom or not (*c*).

*Leggott* v. *Barrett.*

On the other hand, in *Leggott* v. *Barrett* (*d*), the Court of Appeal held that, assuming the vendor could be restrained from soliciting his old customers in accordance with the order of the Court below, which was not appealed from on this point, he could not be restrained from dealing with his old customers, even though he had solicited them prior to the date of the injunction.

*Walker* v. *Mottram.*

The question next arose with reference to the case in which the goodwill had not been voluntarily alienated by the person entitled to it, and the distinction between this case and the case of a voluntary sale was clearly pointed out in *Walker* v. *Mottram* (*e*), in which Jessel, M. R., and the Court of Appeal held that a trader, the goodwill of whose business had been sold by his trustees in liquidation, could not be prevented from actually soliciting his former customers. "An assignment of a business and its goodwill, without more, appears to us," said Lush and Lindley, L. JJ., "to pass now just as much as and no more than in the days of

(*a*) L. R. 13 Eq. 322. See *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191. Also *Angier* v. *Webber*, 14 Allen, 211; *Dwight* v. *Hamilton*, 113 Mass. 175; *Munsey* v. *Butterfield*, 133 Mass. 492.

(*b*) As to the surrender of a business by A. "for the benefit" of B., see *Clark* v. *Leach*, 32 Beav. 14; and also *Harrison* v. *Gardner*, 2 Madd. 198; and *Churton* v. *Douglas*, Johns. 174.

(*c*) *Ginesi* v. *Cooper & Co.*, 14 Ch. D. 596.

(*d*) 15 Ch. D. 306.

(*e*) 19 Ch. D. 355.

Lord Eldon (*a*). As against the assignor it confers on the assignee the exclusive right to carry on the business assigned, and, as incidental to this, it also confers on him the exclusive right to represent himself as carrying on that business, and consequently the right, not only to sue the assignor for damages if he has infringed these rights, but also to restrain him from infringing them if he manifests an intention to infringe them. Moreover, to this extent a bankrupt who does not concur in his trustee's assignment is in no better position than a bankrupt who does. Every bankrupt, whether he concurs or not, is bound by every lawful disposition of his property by the trustee, and whatever rights such a disposition confers on a purchaser must be respected by the bankrupt, whether he joins in the conveyance or not. But, in our opinion, the right of a purchaser of the goodwill of a business from the trustee in bankruptcy does not extend to restrain the bankrupt (even if he joins in the conveyance) from *bonâ fide* commencing a fresh business, and from seeking assistance in it from his old friends and customers. It would, in our opinion, be contrary to the policy of the bankruptcy laws to extend *Labouchere* v. *Dawson* (*b*) to such a case. It is not necessary to overrule that decision; we leave it where it is, that is to say, it will still be applicable to voluntary sales. But we do not think it ought to be extended to alienations which are compulsory" (*c*). On this principle it was held by the Court of Appeal in *Dawson* v. *Beeson* (*d*) that an expelled partner was entitled to solicit the customers of his old firm.

*Pearson* v. *Pearson*.

In *Pearson* v. *Pearson* (*e*), it was definitely laid down by Baggallay and Cotton, L. JJ., Lindley, L. J., dissenting, that *Labouchere* v. *Dawson* (*b*) was wrongly decided, and that a vendor of a business and goodwill cannot, in the absence of an express restrictive covenant, be restrained from soliciting the old customers of the business.

*Trego* v. *Hunt*.

This much-debated question has at length been set at rest by the decision of the House of Lords in *Trego* v. *Hunt* (*f*), in which the view expressed by Lord Romilly in *Labouchere* v. *Dawson* (*g*)

(*a*) Cf. *Trego* v. *Hunt*, (1896) A. C. 7, in which Lord Herschell criticises the language of Lord Eldon in *Cruttwell* v. *Lye*, 17 Ves. 335, 346. And see p. 301.

(*b*) L. R. 13 Eq. 322.

(*c*) See *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453; *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1; *Iowa Seed Co.* v. *Dorr*, 70 Iowa, 481.

(*d*) 22 Ch. D. 504.

(*e*) 27 Ch. D. 145. See *Vernon* v. *Hallam*, 34 Ch. D. 748. And compare *Bergamini* v. *Bastian*, 35 La. Ann. 60; *Bassett* v. *Percival*, 87 Mass. 345; *Hoxie* v. *Chaney*, 143 Mass. 592.

(*f*) (1896) A. C. 7.

(*g*) L. R. 13 Eq. 322.

was unanimously approved, and the view of the majority of the Court in *Pearson* v. *Pearson* (*a*) was overruled. The decision of the House of Lords finally establishes that the vendor of the goodwill of a business is not entitled to canvass the customers of the old firm, although it was treated as settled law that the sale of the goodwill did not, in the absence of special covenants, prevent the vendor from setting up a rival business in the same neighbourhood. The distinction between the two cases is thus pointed out by Lord Herschell: "If a person who has previously been a partner in a firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do, and which those carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would have done if he had never been a member of the firm to which he previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm, he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of *that connection* which he had previously acquired, to take that which constitutes the goodwill away from the persons to whom it has been sold and to restore it to himself." The principle of *Trego* v. *Hunt* equally applies where, on the creation of a partnership, it has been agreed that the goodwill shall belong exclusively to one of the partners (*b*); and the same principle has since been extended to a case where a partnership was dissolved by consent upon the terms that the continuing partner should, on payment of a money consideration to the retiring partner, retain the assets, no express mention being made of the goodwill (*c*). The decision of the House of Lords is only directed to voluntary transactions, and cannot be said to impeach the authority of *Walker* v. *Mottram* (*d*).

Vendor restrained, though no express covenant.

Although there is no implied covenant on the sale of a goodwill, without more, that the vendor will not set up a similar business in the same neighbourhood, yet where a vendor had received in payment for his share of a goodwill a sum calculated by arbitrators

(*a*) 27 Ch. D. 145.

(*b*) *Per* Lord Herschell, (1896) A. C. 21.

(*c*) *Jennings* v. *Jennings*, (1898) 1 Ch. 378.

(*d*) 19 Ch. D. 355.

upon the understanding (to which he had assented) that he would not carry on business in the same street, it was held to be contrary to Equity that he should carry on business in that street, and he was accordingly enjoined (*a*).

Express restrictive covenant usual.

In the sale of a business and goodwill, it is customary to insert an express restrictive covenant, which will be binding on the vendor, restraining him from setting up the same trade within a certain limit of time or space, or using his name or allowing it to be used for that purpose (*b*); and this has become so usual that where (*c*), in a contract for sale, one of the items was "goodwill, &c.," Romilly, M. R., held that in the "&c." would be included, amongst other things, 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. Such a covenant may even have the effect of compelling the vendor to quit his trade altogether for the period specified, as was held by Lord Mansfield, C. J., and the Court of King's Bench, in *Cooper* v. *Watson* (*d*); and it has been held that a breach of a covenant "not to carry on or be concerned or interested in" a certain business, was committed by the inventor entering into the service of a nephew, who carried on the same trade, under the same name, within the prescribed limits (*e*). Again, a covenant not to carry on a certain business directly or indirectly within the counties of C., A., and M., was broken by soliciting orders on three occasions within C., though the offices of the new business were outside the limits (*f*). A vendor of a business who had covenanted

(*a*) *Harrison* v. *Gardner*, 2 Madd. 198. See *Cassidy* v. *Metcalf*, 1 Mo. App. 593.

(*b*) *Cooper* v. *Watson*, 3 Doug. 413; *Bryson* v. *Whitehead*, 1 S. & S. 74; *Williams* v. *Williams*, 2 Swanst. 253; *Whittaker* v. *Howe*, 3 Beav. 383; *Turner* v. *Evans*, 2 De G. M. & G. 740; *Newling* v. *Dobell*, 38 L. J. Ch. 111; *Wolmershausen* v. *O'Connor*, 36 L. T. N. S. 921; *Rawlinson* v. *Clarke*, 14 M. & W. 187; *Rolfe* v. *Rolfe*, 15 Sim. 88; *Shipwright* v. *Clements*, 19 W. R. 599; *Lee* v. *Ehrhart*, 19 L. T. N. S. 637; *Hagg* v. *Darley*, 47 L. J. Ch. 567; *Davis* v. *Smaggasgale*, W. N. 1890, pp. 158, 169; *Vickery* v. *Welch*, 19 Pick. 523; *Smith* v. *Smith*, 4 Wend. 468; *Sander* v. *Hoffman*, 64 N. Y. 248; *Peltz* v. *Eichele*, 62 Mo. 171; *Butler* v. *Burleson*, 16 Vt. 176; *Baumgarten* v. *Broadaway*, 77 N. Car. 8; *Woods* v. *Sands*, Dig. 467; *Morgan* v. *Perhamus*, 36 Ohio St. 517; *Williams* v. *Wilson*, 4 Sandf. Ch. 379; *Gillis* v. *Hall*, 2 Brews. 342; R. Cox, 580; and similarly upon the sale of a trade mark together with the right to manufacture according to a secret recipe: *Filkins* v. *Blackman*, 13 Bl. C. C. 440.

(*c*) *Cooper* v. *Hood*, 26 Beav. 293. See *Jacoby* v. *Whitmore*, 49 L. T. N. S. 335.

(*d*) 3 Doug. 413.

(*e*) *Newling* v. *Dobell*, 38 L. J. Ch. 111. See *Rolfe* v. *Rolfe*, 15 Sim. 88; and compare *Lee* v. *Ehrhart*, 19 L. T. N. S. 637, where there was held to be no breach.

(*f*) *Turner* v. *Evans*, 2 De G. M. & G. 740. And see *Smith* v. *Smith*, 4 Wend. 468; *Butler* v. *Burleson*, 16 Vt. 176; *Sander* v. *Hoffman*, 64 N. Y. 248.

not to carry on such a business, will not be allowed to do so under the pretext of acting as a commission merchant (*a*), and the fact that former customers have requested the vendor to supply them does not prevent his so doing from being a breach of his covenant (*b*). But where the defendant was shown to have so acted in a few instances only, and with the plaintiff's knowledge and consent, and in fact at his request, it was held that there was no breach (*c*).

Damages in respect of improper solicitation.

In an American case (*d*) it was held that a person who had retired from a firm by sale of his interest, and had agreed not to trade in C. under the old firm name, but had nevertheless traded there under the same name, and had solicited former customers of the firm, must pay damages calculated, not upon the total amount of improper solicitation of such customers, but upon the amount of business which could be proved to have been lost through such solicitation.

Covenant to make profitable.

"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" (*e*). But no such covenant will be implied where it is not expressed; thus the sale of the goodwill of a school involves no personal effort on the part of the vendor to influence the attendance of pupils (*f*). Where a servant has covenanted not to carry on a business similar to his master's within certain limits, the benefit of the covenant passes to a purchaser of the goodwill of the business (*g*).

Rights of purchaser of goodwill.

The purchaser of a business and goodwill is entitled to all the advantages of the reputation and connection of the business as previously conducted, except such benefit as the vendor, on setting up a *bonâ fide* new business, as he is at liberty to do if there is no covenant to the contrary, may derive from the fact of his being known to have belonged to the former business; and the purchaser is entitled to restrain the vendor by injunction from interfering

(*a*) *Richardson* v. *Peacock*, 26 N. J. Eq. 40.

(*b*) *Sander* v. *Hoffman*, 64 N. Y. 248.

(*c*) *Rawlinson* v. *Clarke*, 14 M. & W. 187.

(*d*) *Burckhardt* v. *Burckhardt*, 36 Ohio St. 261.

(*e*) *Per* Lord Eldon, C., in *Scott* v. *Mackintosh*, 1 V. & B. 503.

(*f*) *McCord* v. *Williams*, 96 Penn. St. 78.

(*g*) *Jacoby* v. *Whitmore*, 49 L. T. N. S. 335; *Showell* v. *Winkup*, 60 L. T. N. S. 389.

with what he has sold. With respect to the right of the purchaser to continue to trade under the old trade name, it has been thought that, at all events if it consisted in whole or in part of the name of the vendor, injury (*a*), or at least inconvenience (*b*), might result to the latter from its continued use by the purchaser, and in *Scott* v. *Rowland* (*c*) Wickens, V.-C., granted an injunction to restrain the purchaser of the business of "John Scott & Co." from trading under that name. So in *Thynne* v. *Shove* (*d*), where the business had been carried on in the name of "A. Thynne." In *Banks* v. *Gibson* (*e*), however, Romilly, M. R., said that the firm name was an asset of the business, and would pass as a trade mark upon a sale of the business and goodwill; and it seems that the question of the purchaser's right to use the name, where it can be done without injury to the vendor, must now be taken to be settled in the affirmative by the decision of the Court of Appeal in *Levy* v. *Walker* (*f*), in which Jessel, M. R., and James and Bramwell, L.JJ., denied that any liability could be occasioned to the vendor by the use of his name, and held that the plaintiff (Mrs. Levy), who, while Miss Charbonnel, had traded in partnership with the defendant as "Charbonnel & Walker," was not entitled to restrain the defendant, who had bought the goodwill of the business as a going concern, from continuing to use the old name. James, L. J., said: "It should never be forgotten in these cases

*Levy* v. *Walker.*

(*a*) *Per* Wickens, V.-C., in *Scott* v. *Rowland*, 20 W. R. 508, and Hall, V.-C., in *Levy* v. *Walker*, 10 Ch. D. 436. See *Chatteris* v. *Isaacson*, 57 L. T. N. S. 177; *Thynne* v. *Shove*, 45 Ch. D. 577.

(*b*) *Per* Wood, V.-C., in *Churton* v. *Douglas*, Johns. 174.

(*c*) 20 W. R. 508. And see *Lewis* v. *Langdon*, 7 Sim. 421; *Turner* v. *Major*, 3 Giff. 442; *Dence* v. *Mason*, 41 L. T. N. S. 573; *Dickson* v. *McMaster & Co.*, 18 Ir. Jur. 202, 212; *Howe* v. *Searing*, 10 Abb. Pr. 264; R. Cox, 244; *Peterson* v. *Humphrey*, 4 Abb. Pr. 394; R. Cox, 212; *McGowan Bros. Pump and Machine Co.* v. *McGowan*, 2 Cinc. 313; *Reece* v. *Denicke*, 12 Abb. Pr. N. S. 92. In *Tudor* v. *Tudor*, W. N. 1873, p. 72, and *Probasco* v. *Bouyon*, 1 Mo. App. 241, there was an express contract. For decisions on the Massachusetts Gen. Stat. c. 56, requiring the concurrence of an ex-partner or his personal representatives in the continued use of his name by the continuing or surviving partners, see *Bowman* v. *Floyd*, 85 Mass. 76; *Rogers* v. *Taintor*, 97 *ib.* 291; *Morse* v. *Hall*, 109 *ib.* 409; *Hallett* v. *Cumston*, 110 *ib.* 29; *Sohier* v. *Johnson*, 111 *ib.* 238. By the New York statute the purchaser of a business and goodwill is not entitled to trade under the old name, but only to describe himself as successor to the old firm. See *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1.

(*d*) 45 Ch. D. 577.

(*e*) 34 Beav. 566.

(*f*) 10 Ch. D. 436. And see *Webster* v. *Webster*, 3 Swanst. 490, n.; *Clark* v. *Leach*, 32 Beav. 14; *Bond* v. *Milbourn*, 20 W. R. 197; *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Coulson & Sons* v. *Coulson & Co.*, 3 Times L. R. 846; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Attenborough* v. *Jay*, 14 Times L. R. 439; *Smith* v. *McBride*, Ct. Sess. Cas. 4th Ser. XVI. 36; *Phelan* v. *Collender*, 13 N. Y. Sup. Ct. 244; *Booth* v. *Jarrett*, 52 How. Pr. 169; *Woods* v. *Sands*, Dig. 467; *Mossop* v. *Mason*, 18 Grant, Up. Can. Ch. 453.

that 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, a man has a right to say, 'You must not use a name, whether fictitious or real—you must not use a description, whether true or not—which is intended to represent, or calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me.' That is the principle, and the sole principle, on which this 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. If there is any misleading, that may be for the Criminal Courts of the country to take notice of, or for the Attorney-General to interfere with; but an individual plaintiff can only proceed on the ground that, having established a business reputation under a particular name, he has a right to restrain any one else from injuring his business by using that name. . . . But there is another point upon which I myself cannot entertain any doubt: which is this—that the assignment of the goodwill and business of Charbonnel & Walker did convey the right to use the name of Charbonnel & Walker, and the exclusive right to use that name, as between the vendor and the purchaser of that business. Whether it would prevent another person from afterwards using the name of Charbonnel, I do not say; but the trade name, made up of parts of two real names, as the Master of the Rolls says, the trade name of Charbonnel & Walker (whether it was entirely a fictitious name can make no difference) was the name of the business, and that business was sold. That was a name with which every article sold might have been impressed, just as in the case of *Millington* v. *Fox* (*a*), where the name was continued as part of the designation of the article sold. I think it right to say that the sale of the goodwill and business conveyed 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 an exclusive right as against all the world, so that no other person could represent himself as carrying on the

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

same business" (*a*). The result of the authorities seems to be that the old firm name may be used in any way which does not expose the vendor to liability (*b*). But where a partner retires without assigning the goodwill to the continuing partner, the latter cannot continue to use the name of the retiring partner (*c*), and the sale of the goodwill and business of a company in the course of winding up has been held by Kay, J., not to include the right to use the name of the company (*d*).

Rights of purchaser.

The purchaser of the goodwill is, *à fortiori*, entitled to represent himself as continuing the old business: thus, where the business of John Douglas & Co. was sold, it was held that the purchasers alone had the right to describe themselves as "late John Douglas & Co.," and the vendor was restrained from calling his new firm "John Douglas & Co.," that being an interference with that right (*e*). But a purchaser has no right to use the name of the business he has bought in such a way as to create confusion in the minds of the public (*f*); and it is a fraud for a person to purchase the goodwill of a small business in order to gain a right to use a name generally identified with a different and important business (*g*). In *Warner* v. *Warner* (*h*) it was held that not only had the purchaser of the goodwill of a business in proprietary medicines the right to continue to use the old name, but that the change of the name to the purchaser's own name, so as to assimilate it to the name of an old rival business, should be restrained by injunction. And where a business has been carried on under a name somewhat resembling that under which a similar old-established business is carried on, the purchaser of the newer business must not change the name of his business so as to assimilate it to that of the older business (*i*). The mortgagee of the goodwill of a business, including the right to use the name under which the business is carried on, has no such right in that name as to be able to restrain

(*a*) And see *Thorneloe* v. *Hill*, (1894) 1 Ch. 569.

(*b*) *Thynne* v. *Shove*, 45 Ch. D. 577.

(*c*) *Gray* v. *Smith*, 43 Ch. D. 208. And see *Vonderbank* v. *Schmidt*, 44 La. Ann. 264; 32 Am. St. Rep. 336. Cf. *Caswell* v. *Hazard*, 121 N. Y. 484.

(*d*) *In re Bolanachi's Empire Chocolate*, 89 L. T. (Journal) 273.

(*e*) *Churton* v. *Douglas*, Johns. 174. And see *Lewis* v. *Langdon*, 7 Sim. 421; *McGowan Bros. Pump and Machine Co.* v. *McGowan*, 2 Cinc. 313; *Phelan* v. *Collender*, 13 N. Y. Sup. Ct. 244. But see *Howe* v. *Searing*, 10 Abb. Pr. 264; R. Cox, 244; *Reeves* v. *Denicke*, 12 Abb. Pr. N. S. 92; *Young* v. *Jones Bros. & Co.*, 3 Hughes, 274.

(*f*) *Chinn* v. *Thomas*, 5 V. L. R. Eq. 188.

(*g*) *Perks* v. *Hall & Co.*, W. N. 1881, p. 111.

(*h*) 5 Times L. R. 359.

(*i*) *Holt* v. *Smith*, 4 Times L. R. 329.

the use of it by another person, if he has himself never traded under it (*a*).

Implied contract to keep up business.

Where, on a purchase of a business and goodwill, it was agreed that the purchaser should pay the vendor at the end of each of the first ten years a certain proportion of the profits, but there was no special agreement by the purchaser to keep up the business, it was held by Erle, C. J., and the Court of Common Pleas, that the purchaser had entered into an implied contract to keep up the business, at all events for the ten years over which the instalments were to extend (*b*). It seems that while such an implied contract would give a right to damages if broken, it could not be specifically enforced in Equity (*c*), though carrying on a similar business under a different style could be restrained (*d*).

Goodwill of mortgaged property.

In some cases questions have been raised with respect to the ownership of the goodwill of a business carried on on mortgaged premises. This has most frequently been when the mortgaged premises have been taken under compulsory powers, so that it has been necessary to decide to whom, or in what proportions, the purchase-money was payable. The principle which governs such cases was thus laid down by Cotton, L. J. (*e*). "Goodwill is a word of which few people understand the meaniug. It is obvious that to certain kinds of goodwill a mortgagee will be entitled. The goodwill which attaches to a house increases the value of that house, and therefore the mortgagee is entitled to that. By that I mean, for instance, there is a well-known public-house, and from its position being well known, people go it; or a well-known shop, from its being situated in a good thoroughfare, people go to it. The goodwill is attaching to the house, and adds to the value of the house. But there may be other goodwills attaching to the personal reputation which a man has made for himself. That, of course, does not go to the mortgagee, but is a thing personal to the man whose skill and whose name have acquired that goodwill. It does not follow at all that because it is called 'goodwill' the mortgagee will be entitled to it. So far as it is incident to the

(*a*) *Beazley* v. *Soares*, 22 Ch. D. 660.
(*b*) *McIntyre* v. *Belcher*, 14 C. B. N. S. 654. Compare *Harrison* v. *Gardner*, 2 Madd. 198.
(*c*) *Lewis* v. *Langdon*, 7 Sim. 421.
(*d*) *Evans* v. *Hughes*, 18 Jur. 691. And see *Turner* v. *Major*, 3 Giff. 442.
(*e*) *Cooper* v. *Metropolitan Board of Works*, 53 L. J. Ch. 109 (this passage is given rather less fully at 25 Ch. D. 479), and see *Chissum* v. *Dewes*, 5 Russ. 29; *King* v. *Midland Railway Co.*, 17 W. R. 113; *Pile* v. *Pile*, 3 Ch. D. 36; *Ex parte Punnett*, *In re Kitchin*, 16 *ib.* 226.

house, and is connected with the house, and increases the value of the house, it goes as part of the value of the house to the mortgagee."

Goodwill is partnership assets.

In a case of partnership, the goodwill of a business, newspaper, &c., including the firm name, is partnership assets, and, on a sale of the partnership business, must be sold with it, for the benefit of the partners or their creditors (*a*), and a receiver may be appointed until the sale (*b*).

Disposal on dissolution.

On a dissolution of partnership the business and goodwill may be disposed of in three different ways: by sale, for the benefit of the partners or their creditors; by the whole concern, including the trade name, being taken by one partner at a valuation; or by a simple division of the tangible assets of the partnership, in which case each is at liberty to use the trade name just as the partnership did previously (*c*), or at all events to state his connection with the old firm (*d*). But where a partnership was entered into for a certain term, an injunction was granted to restrain one of the partners from carrying on business with others under the old partnership name, the partnership term not having expired (*e*).

Compensation governed by articles.

On a dissolution of a partnership governed by articles, the retiring partner will not be entitled to compensation for his share in the goodwill except in accordance with the articles (*f*). Thus, in a case where provision was not made for such compensation, it was held that the premises on which the business had been carried on for many years, and which the continuing partner was entitled on dissolution to take at a valuation, were to be valued without regard to the fact of previous occupation, as, if that were taken into account, it would have the effect of making the partner in question pay for the goodwill (*g*).

(*a*) *Bradbury* v. *Dickens*, 27 Beav. 53; *Banks* v. *Gibson*, 34 Beav. 566; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *McCormick* v. *McCubbin*, 1 Ct. Sess. Cas. 1st Ser. I. 541; *Dayton* v. *Wilkes*, 17 How. Pr. 510; R. Cox, 224.

(*b*) *Marten* v. *Van Schaick*, 4 Paige, 479; *Williams* v. *Wilson*, 4 Sandf. Ch. 379.

(*c*) *Banks* v. *Gibson*, 34 Beav. 566; *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Levy* v. *Walker*, 10 Ch. D. 436; *Fenton* v. *Levy*, 29 Sol. J. 735; *Chappell* v. *Griffith*, 53 L. T. N. S. 459; *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54; S. C. (2), 51 How. Pr. 455; *Myers* v. *Kalamazoo Buggy Co.*, 54 Mich. 215; *Smith* v. *Imus*, 32 Alb. L. J. 455.

(*d*) *Clark* v. *Leach*, 32 Beav. 14; *Hookham* v. *Pottage*, L. R. 8 Ch. 91; *Dickson* v. *McMaster & Co.*, 18 Ir. Jur. 202; *Peterson* v. *Humphrey*, 4 Abb. Pr. 394; R. Cox, 212. See *Matthews* v. *Hodgson*, 2 Times L. R. 899.

(*e*) *England* v. *Curling*, 8 Beav. 129.

(*f*) *Hall* v. *Hall*, 20 Beav. 139; *Kennedy* v. *Lee*, 3 Mer. 441, 452; *Farr* v. *Pearce*, 3 Madd. 74; *Steuart* v. *Gladstone*, 10 Ch. D. 626.

(*g*) *Burfield* v. *Rouch*, 31 Beav. 241. But see *Dougherty* v. *Van Nostrand*, Hoff. 68.

What terms include goodwill.

But for a retiring partner to be entitled to compensation for his share in the goodwill, it is not necessary for the word "goodwill" to be mentioned in the article governing the distribution of the partnership property. In *Hall* v. *Hall* (*a*), indeed, it was held that a provision in the articles for the valuation, on the determination of the partnership, of the "property, credits, and effects," and "the stock in trade and effects," did not include the goodwill; and so, in *Dickson* v. *McMaster & Co.* (*b*), with respect to the term "stock in trade, goods, chattels, and effects." But those cases must be taken to be overruled by the cases in which the terms "stock belonging to the partnership" (*c*), "property and effects" (*d*), and "effects and things" (*e*), have been held to include goodwill.

*Stewart* v. *Gladstone.*

Where, however, the partnership articles of a firm of commission merchants 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 made thereby 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, it was held by the Court of Appeal that, the share of partners in the goodwill of a commission business not being ordinarily estimated in calculating their annual shares of profits, and that not having been the practice in the case before them, the goodwill could not be taken into account and valued as being included in the partnership "estate and effects" (*f*).

Goodwill included in valuation.

On the other hand, where the articles of partnership 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 that on the determination of the partnership a general account and valuation of the property and effects of the partnership should be taken, the partnership

(*a*) 20 Beav. 139.
(*b*) 18 Ir. Jur. 202.
(*c*) *Hall* v. *Barrows*, 4 De G. J. & S. 150.
(*d*) *Reynolds* v. *Bullock*, 47 L. J. Ch. 773. And see *Wilmer* v. *Thomas*, 74 Md. 485 ("all the estate and property wherever situated").
(*e*) *Barrow* v. *Barrow*, 27 L. T. N. S. 431; *Rolt* v. *Bulmer*, W. N. 1878, p. 119; and see *Shipwright* v. *Clements*, 19 W. R. 599. Where the interest of a deceased partner is purchased by the surviving partner at a valuation, under the Ohio statute, the value of the goodwill must be included. *Rammelsberg* v. *Mitchell*, 29 Ohio St. 22.
(*f*) *Stewart* v. *Gladstone*, 10 Ch. D. 626.

being dissolved by the death of one of the partners, it was held by Stuart, V.-C., that the goodwill must be included in the valuation of the partnership property (*a*).

One partner cannot monopolise goodwill, when no articles.

In *Featherstonhaugh* v. *Fenwick* (*b*), it was decided that on a dissolution of a partnership, not provided for by articles, one partner could not secure to himself the whole benefit of the goodwill by claiming to take the share of the other at a valuation, or requiring him to remove his proportion from the premises, or clandestinely obtaining a renewal to himself of the lease of the premises occupied by the partnership; but where the goodwill goes with the premises, it has been held in America that the partners who quit the premises have no claim in respect of goodwill against a partner who remains on the premises (*c*); and where, under a power contained in the articles, a majority of the partners in a firm expelled another partner, it was decided that in the valuation of the amount to which he was entitled, the value of the goodwill could not be taken into account (*d*).

Estate of dead partner shares in partnership profits until settlement.

If, after a dissolution of partnership by the death of a partner, "the surviving partners think proper to make that which is in Equity the joint property of the deceased and them the foundation and plant of increased profit, if they do not think proper to settle with the executors and put an end to the concern, they must be understood to proceed upon the principle which regulated the property before the death of their partner" (*c*); that is to say, capital belonging to the estate of the deceased partner having been risked, such a proportion of the total profits as are attributable to that capital will belong to that estate.

Subject to circumstances.

But in the computation of what profits are attributable to that capital a variety of circumstances have to be taken into consideration: thus, "the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, the

(*a*) *Wade* v. *Jenkins*, 2 Giff. 509.

(*b*) 17 Ves. 298; and so in *Mitchell* v. *Read* (1), 61 N. Y. 128. As to a trade mark, see *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54.

(*c*) *Musselman and Clarkson's Appeal*, 62 Penn. St. 81.

(*d*) *Steuart* v. *Gladstone*, 10 Ch. D. 626.

(*e*) *Per* Lord Eldon, C., in *Crawshay* v. *Collins*, 15 Ves. 227. And see *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Heathcote* v. *Hulme*, 1 Jac. & W. 122; *Brown* v. *De Tastet*, Jac. 284; *Cook* v. *Collingridge*, Jac. 607; *Macdonald* v. *Richardson*, 1 Giff. 81; and *Parsons* v. *Hayward*, 31 L. J. Ch. 666.

conduct of parties after his death, all of which may materially affect the rights of the parties" (*a*).

Similarly with goodwill.

In the same manner, on the death of a partner, the goodwill ought, if there is no provision regulating its destination in such an event, to be sold for the benefit of the partnership, and if that is not done, the continuing partners will have to account to the estate of the deceased partner for his share in the goodwill.

Goodwill does not survive.

There is, indeed, a distinct decision (*b*) by Lord Loughborough, C., that upon a dissolution of a partnership without articles the goodwill survives to the surviving partner. This position was, however, doubted by Lord Eldon, C., in *Crawshay* v. *Collins* (*c*); and it is now thoroughly established that the goodwill is partnership assets. "The goodwill of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a Court of Equity. Accordingly, in reported cases, Lord Eldon held that a share of it properly and as of right belonged to the estate of the deceased partner. It does not survive to the remaining partners, unless by express agreement; but it may by agreement, as it may be agreed that any particular portion of the partnership assets shall so survive. 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" (*d*). The share of the deceased partner in the concern is not, however, the sole guide to the interest of his estate in the goodwill. The various circumstances alluded to by Wigram, V.-C., in *Willett* v. *Blandford* (*e*) must be considered. Thus, where at the time of the death of one of two partners the partnership was insolvent,

(*a*) *Per* Wigram, V.-C., in *Willett* v. *Blandford*, 1 Hare, 253. And see *Simpson* v. *Chapman*, 4 De G. M. & G. 154, where these remarks were highly approved by Turner, L. J., and it was held that under the circumstances of the case, nothing was due to the estate of the deceased partner.

(*b*) *Hammond* v. *Douglas*, 5 Ves. 539. And see *Lewis* v. *Langdon*, 7 Sim. 421; *Robertson* v. *Quiddington*, 28 Beav. 529; *Young* v. *Jones Brothers & Co.*, 3 Hughes, 274.

(*c*) 15 Ves. 227.

(*d*) *Per* Romilly, M. R., in *Wedderburn* v. *Wedderburn*, 22 Beav. 84. And see *Macdonald* v. *Richardson*, 1 Giff. 81; *Bradbury* v. *Dickens*, 27 Beav. 53; *Smith* v. *Everett*, 27 Beav. 446; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *McCormick* v. *McCubbin*, Ct. Sess. Cas. 1st Ser. I. 641; *Dougherty* v. *Van Nostrand*, Hoff. 68; *Dayton* v. *Wilkes*, 17 How. Pr. 510; R. Cox, 224; cf. *Stewart* v. *Einstein & Sawhill*, 64 U. S. Pat. Gaz. 1333.

(*e*) 1 Hare, 253.

and the deceased partner indebted to the partnership, and the surviving partner subsequently carried on the business with such energy and success that he was able at a later period to sell the goodwill for £1,700, it was held by Jessel, M. R., that the surviving partner was only liable to account to the estate of his deceased partner for the value of a moiety of the goodwill at the time of the latter's death (*a*).

Firm name.

With respect to the trade name, Shadwell, V.-C., in *Lewis* v. *Langdon* (*b*), expressed an opinion that it survived, but the decision in that case only amounted to this: that one of three executors of a deceased partner in the firm of "Brookman & Langdon" had no right to set up in business as "Brookman & Langdon," and that the surviving partner, who was carrying on business as "James Lewis & Co., successors to Brookman & Langdon," had sufficient interest in the name of the old firm to restrain an unauthorised use of it (*c*); and it seems that one member of a firm cannot, on the death of his partner, monopolise all the benefit to be derived from the use of the firm name (*d*), although, if he purchases the interest of his deceased partner from the latter's executors, he will be entitled to the exclusive use of the old firm name (*e*).

Firm continued by certain partners.

When, on a dissolution of partnership, the goodwill of the business becomes the property of some of the former partners, with it they acquire the right of representing their remodelled business as being the continuation of the old one; and they are at liberty to express this by styling themselves "B. & C., late A. and B.," or "B. & C., successors to A. & B.," or by using any similar words (*f*). If they continue to use the style of the old business, "A. & B.," as before, then, as regards the partner by whose retirement or death the dissolution has been brought about, it does not appear that he or his estate will be exposed to loss or inconvenience,

(*a*) *Broughton* v. *Broughton*, 44 L. J. Ch. 526. And compare *Simpson* v. *Chapman*, 4 De G. M. & G. 154.

(*b*) 7 Sim. 421. See *Milner* v. *Reed*, Dig. 328.

(*c*) In this respect *Hine* v. *Lart*, 10 Jur. 106, and *Dent* v. *Turpin*, 2 J. & H. 139, seem to be in point, as in those cases the plaintiff had a certain right, but not an exclusive right, in the trade marks. See *Scott* v. *Scott*, 16 L. T. N. S. 143.

(*d*) A decided opinion to this effect is expressed in Lindley on Partnership. And see *Fenn* v. *Bolles*, 7 Abb. Pr. 202.

(*e*) *Phelan* v. *Collender*, 13 N. Y. Sup. Ct. 244.

(*f*) *Churton* v. *Douglas*, Johns. 174; *Lewis* v. *Langdon*, 7 Sim. 421; *Hookham* v. *Pottage*, L. R. 8 Ch. 91; *Peterson* v. *Humphrey*, 4 Abb. Pr. 394; R. Cox, 212; *McGowan Brothers' Pump & Machine Co.* v. *McGowan*, 2 Cinc. 313; *Phelan* v. *Collender*, 13 N. Y. Sup. Ct. 244; *Young* v. *Jones Brothers & Co.*, 3 Hughes, 274. But see *Reeves* v. *Denicke*, 12 Abb. Pr. N. S. 92.

or that he or his representatives have any ground for complaint (*a*); and, as regards the public, it seems that the use of the old name does not, as a rule, constitute any false representation, the only statement being that the new firm is carrying on the business of the old one (*b*). Such continued user, however, will not be permitted when it can be only for an improper and fraudulent purpose, and in order to deceive the public (*c*); nor where the partnership has been only contrived with a view to giving the purchaser of a professional business the means of appropriating to himself the personal reputation of the vendor (*d*).

**Rights on dissolution by retirement or by death and sale of goodwill.**

When a partner has retired from a business, his share and interest therein being taken over by the continuing partners, or when, on the death of a partner, the partnership business has been sold, the retiring or surviving partner, as the case may be, has full liberty to set up a precisely similar business to that which the partnership carried on, but he must not represent it to be the same business (*e*). To use the language of Fry, J., in *Mogford* v. *Courtenay* (*f*) "the rights of a late partner who has no interest in the goodwill of the old business, to carry on trade are somewhat refined. They amount shortly to this—that he may carry on a similar trade or similar business; he cannot carry on the identical business. He is at liberty to do everything which flows from the right to carry on a similar business; he is prohibited or liable to be restrained from doing anything which conduces to his carrying on the identical business; but what acts come within either of those classes is a question of very considerable nicety." To this extent the rights of an expelled partner are the same as if he had retired voluntarily (*g*). In the valuation, therefore, of the share of a retiring or dead partner, which is to be taken over by the

(*a*) See *Levy* v. *Walker*, 10 Ch. D. 436, and cases at p. 315, *supra*.

(*b*) *Banks* v. *Gibson*, 34 Beav. 566; *Aubin* v. *Holt*, 2 K. & J. 66. And see *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. C. 523; *Phelan* v. *Collender*, 13 N. Y. Sup. Ct. 244; *Probasco* v. *Bouyon*, 1 Mo. App. 241; *Oakes* v. *Tonsmierre*, 4 Woods, 547.

(*c*) *Dence* v. *Mason*, Dig. 534; 41 L. T. N. S. 573.

(*d*) *Thornbury* v. *Bevill*, 1 Y. & C. Ch. 554. And see *Oakes* v. *Tonsmierre*, 4 Woods, 547.

(*e*) *Kennedy* v. *Lee*, 3 Mer. 441, 452; *Harrison* v. *Gardner*, 2 Madd. 198; *Churton* v. *Douglas*, Johns. 174; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Clark* v. *Leach*, 32 Beav. 14; *Bond* v. *Milbourn*, 20 W. R. 197; *Hockham* v. *Pottage*, L. R. 8 Ch. 91; *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191; *Wolmershausen* v. *O'Connor*, 36 L. T. N. S. 021; *Leggott* v. *Barrett*, 15 Ch. D. 306; *Rammelsberg* v. *Mitchell*, 29 Ohio St. 22; *Cottrell* v. *Babcock Printing Press Manufacturing Co.*, 35 Alb. L. J. 129.

(*f*) 45 L. T. N. S. 303.

(*g*) *Dawson* v. *Beeson*, 22 Ch. D. 504.

surviving partner, this fact should be taken into consideration, as it may materially affect and even destroy the value of the share (*a*); and when the business is to be sold, that fact should be stated in the particulars of sale, in order that the purchaser may be able to buy with a full knowledge of the facts (*b*). In *Smith* v. *Everett* (*c*), the survivor of two partners in a banking business sold the business, and it was held that the estate of the deceased partner was entitled to a share of so much of the purchase-money as was attributable to the goodwill. Romilly, M. R., directed that this value should be ascertained, regard being had to the facts that: 1st, the partnership premises belonged to the survivor; 2ndly, the survivor had the right to carry on the business of a banker on the same premises after the sale of the goodwill; 3rdly, the sole right of issuing bank notes survived to him.

Retiring or surviving partner may state former connection.

Unless he has specially contracted not to do so (*d*), a retiring or surviving partner may advertise generally the facts that he was connected with the former business, and that he is establishing a new business (*e*), and he may style himself "formerly" or "late" of the firm, and, if he occupies the premises formerly occupied by the firm, may state that they were so occupied; but he may not describe himself as "successor to" the old firm.

And the termination of that connection.

A retiring partner may advertise the discontinuance of his participation in a periodical issued by the partnership, but he is not at liberty to advertise its discontinuance generally, any more than he might represent the partnership to have ceased to carry on business, upon his own retirement (*f*). And where an ex-partner knowingly allowed his former firm to continue to use his name, it was held that he was estopped from denying his partnership as against a person who had acted in the belief that he was still a partner (*g*).

(*a*) *Mellersh* v. *Keen*, 28 Beav. 453; *Davies* v. *Hodgson*, 25 Beav. 177: *Rammelsberg* v. *Mitchell*, 29 Ohio St. 22.

(*b*) *Cook* v. *Collingridge*, Jac. 607; *Hall* v. *Barrows*, 4 De G. J. & S. 150. And see the form settled by the L.JJ. in *Johnson* v. *Helleley*, 2 De G. J. & S. 446.

(*c*) 27 Beav. 446.

(*d*) *Wolmershausen* v. *O'Connor*, 36 L. T. N. S. 921.

(*e*) *Bradbury* v. *Dickens*, 27 Beav. 53; *Clark* v. *Leach*, 32 Beav. 14; *Labouchere* v. *Dawson*, L. R. 13 Eq. 322; *Graveley* v. *Winchester*, Seton, 5th ed. 591; *Burrows* v. *Foster*, 1 N. R. 156; *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191; *Leggott* v. *Barrett*, 15 Ch. D. 306; *Walker* v. *Mottram*, 19 *ib.* 355; *Dawson* v. *Beeson*, 22 *ib.* 504; *Morgan* v. *Schuyler*, 79 N. Y. 490.

(*f*) *Bradbury* v. *Dickens*, 27 Beav. 53. In *England* v. *Curling*, 8 Beav. 129, an injunction was granted to restrain a partner from publishing notices of the dissolution of the partnership during the term for which it was to subsist.

(*g*) *Richards* v. *Hunt*, 65 Ga. 342. So in *Backus* v. *Taylor*, 84 Ind. 503.

Necessary announcements may be made.

While, however, a retiring partner is not at liberty to depreciate the property, his share in which has passed to others (*a*), a partner who has bought the share of his partner may, even before the purchase is in all respects completed, publish statements which are necessary to induce others to join him, and to enable him to carry on the business, though, in the opinion of the selling partner, that may have a prejudicial effect on what is still, in a sense, the partnership property (*b*).

Business carried on in separate districts.

Where two partners, having been in the habit of carrying on the partnership business, each in a separate district, agreed to dissolve partnership, the premises, stock, and goodwill to be sold, or until sale to vest in a receiver, Stuart, V.-C., restrained one partner from carrying on the business on his own account in one district, and directed him to account for the profits (*c*).

Right of election protected.

Again, where it was provided by the partnership articles that, on the death of one of the partners, his personal representative should have the right to elect, within three months, to take the deceased partner's share in the business, Wood, V.-C., restrained the surviving partner from carrying on the business under any other firm or style than that used in the lifetime of the deceased partner, for three months, or until election by his representative (*d*). But it seems that though the Court can restrain the surviving partner from carrying on the business in any other name, it has no means of compelling him to carry it on in the original name (*e*).

Valuation of goodwill.

The value of a goodwill, or share of a goodwill, is usually estimated at so many years' purchase upon the amount of the profits (*f*); thus, in *Mellersh* v. *Keen* (*g*), it was fixed at one year's purchase of the net annual profits, calculated on an average of three years (*h*).

(*a*) *Bradbury* v. *Dickens*, 27 Beav. 53.
(*b*) *Marshall* v. *Watson*, 25 Beav. 501.
(*c*) *Turner* v. *Major*, 3 Giff. 442.
(*d*) *Evans* v. *Hughes*, 18 Jur. 691.
(*e*) *Lewis* v. *Langdon*, 7 Sim. 421.
(*f*) *Austen* v. *Boys*, 2 De G. & J. 626.
(*g*) 28 Beav. 453; and see *Donald* v. *Hodgart's Trustees*, Ct. Sess. Cas. 4th Ser. XXI. 246.
(*h*) As to other circumstances to be considered, see *Smith* v. *Everett*, 27 Beav. 446; *Johnson* v. *Hellcley*, 34 Beav. 63; 2 De G. J. & S. 446.

# APPENDIX A.

## THE PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888, AND THE RULES AND INSTRUCTIONS THEREUNDER.

### THE PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883 (*a*).

46 & 47 Vict. c. 57.

*An Act to amend and consolidate the Law relating to Patents for Inventions, Registration of Designs, and of Trade Marks.*

[25th August, 1883.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

(*a*) The parts of this Act which have been expunged by the Inter Acts are printed in italics, and the provisions which have been introduced are printed in brackets.

#### PART I.

#### Preliminary.

Part I. Preliminary.

Short title.

1. This Act may be cited as the Patents, Designs, and Trade Marks Act, 1883.

Division of Act into parts.

2. This Act is divided into parts, as follows:—

Part I.—Preliminary.
Part II.—Patents.
Part III.—Designs.
Part IV.—Trade Marks.
Part V.—General.

Commencement of Act.

3. This Act, except where it is otherwise expressed, shall commence from and immediately after the thirty-first day of December, one thousand eight hundred and eighty-three (*a*).

(*a*) The Act of 1883, except where otherwise provided, commenced on the 1st January, 1889 (§ 28).

#### PART II. (Sects. 4—46.)

#### Patents.

## PART III. (Sects. 47—61.)

### Designs (*a*).

(*a*) For § 51, requiring articles bearing a registered design to be marked so as to denote the fact of registration, see Appendix G., p. 608.

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## PART IV.

### Trade Marks.

#### *Registration of Trade Marks.*

Application for registration.

62.—(1.) The comptroller (*a*) may, on application by or on behalf of any person (*b*) claiming to be the proprietor (*c*) of a trade mark (*d*), register the trade mark (*e*).

(2.) The application (*f*) must be made in the form set forth in the first schedule to this Act, or in such other form (*g*) as may be from time to time prescribed (*h*), and must be left at, or sent by post to *the Patent Office in the prescribed manner* [such place and in such manner as may be prescribed] (*i*).

(3.) The application must be accompanied by the prescribed number of representations (*k*) of the trade mark, and must state the particular goods or classes of goods (*l*) in connection with which the applicant desires the trade mark to be registered.

(4.) The comptroller may, if he thinks fit (*m*), refuse to register a trade mark (*n*); but any such refusal shall be subject to appeal to the Board of Trade (*o*), who shall, if required, hear the applicant and the comptroller, and may make an order determining whether, and subject to what conditions (*p*), if any, registration is to be permitted.

(5.) The Board of Trade may, however, if it appears expedient, refer the appeal to the Court; and in that event the Court shall have jurisdiction to hear and determine the appeal, and may make such order as aforesaid (*q*).

[(6.) Where an applicant for the registration of a trade mark otherwise than under an International Convention is out of the United Kingdom at the time of making the application, he shall give the comptroller an address for service in the United Kingdom, and if he fails to do so the application shall not be proceeded with until the address has been given (*r*)].

The amendments in this section were made by § 8 of the Act of 1888.

(*a*) The Comptroller General of Patents, Designs, and Trade Marks: § 117.

(*b*) "Person" includes a body corporate: § 117, Rule 41. There is no limitation to British subjects, and the practice hitherto has been to grant registration to aliens. See, however, *In re Riviere & Co.*, 26 Ch. D. 48. By § 103, a certain priority is given to foreign applicants who have applied for registration in their own countries.

(*c*) By "claiming to be the proprietor" nothing more is meant than "claiming to be the first to adopt," whether there has been any user or not. The doubt expressed in *In re Anderson*, 54 L. J. Ch. 1084; *Edwards* v. *Dennis*, 30 Ch. D. 454; and *In re Lyndon*, 32 Ch. D. 109, is now removed: *In re Hudson*, 32 Ch. D. 311. And see *In re Hicks*, 22 V. L. R. 636, a decision upon a similar provision in the Trade Marks Act of Victoria. But "a person who puts another's trade mark on the register cannot be a person entitled within the Act": *per* Fry, L. J., *In re Apollinaris Co.*, (1891) 2 Ch. 186, 226; and an importer cannot register as his own

a trade mark of the foreign producer, at all events, unless he has the control of the entire output: *Ib.* Again, a person cannot register a trade mark without any intention of using it in his business: *In re Apollinaris Co.*, (1891) 2 Ch. 186, 234, 235; *In re Batt*, (1898) 2 Ch. 432. For registration to be good a title must be shown which is good according to the law of England, so that a mark which has been assigned in gross abroad ought not to be registered: *Pinto* v. *Badman*, 8 P. R. 181—192, 193; nor a mark which, though registered abroad, does not contain any of the essential particulars required by this Act: *In re Carter Medicine Co.*, (1892) 3 Ch. 472. Since by § 77 a trade mark within that section cannot be protected until either it has been registered or registration has been refused, it hardly seems that there can be any effective proprietorship until registration has been granted, or, in the case of an old mark—*i.e.*, a mark used before August 13th, 1875—refused.

(*d*) As to what is a trade mark, see § 64, *infra*, and Ch. II.

(*e*) As to the mode of registration, see Rules 32—35; *infra*, pp. 401—413, where the Rules now in force, viz., the Rules of 1890 as amended by the Rules of 1897 and 1898, are set out. By Rule 33, if an applicant dies before registration, the trade mark may be registered for the successor to the goodwill of his business.

(*f*) For the mode of making application, see Rules 7—16. By § 81 (3), applications for registration of Hallamshire cutlery marks must be made to the Cutlers' Company.

(*g*) Form F. in the Second Schedule to the Rules is substituted for Form F. in the Schedule to the Act. See Rules, 4, 5.

(*h*) "Prescribed," *i.e.*, by the Rules. See § 117.

(*i*) See Rule 16.

(*k*) Four in classes 23—35; three in other classes. See Rule 13, and Form G.

(*l*) The application may be for any goods in a class. See Form F. But it should be only for the particular goods for which the applicant has used or is about to use the mark: *Edwards* v. *Dennis*, 30 Ch. D. 454: *Hargreave* v. *Freeman*, (1891) 3 Ch. 39. Similarly, an application for the whole of a class by a person who does not deal or intend to deal in goods in that class is improper: *In re Batt & Co.*, (1898) 2 Ch. 432. For the classification of goods, see Rule 6 and the Third Schedule to the Rules; also Guide to Classification, *infra*, p. 424.

(*m*) The comptroller's discretion to allow the registration of a trade mark is limited by §§ 69, 72, 73. See *per* Cotton, L. J., in *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278, and *per* Pearson, J., in *In re Price's Patent Candle Co.*, 27 Ch. D. 681. And, further, "the question whether the comptroller shall, in the exercise of the discretion which the Act gives to him, register a trade mark, is a very different question from any of the questions upon a trade mark that can be raised. He is quite within his duty, and he is quite entitled, if he thinks that—either because there are words in it, the exclusive use of which would be calculated to deceive, or otherwise—there is a sufficient reason, to say 'No; I do not think it is proper to register this trade mark'": *per* Kay, J., in *In re Dunn*, 41 Ch. D. 439. And see the same case in the House of Lords, 15 App. Cas. 252; *In re Marks & Tellefsen*, 63 L. T. N. S. 234; *In re Speer*, 55 L. T. N. S. 880; *In re Farrow*, 7 P. R. 260; and *In re Turney*, 11 P. R. 37. It is to be observed that in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 497, Lord Blackburn, referring to § 5 of the Act of 1875, by which it was provided that the Court "may" direct registration of a trade mark to which a claimant is entitled, said: "I cannot construe this section as meaning anything else than that, where the Court of Chancery is satisfied that the applicant is a person who is for the time being entitled to the exclusive use of a trade mark in accordance with law, and that the trade mark is one within the definition in the Act, the Court is, *ex debito justitiæ*, to rectify the register, just as it would, before the Act of 1875, have been bound *ex debito justitiæ*, on similar proof, to prevent any one infringing the trade mark shown to be his property." And his lordship went on to say that, though the burden of proof lay upon the person making the application, yet if he did produce such proof as would, in the opinion of the Court, entitle him to an injunction, he did not think that the Court had any discretion to consider whether the registration would be inconvenient. If the comptroller has an absolute discretion to reject any mark he thinks fit, the result may be, in the case of an old mark, to destroy a very valuable property without redress. These statements must, however, be taken in connection with the dicta in the House of Lords in *Eno* v. *Dunn*, 15 App. Cas. 252, *e.g.*, *per* Lord Herschell, at p. 261, where he said: "Those sections" (*i.e.*, §§ 72 and 73) "prohibit the registration of a trade mark in certain specified cases; but there is no duty cast upon the comptroller of registering every other trade mark that may be applied for. On

the contrary, whilst he is in certain cases prohibited from registering, a discretion whether to register or not appears to me to be in all cases plainly conferred. Of course, this discretion must be reasonably and not capriciously exercised." It is to be observed that Lord Blackburn was primarily referring to an old mark, and Lord Herschell to a new one. In any event the comptroller is forbidden to refuse registration without giving the applicant an opportunity of being heard: § 94. Whether the comptroller is justified in registering oriental words as a trade mark, *quære*: *In re Dewhurst & Sons, Ld.*, (1896) 2 Ch. 137.

(*n*) Before refusing to register a mark, the comptroller is to give the applicant ten days' notice of a time when he may be heard personally or by his agent: § 94 and Rules 17—19.

(*o*) See Rules 20—26 and Form H.

(*p*) As to limited registration, see note (*e*) to § 72, *infra*.

(*q*) The Court is the High Court of Justice in England: § 117. The Court has no jurisdiction to deal with an application which the comptroller has refused, except upon an appeal to the Board of Trade and a reference of the matter by the Board to the Court: *In re Normal Co., Ld.*, 35 Ch. D. 231. But the Board should refer the matter to the Court: *ib.* On the matter coming before the Court all objections can be taken, whether originally raised by the comptroller or not: *In re Sanitas Co., Ld.*, 4 P. R. 533. When the comptroller refuses an application, and the matter is taken to the Court, the usual rule is to make the applicant pay the comptroller's costs, whether successful or unsuccessful: *In re Van Duzer*, 34 Ch. D. 623. Where the Court was moved to direct the comptroller to proceed with an application to register notwithstanding the existence on the register of a mark belonging to a foreign company, and notice was sent to the company, but was not acknowledged, the Court directed the comptroller to proceed in the company's absence without prejudice to any opposition, the applicant undertaking to give due notice to the company of the advertisement: *In re Stringer*, 8 P. R. 445. See Rule 44 as to entering orders of the Court on the register.

(*r*) As to the address for service, see *per* Lindley, L. J., in *In re King & Co.*, (1892) 2 Ch. 462, 378; also *In re Robertson, Sanderson & Co.*, 9 P. R. 213.

Limit of time for proceeding with application.

63. Where registration of a trade mark has not been or shall not be completed within twelve months from the date of the application, by reason of default on the part of the applicant, *the application shall be deemed to be abandoned* (*a*) [the comptroller shall give notice of the non-completion to the agent employed on behalf of the applicant, and if at the expiration of fourteen days from that notice the registration is not completed, shall give the like notice to the applicant, and if at the expiration of the latter fourteen days, or such further time as the comptroller may in special cases permit, the registration is not completed, the application shall be deemed to be abandoned].

(*a*) This provision was first made by the edition of March, 1883, of the Rules under the old Acts. The amendments in this section were made by § 9 of the Act of 1888. By the combined operation of this section and § 113 all applications not completed within the prescribed time by the applicant's default lapse, whether they were pending at the date of this Act or have been made subsequently: *In re Hayward & Co.*, 54 L. J. Ch. 1003. And this is so, though the default was occasioned by the neglect of the applicant's agent, and not of the applicant himself: *Jackson & Co.* v. *Napper*, 35 Ch. D. 162. But a trade mark registered in 1885, in pursuance of an application made in 1879, was allowed to remain on the register, subject to certain disclaimers, and to the entry of a note on the register making the five years for the purposes of § 76 run from 1885 and not from 1879: *In re Hayward & Co.*, 54 L. J. Ch. 1003. An application which has been abandoned may afterwards be renewed, at all events where the applicants are not personally in default: *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *In re Bancroft & Co.*, 5 P. R. 209. In *In re United Vineyards Proprietors' Co.*, Stirling, J., Nov. 8th, 1889, an application made in 1876 had lapsed in consequence of the applicants having failed to comply with a request from the registrar for the payment of the final fee, the letter containing such request having miscarried. The applicants supposed that the mark had been registered, and took no further step. In 1882 a somewhat similar new mark was registered

for the same goods by another firm. In 1889 the mistake was discovered by the original applicants, and they at once made a fresh application. The matter was referred to the Court, and it was held that, the mark having been used long before 1875, the registration should proceed, notwithstanding that the firm registered in 1882 refused to consent, while not appearing to actively oppose. So, also, in *In re Loftus*, (1894) 1 Ch. 193, a renewed application was allowed to proceed.

Conditions of registration of trade mark.

64.—(1.) *For the purposes of this Act, a trade mark must consist of or contain at least one of the following essential particulars (a):*

(a.) *A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner (b); or*

(b.) *A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark (c); or*

(c.) *A distinctive (d) device, mark, brand (e), heading (f), label (g), ticket, or fancy word or words not in common use (h).*

(2.) *There may be added to any one or more of these particulars any letters, words or figures, or combination of letters, words or figures, or of any of them.*

(3.) *Provided that any special and distinctive word or words, letter, figure, or combination of letters or figures or of letters and figures used as a trade mark before the thirteenth day of August, one thousand right hundred and seventy-five, may be registered as a trade mark under this part of this Act.*

[64.—(1.) For the purposes of this Act, a trade mark must consist of or contain at least one of the following essential particulars:

(a.) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

(b.) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or

(c.) A distinctive device, mark, brand, heading, label, or ticket; or

(d.) An invented word or invented words (*i*); or

(e.) A word or words having no reference to the character or quality of the goods, and not being a geographical name (*j*).

(2.) There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them (*k*); but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register (*l*).

(3.) Provided as follows:

(i.) A person (*m*) need not under this section disclaim his own name (*n*) or the foreign equivalent thereof, or his place of business (*o*); but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof;

(ii.) Any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures, used as a trade mark before the thirteenth day of August,

one thousand eight hundred and seventy-five, may be registered as a trade mark under this part of this Act (*p*).]

The amendments in this section were made by § 10 of the Act of 1888.

(*a*) This section is enlarged from § 10 of the Act of 1875. The essential particular is that which causes a mark which, without it, would not be a registrable trade mark, to be a registrable trade mark; it is that by virtue of which registration is granted to a mark; and when the validity of an alleged trade mark is being considered by the Court, "the first duty cast upon the Court is to ascertain whether some one or more than one of the essential particulars of a trade mark, as defined by the Act, is found to exist, so that the mark may be described with one or more than one essential particular or particulars which distinguish it": *per* Earl Cairns, C., in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479. This being so, it is provided by § 92 that, though non-essential particulars of registered trade marks may be altered with the leave of the Court, essential particulars may not be. Where, therefore, two trade marks had been registered, one of which contained the name of the firm in ordinary type, and the other contained it printed in the form of a signature, Jessel, M. R., allowed a firm who had acquired the trade mark by assignment to substitute their own name for the name printed in ordinary type, but refused to allow any alteration of the signature in the second mark: *In re Dewhurst*, M. R., June 11th, 1880. See also *In re Murphy & Co.*, 7 P. R. 163. A trade mark which does not contain any essential particular, and is therefore not registrable, does not become a good trade mark by remaining five years on the register: *In re Palmer* (1), 21 Ch. D. 47; (3), 24 Ch. D. 504; *In re Ralph*, 25 Ch. D. 194; *In re Leonard & Ellis*, 26 Ch. D. 288; *In re Lloyd & Sons*, 27 Ch. D. 646; *In re Wragg*, 29 Ch. D. 551; *Edwards* v. *Dennis*, 30 Ch. D. 454; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Spencer*, 54 L. T. N. S. 659; *In re Apollinaris Co.*, (1891) 2 Ch. 186. So in Victoria: *Lewis* v. *Klapproth*, 11 V. L. R. (E.) 214; *Wolfe* v. *Alsop* (2), 12 V. L. R. (E.) 421; *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752. The definition section in the Canada statute is wider, so that cases on this section must be applied with caution in Canada: *Smith* v. *Fair*, 14 Ont. Rep. 729.

(*b*) See *ante*, p. 23. The words "individual or firm" in clause (a) as in clause (b) mean a real human being and a real firm, the names of fictitious persons falling under clause (c), and if the name falls under clause (a) it is excluded from clause (c), and *vice versâ*: *per* Smith, L. J., *In re Holt*, (1896), 1 Ch. 711, 724, 725. The name of a living public character unconnected with the business falls under this clause and cannot be registered if printed in ordinary type: *In re Carroll*, 16 P. R. 82. The name of an individual in ordinary type is not made distinctive by having the descriptive name of the goods added: *In re Gianaclis*, 6 P. R. 467; *In re Hannay*, 7 P. R. 46: *In re Edge*, 8 P. R. 207. And see *Pirie* v. *Goodall*, (1892) 1 Ch. 35, where Lindley, L. J., stated that "Pirie's" in the genitive was not the name of an individual or firm for the purposes of this clause.

(*c*) See *ante*, p. 31; and *In re Dewhurst*, M. R., June 11th, 1880. Registration of a signature, together with a descriptive word, gives no exclusive right in the descriptive word: *Watt* v. *O'Hanlon*, 4 P. R. 1.

(*d*) See *ante*, p. 32. The word "distinctive" applies to all the varieties of marks mentioned in this sub-section: *per* Cotton, L. J., in *Waterman* v. *Ayres*, 39 Ch. D. 29; and *per* Chitty, J., in *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274: and see *Pirie* v. *Goodall*, (1892) 1 Ch. 35. The distinctiveness which is required cannot consist solely in colour: *In re Hanson*, 37 Ch. D. 112. To entitle a mark to registration it must at the date of registration distinguish the goods of the person registering it from all others: *In re Apollinaris Co.*, (1891) 2 Ch. 186, 226, 230; and an importer cannot register as his own the trade mark of the foreign producer, at all events, unless he has the control of the entire output: *Ib.*

(*e*) To be registrable, a brand cannot consist of words unless they are capable of registration as such: *Pirie* v. *Goodall*, (1892) 1 Ch. 35; nor does the addition of the word "brand," as part of a trade mark, to words which are not capable of registration validate the trade mark: *In re Paine*, 9 P. R. 130. *Semble*, a water-mark woven into the texture of paper may be a brand: *per* Williams, J., in *Pirie* v. *Goodall*, (1892) 1 Ch. 35.

(*f*) A word used alone is not a heading: *per* Earl of Selborne, C., in *In re Leonard & Ellis*, 26 Ch. D. 288, 295.

(*g*) The label itself must be distinctive, so that a label with the name of the proprietors in ordinary type and words descriptive of the goods is not a distinctive

label: *In re Price's Patent Candle Co.*, 27 Ch. D. 681: *In re Bradley*, 9 P. R. 205; *In re Birmingham Vinegar Brewery Co.*, 11 P. R. 195; nor can words which are descriptive or common to the trade be such a label: *Great Tower St. Tea Co.* v. *Smith*, 6 P. R. 165. It has been thought that a distinctive label must contain elements capable of themselves of constituting essential particulars within the Act, and that a novel combination of old elements, none of which fall within this description, will not do: *In re Bryant & May, Ld.*, 8 P. R. 69; but in *In re Bradley*, 9 P. R. 205, Chitty, J., while holding that a mark when looked at as a whole must contain at least one of the essential particulars, thought that a novel combination of devices not in themselves distinctive, because in common use, would be capable of registration: cf. *In re Birmingham Vinegar Brewery Co.*, 11 P. R. 195. The label is the entire combination: *Pinto* v. *Badman*, 8 P. R. 181, 191, *per* Lord Esher, M. R.; see *In re Apollinaris Co.*, (1891) 2 Ch. 186; *In re Smokeless Powder Co.*, (1892) 1 Ch. 590. A label was held to be distinctive in *In re Bryant & May, Ld.*, 4 Times L. R. 675; and see *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72. The registration of a distinctive label does not give an exclusive right to descriptive words appearing on it: *In re Hudson*, 32 Ch. D. 311; *In re Atkins Filter & Engineering Co., Ld.*, 3 P. R. 164; *Symington & Co.* v. *Footman, Pretty & Co.*, 56 L. T. N. S. 696; *Watt* v. *O'Hanlon*, 4 P. R. 1; *Lewis's* v. *Goodbody*, 67 L. T. N. S. 194; *Rugby Portland Cement Co.* v. *Rugby & Newbold Cement Co.*, 8 P. R. 241; 9 P. R. 46; cf. *In re Paine* (2), (1893) 2 Ch. 567; nor to words common to the trade registered in connection with it: *British Tea & Trading Association, Ld.* v. *Cooke*, Bacon, V.-C., June 8th, 1886. And where applicants applied for registration of a label containing descriptive words, and contended that their registration would give them a right to the descriptive words, the opinion of the Court of Appeal negativing the claim was stated in the order of the Court allowing the registration to proceed: *In re Hudson*, 32 Ch. D. 311.

(*h*) See *ante*, p. 38. Fancy words were not registrable under the old Act: *Ex parte Stephens*, 3 Ch. D. 659; and see *Rose* v. *Evans*, 48 L. J. Ch. 618. A fancy word cannot be made out of that which is not one by prefixing the word "the": *In re Stapley & Smith*, 29 Ch. D. 877; nor can words which, used separately, are not fancy words, become so by being used in combination: *Pirie* v. *Goodall*, (1892) 1 Ch. 35. In determining whether a word is a fancy word the time to be looked at is the date of registration, and the word must not be criticised by the light of subsequent events: *In re Beeril T. M.*, (1896) 2 Ch. 600, 605, 607, *per* Lindley and Lopes, L. JJ. An old mark is not considered to be in common use unless it has been used by more than three firms, but the leave of the Court is necessary for the second or third registration of the same, or substantially the same, old mark. See note (*e*) to § 72, and note (*f*) to § 74.

(*i*) See *ante*, p. 41. The new clauses (d) and (e) were inserted on the recommendation of a select committee appointed to inquire into the working of the Act of 1883 for the purpose of obviating the difficulty which had been experienced in construing the term "fancy word." Nevertheless, for some years the Courts showed a disposition to construe the new term "invented word" by the light of the decisions upon fancy words. It was accordingly held that the term "invented word" was impliedly subject to the qualification expressly imposed by the legislature in clause (c) in the case of known words, viz., that it should have no reference to the character or quality of the goods, and great ingenuity was exercised in discovering some covert reference to character or quality in words which, to the ordinary purchaser, would convey no meaning. Thus, registration was refused by Kay, J., to "Satinine" for starch (*In re Meyerstein*, 43 Ch. D. 604), by North, J., and the C. A. to "Somatose" for an extract of meat (*In re Farbenfabriken*, (1894) 1 Ch. 645), and by Kekewich, J., and the C. A. to "Solio" for photographic paper: *In re Eastman Photographic Materials Co.*, 14 P. R. 487. This last decision, however, has been recently reversed by the House of Lords ((1898) A. C. 571), whose decision finally establishes, first, that it is not essential that an invented word should have no reference to the character or quality of the goods; secondly, that the decisions upon "fancy words" are no guide in construing the substituted clauses (d) and (e). But, as was said by Lord Shand, "there must be invention and not the appearance of invention only. It is not possible to define the extent of the invention required; but the words should be clearly and substantially different from any word in ordinary and common use. The employment of a word in such use, with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words, would not be an invented word; and a word would not be 'invented' which, with some trifling addition or very trifling varia-

tion, still leaves the word one which is well-known or in ordinary use, and which would be quite understood as intended to convey the meaning of such a word." Registration has also been refused by Kekewich, J., to the word "Electrozone" (*In re British Electrozone Co.*, 13 P. R. 447) on the ground that it was a word known in the United States, and by the same learned judge and the C. A. to "Pirle" (*In re Ripley*, 15 P. R. 154) on the ground that it was the equivalent of "pearl"; and these cases appear to be unaffected by the decision of the House of Lords. Again, the word "Eboline" (*In re Salt*, (1894) 3 Ch. 166) has been held incapable of registration by Chitty, J., as being a geographical name owing to the existence in Italy of a town called "Eboli": cf. *In re Magnolia Metal Co.*, (1897) 2 Ch. 385. On the other hand, the word "Mazawattee" which was compounded of two words of different foreign languages, viz., Hindustani and Cingalese, was held to have been properly registered for tea: *In re Densham*, (1895) 2 Ch. 176. With regard to the admissibility of foreign words Lord Herschell said, in *In re Eastman Photographic Materials Co.*, (1898) A. C. 571, 581, "I do not think that a foreign word is an invented word simply because it has not been current in our language. At the same time I am not prepared to go so far as to say that a combination of words from foreign languages so little known in this country that it would suggest no meaning, except to a few scholars, might not be regarded as an invented word."

(*j*) See *ante*, p. 13. The reason for inserting in clause (c) the condition that the word shall have no reference to the character or quality of the goods is explained by Lord Herschell in *In re Eastman Photographic Materials Co.*, (1898) A. C. 571, to be that "the vocabulary of the English language is common property; it belongs alike to all, and none ought to be permitted to prevent the other members of the community from using for purposes of description a word which has reference to the character or quality of the goods," and upon this point there is no difference between the policy of the Act of 1883 and the Act of 1888. Thus, in *In re Dunn*, 41 Ch. D. 439, where an application under the Act of 1883 to register the words "Fruit Salt" for baking powder was opposed by Eno, who had used the name for a medicine, Fry, L. J., said, "I cannot help regarding Mr. Eno's attempt as an instance of that perpetual struggle which it seems to me is going on, to enclose and appropriate as private property certain little strips of the great open common of the English language." But, as was subsequently pointed out by Lord Herschell, this reason does not apply to an invented word—a word which is newly coined. Names of imaginary persons, such as the characters in a romance, are included under this clause, and do not fall under clause (a): *In re Holt*, (1896) 1 Ch. 711.

In *In re Magnolia Metal Co.*, (1897) 2 Ch. 371, it was held that the word "Magnolia" which had become the name of a composite metal had no reference to the character or quality of the metal. The objection was also taken that "Magnolia" was a geographical name by reason of the existence of certain places of that name in the United States. The Court of Appeal in affirming the decision of Kekewich, J., overruling this objection, interpreted the term "geographical name" as follows:—"It must, we think, in the absence of special circumstances, be interpreted so as to be in accordance in some degree with the general and popular meaning of the words, and a word does not become a geographical name simply because some place upon the earth's surface has been called by it. For example, we agree with Kekewich, J., that the word 'Monkey' is not proved to be a geographical name by showing merely that a small and by no means generally known island has been called by that name. If, indeed, in its primary and obvious meaning the word has reference to locality, as the word 'Melrose' in *Van Duzer's Case* (34 Ch. D. 623), or the word 'Eboli' in *Sir Titus Salt & Co.'s Case* ((1894) 3 Ch. 166) (from which Chitty, J., declined to distinguish the derivative 'Eboline'), it may well be a geographical name within the meaning of the sub-section. Even where the primary signification is not geographical, if the name is really a local name (however little known the locality may be), and the name is given because of the connection of the article with the locality, whether that be real or imputed only by those who give the name, it may well be a geographical name within the meaning of the sub-section. An instance of this is to be found in the case of the word 'Apollinaris,' given to the water from a spring known as the Apollinaris Spring. So, if 'Magnolia' had been the name of a place where the metal was manufactured, we should have been by no means inclined to say that it would not be a geographical name when applied to the article manufactured in the place having the name." See also *per* Kekewich, J., in *In re Apollinaris Co.*, (1891) 2 Ch. 186, and *In re Clement & Cie.*, 16 P. R. 173.

(*k*) "Figures" mean numerals. See *Ex parte Stephens*, 3 Ch. D. 659. When it is wished to register the same essential (or "material," by which nearly the same thing

appears to be meant) particular, with a number of varying additions, the proper course is to register the marks as a series, under § 66, *q.v.* See also note (*e*) to § 72, *infra*. Inasmuch as the parts of a combination mark which are not within the definition of "essential particulars" are not entitled to registration or protection when standing alone, it seems that there cannot well be infringement of a combination mark unless the essential particular is taken. See *In re Hudson*, 32 Ch. D. 311; *In re Atkins' Filter & Engineering Co., Ld.*, 3 P. R. 164; *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274; *Watt* v. *O'Hanlon*, 4 P. R. 1. In *In re Horsburgh*, 53 L. J. Ch. 237, where a registered trade mark consisted of a distinctive device and a descriptive word, it was held that substantially the same descriptive word might be registered by another firm with a different device, from which it follows that the use of the second trade mark would be no infringement of the first.

There will not be registered as new marks or prominent parts of new marks—(See Instructions, par. 30, *infra*) :—

The Royal Arms, or arms so nearly resembling them as to be calculated to deceive.

Representations of the Queen, or of any member of the Royal Family.

Representations of the Royal Crown.

The National Arms or Flags of Great Britain. (See *Ex parte Davids & Co.*, 16 U. S. Pat. Gaz. 94, as to the American practice.)

Prize or exhibition medals were also formerly excluded, but are now admitted. (As to these, see *Batty* v. *Hill*, 1 H. & M. 264; *Taylor* v. *Gillies*, 59 N. Y. 331; *In re Bush & Co.*, 10 U. S. Pat. Gaz. 164; *In re Brook*, 26 W. R. 791; *In re Farina* (2), 27 W. R. 456. But they cannot be treated as constituting an essential particular: *In re Bryant & May, Ld.*, 8 P. R. 69.)

(*l*) If the essential particular claimed is a distinctive label, it seems very doubtful whether the applicant can be called on to disclaim anything contained in it. "The truth is that the label does not consist of each particular part of it, but consists in the combination of them all": *per* Lord Esher, M. R., *Pinto* v. *Badman*, (1891) 2 Ch. 186, 191. And see *per* Fry, L. J., at p. 188; also in *In re Apollinaris Co.*, (1891) 2 Ch. 186, 233; and *per* Chitty, J., in *In re Smokeless Powder Co.*, (1892) 1 Ch. 590; also *In re Clement & Cie.*, 16 P. R. 173. A disclaimer under the Act has been held to be an answer to an interlocutory application for an injunction by the registered proprietor founded on his common law right to restrain the use of the disclaimed matter in a manner calculated to deceive: *Rosenthal* v. *Reynolds*, (1892) 2 Ch. 301; but this case has been questioned in Scotland, and an injunction has been granted under similar circumstances: *Bayer* v. *Baird*, 15 P. R. 615. And see *Packham & Co.* v. *Sturgess & Co.*, 15 P. R. 652, a passing-off action in which North, J., himself recognized that the defendants were not entitled to use a name, the exclusive right to which the plaintiffs had disclaimed as being descriptive, so as to represent that the defendant's goods were the plaintiffs'; and the fact that the application in *Rosenthal* v. *Reynolds*, (1892) 2 Ch. 301, was interlocutory must be borne in mind. Cf. *In re Loftus*, (1894) 1 Ch. 193.

(*m*) "Person" includes "company," and under this section, as amended, added words which, if used alone, might require to be disclaimed, need not be disclaimed if used as part of the name of the company owning the trade mark: *In re Smokeless Powder Co.*, (1892) 1 Ch. 590. And see *In re Clement & Cie.*, 16 P. R. 173.

(*n*) It is not necessary that the full name, either in the case of a single trader, or in the case of a firm, should be placed upon the trade mark, if it is used fairly and *bond fide* in such a way that it cannot be mistaken for anything else than the name of the manufacturer of the goods to which the mark relates; nor is it necessary that the name should be the private name of the owner if he trades under another name; and it is also no objection that the name should be used in the possessive case. Accordingly it was held by Stirling, J., explaining *Pirie* v. *Goodall*, (1892) 1 Ch. 35, that the firm of J. & J. Colman were not bound to disclaim the word "Colman's": *In re Colman*, (1894) 2 Ch. 115. But a firm describing themselves as successors to another firm must disclaim the name of their predecessors: *In re Birmingham Vinegar Brewery Co.*, 11 P. R. 195.

(*o*) "The names of foreign springs, when added to a trade mark tendered for registration by a limited company with a registered office in England, are not protected against the requirement of a disclaimer by the exception in favour of a 'place of business'": *In re Apollinaris Co.*, (1891) 2 Ch. 186, 211, *per* Kekewich, J.

Old marks.

(*p*) See *ante*, p. 44. The wording of this subsection is wider than that of the corresponding provision in § 10 of the Act of 1875. *E.g.*, a single letter may now be registered as an old mark, though it was formerly excluded from registration:

*In re Mitchell* (1), 7 Ch. D. 36. An old mark must be registered as a whole, and in the exact form in which it has been actually used. Thus, in *In re Royal Baking Powder Co.*, W. N. 1880, p. 49, the applicants were not allowed to register the word "Royal," or the words "Royal Baking Powder," apart from the rest of the label with which they had been used. So in *In re Simpson, Davies & Sons*, Jessel, M. R., January 12th, 1881, the registration of a trade mark consisting of a cross would have been held to be wrongful, by reason of the points of the cross registered being differently shaped from the points of the cross used, had it not been proved that there had been user in both forms. So in *Russell & Sons, Ld.* v. *Smith*, Jessel, M. R., June 18th 1880, it was held that registration was wrongful because the user had been of a rough outline of a crown, and the registration was of an elaborate crown, with all the shading filled in. And see cases at pp. 45, 46. On the other hand, in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479, the House of Lords directed registration of the essential particular, omitting the immaterial additions. Now, by §§ 64, 74, the entire mark would be registered, with a disclaimer of the additions. See *Baker* v. *Rawson*, 45 Ch. D. 519; *In re Meens*, (1891) 1 Ch. 41; *In re Fuente*, (1891) 2 Ch. 166; *In re Phillips*, (1891) 3 Ch. 139. A mark must not be registered as an old mark if it was only used before 1875 as part of a mark: *Baker* v. *Rawson*, 45 Ch. D. 519; *In re Fuente*, (1891) 2 Ch. 166; *Richards* v. *Butcher* (2), (1891) 2 Ch. 522; *In re Kinahan*, 10 P. R. 393; nor if used only on packing cases to identify the contents: *In re Powell*, (1893) 2 Ch. 388; (1894) A. C. 8. And see *Richards* v. *Butcher*, (1891) 2 Ch. 522. And if a device has been registered as an old mark, but was never used *per se*, the registration is bad and will be rectified upon the application of a party aggrieved: *Baker* v. *Rawson*, 45 Ch. D. 519, 528. See also *In re Fuente*, (1891) 2 Ch. 166.

Where it is sought to register as a new trade mark a mark which, though not used before 1875, has yet been used for some years with fraudulent misstatements contained in it, registration will be refused, even though the misstatements are corrected in the mark as tendered for registration: *In re Fuente*, (1891) 2 Ch. 166.

Where blanks are left in the marks as registered, there is nothing to prevent the proprietor from filling them up in actual use: *Newman* v. *Pinto*, 4 P. R. 508, *per* Kekewich, J.; *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888.

The words "Registered," "Registered Design," "Copyright," "Entered at Stationers' Hall," "To Counterfeit this is Forgery," will not be registered under the Acts. See Instructions, par. 29, *infra*. Nor will pictorial representations of goods to which the marks are to be applied, or names of persons in the possessive case in combination with the names of goods. See p. 467, *infra*. As to ornamental or coloured groundwork, see Instructions, par. 28.

Connection of trade mark with goods.

65. A trade mark must be registered for particular goods or classes of goods (*a*).

(*a*) This comes from § 2 of the Trade Marks Registration Act, 1875. The appropriation of a trade mark to particular goods or classes of goods was not new. See *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Somerville* v. *Schembri*, 12 App. Cas. 453. See Rule 6 and Schedule 3 to the Rules with respect to the classification of goods for the purposes of the Act, also *per* Pearson, J., in *In re Lyndon*, 32 Ch. D. 109; and *per* North, J., in *Hart* v. *Colley*, 44 Ch. D. 193. The Third Schedule divides the various descriptions of goods into fifty classes. By the Rules under the Act of 1875, it was provided that where a trade mark was registered, a similar trade mark should not be registered in the name of another proprietor for any goods in the same class without the leave of the Court; but this requirement of the leave of the Court is now limited to cases in which the second application is in respect of the same goods or description of goods. See § 72. Under the old Act, registration for part of a class was granted to old marks: in *Ex parte Barrows*, W. N. 1877, p. 119; L. J. N. of C. 1877, p. 110; *In re Lysaght*, Dig. 623; *In re Rabone*, Dig. 643; *In re Ashton & Sons*, Hall, V.-C., February 26th, 1881; and to new marks in *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Braby & Co.*, 21 Ch. D. 223; and *In re Clark & Co.*, 27 Sol. J. 396, though in this case the mark was common for other goods in the class; and refused to a new mark in *In re Hargreaves*, 11 Ch. D. 669. And see *In re De Otadny*, W. N. 1885, p. 177; *In re Metcalf*, 31 Ch. D. 454. Registration ought to be applied for only in respect of goods for which the mark is used or intended to be

used: *Edwards* v. *Dennis*, 30 Ch. D. 454; *Hargreave* v. *Freeman*, (1891) 1 Ch. 39; *In re Batt & Co.*, (1898) 2 Ch. 432. In cases of Sheffield marks within § 81 (2), the Cutlers' Co. are to register old marks for all the metal goods in § 81, though they may have been used for some only of such goods: *per* North, J., in *In re Lambert*, 5 P. R. 542. If a mark is used for other goods than those in respect of which it is registered, even though in the same class, such user may be restrained if a similar mark has been used and registered by another firm in respect of those other goods: *Upper Assam Tea Co.* v. *Herbert & Co.*, 7 P. R. 183. In America, registration of the same mark in the same class may be granted to different persons if the goods are different: *Sorg* v. *Welsh*, 16 U. S. Pat. Gaz. 910. It has been held under the United States Statute of 1870 (now replaced by that of 1881) that registration in respect of too wide a class of goods is bad altogether: *Smith* v. *Reynolds* (2), 10 Bl. C. C. 100; S. C. (3), 13 *ib.* 458.

Registration of a series of marks.

66. When a person claiming to be the proprietor of several trade marks which, while resembling each other in the material particulars thereof, yet differ in respect of (a) the statement of the goods for which they are respectively used or proposed to be used, or (b) statements of numbers, or (c) statements of price, or (d) statements of quality, or (e) statements of names of places, seeks to register such trade marks, they may be registered as a series in one registration. A series of trade marks shall be assignable and transmissible only as a whole, but for all other purposes each of the trade marks composing a series shall be deemed and treated as registered separately (*a*).

(*a*) This section is entirely new, but a mode of registration bearing a resemblance to that for which provision is here made was suggested by the Court of Appeal as the right one in *In re Barrows*, 5 Ch. D. 353, and was occasionally adopted. See note (*e*) to § 72, *infra*, and cases there cited. In some cases, however, this form of registration was not considered satisfactory by the applicant, usually because, the different combinations not being individually registered, the registered proprietor was unable to get such a certificate of registration as would enable him to obtain registration in foreign countries. In *In re Fox & Co.*, Hall, V.-C., May 7th, 1881, the V.-C. allowed a person who had registered a device together with a word (which, under the Act of 1875, could not be an essential particular in a new trade mark) to obtain a separate registration of the same device with a different word, so that the same one essential particular was separately registered twice over, with additions which, for the purposes of the Act, were immaterial. After this decision, separate registration was generally granted by the registrar to marks which would more properly have been registered in a series, or, as it was more generally called, by representation. The concluding words of this section render separate registration unnecessary, but there is nothing to prevent it. It should, however, be noted that in *Baker* v. *Rawson*, 45 Ch. D. 519, 530, North, J., appears to have considered that a mark already registered should not be allowed to be registered over again with a mere addition common to the trade and consequently disclaimed. See *In re Phillips*, (1891) 3 Ch. 139.

The only rules specially relating to applications for registration of a series of trade marks are Rule 14 (by which a representation of each trade mark included in the series is to be placed on the application form and on each of the forms containing the additional representations required by Rule 13), and Rule 30, relating to the mode of advertisement.

Trade marks may be registered in any colour.

67. A trade mark may be registered in any colour [or colours], and such registration shall (subject to the provisions of this Act) confer on the registered owner the exclusive right to use the same in that or any other colour [or colours] (*a*).

The amendments in this section were made by § 11 of the Act of 1888.

(*a*) In the old Acts and Rules no mention was made of colour, on account of the difficulty of properly advertising marks applied for in colour. See *per* Jessel, M. R.,

in *In re Robinson*, 29 W. R. 31. A trade mark registered in black and white consisted of the device registered, whatever might be the colour in which it was used, and it was therefore regarded as entitled to protection in whatever colour it might be used, and against rival marks in whatever colour: *Nuthall* v. *Vining*, C. A., Jan. 21st, 1880. There it was said that, in cases of alleged infringement, the true test of comparison was to compare the designs of the two trade marks in the same size and free from colour, and that similarities in respect of colour would only be regarded in order either to prove fraud, or to turn the scale when the question of infringement, leaving colour out of sight, was very difficult to decide. In *Hanson* v. *British Tea and Trading Association, Ld.*, Bacon, V.-C., April 9th, 1884; C. A., June 19th, 1884, a label had been used, which, as registered under the Act of 1875, was divided into three parallel stripes of equal width, of which the outer ones were shaded and the middle one was left white, and which had the words "'Red, white, and blue' label" printed across it, and the name of the plaintiffs at the foot, and which, in actual use, was coloured with the French tricolour; and though it was registered without colour, an injunction was granted to restrain the use of a label similarly coloured and containing the same words. But where a fresh application was made to register the same label for other goods under this Act, registration was refused by the comptroller, and his refusal was upheld by the Court, on the ground that the distinctiveness required in a mark tendered for registration could not consist solely in colour: *In re Hanson*, 37 Ch. D. 112. When the question was whether a trade mark sent in for registration was too similar to one already registered for registration to be permitted, and the trade mark already on the register was in practice used in colour, the question was taken into consideration whether the subsequent trade mark, if similarly coloured, would be likely to cause deception: *In re Worthington*, 14 Ch. D. 8. In *In re Jeffrey & Co.*, Stirling, J., May 18th, 1888, the applicants for registration were allowed to bind themselves by a note on the register not to use the trade mark in black colour, nor in so dark a hue as to resemble black; and in *In re Johnson, Philpott & Co.*, North, J., Feb. 21st, 1888, the register was rectified by consent by adding a note that the registered proprietor was only to use his mark in blue and white.

In Canada, the same effect as that provided by this section is given to registration in colour: *Smith* v. *Fair*, 14 Ont. Rep. 729; and in the United States also a trade mark cannot consist in colour alone: *Ex parte Landreth*, 31 U. S. Pat. Gaz. 1441; *Fleischmann* v. *Starkey*, 25 Fed. Rep. 127.

In some exceptional cases, under the Act of 1875, trade marks were found to be incapable of advertisement or registration in black and white, the only peculiarity being the combination of colours, *e.g.*, where coloured threads were twisted in the wick of a candle, or combined in the selvage of a piece of stuff. In such cases the marks were registered by deposit, actual specimens of the marked article being sent in to the registrar and deposited by him at the Patent Museum. For instance, there were so deposited specimens of certain marks for worsted stuffs in Class 34, numbered 5844 to 5850, and consisting of selvages containing distinctive coloured threads. See "Trade Marks Journal," Vol. II., No. 51, p. 88. The use of colour being very frequently of importance in the cotton trade, it was decided that all marks for goods in the cotton classes (23—25) should be registered by deposit. When a trade mark was thus registered by deposit, the actual thing deposited, colour included, constituted the trade mark, so that in questions of infringement the point was whether the device, plus colour, was imitated in the offending mark with sufficient exactness to deceive. And the same rule was applied in registration cases, colour being taken into consideration in estimating the degree of resemblance. Thus, in *In re Robinson*, 29 W. R. 31, a device of a silver rupee being already registered, another applicant sought to obtain registration of a device of a gold mohur, and this was granted, on the ground that all that was registered was a silver coin, notwithstanding that if the second mark were to be coloured silver, deception would be probable. In such cases it was held that the proper manner of regarding the colour was a question for the trade, and that if, in the opinion of the trade, deception might arise, the Court would act on that opinion: *Mitchell* v. *Henry*, 15 Ch. D. 181. See also *In re Christiansen*, 3 P. R. 54, as to the opinion of the trade. Besides the cases above referred to, see *In re Orr-Ewing*, 8 Ch. D. 798; 4 App. Cas. 479; *In re Brook*, 26 W. R. 791; and *In re Jones Bros. & Co.*, Hall, V.-C., July 10th, 1880.

The present section appears to have the effect of giving trade marks registered by deposit at the Patent Office Library, or registered in pursuance of an application

accompanied by coloured representations, the same advantages as registration in black and white, so that for the future the colour of a trade mark registered in colour will not, except in very exceptional cases, such as that of the coloured selvage, be a part of the mark, but after one trade mark is so registered, another will not be entitled to be used or registered, if it would be likely to be mistaken for the first, on the supposition that the first mark was used in any different colour from that in which it was registered.

See Rules 13 and 27 as to the deposit of specimens of trade marks.

Advertisement of application.

68. Every application for registration of a trade mark under this part of this Act shall as soon as may be after its receipt be advertised by the comptroller (*a*), [unless the comptroller refuse to entertain the application] (*b*).

The amendments in this section were made by § 12 of the Act of 1888.

(*a*) "The object of the advertisement is to give to persons who might be claimants of the trade mark proposed to be registered the opportunity of coming forward and objecting": *per* Hall, V.-C., *In re Meikle*, 24 W. R. 1067. Consequently, as was there held, when a refusal of the comptroller to register a trade mark is overruled, the only order that can be made is an order for him to proceed with the application, so that the usual course of advertisement, &c., may be followed. This course was adopted by Hall, V.-C., in *In re Orr-Ewing*, 8 Ch. D. 794, and subsequent cases. For a similar reason a mark which has been wrongfully registered will be removed from the register, even though a new application might be successfully made to register it: *In re Apollinaris Co.*, (1891) 2 Ch. 186, 231. It is not, however, incumbent on persons to see the advertisement, so that if a common mark has been registered, in consequence of the firms interested in opposing it having failed to see the advertisement of the application, they are able to obtain the removal of the mark from the register, with costs, on application within a reasonable time after the registration was brought to their knowledge: *In re Hyde & Co.*, 7 Ch. D. 724. See *In re Palmer* (3), 24 Ch. D. 504; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Lloyd & Sons*, 27 Ch. D. 646; *In re Wragg*, 29 Ch. D. 551; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Spencer*, 54 L. T. N. S. 659; *In re Apollinaris Co.*, (1891) 2 Ch. 186.

As to the mode of advertisement, see Rules 27—30.

(*b*) This exception was no doubt inserted in consequence of the case of *Ex parte Saxlehner*, Q. B. D., July 7th, 1887, in which the comptroller refused to advertise applications by Saxlehner for the registration of certain trade marks, on the ground that similar marks were already registered in the name of the Apollinaris Co., so that registration could not be granted and advertisement was useless; but on application by Saxlehner the Q. B. Div. granted a rule to show cause why a mandamus to advertise should not issue. The matter does not appear to have been further contested, and the marks were advertised in the "Trade Marks Journal" for July 27th, 1887.

Opposition to registration.

69.—(1.) Any person (*a*) may within *two months* [one month or such further time, not exceeding three months, as the comptroller may allow (*b*)] of the *first* advertisement of the application, give notice in duplicate at the Patent Office of opposition (*c*) to registration of the trade mark, and the comptroller shall send one copy of such notice to the applicant.

(2.) Within *two months* [one month] after receipt of such notice or such further time as the comptroller may allow, the applicant may send to the comptroller a counter-statement (*d*) in duplicate of the grounds on which he relies for his application, and if he does not do so, shall be deemed to have abandoned his application.

(3.) *If the applicant sends such counter-statement, the comptroller shall furnish a copy thereof to the person who gave notice of opposition, and shall require him to give security in such manner and to such amount*

*as the comptroller may require for such costs as may be awarded in respect of such opposition; and if such security is not given within fourteen days after such requirement was made or such further time as the comptroller may allow, the opposition shall be deemed to be withdrawn.*

(4.) *If the person who gave notice of opposition duly gives such security as aforesaid, the comptroller shall inform the applicant thereof in writing, and thereupon the case shall be deemed to stand for the determination of the Court* (*e*).

[(3.) If the applicant sends such counter-statement, the comptroller shall furnish a copy thereof to the person who gave notice of opposition, and shall, after hearing (*f*) the applicant and the opponent, if so required, decide whether the trade mark is to be registered (*g*); but his decision shall be subject to appeal to the Board of Trade, who shall, if required, hear (*f*) the applicant and the opponent and the comptroller, and may make an order determining whether, and subject to what conditions (if any), registration is to be permitted.

(4.) The Board of Trade may, however, if it appears expedient, refer the appeal to the Court, and in that event the Court shall have jurisdiction to hear and determine the appeal, and may make such order as aforesaid (*h*).

(5.) If the applicant abandons his application after notice of opposition in pursuance of this section, he shall be liable to pay to the opponent such costs in respect of the opposition as the comptroller may determine to be reasonable.

(6.) Where the opponent is out of the United Kingdom he shall give the comptroller an address for service in the United Kingdom.]

(*a*) This section comes from the old rules. The amendments were made by § 13 of the Act of 1888.

There is no limitation of the right of opposing to persons who can themselves claim registration: *In re Riviere & Co.*, 26 Ch. D. 48; and "the statute allows any person to oppose an application for registration, whether he has or has not a personal interest in the result": *per* Lord Macnaghten, in *Eno* v. *Dunn*, 15 App. Cas. 252, 262; nor is there any limitation of the right of opposing on the ground of similarity to proprietors of trade marks registered for the same goods, or even for goods in the same class, as the goods for which the applicant is seeking to register. But an opposition on this ground would, of course, not succeed unless the two marks would come into collision in some way when being used. Thus, in *In re Simpson, Davies & Sons*, Jessel, M. R., Jan. 12th, 1881, the application was for registration in class 22 for railway waggons, and the successful opposition was by a firm registered in class 4 for coal, whose trade mark was used by placing it on the waggons in which the coal was conveyed and sold. In *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278, a mark applied for in respect of wines was not allowed to be registered on account of its similarity to a mark already registered for spirits; and in the similar case of *In re Turney*, 11 P. R. 37, beer and rum were for this purpose held to be the same description of goods. In *In re Dunn*, 41 Ch. D. 439; 15 App. Cas. 252, the opposition failed in the Court of Appeal, because a mark used for baking-powder was thought not to be capable of being mistaken for a mark used for powder for an effervescing drink, but in the House of Lords the opposition succeeded. Registration has also been refused on the ground of fraudulent misstatements contained in the mark as previously used for several years, though corrected in the mark as tendered for registration: *In re Fuente*, (1891) 2 Ch. 166. The opposition may be by a person with whom the applicant has covenanted not to use the mark. See the Victorian case of *Ex parte Grist & Bowring*, 11 V. L. R. 630.

It has been thought that if what is desired is not to have the registration altogether refused, but to have it limited by the addition of a note stating, *e.g.*, that the mark is only to be used in trade with a particular country, and the applicant is willing to consent to such limitation, it is not necessary to go through the process

of entering a notice of opposition, but that an order directing that the mark, if registered, is to be registered with the addition of a note to the desired effect, may be obtained by the applicant on an *ex parte* application: *In re Keep Brothers*, 26 Ch. D. 187. The entry of such notes is, however, now objected to by the comptroller, and has not been allowed in recent cases.

(*b*) The period allowed seems to be at most three months from the date of the advertisement, not three months after one month, *i.e.*, four months. See *In re Moet*, 7 P. R. 226, 230.

(*c*) See pp. 474, 494 for notice of opposition. The practice in opposition cases is prescribed by Rule 31. The notice of opposition may be amended under Rule 54, even after the counter-statement has been put in: *In re Moet*, 7 P. R. 226.

(*d*) pp. 485, 497, *infra*.

(*e*) This being the time at which the case stood for the determination of the Court, it was held that the costs of the previous proceedings in the office could not be given to a successful opponent: *In re Brandreth*, 9 Ch. D. 618; *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278. Where a claim had been wrongfully set up to use a certain trade mark, the claimants were ordered to pay the costs of cross adjourned summonses, as well as of an action which had been brought to enforce the right, even though they had not actually used the mark in question: *Davis* v. *Tylor*, Jessel, M. R., April 24th, 1879. In *In re Hudson*, 32 Ch. D. 311, no costs of an opposed application were given to successful applicants, on the ground that they had caused the litigation by the manner in which they had put forward their case. By the rules under the Act of 1883 the proceedings subsequent to the case standing for the determination of the Court were to take the form of an application by the applicant to the Court by summons for leave to register. Now the proceedings are assimilated to those in the case of an unopposed application for registration, and the rights of the parties are decided by the comptroller, with an appeal to the Board of Trade, who may refer the case to the Court. Under the old Acts and Rules the opponent was required to take out a summons for directions, which almost always resulted in the applicant being directed to apply for leave to register. See *In re Simpson, Davies & Sons*, 15 Ch. D. 525; also *In re Johnston*, 43 L. T. N. S. 672. See Rule 46 as to notifying the order of the Court to the comptroller.

(*f*) The position which the comptroller ought to take up is thus defined by the Law Peers who formed the majority in *Eno* v. *Dunn*, 15 App. Cas. 252. Lord Watson said, "The statute nowhere confers an absolute right to register a trade mark. The comptroller, by § 62, may, if he thinks fit, refuse to register, his refusal being subject to an appeal to the Board of Trade, who may either hear the parties, and decide whether and subject to what conditions, if any, registration is to be permitted, or may refer the matter to the Court for its determination. § 72 (2) prohibits the registration, with respect to the same goods or description of goods, of a trade mark so nearly resembling a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive. That provision is supplemented by the broader enactments of § 73 to the effect that 'It shall not be lawful to register, as part of or in combination with a trade mark, any words the exclusive use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice, or any scandalous design.' These prohibitory clauses cast upon the applicant the duty of satisfying the comptroller, or the Court, that the trade mark which he proposes to register does not come within their scope. In an inquiry like the present, he does not hold the same position which he would have occupied if he had been defending himself against an action for infringement. There the onus of showing that his trade mark was calculated to mislead rests, not on him, but upon the party alleging infringement; here he is *in petitorio*, and must justify registration of his trade mark by showing affirmatively that it is not calculated to deceive. It appears to me to be a necessary consequence that, *in dubio*, his application ought to be disallowed." Lord Herschell said, "The case was argued on behalf of the respondent as if he had an absolute right to have any trade mark registered which was not proved to fall within the terms of either the 72nd or 73rd section of the Act. I do not so read the statute. Those sections prohibit the registration of a trade mark in certain specified cases; but there is no duty cast upon the comptroller of registering every other trade mark that may be applied for. On the contrary, whilst he is in certain cases prohibited from registering, a discretion whether to register or not appears to me to be in all cases plainly conferred. Of course this discretion must be reasonably and not capriciously exercised: but it is,

in my opinion, a reasonable exercise of it to refuse registration when it is not clear that deception might not result from it." See, however, *per* Lord Blackburn in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479, as to old marks. In accordance with the principles above laid down by Lord Herschell, registration of a device was refused by Kekowich, J., on the ground that a similar device was used by the opponent as an advertisement though not registered as a trade mark, notwithstanding that the case did not fall within either § 72 or § 73: *In re Sphincter Grip Armoured Hose Co.*, 10 P. R. 84; and North, J., came to a similar decision in the case of a label: *In re Roger* (2), 12 P. R. 149. The comptroller has also power to deal with oppositions based on the alleged fraud of the applicant for registration: *In re Moet*, 7 P. R. 226.

(*g*) It seems that if, for any reason, an opponent is not heard, his course is to apply for a mandamus: see *per* Bowen, L. J., in *In re Lambert*, 6 P. R. 344.

(*h*) See Rules 20—26, and compare § 62. It is convenient that unless other directions are given by the Court or the Board of Trade, the appeal to the Court should be heard on the same evidence as before the comptroller: *In re Farrow*, 7 P. R. 260. But there is no binding limitation. See also *In re Roger*, 11 P. R. 637; and *In re Kingsford & Sons*, 15 P. R. 197, as to evidence where an appeal is referred to the Court. On an opposed application coming before the Court, the Court has full jurisdiction to decide as to the validity of the mark, notwithstanding that the comptroller has originally, under § 62, passed it for registration: *In re Arbenz*, 35 Ch. D. 248. And where an application is duly opposed, all questions as to the validity of the mark are open to the consideration of the Court; but the Court will not readily overrule the comptroller: *In re Farrow*, 7 P. R. 260. The Court has no power to give leave to amend the notice of opposition, nor, after the appeal has been presented, has the comptroller, he being *functus officio*: *In re Robertson, Sanderson & Co.* (2), (1892) 2 Ch. 245. Where an opponent appeals against the comptroller, upon an application made by a Scotch or Irish firm having no address for service in the United Kingdom, and the appeal is referred to the Court, he may address the notice of motion to the comptroller only, and give informal notice of the proceedings to the applicant: *In re Robertson, Sanderson & Co.* (1), 9 P. R. 213. And see *In re King & Co.*, (1892) 2 Ch. 462. Where an opponent's appeal is referred to the Court, but before the hearing the parties agree to its dismissal without costs, the registrar will not proceed with the registration without an order of the Court; and in order to obtain the order, it is not sufficient for the applicant to produce the written consent of the parties, but the Court will require the production of a consent brief: *In re Crosfield*, 15 P. R. 754. It remains to be decided what costs the Court now has power to award; but it would appear that the Court can give the costs of the appeal, but not of the proceedings before the comptroller. See note (*e*) *supra*.

Assignment and transmission of trade mark.

**70. A trade mark, when registered, shall be assigned and transmitted (*a*) only in connection with the goodwill (*b*) of the business concerned in the particular goods or classes of goods for which it has been registered (*c*), and shall be determinable with that goodwill (*d*).**

(*a*) This section comes from § 2 of the Act of 1875. As to assignment and transmission, see Rules 36—40 and 61, and Form K. in the Second Schedule to the Rules. See, too, Ch. III., *supra*.

Assignments and transmissions are to be entered in the register: see §§ 78, 87, *infra*. By § 4 of the Act of 1875, it was enacted that every proprietor registered in respect of a trade mark subsequently to the first registered proprietor should, as respected his title to that trade mark, stand in the same position as if his title were a continuation of the title of the first registered proprietor. This enactment is not now repeated, the same result being effected by generalising the language of § 76. Compare the American case of *Walton* v. *Crowley*, 2 Bl. C. C. 440; R. Cox, 166.

(*b*) As to the connection between trade marks and the goodwill of the business, see *Cooper* v. *Hood*, 26 Beav. 293; *Churton* v. *Douglas*, Johns. 174; *Shipwright* v. *Clements*, 19 W. R. 599; *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *Pinto* v. *Badman*, 8 P. R. 181; *Hammond* v. *Malcolm, Brunker & Co.*, 9 P. R. 301; *In re Magnolia Metal Co.*, (1897) 2 Ch. 371; and the American cases of *Solhier* v. *Johnson*, 111 Mass. 238; *Witthaus* v. *Braun*, 44 Md. 303; *Taylor* v. *Bemis*, 4 Biss. 406; *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54, and S. C. (2), 51 How. Pr. 455; *Morgan* v. *Rogers*,

19 Fed. Rep. 596; *McVeagh* v. *Valencia Cigar Factory*, 32 U. S. Pat. Gaz. 1124; *Oakes* v. *Tonemierre*, 4 Woods, 547; *Smith* v. *Fair*, 14 Ont. Rep. 729. "The main object of the restriction upon assignments imposed by the Act would seem to be to prevent confusion or deception by suggesting that the articles to which the mark is applied continue to have some connection or other with the original registered owner": *per* Court of Appeal in *In re Magnolia Metal Co.*, (1897) 2 Ch. 371, 396; and it seems that in considering the sufficiency of the connection of the trade mark with the goodwill, regard must be had to this object. Where a trade mark has been placed on the register, but no business exists in which it is used, the mark cannot be assigned, since there is no goodwill to be assigned with it: *Ex parte Lawrence Bros.*, 44 L. T. N. S. 98. See *In re Farina* (4), 44 L. T. N. S. 99. In *In re Wellcome*, 32 Ch. D. 213, the English agents of an American firm had registered in their own names two trade marks used by the latter, and subsequently assigned them to them; and it was held by Chitty, J., that the assignment being an assignment to the persons entitled to the goodwill of the business for the purposes of which the trade marks had been registered, it was an assignment of the trade marks in connection with the goodwill, within this section, notwithstanding that the persons originally registered had no interest in the goodwill; and where a member of a firm erroneously obtains registration in his own name of a mark belonging to the firm, the proper course is to assign to the firm, and the comptroller ought to register the assignment: *In re Greenlees*, 9 P. R. 93; cf. cases on rectification at p. 373. As to goodwill, see Ch. IX., *ante*.

(c) "An assignee has no exclusive right to a trade mark unless the assignment is of a business co-extensive with the trade mark as registered": *per* Fry, L. J., in *Edwards* v. *Dennis*, 30 Ch. D. 454. And an assignment of a trade mark with a goodwill consequently gives the assignee no right in the trade mark in connection with any goods other than those to which the goodwill extends: *Ib.*

(d) It would appear that, since a trade mark is to determine when the goodwill of the business in connection with which it has been used determines, the registration should also be determined upon that event happening. So long as the registration continues, there is, under § 75, public use of the mark, which might be thought to imply the existence of a goodwill. It will be noticed that sub-section 1 of § 90 only gives power to expunge an entry *made* without sufficient cause, so that it would appear that an entry made at a time when a goodwill was in existence is not within the wording of the sub-section. See, however, *In re Batt & Co.*, (1898) 2 Ch. 432. However this may be, registration of a trade mark is, by § 76, only evidence of the proprietor's right, *subject to the provisions of the Act*. Rule 34 of the old Trade Mark Rules (re-numbered 33 in the edition of March 1883) gave power to the Court, on the application of any person aggrieved, to remove any trade mark from the register on the ground, after the expiration of five years from the date of the registry thereof, that the registered proprietor was not engaged in any business concerned in the goods within the same class as the goods with respect to which the trade mark was registered; and under this rule a trade mark was removed from the register in *In re Ralph*, 25 Ch. D. 194.

A patentee is carrying on business, and has, therefore, an existing goodwill, as long as he receives royalties from licensees, though he does not himself manufacture: *In re Ralph*, 25 Ch. D. 194. This rule is not re-enacted, but there is no reason to suppose that this omission is due to an intention to allow a trade mark to be protected after the goodwill has determined, and after, by this section, the mark has itself determined.

Conflicting claims to registration.

71. Where each of several persons claims to be registered as proprietor of the same trade mark, the comptroller may refuse to register any of them until their rights have been determined according to law, and the comptroller may himself submit or require the claimants to submit their rights to the Court (*a*).

(*a*) This section comes from § 5 of the Act of 1875. Rules 42—45 direct that the mode of submission to the Court shall be by special case. This was also provided by the Rules under the old Acts, and *Allsopp* v. *Walker*, Dig. 545, was heard on special case, and in *Ex parte Grimshaw*, W. N. 1877, p. 21, Hall, V.-C., refused to order otherwise. It was, however, found to be so difficult in practice to settle the

statement of facts that in all cases of rival claim the practice was adopted of applying to the Court by way of motion or summons, asking at the same time for the leave of the Court to have the matter decided in that way, and it is believed that after the first year or two from the passing of the Act of 1875 there is no instance of a special case to be found. *Allsopp* v. *Walker* was a case in which the registration of a trade mark was objected to on the ground of its similarity to another trade mark, but the cases which this section and the rules under it appear to be really intended to govern are cases in which not similar, nor even identical, trade marks are claimed, but in which *the same* trade mark is claimed, *e.g.*, where a partnership has been dissolved and a question has arisen between the former co-partners as to the way in which the trade marks of the partnership have been transmitted.

Restrictions on registration.

72.—(1.) Except where the Court has decided (*a*) that two or more persons are entitled to be registered as proprietors of the same trade mark, the comptroller shall not register (*b*) in respect of the same goods or description of goods (*c*) a trade mark identical with one already on the register with respect to such goods or description of goods.

(2.) [Except as aforesaid] (*d*) the comptroller shall not register (*b*) with respect to the same goods or description of goods (*c*) a trade mark *so nearly resembling* [having such resemblance to] a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive (*e*).

The amendments in this section were made by § 14 of the Act of 1888.

(*a*) This section comes from § 6 of the Act of 1875, by which the "special leave" of the Court was required for such subsequent registration. Of this leave of the Court, Jessel, M. R., said in *In re Jelley, Son & Jones*, 51 L. J. Ch. 639, that it "is not a capricious leave. It merely means that the second man must show his title." The same principle will still govern the decisions of the Court, which will be obtained on motion or adjourned summons. It is for the Court to judge as to the similarity, so that registration may be granted notwithstanding the adverse decision of the Manchester Committee of Experts (see notes to cotton rules, *infra*), or refused, notwithstanding the favourable decision of a foreign Court: *In re Farina* (2), 27 W. R. 456. "The Court," being the High Court of Justice, an order of the House of Lords should be made an order of the High Court of Justice. See *In re Orr-Ewing* (2), 28 W. R. 412.

(*b*) The comptroller's discretion to allow registration is limited by this section: *In re Price's Patent Candle Co.*, 27 Ch. D. 681; *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278; *Eno* v. *Dunn*, 15 App. Cas. 252.

(*c*) The prohibition of § 6 of the old Act was of registration "in respect of the same goods or *classes* of goods." The alteration in the language confines the prohibition to cases in which the goods are substantially the same, so that it no longer applies to cases of different goods which happen to be grouped together in the same class. Even under the old Act registration was sometimes granted to similar marks for different goods included in the same class, when no clashing could take place. See note (*a*) to § 65, and note (*a*) to § 69.

(*d*) Before the introduction of these words by the Act of 1888 the prohibition was absolute; but it was held that the Court had a certain discretion where the case was not precisely covered by this section: *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278.

"Calculated to deceive."

(*e*) The meaning of the words "calculated to deceive" was considered in *In re Lyndon*, 32 Ch. D. 109, in which Fry, L. J., said that "the words 'calculated to deceive' import at first sight a design to deceive; but I think it plain, from the rest of the section and the decisions of the Courts, that a mark is within the section 'calculated to deceive' when that mark, fairly used, is so like a mark on the register, also fairly used, as that the one is likely to be mistaken for the other." And Bowen, L. J., said "a trade mark is calculated, by its resemblance to another already on the register, to deceive, if in the course of its legitimate use in the trade it is likely to do so." In *In re Farina* (1), 26 W. R. 261, Hall, V.-C., appears to have thought that a mark ought only to be refused registration as being "calculated

to deceive" if it bore such a resemblance to the earlier mark that an injunction would be granted to restrain the use of it; but in *In re Marks & Tellefsen*, 63 L. T. N. S. 234, Pearson, J., considered that the question in such cases was, not whether an injunction would necessarily be granted to restrain the use of the mark applied for, but whether it so nearly resembled the earlier mark as to be likely in future to give rise to litigation; and in *In re Speer*, 4 P. R. 521, Kay, J., took the same view, and went on to explain that the comptroller would be right in refusing to register a mark which was so composed as to be likely to cause the goods to which it was applied to be known by the same name in the market as the goods to which the older mark was applied. And see also *per* Kay, J., in *In re Dunn*, 41 Ch. D. 439, and *per* Stirling, J., in *In re Baschiera & Co.*, 33 Sol. J. 469. The House of Lords has now decided in favour of this view: *Eno* v. *Dunn*, 15 App. Cas. 252. Again, in *In re La Société Anonyme des Verreries de L'Etoile*, (1894) 1 Ch. 61; (1894) 2 Ch. 26, Stirling, J., thus lays down the duties of the comptroller:—"If," he said, "it is brought to his notice by the evidence adduced by an opponent that, even though the two marks are not physically similar, there is a reasonable probability of the public being misled into buying one thing when they think they are buying another, I apprehend that it would be his duty to refuse registration;" and on appeal, Lindley, L. J., intimated that if a device could not be registered as being calculated to deceive, a description of it in words could not be registered, inasmuch as regard ought to be had to the appeal to the ear as well as to the appeal to the eye. And see *Reiners, Von Luer & Co.* v. *Fehr*, 9 Cape of Good Hope, 306. In *In re Dewhurst & Sons, Ld.*, (1896) 2 Ch. 137, the same principle was extended to a description in Burmese characters; and it was held further, that the consent of the owner of a mark already on the register was not conclusive on the question whether a mark was calculated to deceive. And see *In re Ehrmann*, (1897) 2 Ch. 495. The provisions of this section exist not merely for the benefit of the owners of trade marks, but for the protection of the public, viz., to prevent confusion and deception, and the like principle will govern the Court in considering whether it ought to encourage concurrent applications. *Per* Stirling, J., in *In re Ehrmann*, (1897) 2 Ch. 495, where applications by two persons who had dissolved partnership were refused although each consented to the other's application. Cf. *In re König & Ebhardt*, (1896) 2 Ch. 236, where the existence on the register of several marks containing a particular device for a variety of goods in a particular class was held no bar to registration of a mark containing a similar device for other goods in the same class subject to a note of disclaimer of the exclusive right to the device, the previous owners consenting or not objecting. If the essential and permanent particulars of the two marks are too similar, it is immaterial that there are differences in the non-essential and changeable elements: *In re Murphy & Co.*, 7 P. R. 163; *In re Currie*, 13 P. R. 681. It has been held in Victoria, that when A. and B. have for years used marks bearing a certain resemblance to one another, A. cannot afterwards register a mark still more similar to B.'s mark: *In re Rowley & Pyne*, 9 V. L. R. (L.) 307; and in Canada, the use of a heart-shaped label which the proprietor erroneously believed to be properly registered was held to be a bar to the registration of a label of a similar shape and general appearance: *De Kuyper* v. *Van Dulken*, 24 Can. Sup. Ct. Rep. 114.

Registration as a series.

The restriction imposed on the registration of similar trade marks does not extend to similar marks of the same owner, but when one person applies for the registration of an essential particular, or combination of essential particulars, together with varying additions, the proper course is to register the marks as a series under § 66, *ante*. The old Act contained no provision corresponding to those of § 66, but the same course was considered to be the right one, viz., either to register the essential particular, omitting the additions, but stating that there were to be such, or else to register the essential particular with one form of addition, but stating that that might be varied. See *In re Barrows*, 5 Ch. D. 353; *In re Brook*, 26 W. R. 791; *In re William Dixon Ld.*, Jessel, M. R., April 4th, 1879; *Davis* v. *Tylor*, Jessel, M. R., April 24th, 1879; *In re Clippens Oil Co.*, Jessel, M. R., March 11th, 1881; *In re Steedman*, L. J. N. of C. 1883, p. 83; though occasionally separate registration was granted to marks which differed only in non-essential respects, as in *In re Fox & Co.*, Hall, V.-C., May 7th, 1881; but see *Baker* v. *Rawson*, 45 Ch. D. 519, 530. See the observations of Jessel, M. R., in *In re Kuhn & Co.*, 53 L. J. Ch. 238, as to registration with a note of disclaimer. Also *infra*.

Old marks favoured.

When the second of two trade marks which it is thought may conflict is claimed by a different person from the registered proprietor of the first one, it makes a con-

siderable difference whether the second mark is an old one or a new one; for it is the duty of a manufacturer, when adopting a new mark, to take especial care to select a distinctive one, and the Court will be far more strict in deciding whether this has been done, than it will be in deciding as to similarities between old marks. So that old marks bearing a certain similarity to each other may sometimes be allowed to be registered, though if the mark last applied for were a new one, registration would be refused to it: *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Rosing*, 54 L. J. Ch. 975; *In re Lambert*, 6 P. R. 344; and see *per* Lord Blackburn in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 499.

The "Three Mark Rule."

When the Act of 1875 came into operation it was soon discovered that trade marks which were for practical purposes indistinguishable had in various instances been used by two or more firms, generally in different parts of the country, for the same or substantially the same goods, and the injustice of giving an exclusive right to the first of these firms was felt to be so great that what is known as the "Three Mark Rule" was promulgated by the Commissioners of Patents. The first public announcement of the new rule was made by Jessel, M. R., in *In re Walkden Aerated Waters Co.* (54 L. J. Ch. 394), when he stated that the Lord Chancellor was of opinion that the number of times that a device or emblem might be registered as a trade mark for articles of the same class ought, for the sake of distinctiveness, in no case to exceed three. That was a case in which the application was for the registration of a mark similar in its main features to two others already on the register. The mark was a new one, and the application was only allowed upon condition of the consent of both the previously registered proprietors being produced. On account of the mark in that case having been a new one, an idea arose that the rule was only applicable to new marks, but in *In re Hyde & Co.* (54 L. J. Ch. 395) the Master of the Rolls took another opportunity of referring to the rule, and stated that the Lord Chancellor had personally come to the decision that not more than three registrations of the same, or practically the same, mark should be allowed, and that this was also his own decision; and, in fact, that of the Commissioners of Patents, having been communicated to the Attorney and Solicitor-General. This decision was intended to cover old marks, and not merely new ones. A mark used in substance by more than three firms could not be registered, but must be treated as open. The rule therefore is, that where a mark has been used by more than three firms it is common to the trade and incapable of registration; that where a mark has been used by two firms or three firms before the 13th of August, 1875 (the date of the passing of the Act of 1875), it is the old mark of each firm, and each firm is entitled to registration, almost as of right, on proof of the facts; but that where a mark has been registered by one firm or two firms, another firm will not be allowed to register substantially the same mark for the same goods as a new mark, except by the consent of the previously registered proprietors. See *In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Brook*, 26 W. R. 791; *In re Powell*, Dig. 589; *Ex parte Sales, Pollard & Co.*, Dig. 620; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *Benbow* v. *Low* (4), 44 L. T. N. S. 875; *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398; and *In re Vergaras*, Hall, V.-C., June 3rd, 1881, in which last case the same mark was allowed to be registered by three separate firms as a new mark, all consenting. In *In re Walkden &c. Co.*, 54 L. J. Ch. 394, the mark was allowed to be registered as a new mark with the consent of two other firms who had registered similar marks as their old marks. The tendency of recent cases, however, appears to be to attach less importance than formerly to the consent of previous owners, and to prohibit altogether the registration of a new mark similar to an old one; since the section, it is said, is framed for the protection of the public as well as of the trade mark owners. *In re Dewhurst & Sons, Ld.*, (1896) 2 Ch. 137, and *In re Ehrmann*, (1897) 2 Ch. 495, where registration was refused; and see *In re König & Ebhardt*, (1896) 2 Ch. 236. An old mark may be registered under the Three Marks Rule, notwithstanding that another similar mark has been on the register for upwards of five years: *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *In re Bancroft & Co.*, 5 P. R. 209. And to entitle a mark to such registration it is not necessary to show user on the identical goods for which it is sought to register; it is sufficient to show actual user before August, 1875, on substantially identical goods—*e.g.*, hatchets and axes, gimlets and augers, coopers' drawing-knives and carpenters' drawing-knives: *Jackson & Co.* v. *Napper*, 35 Ch. D. 162. In *In re United Vineyards Proprietors' Co.*, Stirling, J., Nov. 8th, 1889, the company applied in 1876 for the registration of a device of a salamander with the words "The Salamander" as their old mark for brandy, used upwards of twenty years before 1876; but the application

lapsed in consequence of the applicants having never received a letter from the registrar requesting the final fee to be forwarded. The applicants supposed the mark to have been registered. In 1882 another firm obtained the registration of a different device of a salamander as their new mark for fermented liquors and spirits. In 1889 the original applicants became aware of the non-registration, and at once made a fresh application for registration of their original mark as their old mark for brandy, used since 1850. The firm registered in 1882 refused to consent to the application, but did not appear to oppose it; and it was held that the registration should proceed, the mark being an old one. Where a new mark had been registered and much used, and another similar mark which had not been much used was proved to be an old mark and was allowed to be registered, the new mark was not removed from the register, but was allowed to remain there side by side with the old one: *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398. But where the word "Emollio" had been used for several years prior to 1870, but had been abandoned from that year till 1881, when the user was recommenced in a different form, and there had been considerable use of the word "Emollino" by another firm since 1876, "Emollio" was not allowed to be registered: *In re Grossmith*, 6 P. R. 180. In *In re Sone & Fleming Manufacturing Co.*, 30 Ch. D. 505, the applicants had used the mark in England and America since 1872, and had registered it in America in 1881. On their applying for registration in 1885 registration was refused by the comptroller on account of a somewhat similar mark having been registered by another firm in 1877, but that firm not appearing to oppose, though served with notice of the application, and the mark being an old one, registration was granted. So in *In re Bancroft & Co.*, 5 P. R. 209; *In re Kenrick & Jefferson*, 7 P. R. 321. To bring a mark within the rule and entitle it to registration, notwithstanding a previous similar registration for the same goods, foreign user is insufficient, and there must have been user within the United Kingdom: *In re Münch*, 50 L. T. N. S. 12; with which compare *In re Riviere & Co.*, 26 Ch. D. 48; *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288, *per* Fry, L. J.; and *Berliner Brauerei Gesellschaft Tiroli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70. And the mere passage of marked goods through England, without any sale or exposure for sale, is not user of the mark in England: *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *In re Meens*, (1891) 1 Ch. 41. And see *Newman* v. *Pinto*, 4 P. R. 508, *per* Kekewich, J. The user within the United Kingdom must have been substantial, and not merely nominal and unknown to the other proprietor: *In re Hodson & Co.*, 26 Sol. J. 43. A mark will be held to have been in common use, and to be consequently incapable of registration in any name, if the substantial part of it was so, though the minor parts were sometimes varied; *e.g.*, in *In re Wragg*, 29 Ch. D. 551, the device of a syphon, hand and glass, was held to be common to the mineral waters trade, though in the six cases relied on the three elements appeared together in three only, the syphon and hand in one, and the syphon and glass in two. From the same case it appears that the cases of user, which make the mark common, need not all have been on the goods, as in three out of the six cases the user was only on invoices and circulars, and not on the bottles.

Registration with a note.

In some cases the similarity between marks has been got over by registering for different goods, though in the same class (see note (*a*) to § 65, *ante*: also *In re Kenrick & Jefferson*, 7 P. R. 321; *In re König & Ebhardt*, (1896) 2 Ch. 236); or restricting the manner of user in respect of colour (*In re Johnson, Philpott & Co.*, North, J., Feb. 21st, 1888; *In re Jeffrey & Co.*, Stirling, J., May 18th, 1888); or otherwise (*In re Whiteley*, 43 L. T. N. S. 627; *In re Sykes*, 43 L. T. N. S. 626; *In re Farina* (3), Dig. 654; see *In re De Otaduy*, W. N. 1885, p. 177); or the locality within which the mark is to be used (*In re Rabone*, Dig. 643; *In re Keep Brothers*, 26 Ch. D. 187; *In re Mitchell & Co.*, 28 Ch. D. 666; *In re Johnson, Philpott & Co.*, North, J., Feb. 21st, 1888; *In re Steel*, Chitty, J., Jan. 12th, 1893. Where registration is granted with a limitation, the nature and extent of the limitation should appear on the face of the register, so as to be ascertainable by persons searching the register: *In re Mitchell & Co.*, 28 Ch. D. 666. See *In re De Otaduy*, W. N. 1885, p. 177. And in the same spirit, the improper grant of an exclusive right in common elements has been avoided by the use of disclaimers (*In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Hubbuck*, Jessel, M. R., June 20th, 1879; *Ex parte Sales, Pollard & Co.*, Dig. 620; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *In re Hoyle & Sons, Ld.* (2), Chitty, J., Nov. 30th, 1883; *In re Davies*, Chitty, J., March 9th, 1885; *In re König & Ebhardt*, (1896) 2 Ch. 236; and see *In re Dewhurst & Sons, Ld.*, (1896) 2 Ch. 137; see also, § 74); and permission to use a mark has been reserved to

certain persons on registration against all others being granted: *Ex parte Hemming & Son*, Jessel, M. R., April 27th, 1881. In *In re Deuhurst & Sons, Ld.*, (1896) 2 Ch. 137, the Court of Appeal held that registration subject to a condition imposing a geographical limit ought not to be allowed, and it seems that the cases in which special notes have been made on the register can no longer be regarded as precedents, at all events in the case of new marks.

Marks compared as used.

In considering whether there is in fact such similarity between two marks as to exclude the second from registration, it is very important to compare them in the actual mode of user—*e.g.*, as branded on metal goods: *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Rosing*, 54 L. J. Ch. 975; *Nuthall* v. *Vining*, C. A. Jan. 21st, 1880. And compare *Davis* v. *Reid*, 17 Grant, Up. Can. Ch. 69. And if there are blanks in the new mark, as tendered for registration or registered, regard will be had to the manner in which these are filled up in practice (*In re Christiansen*, 3 P. R. 54); and the manner of arrangement of parts common to the trade will also be taken into consideration: *ib.* And see *In re Farrow*, 7 P. R. 260. And it has been held that, if one trade mark has been registered without colour, but is in practice used in a particular colour, and another trade mark is offered for registration which is distinguishable without colour, but might by the addition of colour be made to resemble the first mark, registration will be refused (*In re Worthington*, 14 Ch. D. 8); and *à fortiori*, where it is proved that the proposed new mark was intended to be used in the same colour as the opponent's mark: *In re Turney*, 11 P. R. 37. And see *In re Biegel*, 4 P. R. 525; and *In re La Société Anonyme des Verreries de l'Etoile*, (1894) 2 Ch. 26, in which case, it being conceded that where a device of a star had been registered for glass a device of a red star could not be registered, a mark consisting of the words "Red Star Brand" was removed from the register. Although a trade mark must now be distinctive, irrespective of colour (*In re Hanson*, 37 Ch. D. 112), it may now be registered in colour (§ 67), an advantage which was previously reserved for cotton marks and other marks of a special character requiring registration by deposit. In such a case it was formerly held that the colour was part of the mark, so that a gold coin might be registered for goods for which a silver coin was already registered, though if both were in gold, or both in silver, there would be a similarity (*In re Robinson*, 29 W. R. 31); but, having regard to the provisions of § 67, it hardly seems that this decision could now be repeated. In *In re Lyndon*, 32 Ch. D. 109, it was held by the Court of Appeal that a mark tendered for registration must be compared with a mark already registered, not as actually used, but as registered, and on the footing that the applicant's mark will be fairly used; and "it is established now that when two marks are being compared together for the purpose of seeing to what extent one resembles the other with reference to the question of registering or not, the Court must presume a fair user of the mark; and at the same time it is established that the Court must look, in deciding such a question as this, to the mode in which the mark would be stamped or affixed, the character of the goods upon which it is affixed, and generally to all the circumstances of the case with respect to the placing on of the mark and the user of it. But, though the circumstances are to be looked at, it is a cardinal proposition that the Court must presume a fair user": *per* Chitty, J., in *In re Haines, Batchelor & Co.*, 5 P. R. 669. In the same way Cotton, L. J., said, in *In re Lambert*, 6 P. R. 344, 351: "In considering whether the mark is calculated to deceive, we must consider what would be the ordinary use, without fraud, of the mark, and not go into the question of what might be done by a fraudulent user. If that were done—if there were a fraudulent user—then the Court would interfere, not because the man had not got the trade mark, but because he was using that trade mark fraudulently, so as to pass off his goods for those of another. That matter of fraud is not to be considered in dealing with the question whether the mark is so like another as to be calculated to deceive. In dealing with that question you must assume that it is fair and right." And see *In re Farrow*, 7 P. R. 260; and *In re Kutnow*, 10 P. R. 401. It has been held in Victoria (*Ex parte Kennedy*, 9 Vict. L. R. (L.) 335), and the same would appear to hold good in this country, that the marks ought to be compared taken apart, and not as seen side by side, and that the question is whether it is or is not probable that an incautious person would be deceived.

Cotton marks.

In the case of cotton marks which were brought before the Manchester Committee of Experts, due weight should be given to their opinion as to the distinctiveness of the marks (*Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479), but they seem to have given somewhat too wide an interpretation to the expression "substantial

similarity" in their instructions. See *In re Brook*, 26 W. R. 791. The cotton rules being now repealed, a B. list mark may be registered without an application to the Court, if the comptroller considers that a mistake has been made.

Cases of refusal.

For instances of cases in which registration has been refused on the ground of similarity, reference may be made to *Allsopp* v. *Walker*, Dig. 545, in which the first mark was a man's hand held upwards, and the second was a female hand pointed horizontally; *In re Jelley, Son, & Jones*, 51 L. J. Ch. 639, in which the first mark was a pointer at a point, with the word "Staunch," and the second was a pointer feeding out of a porridge pot; *In re Rosing*, 54 L. J. Ch. 975, in which the first mark was a plain horn with a looped cord, and the second was a sprig of two roses with a twisted horn; *Barrows* v. *Feisall Coal and Iron Co.*, Dig. 530, in which the marks were a crown with "B. B. H." in Roman letters, and a crown with "B. B. S." in italics; *In re Worthington & Co.*, 14 Ch. D. 8, a plain triangle, and a triangle containing a church with an inscription; *In re Barker & Son*, 53 L. T. N. S. 23, where each label consisted of a sporting scene; *In re Marks & Tellefsen*, 63 L. T. N. S. 234, in which the general arrangement of the two marks was very similar; *In re Speer*, 4 P. R. 521, a dog, tower and harp, in each case; *In re Sanitas Co., Ld.*, 4 P. R. 533, where the application was for the word "Sanitas," which was included in two previous marks; *In re Grossmith*, 6 P. R. 180, where "Emollio" was thought too similar to "Emolline"; *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278, where each mark contained prominently a device of a golden fleece; *In re Baschiera & Co.*, 33 Sol. J. 469, a lion and a winged lion; *In re Murphy & Co.*, 7 P. R. 163, a lion rampant with a crown and a lion rampant with a sheaf; *In re Dunn*, 41 Ch. D. 439; 15 App. Cas. 252, "Fruit Salt" for producing a beverage and "Fruit Salt" baking powder; *In re Farrow*, 7 P. R. 260, a bull's head and a bison; *In re Goodall*, 42 Ch. D. 566, a similar arrangement of common words; and see *In re Farina* (2), 27 W. R. 456; *In re Hargreaves*, 11 Ch. D. 669; *In re Meyerstein & Co.*, 43 Ch. D. 604; *In re Turney*, 11 P. R. 37; *In re Dewhurst and Sons, Ld.*, (1896) 2 Ch. 137, and other cases; also *Ex parte Kennedy*, 9 V. L. R. (L.) 335, in Victoria.

Cases of non-refusal.

For instances of cases in which registration has not been refused on the ground of similarity, see *In re Farina* (1), 26 W. R. 261, where a label had been registered with a small seal in one corner, and application was made for the registration of the same seal alone; *In re Lyndon*, 32 Ch. D. 109, a man's head surmounting the word "way," and a helmeted female head surmounting the word "Athena"; *In re Haines, Batchelor & Co.*, 5 P. R. 669, a shaded device of a pointer at a point, facing to the left, and surmounting the word "Staunch," and an outline device of a pig, facing to the left, and surmounting the initials "H. B. & Co."; *In re Burgoyne*, 6 P. R. 227, "Emu" and "Oomoo"; *In re Simpson*, L. J. N. of C. 1890, p. 143; *In re Loftus*, (1894) 1 Ch. 193. See also *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479, and the other cotton cases mentioned in the notes to the cotton rules. Except in the cases of cotton marks the opposition has usually been successful, and registration has either been refused altogether or only granted subject to limitations.

American cases.

Under the similar section in the United States Act, registration was refused where the first mark was the figure of a star and the second was the word "star" (*In re The American Lubricating Oil Co.*, 9 U. S. Pat. Gaz. 687); where the first mark was the name "Haxall," and the principal part of the second consisted of the same name and a maltese cross (*In re Coggin, Kidder & Co.*, 11 U. S. Pat. Gaz. 1109); where the marks were the word "Swan" and the words "Black Swan" (*Ex parte Caire*, 15 U. S. Pat. Gaz. 248); so where a trade mark was tendered which consisted of three parts, each of which was already registered, one by the applicant and the others by other firms (*In re Bush & Co.*, 10 U. S. Pat. Gaz. 164), and where the new mark consisted of "A. S. California Family * Soap," and "California" and "*" were already on the register (*Ex parte Smith* (1), 16 U. S. Pat. Gaz. 679); and see *Ex parte Weisert Bros.*, 16 U. S. Pat. Gaz. 680. In *In re Cornwall* (1), 12 U. S. Pat. Gaz. 138, registration was granted to a star and crescent, a star being on the register; and see *In re Imbs*, 10 U. S. Pat. Gaz. 463. And see cases collected at p. 645, notes (*d*) and (*e*).

The comptroller is entitled to his costs of opposing an application on the ground of similarity to a registered mark; at all events, unless the marks are very clearly distinct. See *In re Patent Plumbago Crucible Co.*, Jessel, M. R., Aug. 1st, 1879.

See Rule 46 as to notifying the order of the Court to the comptroller.

Where the Registrar had refused to register on the ground of similarity

to a registered mark, and the marks did not appear to be similar, but the owner of the registered mark had not been served with the notice of motion of the person applying for the registration of the second mark, Chitty, J., directed the registered owner to be served, and on that being done, and no objection being made, ordered the registration to proceed: *In re Milne & Co.*, Chitty, J., July 6th, 1883. And where the comptroller objects to register a mark on the ground of similarity to a registered mark, the usual practice now is to require notice of the application to be given to the proprietor of the registered mark: *In re Sone & Fleming Manufacturing Co.*, 30 Ch. D. 505; *In re Bancroft & Co.*, 5 P. R. 209; *In re Baschiera & Co.*, 33 Sol. J. 469.

Further restriction on registration.

73. It shall not be lawful to register as part of or in combination with a trade mark any words the *exclusive* use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of Justice (*a*), or any scandalous design.

(*a*) This section is taken from § 6 of the Act of 1875, and was amended by § 15 of the Act of 1888. The wording of the original enactment was "would not be deemed entitled," and the present wording, "would be deemed disentitled," seems less open to misinterpretation. That the original enactment only referred to deceptiveness inherent in the mark itself, and not to liability to be mistaken for another mark, was held by Jessel, M. R., in *In re Horsburgh*, 53 L. J. Ch. 237. Kay, J., however (*In re Grossmith*, 6 P. R. 180; *In re Dunn*, 41 Ch. D. 439), and Stirling, J. (*In re Swift Specific Co.*, 6 P. R. 352), appear to have thought that words were within this section which bore a resemblance to words included in an earlier mark. And Cotton, L. J., took this view in *In re Dunn*, 41 Ch. D. 439. But in that case Lindley, L. J., expressly concurred in the view taken by Jessel, M. R., and Fry, L. J., did not dissent from it. And in *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278, the observations of Cotton, L. J., incline rather in the same direction.

However, after the decision of the House of Lords in *Eno* v. *Dunn*, 15 App. Cas. 252, which was considered on the footing that the section applied to words tendered for registration which were calculated to deceive by reason of similarity to words previously in use by a different trader, the wider construction will no doubt, be given to the enactment. See *In re Hill*, 10 P. R. 113; *In re Thewlis & Blakey*, *ib.* 369. This much seems to be clear, that the comptroller is necessarily bound to refuse marks which offend against either §§ 72 or 73, whether he himself discovers the objection, or whether his attention is called to it in the course of an opposition, that the comptroller has a discretion either to register or not in cases which do not offend against these sections, though he should not reject an application without some adequate legal or moral reason, and that he can exercise this discretion either of his own motion under § 62, or on an opposition under § 69, which contains no limitation of the grounds upon which a mark may be opposed. The question as to what is the exact meaning of § 73 is somewhat academical, when it is remembered that the comptroller has a judicial discretion to register or not, and that even if an objectionable mark escapes his vigilance, it may be removed from the register under § 90 as having been registered without sufficient cause.

There is no doubt that § 73 applies to cases in which a trade mark contains a false statement of origin (*In re Horsburgh*, 53 L. J. Ch. 237); or in which the trade mark untruly states that the proprietors are the "sole makers" (*In re Hayward & Sons*, 54 L. J. Ch. 1003); or in which it untruly states the name and address of the maker (*In re Hill*, 10 P. R. 113); or in which the mark is habitually used as part of a deceptive whole: *Wood* v. *Lambert*, 32 Ch. D. 247. If a trade mark tendered for registration contains the words "trade mark" so placed as to be likely to mislead the public into the belief that a particular part of the trade mark, and not the whole of it, is claimed and registered, registration ought to be refused under this section: *In re Apollinaris Co.*, (1891) 2 Ch. 186, 233, 235; *In re Wills*, (1893) 2 Ch. 262. See *Hammond* v. *Malcolm, Brunker & Co.*, 9 P. R. 301; *In re Colman*, (1891) 2 Ch. 402; *In re Phillips*, (1891) 3 Ch. 139. The onus of proving that a mark is not calculated to deceive under this section is on the applicant for registration (*Eno* v. *Dunn*, 15 App. Cas. 252; *In re Thewlis & Blakey*, 10 P. R. 369); but a mark is not calculated to deceive merely because it includes the capability of being used by the

party registering it for purposes of deception: *per* North, J., in *In re Kutnow*, 10 P. R. 401. Thus, in *In re Smokeless Powder Co.*, (1892) 1 Ch. 590, it was held that the words "Smokeless Powder" used as part of the name of the company were not calculated to deceive the public into the notion that the company had a monopoly in smokeless powder. But registration was refused to a mark which, as previously used, contained fraudulent misstatements, though they were corrected in the mark as tendered for registration: *In re Fuente*, (1891) 2 Ch. 166.

Words which are descriptive or deceptive.

Where it is sought to register as a trade mark a word or words which are or may be appropriate to the article to which the trade mark is to be applied, the applicant is in the dilemma that the alleged trade mark is either descriptive or deceptive; if the word or words are properly applicable to the article and may be truly used with respect to it, they are descriptive and are not within § 64; if they may be read as stating something with respect to the article which is untrue, they are deceptive within the present section; so that *quâcunque viâ* the application must fail. Thus, in *In re Saunion & Co.*, Dig. 625, where the mark was "Anglo-Portugo Oysters," either the oysters were of Anglo-Portuguese origin, in which case any one had a right to say that they were so, or they were not of such origin, in which case no one had a right to say so; and this was adopted by Lopes, L. J., in *In re Van Duzer*, 34 Ch. D. 623. And see *In re Hannay*, 7 P. R. 46; *In re Edge*, 8 P. R. 207. There are numerous similar cases under the U. S. Acts. Thus, *In re American Sardine Co.*, 3 U. S. Pat. Gaz. 435 ("American Sardines"); *In re Dole Bros.*, 12 *ib.* 939 ("Egg Macaroni"); *In re Warburg & Co.*, 13 *ib.* 44 ("Cachemire Milano"); *Ex parte Marsching*, 15 *ib.* 294 ("French" paints); *Ex parte Knapp*, 16 *ib.* 318 ("London" Animal Foods); *Ginter* v. *Kinney Tobacco Co.*, 12 Fed. Rep. 782 ("Straight-cut" Cigarettes); *Ex parte Grove*, 67 U. S. Pat. Gaz. 1447 ("Bromo-Quinine"). And see *California Fig Syrup Co.* v. *Putnam*, 69 Fed. Rep. 740; *Same* v. *Stearns*, 73 *ib.* 812 ("Fig Syrup"). Compare *In re Green*, 8 U. S. Pat. Gaz. 729 ("German Sirup"), where registration was allowed.

In the American case of *Ex parte Cigar Makers' Association*, 16 *ib.* 958, it was held that a mark could not be registered which was intended to be used by any member of an association on goods of any quality, nor one which was intended to be used for the furtherance of a scheme in restraint of trade. And in *Schneider* v. *Williams*, 44 N. J. Eq. 391, the Court refused to protect such a mark at the instance of a member of such an association. See also *Cigar Makers' Protective Union* v. *Conhaim*, 40 Minn. 243; 12 Am. St. Rep. 726; *McVey* v. *Brendel*, 144 Penn. St. 235; 27 Am. St. Rep. 625; *Weener* v. *Brayton*, 152 Mass. 101; *State* v. *Bishop*, 128 Mo. 373; 49 Am. St. Rep. 569. But see *Strasser* v. *Moonelis*, 108 N. Y. 611; *People* v. *Fisher*, 57 N. Y. Sup. Ct. 552; *Allen* v. *Macarthy*, 37 Minn. 347; *Bloete* v. *Simon*, 19 Abb. N. C. 88; *Cohn* v. *People*, 149 Ill. 486; 41 Am. St. Rep. 304; *Gravel Roofers' Exchange* v. *Turnbull*, 64 U. S. Pat. Gaz. 441. And in *Ex parte Bloch & Co.*, 40 *ib.* 443, registration was refused in America to a mark which contained the words "Knights of Labour," the applicants having no connection with the society of that name.

As to what will be deemed to disentitle to protection in a court of justice, see further Ch. 7, *ante*.

Saving for power to provide for entry on register of common marks as additions to trade marks.

74.—(1.) Nothing in this Act shall be construed to prevent the comptroller entering on the register, in the prescribed manner, and subject to the prescribed conditions, as an addition to any trade mark (*a*)—

(a.) In the case of an application for registration of a trade mark used before the thirteenth day of August one thousand eight hundred and seventy-five—

Any distinctive (*b*) device, mark, brand, heading, label, ticket, letter, word, or figure, or combination of letters, words, or figures, though the same is common to the trade (*c*) in the goods with respect to which the application is made;

(b.) In the case of an application for registration of a trade mark not used before the thirteenth day of August one thousand eight hundred and seventy-five—

Any distinctive (*b*) word or combination of words, though the

same is common to the trade (*c*) in the goods with respect to which the application is made;

(2.) *The applicant for entry of any such common particular or particulars must, however, disclaim* (*d*) *in his application any right to the exclusive use of the same, and a copy of the disclaimer shall be entered on the register.*

[(2.) The applicant for registration of any such addition must, however, state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register.

Provided that a person need not, under this section, disclaim his own name or the foreign equivalent thereof, or his place of business (*e*); but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof.]

(3.) Any device, mark, brand, heading, label, ticket, letter, word, figure, or combination of letters, words or figures, which was, or were, before the thirteenth day of August one thousand eight hundred and seventy-five, publicly used by more than three persons on the same or a similar description of goods shall, for the purposes of this section, be deemed common to the trade in such goods (*f*).

The amendments in this section were made by § 16 of the Act of 1888.

(*a*) This section was new in 1883, and is not very clearly expressed, but what is intended appears to be that when a trade mark sent in for registration contains, together with an essential particular, a feature which is in common use in the trade, that common feature must be disclaimed, so that the rest of the trade may not be deprived of their right to use it. The additions to which this section relates are apparently not quite the same as the additions to an essential particular referred to in § 64 (2), but such as would be capable of distinguishing the goods, were it not that in point of fact they have been used by several different firms. Thus, if a device of an animal were registered in combination with the words "First quality," for iron, the case would be within § 64; but if the same device were to be registered in combination with a crown, the case would be within the present section, the crown being *primâ facie* distinctive, but in point of fact common to the trade. Long user does not entitle members of a trade to register a particular device as part of their trade marks when the user was fraudulent in its inception and is still calculated to deceive (*In re Heaton*, 27 Ch. D. 570); and if words forming part of a trade mark are calculated to deceive, the person claiming the mark cannot assist his application for registration by disclaiming the objectionable words: *Eno* v. *Dunn*, 15 App. Cas. 252. It seems that where a distinctive label is registered as a whole, words which are included in the label are a part of the label, and not additions to it, and need not consequently be disclaimed under this section: *In re Apollinaris Co.*, (1891) 2 Ch. 186, 233; *Pinto* v. *Badman*, 8 P. R. 181, 188, 191; *In re Smokeless Powder Co.*, (1892) 1 Ch. 590; *In re Clement & Cie.*, 16 P. R. 173.

(*b*) The word "distinctive" is applicable to all the matters here mentioned: *per* Chitty, J., in *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274. And see *per* Cotton, L. J., in *Waterman* v. *Ayres*, 39 Ch. D. 29. There is at first sight a contradiction in terms here, as a mark common to the trade cannot, of course, be distinctive; but what is intended appears to be that any mark which is *primâ facie* distinctive, but which is really common to the trade, must be disclaimed when registered as part of a combination. The epithet "distinctive" would thus be here applied to every mark which is not inherently incapable of appropriation by an individual. This view was approved by Chitty, J., in *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274. From the dicta in the Court of Appeal in *In re Hudson*, 32 Ch. D. 311, and *In re Atkins Filter & Engineering Co., Ld.*, 3 P. R. 164, it would appear that their attention had not been directed to this word.

(c) The words "common to the trade" have been construed to mean "open to the trade": *Humphries* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820; and *Burland & Co.* v. *Broxburn Oil Co. Ld.* (2), 42 Ch. D. 274; *In re Apollinaris Co.*, (1891) 2 Ch. 186, 209, 210; and this seems to be what is meant. In *Thompson* v. *Montgomery*, 41 Ch. D. 35, Lindley, L. J., said that "nothing can be common to the trade which is used only by one person in the trade": but in § 64, where it was intended to exclude from registration fancy words "in common use," that expression was employed, and the difference of language seems to show that the phrase here means that which is of common right, whether in common use or not. When it is alleged adversely to an applicant for registration, that the whole or a part of his trade mark is common to the trade, the onus is upon the person alleging that this is so to prove it, not upon the applicant for registration to prove the contrary: *In re Leonard & Ellis*, 26 Ch. D. 288; *In re Edgington*, 6 P. R. 513; and see *Pinto* v. *Badman*, 8 P. R. 189. And the entries in the registry office books of applications for registration do not prove that a mark is in common use, as they only prove that the applications entered have been made, not that they have all been properly made, or upon true allegations, or that the marks applied for have in fact been used: *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434. A mark is not made common to a particular trade by the fact that persons engaged in different trades have used it on goods of a different character (*Somerville* v. *Schembri*, 12 App. Cas. 453), nor by fraudulent user by infringers (*Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 414, 419), nor by the fact that goods marked with it have passed through England from one foreign country to another, without any offering for sale in England: *Newman* v. *Pinto*, 4 P. R. 508 (*per* Kekewich, J.). And see *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *In re Means*, (1891) 1 Ch. 41. In a number of cases since the Registration Acts marks have been found to be common to different trades: thus, a number of words and devices to the iron trade: *In re Barrows*, 5 Ch. D. 353; *In re Davies*, Chitty, J., March 9th, 1885; the words "Bank of England," to the sealing-wax trade: *In re Hyde & Co.*, 7 Ch. D. 724: the word "Selected," and other words and devices, to the steel-pen trade: *In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Kuhn & Co.*, 53 L. J. Ch. 238; the letters "S. P." to the snuff trade: *Ex parte Sales, Pollard & Co.*, Dig. 620; the Eton arms to the hat trade: *Lucke* v. *Webster*, Jessel, M. R., April 4th, 1879; the words "Braided Fixed Stars," to the match trade: *In re Palmer* (3), 24 Ch. D. 504; the words "La Minerva, Habana," "La Pureza," and "Gold Leaf," to the cigar and tobacco trade: *In re Lloyd & Sons*, 27 Ch. D. 646; *Newman* v. *Pinto*, 4 P. R. 508; *Partlo* v. *Todd*, 12 Ont. Rep. 171; a device of a syphon, hand, and glass to the mineral-water trade: *In re Wragg*, 29 Ch. D. 551; the words "Extra," "Extra G.," "Coker," to the canvas trade: *In re Haycard & Sons*, 54 L. J. Ch. 1003; the words "Mandarin Tea" to the tea trade: *British Tea & Trading Association, Ld.* v. *Cooke*, Bacon, V.-C., June 8th, 1886; the words "Old Innishowen" to the whiskey trade: *Watt* v. *O'Hanlon*, 4 P. R. 1; the words "Parchment" and "Bank" to the paper trade: *In re Goodall*, 42 Ch. D. 566; *Pirie* v. *Goodall*, (1892) 1 Ch. 35; various animals, devices, and colours to the cotton trade: *Orr-Ewing & Co.* v. *Johnston & Co.*, 7 App. Cas. 219; *Wallace & Co.* v. *King & Co.*, Bombay High Ct., April 30th, 1879; *In re Hoyle & Sons, Ld.* (2), Chitty, J., Nov. 30th, 1883. And see *Orr-Ewing & Co.* v. *Registrar of Trade Marks*, 4 App. Cas. 479; and *In re Brook*, 26 W. R. 791. Common marks.

(d) The practice of entering disclaimers in the register appears to have originated with the cases of *In re Leonardt*, Dig. 610, and *In re Mitchell* (2), Dig. 611. In those cases the consent of the owner of the mark was required, but in *In re Kuhn & Co.*, 53 L. J. Ch. 238, an order for a disclaimer was made notwithstanding that the owner did not formally consent, and in other cases the registration was subjected to limitations entered on the register. See cases cited in note (c) to § 72, *supra*. The practice has been carried so far, that in *In re Hoyle & Sons, Ld.* (2), Chitty, J., Nov. 30th, 1883, a trade mark, consisting of a pheasant sitting on a gate, was registered with a disclaimer of the bird, leaving only the gate. See the order of the House of Lords in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479; and see also the statement by Jessel, M. R., in *In re Kuhn & Co.*, 53 L. J. Ch. 238; and *Baker* v. *Rawson*, 45 Ch. D. 519, 530. Disclaimers under the Act of 1875.

In *In re Hudson*, 32 Ch. D. 311, the Court of Appeal appears to have thought that a disclaimer could not be compulsorily enforced under the Act of 1875; but there does not seem to have been much argument on the point, and the case was decided on the ground that the words of which it was sought to compel a disclaimer

were descriptive, and could not in any event be claimed as a result of the registration of the label. The words not being *primâ facie* distinctive, the question as to disclaimer could not really arise. The same was the case in *In re Atkins Filler & Engineering Co., Ld.*, 3 P. R. 164. In *In re Hayward & Sons*, 54 L. J. Ch. 1003, Kay, J., held that the Court had power under the Act of 1875 to order a compulsory disclaimer, and he accordingly ordered a disclaimer to be entered of the words "Extra G," which were common to the trade. And see *Baker* v. *Rawson*, 45 Ch. D. 519, 530.

**Disclaimers under the Acts of 1883—1888.**

The provision in the present Acts being that the common particular must be disclaimed *in the application*, the question has been raised whether such a disclaimer can be made at a later date, and North, J., in *In re Goodall*, 42 Ch. D. 566, decided that this could not be done, and that an application from which a necessary disclaimer had been omitted was simply null and void. So also Chitty, J., in *In re Mecus*, (1891) 1 Ch. 41, and Kekewich, J., in *In re Apollinaris Co.*, (1891) 2 Ch. 186, 212. In *In re Swift Specific Co.*, 6 P. R. 352, Stirling, J., refrained from deciding whether an application defective in this respect was invalid, but directed a disclaimer to be entered on the register; and see *per* North, J., in *Baker* v. *Rawson*, 45 Ch. D. 519, 530. Subsequent disclaimers have also been directed under these Acts by Kay, J.: *In re Hayward & Co.*, 54 L. J. Ch. 1003 ("Extra," "Coker"); by Kekewich, J.: *Humphries* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820 ("Herbalin"); and by Chitty, J.: *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274 ("Washerine"); *In re Edge*, 8 P. R. 207 ("Filtered Blue"). It has also been held by Kekewich, J., that the fact that a common word has been registered as part of a trade mark, without a disclaimer, does not necessarily disentitle the owner of the mark to his costs in an action against a person who has adopted the same trade mark: *Newman* v. *Pinto*, 4 P. R. 508. Where a distinctive device has been registered, together with words which are in fact common to the trade, but without any disclaimer, no right is acquired in the common word, even after the lapse of five years from registration: *British Tea and Trading Association, Ld.* v. *Cooke*, Bacon, V.-C., June 8th, 1886 ("Mandarin Tea"). Inasmuch as the section only provides for disclaimer of matters common to the trade, a trader will not be allowed to register, as an addition to a device, words which are not necessarily of common right, and which have, in fact, been used by one firm only besides himself, with a disclaimer of any exclusive right to such words, for the purpose of avoiding a conflict with the longer user of the other firm. If he has a concurrent right with the other firm, he must register without a disclaimer; if he has not, he cannot register the words at all: *In re Mecus*, (1891) 1 Ch. 41.

(*c*) See notes (*n*) and (*o*) to § 64 (3) (i); and *In re Apollinaris Co.*, (1891) 2 Ch. 186, 211.

(*f*) The intention of this sub-section is to introduce here the "Three Mark Rule," as to which see note (*e*) to § 72, *supra*. That rule is that registration of the same or substantially the same mark may be granted to not more than three persons, who can prove real user before August 13th, 1875, but that proof of user by more than three persons before that date debars all persons from registering. For there to have been "public user" by more than three persons, it would seem that the user by each must have been substantial (*In re Hodson & Co.*, 26 Sol. J. 43), and such as came or ought to have come to the knowledge of each of the others. But the marks used need not have been absolutely identical, nor in all cases on the actual goods: *In re Wragg*, 29 Ch. D. 551. It will be noticed that this sub-section only relates to old marks. In the case of new marks a second registration of the same device would not be granted under § 72, except by the consent of the previously registered proprietor, and a disclaimer might even then be required as a condition of his consent. User is not proved by the books of applications for registration, as the allegations therein contained are not proved: *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434.

### *Effect of Registration.*

**Registration equivalent to public use.**

75. *Registration of a trade mark shall be deemed to be equivalent to public use of the trade mark* (*a*).

[Application for registration of a trade mark shall be deemed to be equivalent to public use of the trade mark, and the date of the appli-

cation shall for the purposes of this Act be deemed to be, and as from the first day of January one thousand eight hundred and seventy-six to have been, the date of the registration (*b*).]

(*a*) The original § 75, for which the present section was substituted by § 17 of the Act of 1888, came from § 2 of the Act of 1875, the provision in which Act was made expressly subject to the existence of a connection with goodwill. This is not expressly stated in the present section, but must, in the view of the Court of Appeal, be implied, for the words registration of a trade mark shall be equivalent to public use of the trade mark "did not and could not mean that continued registration was equivalent to continued use": *per* Lindley, M. R., *In re Batt*, (1898) 2 Ch. 432. Registration does not entitle to an injunction in respect of goods for which the mark has not been used, though it has been registered for them, at all events unless the mark has been exactly copied: *Edwards* v. *Dennis*, 30 Ch. D. 454; *Hargreave* v. *Freeman*, (1891) 3 Ch. 39. And see *Apollinaris Co.* v. *Snook*, 7 P. R. 474; 8 P. R. 166. In the United States also registration is equivalent to public use. See *In re Dutcher Temple Co.*, U. S. Pat. Comm. Decis., 1871, 248. Apart from the legislation on the subject, public use of a trade mark gives a property in it. See *per* Lord Blackburn, in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 496. It has been decided that to constitute public use it is not sufficient for the marked goods to be advertised; they must be actually in the market. But so long as that is the case, length of user is not necessary. See *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *In re Simpson, Davies & Sons*, Jessel, M. R., Jan. 12th, 1881. And see the remarks of Chitty, J., on this section in *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 404.

(*b*) The last part of this clause, as now altered, comes from Rule 32 of the Rules of 1883, and originally from the old rules. The principle that registration dated from the receipt of the application prevailed throughout. Now a slight alteration is made by substituting the date of the application for the date of the receipt of it.

Right of first proprietor to exclusive use of trade mark.

76. The registration of a person as proprietor of a trade mark shall be *primâ facie* evidence (*a*) of his right to the exclusive use (*b*) of the trade mark, and shall, after the expiration of five years from the date of the registration, be conclusive evidence (*a*) of his right to the exclusive use of the trade mark, subject to the provisions of this Act (*c*).

Effect of registration.

(*a*) This section comes from § 3 of the Act of 1875. Until the end of five years from registration the only effect of it is, as was said in the Court of Appeal in *Nuthall* v. *Vining*, C. A., Jan. 21st, 1880, to qualify the registered proprietor for suing infringers—in other words, registration is "simply a condition precedent to suing," *per* Chitty, J., in *Monson & Co.* v. *Bochm*, 26 Ch. D. 398; and in *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 405; *In re Hudson*, 32 Ch. D. 325; and see *Sen-Sen Co.* v. *Britten*, (1899) 1 Ch. 692; and it seems that when an action is brought to restrain an alleged infringement of a trade mark which has been registered for less than five years, the defendant may rebut the *primâ facie* evidence of the plaintiff's right afforded by his registration, without moving to rectify the register by expunging the mark. See *In re Palmer* (1), 21 Ch. D. 47; *Lever* v. *Goodwin*, 4 P. R. 492; *Weaver* v. *Sanitary Engineering and Ventilation Co.*, L. J. N. of C., 1887, p. 144; *Weaver* v. *Stiff & Sons*, *ib.* After the expiration of five years from registration, the title of the registered proprietor is, for the purposes of an action for infringement, an absolute right, and cannot be disputed except upon an application under § 90 to rectify the register: *Edwards* v. *Dennis*, 30 Ch. D. 454; *Apollinaris Co., Ld.* v. *Herrfeldt*, 4 P. R. 478. Compare *Evans* v. *Smith*, 3 Times L. R. 390, and *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236, where this principle does not appear to have had full effect given to it. This applies also to cases of colourable imitation, as well as to cases of direct copying: *Rodgers & Sons, Ld.* v. *Rottgen*, 5 Times L. R. 678. The lapse of five years from registration is, however, no bar to proceedings brought for the purpose of rectifying the register. It seems that the description of goods given on registration is not conclusive: *Hargreave* v. *Freeman*, (1891) 3 Ch. 39. In *Apollinaris Co.* v. *Snook*, 7 P. R. 474, the validity of a registered trade mark

was not allowed to be questioned in an action for infringement, there being no motion to rectify, but the fact that the mark had been registered for less than five years, so that the registration was only *primâ facie* and not conclusive evidence of the right of the registered proprietor, does not seem to have been pointed out. The action was dismissed on appeal (see 8 P. R. 166), in consequence of the mark having been removed from the register in other proceedings, so that the decision of the Court of Appeal on the point here raised was not taken. The question came before the Court of Appeal in *Pinto* v. *Badman*, 8 P. R. 181, where a mark recently registered was alleged to have been infringed, and although there was no valid application to rectify, and the mark was, in fact, left on the register, yet the action was dismissed on the ground of want of title in the plaintiffs. Lord Esher, M. R., said (p. 189): "The 76th section of the Act says that the registration is *primâ facie* evidence of the plaintiff's right to the exclusive use of the label, but it is only *primâ facie* evidence. It follows that it can be met. That is not denied"; and Fry, L. J., said (p. 193): "It is undoubted that under the Statute of 1883, when a trade mark has been registered, it gives a *primâ facie* title to the registered owner to sue for an infringement of it; but that right is *primâ facie* only, and may be repelled by evidence of the defendant, or may be repelled by evidence which the plaintiff himself puts in." The view originally entertained as to the effect of this section, and the corresponding section of the Act of 1875 upon applications to rectify, appears to have been that during the first five years from registration the mark remained liable to removal from the register, *e.g.*, on application by the true proprietor of it, when it had been wrongfully registered in the name of another person, as in *Ex parte Lawrence Bros.*, 44 L. T. N. S. 98; *In re Australian Wine Co., Ld.*, 61 L. T. N. S. 427; but that after the expiration of five years from registration the title of the registered proprietor was secure against individual rival claimants, but as "the Act only says that after five years the person who has registered a trade mark shall be entitled to the trade mark, but does not say that the mark as registered shall be deemed to be a trade mark"—see *per* Jessel, M. R., in *In re Palmer* (1), 21 Ch. D. 47; and compare the Victorian cases of *Lewis* v. *Klapproth*, 11 V. L. R. (E.) 214; *Wolfe* v. *Alsop* (2), 12 V. L. R. (E.) 421; *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752—the trade mark remained liable to removal for inherent defects in it—*e.g.*, that it contained no one of the essential particulars specified by § 64. Thus in *In re Palmer* (1), 21 Ch. D. 47; and (3) 24 *ib.* 504, the words "Braided fixed stars," registered for matches, were expunged, on the ground that at the date of the registration and ever since they had been merely descriptive of matches prepared in a particular way. So where the word "Valvoline" had been registered, though it had been used as a descriptive term: *In re Leonard & Ellis*, 26 Ch. D. 288. And see *In re Ralph*, 25 Ch. D. 194; *In re Lloyd & Sons*, 27 Ch. D. 646; *In re Wragg*, 29 Ch. D. 551; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Spencer*, 54 L. T. N. S. 659. Since the case of *Edwards* v. *Dennis*, 30 Ch. D. 454, however, it has been generally recognized that § 90 (§ 5 of the Act of 1875) overrides the provisions of this section (§ 3 of the Act of 1875), and that even after the lapse of five years the registration of a mark which is for any reason wrongful may be rectified. In that case Cotton, L. J., said that "the third section (of the Act of 1875) is intended to afford assistance to a person who is bringing an action against another person for passing off his goods as the goods of the person who brings the action. In such a case, if the plaintiff shows that he has been on the register for five years, that dispenses with the necessity of his adducing evidence of exclusive use of his trade mark. But the third section is no bar to an application under the fifth section for rectification of the register, and in the case of such an application the Court is bound to consider whether the trade mark is properly on the register; for, although it may have been on for five years, if it ought not to have been on at all, then it can be taken off." And in this the other Lords Justices concurred. That there is no distinction for this purpose between the Acts of 1875 and 1883 was held by North, J., in *Baker* v. *Rawson*, 45 Ch. D. 519, 531. Where words common to the trade—*e.g.*, "Mandarin Tea"—have been registered in combination with a distinctive device, or in connection with a distinctive label, for upwards of five years, no exclusive right is thereby acquired in the words: *British Tea and Trading Association, Ld.* v. *Cooke*, Bacon, V.-C., June 8th, 1886; *In re Wills*, (1893) 2 Ch. 262; and the same principle as to the lapse of five years has been applied in Scotland: *Cowie* v. *Herbert*, 14 P. R. 436; and a corresponding provision in the Victorian Act has received a similar construction: *Mitchell & Co.* v. *Joshua Bros.*, 17 V. L. R. 736. In *Lamplough* v. *Beedzler*, C. A., Nov. 12th, 1880, it was held that the registered words "Pyretic Saline"

were purely descriptive. See *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57; and *Wheeler* v. *Johnston*, 3 L. R. Ir. 284. In *In re Hayward & Co.*, 54 L. J. Ch. 1003, a note was entered on the register that in the case of a mark registered in 1885 the five years were to run from that date, and not from the date of the application, which was in 1879.

In the United States, registration only affords *primâ facie* evidence of ownership (Act of 1881, § 7), and amounts to nothing more than a mere record of a claim: *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183; and it has been there held that registration of descriptive words confers no right in them: *Van Beil* v. *Prescott*, 82 N. Y. 630; and that the use of a registered mark may be restrained: *Glen Cove Manufacturing Co.* v. *Ludeman*, 23 Bl. C. C. 46; *Schumacher & Ettlinger* v. *Schwenke* (2), 36 U. S. Pat. Gaz. 457. In Canada it has been repeatedly held that registration can be invalidated by proof that the registered proprietor was not the first to use the mark: *McCall* v. *Theal*, 28 Grant Up. Can. Ch. 48; *Partlo* v. *Todd*, 12 Ont. Rep. 171; *Watson* v. *Westlake*, 12 Ont. Rep. 449. But it has also been held that, for this to be so, the user by others must have been before the registered proprietor used the mark, not merely before he registered it: *Smith* v. *Fair*, 14 Ont. Rep. 729. Under the Canadian Statute it has been held that registration gives no right of action for anything done before registration: *Morse* v. *Martin*, Quebec Super. Ct., Feb. 28th, 1882; but neither the Quebec Court of Queen's Bench (3 Dorion, 353) nor the Canada Supreme Court (Cassel's Dig. 509) decided the point. In New South Wales the right to registration depends, not on priority of application, but on priority of user: *Harris* v. *Ogg*, 5 N. S. W. Rep. (E.) 114; and although registration has been held to be from the outset conclusive proof of the right of the registered proprietor: *Walker* v. *Cargill*, 5 N. S. W. Rep. (E.) 243, the use of a registered mark has been restrained by injunction: *Harris* v. *Ogg*, 5 N. S. W. Rep. (E.) 114; *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72.

(*b*) The right to the exclusive use of a trade mark, first asserted in *Gout* v. *Aleploglu*, 5 Leg. Obs. 495, and *Millington* v. *Fox*, 3 My. & Cr. 338, and after much discussion affirmed by the Chancery judges (see Ch. 6, *ante*), is now given by statute upon registration.

(*c*) See § 70 as to the connection with goodwill.

Restrictions on actions for infringement, and on defence to action in certain cases.

77. A person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of a trade mark unless, in the case of a trade mark capable of being registered under this Act, it has been registered in pursuance of this Act, or of an enactment repealed by this Act, or, in the case of any other trade mark in use before the thirteenth of August one thousand eight hundred and seventy-five, registration thereof under this part of this Act, or of an enactment repealed by this Act, has been refused (*a*). The comptroller may, on request, and on payment of the prescribed fee, grant a certificate that such registration has been refused (*b*).

Necessity for applying for registration.

(*a*) This part of this section comes from § 1 of the Act of 1876. By § 1 of the Act of 1875, failure to obtain registration was fatal to the owner of a trade mark, whether old or new. The effect of the alteration introduced by the Act of 1876 was clearly explained by Lord Blackburn in the House of Lords in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 498, in which he said: "This alters the Act of 1875 in two respects: it renders registration a condition precedent to a proceeding to recover damages, as well as to a proceeding to prevent infringement; and it provides that if the proprietor of a trade mark in use before the passing of the principal Act has been refused registration, he may, notwithstanding such refusal, institute proceedings, either for prevention of, or damages for, the infringement of such trade mark, and need not wait till he has got the register rectified." And again he said: "It seems to me that the effect of the Act of 1876 is, that if one who says he is the proprietor of a trade mark wishes to institute proceedings against some one who, as he says, is infringing it, he must first try to have his trade mark registered. If the registration is refused for any reason, he may apply (under § 5 of the Act of 1875) to have the register rectified, and then the Court will have to determine as the principal question whether the reason of the refusal was sufficient. But he

may also seek for more speedy redress. He may obtain a certificate of the refusal, and then institute proceedings to prevent the infringement, and then the Court will have to determine whether he was the proprietor of the trade mark." See, also, Malins, V.-C., in *In re Barrows*, 5 Ch. D. 353, 359, and *Twentsche Stoom Bleekery Goor* v. *Ellinger & Co.*, 26 W. R. 70. The present section differs from § 1 of the Act of 1876, in that by that section the alternative of registering or procuring a certificate of refusal was given to an owner of any old mark, whether the old mark was or was not capable of being registered, so that an owner of such a mark might safely be content with a certificate of refusal, however obviously wrong the refusal might be. In the present section it will be seen that this alternative is no longer given to owners of old marks capable of being registered. Such marks must now be registered or left unprotected. New marks which are incapable of being registered under § 64 need not apparently be either registered or refused registration. The effect of the present section is, as Fry, L.J., said, in *In re Hudson*, 32 Ch. D. 325, of § 1 of the earlier Act, to "put a fetter upon the right of suing" of the proprietor of a trade mark; and see *Mouson & Co.* v. *Boehm*, 26 Ch. D. 388; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 405; and *Sen-Sen Co.* v. *Britten*, (1899) 1 Ch. 692; and if the owner of a trade mark for which registration or refusal to register is required is unable, when suing an infringer, to produce a certificate of registration or of refusal to register, his remedy is barred: *Goodfellow* v. *Prince*, 35 Ch. D. 9; even though he has made application for registration, and has only failed to obtain it because of delay in the office (*Hazzopulo* v. *Kaufmann*, 23 Sol. J. 819); and where a trade mark is registered in the name of a foreign producer, an importer, even with an exclusive contract for the United Kingdom, cannot sue in his own name: *Richards* v. *Butcher* (1), 7 P. R. 288. In *Hart & Colley*, 44 Ch. D. 193, North, J., decided that a trade mark which had been registered for some only of the goods in a class could not be protected in respect of other goods in the same class for which it had not been registered, and this decision appears to be in accordance with the spirit of the Act. It has been held that where a mark has been properly registered under the Act, persons to whom it has been assigned with the goodwill are not precluded under this section from suing on it before transfer of the registration into their names: *Ihlee* v. *Henshaw*, 31 Ch. D. 323; and see *Reveliere* v. *Gateley*, 89 L. T. (Journal), 314; and the same has been decided in Canada: *Carey* v. *Goss*, 11 Ont. Rep. 619.

It appears that there is nothing in this section to preclude, in the absence of registration, the granting of an injunction where the get-up of goods has been imitated: *Lever* v. *Goodwin*, 36 Ch. D. 1 (with which compare the Canadian case of *Smith* v. *Fair*, 14 Ont. Rep. 729); nor where special words have been imitated, apart from trade mark: *Sanitas Co., Ld.* v. *Condy*, 4 P. R. 530; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 411, *per* Cotton, L. J.; nor where a distinctive name or mark has been imitated, under which the plaintiff's goods have become known in the market: *In re Sanitas Co., Ld.*, 4 P. R. 533; *Rodgers & Sons, Ld.* v. *Rottgen*, 5 Times L. R. 678: *Jay* v. *Ladler*, 40 Ch. D. 649; nor where the registered trade mark is usually placed with other matters on a label or wrapper: *Great Tower St. Tea Co.* v. *Langford & Co.*, 5 P. R. 66; *Ascough* v. *Johnson & Co.*, 3 Times L. R. 735; nor where spaces left blank in the trade mark as registered are in practice filled in: *Newman* v. *Pinto*, 4 P. R. 508, *per* Kekewich, J.; *Melachrino & Co.* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888.

Under the Canadian statute it has been held that registration only qualifies for suing in respect of acts done after registration, and not in respect of earlier acts: *Morse* v. *Martin*, Quebec Super. Ct., Feb. 28th, 1882. But the point was not decided either by the Quebec Ct. of Q. B. (3 Dorion, 353) or by the Supreme Court of Canada (Cassel's Dig. 509); and in *Smith* v. *Fair*, 14 Ont. Rep. 729, it was held that the account granted in cases of infringement should not be limited to the period of registration, at all events where fraud was proved. In the last-mentioned case it was also held that a plaintiff who has failed in an action for infringement by reason of non-registration is not debarred by that fact from bringing a fresh action after he has effected registration. In California an exclusive right to the use of a name or trade mark cannot now be acquired without registration as provided by the State Code: *Whittier* v. *Dietz*, 66 Cal. 78.

By § 1 of the Act of 1875, as amended by § 1 of the Act of 1876, the disability for suing without registration was to begin from July 1st, 1877. The time thus allowed for registration was extended, in the case of marks used in respect of any

goods in Classes 23 to 35 ("textiles," by § 1 of the Act of 1877, and Orders in Council of Dec. 12th, 1877, and June 29th, 1878, to Dec. 31st, 1878); and in the case of marks used in respect of cotton piece goods, by further Orders in Council of Nov. 27th, 1878, and May 17th, 1879, to July 31st, 1879. Since the date last mentioned, a certificate of registration or of refusal to register has been a *sine qud non* in all cases within the Acts.

(*b*) See § 96, Rule 60, and Forms L. & T[1]. See, also, *per* Chitty, J., in *In re Normal Co., Ld.*, 35 Ch. D. 231.

Certificate as to exclusive use and costs thereon.

[77A. In an action for infringement of a registered trade mark (*a*) the Court or a judge may certify that the right to the exclusive use of the trade mark came in question; and if the Court or a judge so certifies, then in any subsequent action for infringement the plaintiff in that action, on obtaining a final order or judgment in his favour, shall have his full costs, charges, and expenses as between solicitor and client, unless the Court or judge trying the subsequent action certifies that he ought not to have the same.]

This new section was introduced by § 18 of the Act of 1883.

(*a*) This new provision for the benefit of trade mark owners does not seem likely to be of much use to them, inasmuch as it only provides for a certificate being given where the right to a trade mark has come in question in an action for infringement; whereas the right to a trade mark is almost invariably contested on a motion to rectify, and the result of the action follows the result of the motion. Kay, J., has held that this provision does not apply to such a case: *B. Edgington, Ld.* v. *John Edgington & Co.*, 6 P. R. 513, and this appears to be so. In *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 411, a certificate was given; also in *Apollinaris Co.* v. *Snook*, 7 P. R. 474; and in *Pinto* v. *Badman*, 8 P. R. 181, 186. It seems that a certificate granted under this section is unappealable. See *Pinto* v. *Badman*, 8 P. R. 181, 188; *Haslam Co.* v. *Hall*, 20 Q. B. D. 491.

## *Register of Trade Marks.*

Register of trade marks.

78. There shall be kept at the Patent Office a book called the Register of Trade Marks (*a*), wherein shall be entered the names and addresses of proprietors of registered trade marks, notifications of assignments and of transmissions of trade marks, and such other matters as may be from time to time prescribed.

(*a*) The register of trade marks was previously kept under the authority of § 1 of the Act of 1875. As to entries in the register, see §§ 87, 91, and 92, and Rules 32—34, and 46—48, *infra*.

Removal of trade mark after fourteen years unless fee paid.

79.—(1.) At a time not being less than two months nor more than three months before the expiration of fourteen years (*a*) from the date of the registration of a trade mark, the comptroller shall send notice to the registered proprietor that the trade mark will be removed from the register unless the proprietor pays to the comptroller before the expiration of such fourteen years (naming the date at which the same will expire) the prescribed fee (*b*); and if such fee be not previously paid, he shall at the expiration of one month from the date of the giving of the first notice send a second notice to the same effect.

(2.) If such fee be not paid before the expiration of such fourteen years the comptroller may after the end of three months from the expiration of such fourteen years remove the mark from the register (*c*), and so from time to time at the expiration of every period of fourteen years.

(3.) If before the expiration of the said three months the registered proprietor pays the said fee together with the additional prescribed fee (*d*), the comptroller may, without removing such trade mark from the register, accept the said fee as if it had been paid before the expiration of the said fourteen years.

(4.) Where after the said three months a trade mark has been removed from the register for non-payment of the prescribed fee, the comptroller may, if satisfied that it is just so to do, restore such trade mark to the register on payment of the prescribed additional fee (*e*).

(5.) Where a trade mark has been removed from the register for non-payment of the fee or otherwise, such trade mark shall nevertheless, for the purpose of any application (*f*) for registration during *the five years* [one year] next after the date of such removal, be deemed to be a trade mark which is already registered [unless it is shown to the satisfaction of the comptroller that the non-payment of the fee arises from the death or bankruptcy of the registered proprietor, or from his having ceased to carry on business, and that no person claiming under that proprietor or under his bankruptcy is using the trade mark].

(*a*) This section comes from the old rules. The amendments were made by § 19 of the Act of 1888.

(*b*) *I.c.*, £1. See First Schedule. Also Form X.

(*c*) The removal and its cause are to be recorded, under Rule 47.

(*d*) *I.c.*, 10*s*. See First Schedule. Also Form Y.

(*e*) *I.c.*, £1. See First Schedule. Also Form Z.

(*f*) The effect of this is that (under § 72) the comptroller cannot, for one year after a mark has been removed from the register, place another similar mark on the register for similar goods, except under the circumstances stated in the words added to the sub-section.

*Fees.*

Fees for registration, &c.

80. There shall be paid in respect of applications and registration and other matters under this part of this Act, such fees as may be from time to time, with the sanction of the Treasury, prescribed by the Board of Trade (*a*); and such fees shall be levied and paid to the account of Her Majesty's Exchequer in such manner as the Treasury may from time to time direct.

(*a*) Under § 7 of the Act of 1875, these fees were fixed by the Lord Chancellor, with the assent of the Treasury. For the list of fees now fixed by the Board of Trade, see the First Schedule to the Rules. Also Rule 3. As to mode of payment, see Notice as to Fees, *infra*, p. 415.

*Sheffield Marks.*

Registration by Cutlers' Company of Sheffield marks.

81. With respect to the Master, wardens, searchers, assistants, and commonalty of the Company of Cutlers in Hallamshire, in the county of York (in this Act called the Cutlers' Company), and the marks or devices (in this Act called Sheffield marks) assigned or registered by the Master, wardens, searchers, and assistants of that Company (*a*), the following provisions shall have effect:

(1.) The Cutlers' Company shall establish and keep at Sheffield a new register of trade marks (in this Act called the Sheffield register):

(2.) *The Cutlers' Company shall enter* (*b*) *in the Sheffield register, in respect of cutlery, edge tools, or raw steel, and the goods mentioned in the next sub-section, all the trade marks entered before the commencement of this Act in respect of cutlery, edge tools, or raw steel and such goods in the register established under the Trade Marks Registration Act*, 1875, *belonging to persons carrying on business in Hallamshire, or within six miles thereof, and shall also enter in such register, in respect of the same goods, all the trade marks which shall have been assigned by the Cutlers' Company and actually used before the commencement of this Act, but which have not been entered in the register established under the Trade Marks Registration Act*, 1875 (*c*).

[(2.) The Cutlers' Company shall enter in the Sheffield register, in respect of metal goods as defined in this section, all the trade marks entered before the first day of January one thousand eight hundred and eighty-nine, in respect of metal goods, either in the register established under the Trade Marks Registration Act, 1875, or in the register of trade marks under this Act, belonging to persons carrying on business in Hallamshire or within six miles thereof. The Cutlers' Company shall also, on request made in the prescribed manner, enter in the Sheffield register, in respect of metal goods, all the trade marks which shall have been assigned by the Cutlers' Company and actually used before the first day of January one thousand eight hundred and eighty-four, but which have not been entered in either of the said registers (*d*).]

(3.) An application for registration of a trade mark used *on cutlery, edge tools, or on raw steel, or on goods made of steel, or of steel and iron combined, whether with or without a cutting edge*, [on metal goods] shall, if made after the commencement of this Act by a person carrying on business in Hallamshire, or within six miles thereof, be made to the Cutlers' Company (*e*).

(4.) Every application so made (*f*) to the Cutlers' Company shall be notified to the comptroller in the prescribed manner (*g*), and unless the comptroller within the prescribed time (*h*) gives notice to the Cutlers' Company that he objects to the acceptance of the application, it shall be proceeded with by the Cutlers' Company in the prescribed manner (*i*):

(5.) If the comptroller gives notice of objection as aforesaid, the application shall not be proceeded with by the Cutlers' Company, but any person aggrieved may appeal to the Court:

(6.) Upon the registration of a trade mark in the Sheffield register the Cutlers' Company shall give notice thereof to the comptroller, who shall thereupon enter the mark in the register of trade marks; and such registration shall bear date as of the day of application to the Cutlers' Company, and have the same effect as if the application had been made to the comptroller on that day:

(7.) *The provisions of this Act, and of any general rules made under this Act, with respect to application for registration in the register of trade marks, the effect of such registration, and the assignment and transmission of rights in a registered trade mark, shall apply*

*in the case of applications and registration in the Sheffield register (j); and notice of every entry made in the Sheffield register must be given to the comptroller by the Cutlers' Company, save and except that the provisions of this sub-section shall not prejudice or affect any life estate and interest of a widow of the holder of any Sheffield mark which may be in force in respect of such mark at the time when it shall be placed upon the Sheffield register (k):*

[(7.) The provisions of this Act, and of any general rules made under this Act, with respect to the registration of trade marks, and all matters relating thereto, shall, subject to the provisions of this section, apply to the registration of trade marks on metal goods by the Cutlers' Company, and to all matters relating thereto; and this Act and any such general rules shall, so far as applicable, be construed accordingly, with the substitution of the Cutlers' Company, the office of the Cutlers' Company, and the Sheffield Register, for the comptroller, the Patent Office, and the Register of Trade Marks respectively; and notice of every entry, cancellation, or correction made in the Sheffield Register shall be given to the comptroller by the Cutlers' Company: provided that this section shall not affect any life estate and interest of a widow of the holder of any Sheffield mark which may be in force in respect of such mark at the time when it shall be placed upon the Sheffield Register (*l*).]

(8.) Where the comptroller receives from any person not carrying on business in Hallamshire or within six miles thereof an application for registration of a trade mark used on *cutlery, edge tools, or on raw steel, or on goods made of steel, or of steel and iron combined, whether with or without cutting edge,* [on metal goods] he shall in the prescribed manner (*m*) notify the application and proceedings thereon to the Cutlers' Company (*n*):

(9.) At the expiration of five years from the commencement of this Act the Cutlers' Company shall close the Cutlers' register of corporate trade marks, and thereupon all marks entered therein shall, unless entered in the Sheffield register, be deemed to have been abandoned:

(10.) A person may (notwithstanding anything in any Act relating to the Cutlers' Company) be registered in the Sheffield register as proprietor of two or more trade marks:

(11.) A body of persons, corporate or not corporate, may (notwithstanding anything in any Act relating to the Cutlers' Company) be registered in the Sheffield register as proprietor of a trade mark or trade marks (*o*):

(12.) Any person aggrieved by a decision of the Cutlers' Company in respect of anything done or omitted under this Act may, in the prescribed manner, appeal (*p*) to the comptroller, who shall have power to confirm, reverse, or modify the decision, but the decision of the comptroller shall be subject to a further appeal to the Court:

(13.) So much of the Cutlers' Company's Acts as applies to the summary punishment of persons counterfeiting Sheffield corporate

marks, that is to say, the fifth section of the Cutlers' Company's Act of 1814, and the provisions in relation to the recovery and application of the penalty imposed by such last-mentioned section contained in the Cutlers' Company's Act of 1791, shall apply to any mark entered in the Sheffield register (*q*).

[(14.) For the purposes of this section, the expression "metal goods" means all metals whether wrought, unwrought, or partly wrought, and all goods composed wholly or partly of any metal.

(15.) For the purpose of legal proceedings in relation to trade marks entered in the Sheffield register a certificate under the hand of the Master of the Cutlers' Company shall have the same effect as the certificate of the comptroller.]

The amendments in this section were made by § 20 of the Act of 1888.

(*a*) As to the Cutlers' Company, the old Sheffield corporate marks, and the system which prevailed with respect to Sheffield marks under the Trade Marks Registration Act, 1875, see Appendix G., *infra*. The specified goods now form a much wider class than formerly. The present section provides for the closing of the old Cutlers' register, and the immediate establishment of a new one, which will be an exact duplicate of the general register, so far as it relates to marks used for the specified goods within the specified limits.

(*b*) Under this sub-section the Cutlers' Company are performing a mere ministerial act in registering marks which come within this sub-section, whether the marks are registered on the Company's own motion or on the application of a party claiming to be the proprietor of the marks, and there is no appeal from their action under sub-s. (12), nor any *locus standi* for an opposition to an application to them to register a mark under this sub-section, and they are directed to register marks within the sub-section for all the goods mentioned in the sub-section, though they may have been used for some only of those goods. And they are authorised to register, under this sub-section, marks which have been assigned by the proprietor on the Sheffield register to another, but which have not been surrendered by him to the Company and re-assigned by them to the assignee: *In re Lambert*, 5 P. R. 542; 6 *ib.* 344.

(*c*) By § 9 (6) of the Act of 1875, Sheffield corporate marks were allowed to be registered in the trade marks register in the same manner and upon the same terms and conditions in and upon which they might have been registered if they were not corporate marks. Under this provision it was held that where a corporate mark had been assigned by its proprietor, but had not been surrendered to the Company and re-assigned by them to the assignee, he must perfect his title with the Company before he could obtain registration under the Act: *In re Rabone*, Dig. 643. There was, however, no requirement for corporate marks to be registered.

(*d*) See form of application at end of Second Schedule to Rules, *infra*, p. 484.

(*e*) This sub-section relates to new marks not within sub-s. (2), and it appears that applications to register such marks may be opposed by other persons in the trade (*In re Lambert*, 5 P. R. 542, *per* North, J.); and that if the Cutlers' Company refuse to hear such opposition the opponent's proper remedy is by mandamus: *ib.* 6 P. R. 344, *per* Bowen, L. J. Applications under this sub-section are to be made in duplicate, accompanied by the prescribed fees and representations: Rule 56.

(*f*) This and the two next sub-sections relate to new marks: *In re Lambert*, 5 P. R. 542.

(*g*) By sending to the comptroller one copy of the application and two representations of the mark for each class, within seven days after receipt of the application: Rule 57.

(*h*) One month from the receipt by the comptroller of the notice from the Company: Rule 58 (1).

(*i*) The Company is to require the applicant to send the comptroller a wood block or electrotype, and the comptroller is to advertise the application as in other cases: Rule 58 (2).

(*j*) It appears that this first part of this sub-section relates to new marks only: *In re Lambert*, 5 P. R. 542.

(*k*) This latter part of this sub-section relates to all Sheffield marks, new or old: *In re Lambert*, 5 P. R. 542. See Rule 59, by which the proceedings at Sheffield are assimilated to those in London.

(*l*) It has been held that the company ought not to allow the register to be amended upon a change of name of the proprietor of a Sheffield mark without an order of the Court: *In re Burgon & Wilkinson*, 40 Sol. J. 336.

(*m*) By sending a copy of the official paper, with a note distinguishing the application: Rule 58 (3).

(*n*) In *In re Rosing*, 54 L. J. Ch. 975, the Company opposed the registration of a trade mark on the ground of similarity to a corporate mark, but, the objection failing in the Court of First Instance, were ordered to pay the costs of the motion. On appeal, however, the objection taken by the Company was supported.

(*o*) Compare Rule 41.

(*p*) This sub-section applies to all cases in which the Cutlers' Company have arrived at a decision, but not to cases in which the Company have performed a mere ministerial act—*e.g.*, by registering an old mark under sub-section (2), in which case there is no appeal: *In re Lambert*, 5 P. R. 542. For Form of Notice of Appeal, see Form W.

(*q*) These provisions are, shortly, that a counterfeiter may be fined not exceeding 20*l.* by a justice or justices of the peace, subject to an appeal to Quarter Sessions. See Appendix H., *infra*.

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# PART V.

## GENERAL.

### *Patent Office and Proceedings thereat.*

Patent Office.

82.—(1.) The Treasury may provide for the purposes of this Act an office with all requisite buildings and conveniences, which shall be called, and is in this Act referred to as, the Patent Office:

(2.) Until a new Patent Office is provided, the offices of the Commissioners of Patents of inventions and for the registration of designs and trade marks existing at the commencement of this Act (*a*) shall be the Patent Office within the meaning of this Act.

(3.) The Patent Office shall be under the immediate control of an officer called the comptroller-general of patents, designs, and trade marks (*b*), who shall act under the superintendence and direction of the Board of Trade.

(4.) Any act or thing directed to be done by or to the comptroller may, in his absence, be done by or to any officer for the time being in that behalf authorised by the Board of Trade.

(*a*) This is in Southampton Buildings, Chancery Lane, W.C.

(*b*) Under the Trade Marks Registration Acts the registrar was at the head of the Registry Office.

Officers and clerks.

83.—(1.) The Board of Trade (*a*) may at any time after the passing of this Act, and from time to time, subject to the approval of the Treasury, appoint the comptroller-general of patents, designs, and trade marks, and so many examiners and other officers and clerks, with such designations and duties as the Board of Trade think fit, and may from time to time remove any of those officers and clerks.

(2.) The salaries of those officers and clerks shall be appointed by the Board of Trade, with the concurrence of the Treasury, and the

same and the other expenses of the execution of this Act shall be paid out of money provided by Parliament.

(*a*) The authority given by this section to the Board of Trade was formerly possessed by the Lord Chancellor, under § 7 of the Act of 1875.

Seal of Patent Office.

84. There shall be a seal for the Patent Office, and impressions thereof shall be judicially noticed and admitted in evidence.

Trust not to be entered in registers.

85. There shall not be entered in any register kept under this Act, or be receivable by the comptroller, any notice of any trust expressed, implied or constructive (*a*).

(*a*) This section, so far as it relates to trade marks, comes from the old Rules. Under this section an order to rectify the register by adding to the registration of a trade mark a note stating that the user was restricted by an agreement of which the date only was given, was varied so that the terms of the agreement should appear on the face of the register (*In re Mitchell & Co.*, 28 Ch. D. 666); and in another case a similar agreement was allowed to be stated in the register so far as it restricted the goods on which a registered trade mark was to be used, but not so far as it regulated the manner of user or the way in which orders were to be executed: *In re De Otaduy*, W. N. 1886, p. 177. And the entry of such notes is not now regarded favourably.

Refusal to grant patent, &c. in certain cases.

86. The comptroller may refuse to grant a patent for an invention, or to register a design or trade mark, of which the use would, in his opinion, be contrary to law or morality (*a*).

(*a*) This is a new section, and, so far as it relates to trade marks, does not seem to carry much farther the provisions of § 6 of the Act of 1875, now re-enacted in § 73, *supra*, prohibiting the registration of a scandalous design as a trade mark.

Entry of assignments and transmissions in registers.

87. Where a person becomes entitled by assignment, transmission, or other operation of law to a patent, or to the copyright in a registered design, or to a registered trade mark, the comptroller shall on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent, copyright in the design, or trade mark, in the register of patents, designs, or trade marks, as the case may be (*a*). The person for the time being entered in the register of patents, designs, or trade marks, as proprietor of a patent, copyright in a design, or trade mark, as the case may be, shall, subject to [the provisions of this Act and to] any rights appearing from such register to be vested in any other person, have power absolutely to assign (*b*), grant licences (*c*) as to, or otherwise deal with, the same, and to give effectual receipts for any consideration for such assignment, licence, or dealing. Provided that any equities in respect of such patent, design, or trade mark may be enforced in like manner as in respect of any other personal property (*d*).

The amendment in this section was made by § 21 of the Act of 1888.

(*a*) As to the mode of obtaining registration as a subsequent proprietor, see Rules 36—40 and Form K. Though § 4 of the Act of 1875 is not re-enacted, it seems that a subsequent proprietor will still, as regards his title to the trade mark, be in the same position as if his title were a continuation of the title of the first registered proprietor. In *In re Bryant & May, Ld.*, 4 Times L. R. 675, a question was raised as to a title by assignment, and it was held that an agreement to assign the goodwill and trade marks was sufficient. Where a registered proprietor changes his name, the comptroller has power under this section to make the requisite alteration in the register, and it seems that if he refuses, the Court may interfere under § 90: *In re New Ormonde Cycle Co.*, (1896) 2 Ch. 520.

(*b*) A trade mark can be assigned only in connection with the goodwill of the business. See § 70, *supra*. Also *In re Wellcome*, 32 Ch. D. 213; and Ch. III. ("Transfer").

(*c*) The power of granting licences must not be exercised so as to deceive the public, *e.g.*, so as to authorise the use of the mark on inferior goods. Nor does a licence to use a trade mark give any right to the exclusive use of a part only of the mark, which part would not of itself be capable of registration: *Lewis's* v. *Goodbody*, 67 L. T. N. S. 194. See Ch. VII. The power of granting licences at all seems, in the case of trade marks, rather to conflict with § 70; the intention of which appears to be that only the person entitled to the goodwill shall have the right of using the trade mark.

(*d*) This proviso prevents the power of licensing from being used so as to defeat an agreement between former partners giving a restricted right to each to use the firm marks, such power being inconsistent with the purpose of the agreement: *Hanson* v. *Game, Harrison & Larner, Ld.*, 9 P. R. 186.

Inspection of and extracts from registers.

88. Every register kept under this Act shall at all convenient times be open to the inspection of the public, subject to [the provisions of this Act and to] such regulations as may be prescribed (*a*); and certified copies, sealed with the seal of the Patent Office, of any entry in any such register shall be given to any person requiring the same on payment of the prescribed fee (*b*).

The amendment in this section was made by § 22 of the Act of 1888.

(*a*) This section is taken from the old Rules. See Rule 52 for the present regulations. The fee for inspection is 1*s.* for every quarter of an hour.

(*b*) See First Schedule.

Sealed copies to be received in evidence.

89. Printed or written copies or extracts, purporting to be certified by the comptroller and sealed with the seal of the Patent Office, of or from patents, specifications, disclaimers and other documents in the Patent Office, and of or from registers and other books kept there, shall be admitted in evidence in all courts in Her Majesty's dominions, and in all proceedings, without further proof or production of the originals.

Rectification of registers by Court.

90.—(1.) The Court may on the application (*a*) of any person aggrieved (*b*) by the omission without sufficient cause of the name of any person [or of any other particulars] (*c*) from any register kept under this Act, or by any entry made without sufficient cause in any such register (*d*), make such order for making (*e*), expunging (*f*), or varying (*g*) the entry, as the Court thinks fit; or the Court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the Court thinks fit (*h*).

(2.) The Court may, in any proceeding under this section, decide any question that it may be necessary or expedient to decide for the rectification of a register, and may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved.

(3.) Any order of the Court rectifying a register shall direct that due notice of the rectification be given to the comptroller (*i*).

This section comes from § 5 of the Act of 1875, but is in rather different terms. The amendment was made by § 23 of the Act of 1888.

Mode of procedure for rectification.

(*a*) The register cannot be rectified on counterclaim, and it seems questionable whether it can be rectified in an action: *Pinto* v. *Badman*, 8 P. R. 181, 187, 190. See, however, *Pinto* v. *Trott*, 8 P. R. 173. The Act is silent as to the procedure to be followed upon an application to expunge a mark registered in the name of a person domiciled out of the jurisdiction, and it seems that if sufficient notice of the

nature of the application is given to the registered proprietor, the form of the notice is immaterial, but the usual course is to address the notice of motion to the comptroller only, and to send a copy of such notice to the registered proprietor with a letter informing him of the nature of the proceedings: *In re King & Co.*, (1892) 2 Ch. 462; *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer*, (1891) 3 Ch. 451; *In re Royal Baking Powder Co.*, 14 P. R. 425. It further appears that an application under this section is not subject to all the technical rules which apply to notices of motion, and therefore the alteration of the notice is a matter of detail, so that the striking out the name of the registered proprietor as respondent, or changing the date of the hearing, does not make it a new notice of motion requiring to be re-marked with the name of the judge in rotation. As a general rule the foreign proprietor who desires to appear on a motion for rectification will not be required to give security for costs: *In re La Société Anonyme des Verreries de l'Etoile* (1), 10 P. R. 290; but see *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer*, (1891) 3 Ch. 451.

"Person aggrieved."

(*b*) The first question on an application to rectify the register under this section is whether the applicant is or is not a "person aggrieved." This question usually has to be considered with reference to cases in which it is alleged that a mark which is on the register ought not to be there; and it has been said that in such cases "any person interested in the same trade as the registered proprietor" is a person aggrieved (*Rose* v. *Evans*, 48 L. J. Ch. 618); and that "the course of decision before the Act of 1883 was passed was that any person interested in the same trade might, without showing any special damage, be treated as a 'person aggrieved' by any improper or inaccurate registration": *In re Hayward & Sons*, 54 L. J. Ch. 1003. This principle was also acted on in *In re Edge*, 8 P. R. 207. That there must be some legal damage was laid down by Lord Selborne, C., in *In re Riviere*, 26 Ch. D. 48, where he pointed out that what was necessary to constitute a "person aggrieved" was that the thing complained of should be one of the grievances mentioned in the section, and that it should tend to his injury, to inflict upon him some damage, in a legal sense. Similarly, on the further hearing of the same case (53 L. T. N. S. 239), it was said by Fry, L. J., that "'any person aggrieved' means 'every person who will in reasonable probability suffer any injury or loss'—using those words in a legal and not in a sentimental sense—from the other persons claiming to use it": and *per* Lindley, L. J. (S. C.), that the person must be aggrieved "in the sense of sustaining legal damage, either immediate or prospective." The question was much considered in the case of *In re Apollinaris Co.*, (1891) 2 Ch. 186, in which the Vichy Co. sought to expunge certain marks registered by the Apollinaris Co., and Fry, L. J., in delivering the judgment of the Court of Appeal said (p. 224), "Are the Vichy Co. persons aggrieved? Now we approach this question on the assumption, which is necessary, of course, to answer this question, that the trade mark was wrongly on the register, and further, with these two observations in the first place, that the question is merely one of *locus standi*, and in the second, that the words 'person aggrieved' appear to us to have been introduced into the statute to prevent the action of common informers or of persons interfering from merely sentimental motives, but that they must not be so read as to make evidence of great and serious damage a condition precedent to the right to apply. Further, we are of opinion that whenever one trader, by means of his wrongly-registered trade mark, narrows the area of business open to his rivals, and thereby either immediately excludes, or with reasonable probability will in the future exclude, a rival from a portion of that trade into which he desires to enter, that rival is 'an aggrieved person.' Again, if the effect produced, or likely to be produced, by the wrongful trade mark is not the exclusion, but the hampering, of a rival trader, that rival trader, again, is in our opinion a person aggrieved. A man in the same trade as the one who has wrongfully registered a trade mark, and who desires to deal in the article in question, is *primâ facie* 'an aggrieved person.' This may be rebutted by showing that, by reason of some circumstances entirely independent of the trade mark, the person complaining never could carry on any trade in the article; but the burden of tendering such proof is on the man who claims the mark, and here that burden has not been discharged." That case was discussed in *In re Powell*, (1893) 2 Ch. 388, in which Bowen, L. J., says "persons who are aggrieved are persons who are in some way or other substantially interested in having the mark removed from the register, or persons who would be substantially damaged if the mark remained. It is very difficult to frame a nearer definition than that. In the *Apollinaris Case*, (1891) 2 Ch. 186, it was pointed out, not as a complete or exhaustive definition, that people would be aggrieved if they were in the same trade and dealt

in the same article. To my mind, it is equally true that persons would be aggrieved if they are in the same trade, and might reasonably be expected to deal in the same article, though not prepared to prove at the moment that they had formed a clear determination to do so." *In re Powell* was affirmed by the House of Lords ((1894) A. C. 8), and Lord Herschell there said: "Wherever it can be shown that the applicant is in the same trade as the person who has registered the trade mark, and wherever the trade mark, if remaining on the register, would or might limit the legal rights of the applicant so that, by reason of the existence of the entry upon the register, he could not lawfully do that which, but for the appearance of the mark upon the register, he could lawfully do, it appears to me that he has a *locus standi* to be heard as a person aggrieved." And see *In re Talbot*, 11 P. R. 77. But an applicant, in order to show that he is a "person aggrieved," must show that in some possible way he may be damaged or injured if the trade mark is allowed to stand, the word "possible" being used in a practical sense and not fantastically: *per* Romer, J., approved by the Court of Appeal in *In re Wright, Crossley & Co.*, 15 P. R. 131: *ib.* 377. And where the mark sought to be removed is the name of the registered proprietor who has for many years carried on business under his own name, it can make no difference to an applicant having no right to the name that the name has been registered as a trade mark: *ib.* Where the grievance of the applicant is not that he can possibly be damaged by the particular entry on the register, but that he may be damaged by the respondent having any mark on the register, he is not a "person aggrieved": *per* Lindley, M. R., in *In re Wright, Crossley & Co.*, 15 P. R. 377. The observations of Lord Herschell in *In re Powell*, (1894) A. C. 8, do not justify the statement that the mere fact that a man is engaged in the same trade is sufficient to make him a person aggrieved. That is contrary to the principle of the decision in the House of Lords: *per* Rigby, L. J., *In re Wright, Crossley & Co.*, 15 P. R. 377.

Grievance by use of the trade mark in legal proceedings.

The commonest case is where the proprietor of a registered trade mark brings an action for infringement of it, and the defendant applies to have it removed from the register, on the ground that it never ought to have been placed there. In such cases it has been repeatedly held that the person sued is entitled to apply as a "person aggrieved": *In re Ralph*, 25 Ch. D. 194; *In re Leonard & Ellis*, 26 Ch. D. 288; *Lloyd & Sons* v. *Bottomley*, 27 Ch. D. 646; *In re Wragg*, 29 Ch. D. 551; *Edwards* v. *Dennis*, 30 Ch. D. 454; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Spencer*, 54 L. T. N. S. 659; *In re Lever*, Chitty, J., Dec. 3rd, 1886; *In re Tougood*, 4 P. R. 67; *In re Ainslie*, 4 P. R. 212; *In re Perry Davis & Son*, 5 P. R. 333; 15 App. Cas. 316; *Baker* v. *Rawson*, 45 Ch. D. 519, 529; *Richards* v. *Butcher* (2), (1891) 2 Ch. 522. In *In re Gianaclis*, 6 P. R. 467, this was held to be so, though no relief was claimed in the action as for infringement of trade mark, seeing that the registration was set out in detail in the statement of claim, thus showing that it was intended to make some use of it. And in *Thompson* v. *Montgomery*, 41 Ch. D. 35, words registered as a trade mark were removed from the register on the application of a person who was restrained by the same judgment from using them, and Lindley, L. J., said that "it is the duty of the Court, where its attention is called to an improper entry upon the register, to rectify upon an application being made." A similar result was brought about in the Yorkshire Relish case: *Powell* v. *Birmingham Vinegar Brewery Co.*, (1894) A. C. 8; *Birmingham Vinegar Brewery Co.* v. *Powell*, (1897) A. C. 710. Somewhat similarly it was held in *In re Ainslie*, 4 P. R. 212, that the fact that the applicants for rectification had contracted with the proprietors of the registered words "Ben Ledi," to sell no whiskey but theirs under that name, did not prevent them from applying as persons aggrieved. Equally a person is aggrieved when the presence of a mark on the register is used by the registered proprietor to support an application for the registration of a fresh mark, which is opposed by the person aggrieved. This was the case in *In re Apollinaris Co.*, (1891) 2 Ch. 186, in which Fry, L. J., said (p. 229): "In our opinion, when one trader uses the fact of his registration as any part of his case against another trader in any legal proceedings, that second trader is aggrieved, and this is not the less so because that trader may have other means of defending himself. If the owner of the registered trade mark says to a defendant in a litigation 'I am the owner of this registered trade mark, and therefore you are doing me a wrong,' the person attacked ought to be at liberty to reply two things: first, 'You ought not to be on the register,' and secondly, 'Even if you ought, I have done you no wrong.' The completeness of the second line of defence ought not to preclude the attacked person from availing himself of the first. If I am assailed with the conclusion of a syllogism, I am at liberty, both in logic and in law, to defend myself by denying

both or either of the two propositions which are alleged in support of the conclusion, and I am aggrieved if I am unjustly deprived of that right. This liberty of defence is a matter of great importance to a litigant." In *In re Vignier*, 6 P. R. 490, the applicants were aggrieved, they having registered and used the word "Monopole" for champagne, and the respondents having registered the similar word "Monobrut." But where the alleged grievance consists in registering a mark which is not too similar to an earlier mark, there is no grievance: *In re Lambert*, 6 P. R. 344. In *In re Batt & Co.*, 6 P. R. 493, the applicants had used the word "Brymbo" on iron and steel, and the respondents had registered the words "The Brymbo Special" for the whole of Class 5, having used it only for tin-plates; and although the respondents offered to limit their registration to tin-plates, it was held that the applicants, being aggrieved by the registration as it stood, and the mark being bad in itself, it must come off altogether. There is no ground for thinking that only a person who is himself entitled to registration can be a person aggrieved (*In re Riviere*, 26 Ch. D. 48), and it is not impossible for a person who only carries on a foreign trade to be aggrieved by a wrongful registration. *Ib.* If a registered proprietor becomes insolvent while proceedings to rectify his registration are pending, his representative in bankruptcy may be added as a respondent to the application for rectification: *In re Rowe*, 48 L. T. N. S. 388.

(*c*) These words, now inserted, remove the possibility of any question whether the Court is enabled under this section to direct any other entry than that of a name to be made. It has been decided that the Court has power to direct the correction of any entry which has been improperly made in the register, whether of a name or of a mark: *In re Arbenz*, 35 Ch. D. 248.

(*d*) With reference to the words "entry made without sufficient cause," it was said by Fry, L. J., in *In re Apollinaris Co.*, (1891) 2 Ch. 186, 234, 235, that: "The object of the statute is to protect trade marks, that is, marks placed on goods to indicate their origin, or their selection, or their importation, or some other trade qualification, and thereby to give information with regard to those goods to all persons trading in them. They are marks under which the trader trades. It may well be that in the case of new marks the intention to use as a trade mark may be presumed; but when it is apparent, as it is here, by the evidence and admissions at the bar, that there is no such intention, but that the registration is directed to a different end, then the entry has, within the meaning of § 90, been made without sufficient cause, and ought to be expunged." Further, it has been held by the Court of Appeal that these words are to be read, not as if they were "made without sufficient cause at the time of registration," but as including any entry at any time on the register without sufficient cause, however it got there: *In re Batt & Co.*, (1898) 2 Ch. 432.

Rectification by registration.

(*e*) It seems that the Court has no jurisdiction to rectify the register under this section, unless some entry has been made in it; and it cannot rectify the register by directing a mark to be registered after it has been refused registration by the comptroller, except upon an appeal from the comptroller to the Board of Trade, referred by the Board to the Court under § 62: *In re Normal Co., Ld.*, 35 Ch. D. 231. An application to register, which is opposed by another trader, is not an application to rectify under this section, but is governed by § 69: *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278. The jurisdiction to rectify by making an entry is, therefore, confined to small matters of detail.

Rectification by removal.

(*f*) On an application to remove a mark from the register, the question whether it was entitled to registration must be decided as at the date when registration was effected: *Wood* v. *Lambert*, 32 Ch. D. 247; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 400; *In re Apollinaris Co.*, (1891) 2 Ch. 186, 230; *In re Borril T. M.*, (1896) 2 Ch. 609. But see *In re Batt*, (1898) 2 Ch. 432. The burden of proof is upon the applicant for removal, but he may prove his case by the statements in or omissions from the evidence tendered on behalf of the registered proprietor: *In re Leonard & Ellis*, 26 Ch. D. 288; *Pinto* v. *Badman*, 8 P. R. 189. Consequently, if the mark is one which was inherently capable of being used as a trade mark, and the application for removal is based on an allegation that it was not used as a trade mark, but as a descriptive term, the burden of proving that it was not used as a trade mark is on the applicant. See *per* Cotton, L. J., in *In re Leonard & Ellis*, 26 Ch. D. 288. And where a word was registered in 1878 as an old mark, and an application was made in 1889 to remove it from the register on the ground that it had not been used as a trade mark before 1875, and the original proprietor and his family were dead, and his successors in business failed to prove user of the

Burden of proof.

word *per se* as a trade mark on the goods before 1875, though they proved user in various other ways before that date, Kay, J., while refusing to receive in evidence the statutory declaration made by the original proprietor on applying for registration, held that the applicants for removal after so great a lapse of time had not discharged the burden which rested on them, and that the mark could not be directed to be removed from the register: *B. Edgington, Ld.* v. *J. Edgington & Co.*, 6 P. R. 513. "The Court is not bound, upon the application of an unmeritorious applicant, to displace an entry on the register which, on the face of it, is not illegal, because the original registration might have been opposed on the ground of prior user by a third person who never opposed it on any such ground, and who at the time of the motion to rectify has discontinued such user:" *per* Bowen, L. J., in *In re Paine* (2), (1893) 2 Ch. 567; and see *In re Wright, Crossley & Co.*, 15 P. R. 131, 377; though it seems that if the mark were in itself illegal or improper the Court would expunge the entry in the interests of trade whatever the demerits of the applicant: *In re Paine* (2), (1893) 2 Ch. 567. And see *In re Hill*, 10 P. R. 113; *In re Talbot*, 11 P. R. 77.

Comparison of marks.

Where it is sought to remove a trade mark from the register on the ground of its too great similarity to an earlier mark, it is necessary, when comparing the two marks, to take into consideration (1) the manner in which blanks left in the earlier mark as registered are filled in in practice; (2) the manner in which the parts common to the trade are arranged; (3) the opinion of the trade as to the probability of deception: *In re Christiansen*, 3 P. R. 54, in which Lopes, L. J., said, as to the second point: "In dealing with matters which are common to the trade, I think we must look at the combination of those different matters common to the trade, their collocation and arrangement, and if we find things that are common to the trade all inserted in a similar position, in a similar form, and in similar arrangements, so as to make the whole so similar as to be calculated to deceive, I think that is enough." As to the third point, see *Mitchell* v. *Henry*, 15 Ch. D. 181. It is, however, necessary, when making such a comparison, to deal with the two marks on the footing that both will be fairly used (*In re Lambert*, 6 P. R. 344, *per* Cotton, L. J.; *In re Kutnow*, 10 P. R. 401); and it is not a ground for expunging a mark that a fraudulent use might be possible: *In re Wright, Crossley & Co.*, 15 P. R. 131. In considering the probability of deception, the length of time during which a mark has been on the register is material: *In re Talbot*, 11 P. R. 77. And see notes to § 72. In determining whether an application to expunge should not be granted if an opposition to registration would have been successful, two things ought to be considered: (1) What was the reason of the delay in the application to expunge; (2) Has there been any substantial injury caused to the respondent through the application not having been made until after registration: *per* Romer, J., in *Eastman Photographic Materials Co.* v. *Griffiths Cycle Co.*, 15 P. R. 105, in which case a mark identical with a previous mark but registered in another class was ordered to be removed from the register on the ground that an opposition to registration would have been successful according to the principles laid down in *Eno* v. *Dunn*, 15 App. Cas. 252.

Cases of removal.

The cases in which marks have been removed from the register are numerous, and the grounds of removal may be classified as follows:—

(i.) Name not printed in a distinctive manner (§ 64 (1) (*a*)): *In re Gianaclis*, 6 P. R. 467 ("Gianaclis Cigarettes"); *In re Hannay*, 7 P. R. 46 ("Hannay's Electroid Anti-fouling Composition"); *In re Edge*, 8 P. R. 207 ("Edge's Filtered Blue"); *Pirie* v. *Goodall*, (1892) 1 Ch. 42 ("Pirie's Parchment Bank" note-paper).

(ii.) Device not distinctive, being in common use in the trade (§ 64 (1) (*c*)); *In re Wragg*, 29 Ch. D. 551 (Syphon, hand and glass).

(iii.) Words not distinctive or fancy words, being in common use in the trade (§ 64 (1) (*c*), § 64 (3)): *In re Hyde & Co.*, 7 Ch. D. 724 ("Bank of England" sealing-wax); *In re Lloyd & Sons*, 27 Ch. D. 646 ("La Minerva Habana" cigars); *Great Tower St. Tea Co.* v. *Smith*, 6 P. R. 165 ("Tower Tea").

(iv.) Words not distinctive or fancy words, being descriptive (§ 64 (1) (*c*), § 64 (3)): *In re Palmer* (3), 24 Ch. D. 504 ("Braided Fixed Stars" cigar-lights); *In re Harden Star, &c. Co., Ld.*, 3 P. R. 132 ("Hand Grenade Fire Extinguisher"); *In re Stock*, 52 L. T. N. S. 123 ("Strathmore" whiskey); *In re Lever*, Chitty, J., Dec. 3rd, 1886, following *Lever* v. *Goodwin*, 36 Ch. D. 1 ("The Self Washer" soap); *In re*

*Vaughan-Jones*, North, J., June 21st, 1884 ("Glenlivet" whiskey): *In re Towgood Bros.*, 4 P. R. 67 ("The Jubilee" note-paper); *In re Ainslie*, 4 P. R. 212 ("Ben-Ledi" whiskey); *In re Laing*, L. J. N. of C. 1887, p. 102 ("Glengowrie Blend of fine old Highland Whiskey"); *In re Arbenz*, 35 Ch. D. 248 ("Gem" air-guns); *In re Waterman*, 39 Ch. D. 29 ("Reversi" game); *In re Perry Davis & Son*, 5 P. R. 333; 15 App. Cas. 316 ("Pain-Killer" medicine); *In re Davis & Co.*, 6 P. R. 207 ("Bokül" beer); *Humphries* v. *Taylor Drug Co.* (2), 5 P. R. 687 ("Herbalin" medicine); *Great Tower St. Tea Co.* v. *Smith*, 6 P. R. 165 ("Tower Tea"); *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274 ("Washerine" soap); *In re Vignier*, 6 P. R. 490 ("Monobrut" champagne); *In re Batt & Co.*, 6 P. R. 493 ("The Brymbo Special" metal goods); *In re Hannay*, 7 P. R. 46 ("Elec[illegible]" anti-fouling composition); *In re Apollinaris Co.*, (1891) 3 Ch. [illegible] ("Apollinaris," "[illegible]drichshall" and "Hunyadi [illegible]os" mineral waters and products); *In re Edge*, 8 P. R. 207 ("Filtered Blue"); *[illegible] v. Good*, (1892) 1 Ch. 42 ("Parchment Bank" note-paper); *In re [illegible]d*, 10 P. R. 281 ("Carnival" cigarettes); *In re Talbot*, 11 P. R. 77 ("Emolliolorum" saddle paste); *In re Banks & James*, 44 W. R. 32 ("Shakspere" cigars); *In re Davis*, 14 P. R. 903 ("Compactum" umbrellas); *Meaby & Co.* v. *Triticine, Ld.*, 15 P. R. 1 ("Triticumina" food); *In re Magnolia Metal Co.*, (1897) 2 Ch. [illegible], 391 ("Magnolia" metal).

(v.) Words not being words having no reference to the character or quality of the goods (§ 64 (1) (*c*)): *In re Edge*, 8 P. R. [illegible]7 ("Filtered Blue"); *In re Talbot*, 11 P. R. 77 ("Emolliolorum" saddle paste); *In re Magnolia Metal Co.*, (1897) 2 Ch. 371 ("Magnolia" metal).

(vi.) Words registered as old mark, but not used as a trade mark *per se* on the goods before 1875 (§ 64 (3)): *In re Palmer* (3), [illegible] Ch. D. 504 ("Braided Fixed Stars" cigar-lights); *In re Spencer*, [illegible] R. [illegible] "Diamond Cast Steel"); *In re Hayward & Sons*, 54 L. J. Ch. 1003 ("Hayward's Coker Canvas"); *In re Perry Davis & Son*, 5 P. R. 333; 15 App. Cas. 316; ("Pain-Killer Medicine"); *In re Eno*, 41 Ch. D. 439 ("Fruit Salt" medicine); *Thompson* v. *Montgomery*, 41 Ch. D. 35 ("Stone Ale"); *In re Powell* (2), (1893) 2 Ch. 388; (1894) A. C. 8 ("Yorkshire Relish"); *In re Gordon & Dilworth*, 13 P. R. 629 ("Tomato Catsup"); *In re Royal Baking Powder Co.*, 14 P. R. 425 (a label containing the words "Royal Baking Powder").

(vii.) Device registered as old mark but not used as a trade mark *per se* prior to goods before 1875 (§ 64 (3)): *Baker* v. *Rawson*, 45 Ch. D. 519, [illegible]. In *In re Huet*, Kekewich, J., Dec. 6th, 1898, the mark was registered with a claim of user of 183 years, instead of three years, or less, before 1875, and was expunged on that account.

(viii.) Words registered as old mark, but used descriptively and not as a trade mark (§ 64 (3)): *In re Leonard & Ellis*, 26 Ch. D. 288 ("Valvolino" oil); *In re Harrison, McGregor & Co.*, 42 Ch. D. 691 ("Albion" tools); *Richards* v. *Butcher* (2), (1891) 2 Ch. 522 ("Monopole" champagne): *In re Powell* (2), (1894) A. C. 8 ("Yorkshire Relish").

(ix.) A mark registered for goods for which it was not used or intended to be used (§ 65): *Edwards* v. *Dennis*, 30 Ch. D. 454 ("Neptune" brand metal goods); *In re Apollinaris Co.*, (1891) 2 Ch. 186 (mark for Friedrichshall water); *In re Batt & Co.* (2), (1898) 2 Ch. [illegible] (device of butterfly for food substances).

(x.) Registered proprietor carrying [illegible] 1876, now repealed): *In re Ralph*, 25 Ch. D. 194 ("Homeopathic" medicine).

(xi.) Marks registered, though too [illegible] marks (§§ 69, 72): *In re Barker & Son*, 53 L. T. N. S. [illegible] (a sporting scene in each case); *In re Christiansen*, 3 P. R. 54 (maiden [illegible]); *In re Hayward & Sons*, 54 L. J. Ch. 1003 ("Hayward's Coker Canvas"); *In re Melhuish*, 31 Ch. D. 454 ("Milkmaid" brand and "Dairymaid" brand condensed milk); *In re Biegel*, 4 P. R. 525 (three [illegible] devices for beer); *In re Vignier*, 6 P. R. 490 ("Monopole" and "Monobrut" champagne); *In re Batt & Co.*, 6 P. R. 493 ("Brymbo" and "The Brymbo Special" metal goods); *In re La Société Anonyme des Verreries de l'Etoile*, (1894) 2 Ch. 26 (the device of a star and the words "Red Star Brand").

(xii.) A mark identical with previous mark, but registered in another class, it being proved that the later mark was calculated to deceive (§§ 65, 69, 72): *Eastman Photographic Materials Co.* v. *Griffiths Cycle Co.*, 15 P. R. 105 ("Kodak" for cameras and for cycles).

(xiii.) Marks inherently deceptive (§ 73): *In re Hayward & Sons*, 54 L. J. Ch. 1003 ("Solo Makers Extra Coker" canvas); *Wood* v. *Lambert*, 32 Ch. D. 247 ("Eton" cigarettes, made in London, but used with addresses in St. Petersburg and Constantinople); *In re Apollinaris Co.*, (1891) 2 Ch. 186, 233; *In re Wills* (2), (1893) 2 Ch. 262 (words "Trade Mark" used deceptively); *In re Hill*, 10 P. R. 113 ("Forrest" watches registered by a person having no connection with "Forrest" a London watchmaker).

(xiv.) Mark registered by servant of owner: *Ex parte Lawrence Bros.*, 44 L. T. N. S. 98 (mark for printers' rollers).

(xv.) Marks belonging to foreign producer registered by importer: *In re Apollinaris Co.*, (1891) 2 Ch. 186 (marks for Apollinaris, Friedrichshall and Hunyadi Janos mineral waters and products); *In re European Blair Camera Co.*, 13 P. R. 600 ("Bull's-Eye" cameras).

In some of the above cases the marks were not absolutely expunged, but some lesser step was taken: but in *In re Hill*, 10 P. R. 113, Chitty, J., considering the mark as a whole to be dishonest, ordered the whole mark to be expunged, although part of it was not objected to. Where a trade mark has been wrongly registered, it may be expunged forthwith, without waiting for the trial of an action to meet which the application is made: *In re Gianaclis*, 6 P. R. 467. Five years' registration is no bar to the removal of the mark: *Edwards* v. *Dennis*, 30 Ch. D. 454. And see cases in note to § 76.

Applications for rectification were refused on various grounds in the following cases: *In re Riviere*, 53 L. T. N. S. 237; *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398; *In re Chorlton and Dugdale*, 53 L. T. N. S. 337; *In re James*, 33 Ch. D. 392; *In re Talbot*, 3 P. R. 276; *In re Lambert*, 6 P. R. 344; *In re B. Edgington, Ld.*, 6 P. R. 513; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395; *In re Densham*, (1895) 2 Ch. 176; *In re Holt*, (1896) 1 Ch. 711; *In re Bovril T. M.*, (1896) 2 Ch. 600; *Rowland* v. *Michell*, (1897) 1 Ch. 71; *Cowie* v. *Herbert*, 14 P. R. 436; *In re Wright, Crossley & Co.*, 15 P. R. 131, 377; *In re Clement & Cie.*, 16 P. R. 173; *Freeman Bros.* v. *Sharpe Bros. & Co.*, 16 P. R. 205.

In *In re Palmer* (2), 22 Ch. D. 88, when the Court of Appeal had decided that the fact of five years' registration was not a legal bar to an application to expunge a mark, they refused to stay the hearing of the case with the evidence till after the determination by the House of Lords of an appeal from their decision on the point of law. It seems that an appeal from a decision upon an application for the removal of a trade mark from the register will not be treated as an interlocutory appeal, but that the case must be heard by three judges: *In re Riviere & Co.*, 26 Ch. D. 48; *In re Leonard & Ellis*, *ib.* 288. Where a mark is registered in the name of a domiciled Scotchman, it has been held in Scotland that the Scotch Courts have jurisdiction to order its removal: *Cowie* v. *Herbert*, 14 P. R. 436. On the other hand, it has been held in Ireland that the Irish Courts have no jurisdiction to order any alteration or rectification of the register of trade marks, that being a special jurisdiction conferred on the High Court in England: *Bayer* v. *Connell*, (1897) 1 I. R. 544. And see note to § 111.

For Australian cases of removal from the register, see *In re Rowley & Pyne*, 9 V. L. R. (L.) 307, in which R. & P. had used a device of a horse and groom for twenty years, and D. and his predecessor in business had used a device of a horse alone for twelve years, and then R. & P. adopted and registered a device of a horse alone, and it was removed from the Victorian register on D.'s application; *Harris* v. *Ogg*, 5 N. S. W. Rep. (E.) 114, in which a mark which had been registered by a person who had not used it, was removed from the New South Wales register on the application of a person who had long done so. *In re Hicks*, 22 V. L. R. 636, in which a trade mark was removed from the Victorian register upon similar grounds; and *National Starch Manufacturing Co.* v. *Munn's Patent Maizena & Starch Co.*, 13 N. S. W. R. (E.) 101; (1894) A. C. 275, in which the name "Maizena" was removed from the New South Wales register on the ground that it had become *publici juris* at the date of registration.

Rectification by varying.

(g) The register has been rectified by varying an entry in the following ways:—

(i.) By restricting the goods for which the mark is registered: *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Metcalf*, 31 Ch. D. 454; *In re Banks & James*, 12 P. R. 333; *In re Batt & Co.* (2), (1898) 2 Ch. 432.

(ii.) By striking some part of the mark out of it: *In re Stock*, 52 L. T. N. S. 123 (word "Strathmore" struck out of a whiskey mark); *In re Vaughan-Jones*, North, J., June 21st, 1884 (word "Glenlivet" struck out of a whiskey mark); *In re Biegel*, 4 P. R. 525 (three-triangle device struck out of a beer mark). And see *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274.

(iii.) By causing a partial disclaimer to be entered on the register, as in *In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Hubbuck*, Jessel, M. R., June 20th, 1879; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *In re Johnson, Philpott & Co.*, North, J., Feb. 21st, 1888; *Humphries & Co.* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820; *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274; *Baker* v. *Rawson*, 45 Ch. D. 519, 534; *In re Edge*, 8 P. R. 207; *In re Steel*, Chitty, J., Jan. 12th, 1893; *In re Thompson*, 13 P. R. 35. See notes to §§ 72 and 74.

(iv.) By directing an alteration in the name of the registered proprietor. It is however, very questionable whether this can be done, and when registration has been effected in accordance with the application, but the application was wrong in some respect, it seems that the Court will amend the register by expunging the entry, but not by varying it so as to make the registration stand in another name. Thus Hall, V.-C., said, in *In re Ward, Sturt & Sharp*, 50 L. J. Ch. 347: "I cannot rectify the register where no error has been committed. The term 'rectification' is only applicable to cases in which there has been some mistake or error in the registration. In other cases the applicant must follow the course laid down for cases of assignment or transmission." So in *Ex parte Lawrence Bros.*, 44 L. T. N. S. 98, Jessel, M. R., expunged the entry, and left the rightful owners of the mark to make a fresh application in their own names. So in *In re Farina* (4), 44 L. T. N. S. 99, he directed administration to be taken out to the estate of the deceased registered proprietor, and the administrator, when appointed, to assign to the rightful proprietor. In *In re Rust & Co.*, 44 L. T. N. S. 98, however, the same learned judge allowed a mark to be transferred from the name of an individual member of a firm, stated to be trading under the name of the firm, into the names of all the partners trading under the name of the firm. It appears to have been thought by Jessel, M. R., in *Ex parte Lawrence Bros.*, 44 L. T. N. S. 98, that it might not be impossible for the Court to transfer a registration from one name into another, if the registered proprietor has registered another's trade mark in his own name when he was actually employed by the true owner to register it for him, and was so the agent and trustee for the other. In that case there was no agency, and no such order was made; but in *In re Australian Wine Co., Ld.*, 61 L. T. N. S. 427, where the sole consignee in England of the wine from certain Australian vineyards had registered the name of the vineyards as his own trade mark, but intending it to be for the benefit of the owner of the vineyards, an order transferring the mark into the name of the owner of the vineyards was made. In *In re Riviere*, 53 L. T. N. S. 237, however, the Court of Appeal seems to have been decidedly of opinion that such an order could not be made, and Cotton, L. J., said: "In my opinion, whatever might be the result of the application to strike the name of the French firm off the register, the other application ought not to be granted. Without saying that it is impossible to grant such an application as this in any case where one person is improperly on the register, and another person who is entitled to the trade mark wishes to be put on, yet, as a rule (and I do not know a case where there would be an exception), when any one applies in the first instance to be publicly registered as the proprietor of a trade mark, the requirements of the Act and Rules as to issuing advertisements and otherwise ought to be complied with. For there may be cases—and I can imagine them—where, although the person applying to strike a name off the register may be entitled to say, as against the person on the register, that he is improperly registered as owner of the trade mark, yet there may be persons, not present at the litigation, who have a right, as against the applicant, to rectify the register, and to say that such applicant is not himself entitled to be there

so as to prevent such third person from using the mark. I have thought it right to express my opinion on that part of the case at once." And Lindley, L. J., added: "If the applicants had succeeded in making out a case to remove the name of Riviere & Co., I do not think they would have been entitled to have themselves registered in respect of this mark. I think Mr. Stirling's observation is conclusive—that they could not have registered anew in respect of the old mark without advertising and taking the other steps required by the Act and Rules. I say that on behalf of the public." The same view was taken independently by Kay, J., in *In re Kingsford & Son*, 6 P. R. 413. The most expedient course to adopt in such cases, where the parties are friendly, is indicated by the case of *In re Wellcome*, 32 Ch. D. 213, where an agent had registered his foreign principal's mark in his own name, but for the benefit of the principal, and subsequently assigned the trade mark to the principal, and it was held that the assignment was an assignment in connection with the goodwill, within § 70, and ought to be registered. A similar course was directed by Stirling, J., following *In re Farina* (4), 44 L. T. N. S. 99, and distinguishing *In re Rust & Co.*, 44 L. T. N. S. 98, in *In re Greenlees*, 9 P. R. 93, where a member of a firm had erroneously registered the mark of the firm in his own name, the Court expressing its opinion that the comptroller ought to register the assignment. A very special order was made in *In re April*, Stirling, J., April 20th, 1888, in which persons to whom the registered proprietor of a trade mark had assigned her business and goodwill, with the right to use the trade mark, all for a limited period of six-and-a-quarter years, at the end of which period those rights were to revert to her, procured themselves to be registered as the proprietors of the trade mark in succession to their assignor; but, on her making complaint, they applied to the Court to restore the register to its previous condition, and it was accordingly ordered that the register should be rectified by removing their names as subsequent proprietors of the mark and re-entering the name of the original proprietor. In *In re Patent Plumbago Crucible Co.* (2), 7 P. R. 282, two trade marks were registered in 1879 as the property of the Patent Plumbago Crucible Co., an unregistered company. In 1882 the Company assumed the name of "The Morgan Crucible Co.," and in 1890 the marks were allowed to be transferred into the name of "The Morgan Crucible Co., formerly trading as the Patent Plumbago Crucible Co." And this case has been followed by Kekewich, J., in *In re Burgon & Wilkinson*, 40 Sol. J. 336; but the proprietor being in that case a registered company, the learned judge held that the words "originally called" should be substituted for the words "formerly trading as." The decision of Stirling, J., has, however, been questioned by North, J., in *In re New Ormonde Cycle Co.*, 13 P. R. 475, from which it seems that where a registered proprietor changes his name the application should be made under § 87, which see. In America a partner who registered in his own name a trade mark of the firm was ordered to assign to his partner an equal interest in it: *Taylor* v. *Bothin*, 5 Sawy. 584.

When a trade mark has been improperly registered, the register will be rectified on an application by a person aggrieved, even though, by reason of a change in the circumstances, or by the coming into operation of a new Act of Parliament, the registration might be immediately renewed, seeing that the public must have an opportunity of opposing the new application: *In re Apollinaris Co.*, (1891) 2 Ch. 186, 231. Compare *In re Riviere*, 53 L. T. N. S. 237.

(*h*) It has been held that opposed applications for the registration of trade marks are not within this section, and that the Court has no jurisdiction to give a successful opponent his costs of the proceedings in the Registry Office: *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278; following *In re Brandreth*, 9 Ch. D. 618. As to the costs of applications to remove marks, see Chap. VII. *sub fine*. Where the comptroller is served with notice of the application, as he now must be (Rule 49), and appears, his costs are usually ordered to be paid by the unsuccessful party.

(*i*) See Rule 46 and Form N. in the Second Schedule. The order is to be carried into effect by the comptroller (Rule 46), and to be made public, if he thinks fit (Rule 50).

Power for comptroller to correct clerical errors.

91. The comptroller may (*a*), on request in writing, accompanied by the prescribed fee (*b*),—

(a.) Correct any clerical error (*c*) in or in connection with an application for a patent, or for registration of a design or trade mark; or

(b.) Correct any clerical error (*c*) in the name, style or address of the registered proprietor of a patent, design, or trade mark.

(c.) Cancel the entry or part of the entry of a trade mark on the register (*d*): Provided that the applicant accompanies his request by a statutory declaration made by himself, stating his name, address, and calling, and that he is the person whose name appears on the register as the proprietor of the said trade mark (*e*).

[(d.) Permit an applicant for registration of a design or trade mark to amend his application by omitting any particular goods or classes of goods in connection with which he has desired the design or trade mark to be registered.]

The amendment in this section was made by § 24 of the Act of 1888.

(*a*) In addition to the powers given by this section, the comptroller has authority, under Rule 48, to alter in the register the address of the proprietor of a trade mark (see Form M), and, under Rule 54, to allow amendments of documents.

(*b*) By the First Schedule the fee for altering address, or allowing correction of a clerical error, or cancelling the whole or part of an entry, or permitting amendment, is 5*s*.

(*c*) For form of request, see Form Q.

(*d*) This comes from the old rules. For form of application for cancellation, see Form O. In *In re Lysaght*, Dig. 623, a registration for all the goods in Class 5 was, on application by the proprietor, corrected by limitation to galvanized sheet iron only. In *Ex parte Sales, Pollard & Co.*, Dig. 620, the registered proprietors of a trade mark for snuff, consisting of the letters "S. P.," the initials of their firm, discovered that that mark had been for many years in common use in the snuff trade, though used originally by themselves, and procured the cancellation of the registration.

(*e*) See Rule 61, and for form of declaration see Form P.

Alteration of registered mark.

92.—(1.) The registered proprietor of any registered trade mark may apply to the Court for leave to add to or alter (*a*) such mark in any particular, not being an essential particular (*b*) within the meaning of this Act, and the Court may refuse or grant leave on such terms as it may think fit.

(2.) Notice of any intended application to the Court under this section shall be given to the comptroller by the applicant (*c*); and the comptroller shall be entitled to be heard on the application.

(3.) If the Court grants leave, the comptroller shall, on proof thereof (*d*) and on payment of the prescribed fee (*e*), cause the register to be altered in conformity with the order of leave.

(*a*) This section is taken from the old rules.

(*b*) For what is an "essential particular," see § 64, *supra*. The alteration of a mark in non-essential respects does not deprive a mark of the benefit of the period of user before the alteration: *In re Bryant & May, Ld.*, 4 Times L. R. 675.

Alteration of trade marks.

Old Marks.

An important question which was raised for the first time in 1891, after the registration system had been in operation for sixteen years or thereabouts, and after many orders had been made by the Court by which alterations of various kinds in old marks, *i.e.*, marks originally used before the date of the Act of 1875, were

allowed, is how far, if at all, the provisions of this section authorize the alteration of old marks. In *In re Phillips*, (1891) 3 Ch. 139, it seems to have been suggested by Chitty, J., that old marks ought to remain on the register in the precise form in which they had been originally used; and in *In re Adams*, 9 P. R. 174, and *In re Henry Clay & Bock & Co.*, (1892) 3 Ch. 540, the same view has been taken by Kekewich, J. It is, however, to be noticed that the nature of the alteration desired in these cases, or, at all events, in the first two of them, was very serious, and might have had the effect of making a good mark out of a bad one, while, in the first case, it certainly would have resulted in depriving the public of the indication of a restricted claim which previously existed, and this was pointed out by Chitty, J., in the case referred to. From the list of orders given below it will be seen that Chitty, J., has allowed alterations of old marks in many cases, and Kekewich, J., in a few, so that it may perhaps be considered that the observations made in the cases above cited were intended to have special reference to the cases then before the Court, in which the alteration would have materially altered the marks there in question. This much is clear, that neither in § 92 itself, nor in Rule 35 of the Rules under the Act of 1875, from which this section is taken, is the power of the Court to permit alterations restricted in any way to new marks, that the great bulk of the marks to which the rule was applicable when it was made in 1875 were old marks, and that, as a matter of fact, the majority of the instances in which alterations were allowed, at all events, down to a comparatively recent date, occurred with reference to old marks. The old mark must, no doubt, be registered precisely as used, but when the mark has once been properly registered the Court has full power to permit it to be altered in non-essential particulars if the case appears to be a proper one for such an indulgence. It is suggested that the true principle is that no mark, whether old or new, should be allowed to be altered where the alteration, whether in a technically "essential particular" or not, would materially alter the nature or appearance of the mark, or make a good mark out of a bad, or possibly bad, one; but that when the proposed alteration is not open to such an objection there is no reason why the Court should not allow the alteration if it thinks fit, whether the mark be old or new.

Classes of alterations.

The Trade Marks Journal contains numerous instances of announcements of alterations in registered trade marks authorized by the Court, and a list of them is given at p. 380, distinguishing them as they refer to old and new marks respectively. In two or three cases the orders referred to do not appear to have been advertised in the Trade Marks Journal, the reason being that the applicants remained content with obtaining their orders and omitted to notify them to the office, so that the register has *de facto* continued unaltered. In the earlier years the registrar or comptroller was not represented on these applications, but it ought hardly to be assumed that the orders were made without proper consideration on that account.

It seems convenient to classify the orders made under the headings: (1) Alterations in the name or initials appearing on the mark: (2) alterations in respect of the word "limited" or abbreviations of it; (3) alterations in respect of the words "patent" or "trade mark" on the mark; (4) other alterations in respect of wording, type, &c., appearing on the mark; to which may be added (5) alterations made, not in the mark itself, but in the name of the registered proprietor of the mark.

Alterations in name on mark.

In several cases it has happened that a registered mark has contained the name of the proprietor of the mark, but that, on account of a subsequent change of ownership, it has become desirable that the name in the mark should be changed so as to correspond with the altered circumstances, and in such cases the Court has usually allowed the change to be made. Thus, in *In re Dewhurst*, February 23rd, 1878, March 19th, 1880, and July 9th, 1880, Jessel, M. R., allowed a number of marks in the cotton classes to be altered by substituting the names of the new proprietors for the names of the former proprietors, "Alexander Collie & Co." and "Balfour, Heugh & Co." But in one of these cases, in which the name of the former proprietor was printed in the form of a signature, so as to constitute an essential particular, the Master of the Rolls refused to allow the alteration. See also *In re Murphy & Co.*, 7 P. R. 163. In *In re Boord*, Mar. 25th, 1881, Jessel, M. R., allowed the registered proprietors of a mark for beer which contained a former name of their firm, "Swaine, Boord & Co.," in ordinary type, to remove the name from the mark, leaving the space vacant, and to add a note to the registration stating that the name of the person or firm for the time being entitled to the mark might, in practice, be inserted in the blank space. See, however, *In re Brown*, 11

P. R. 365. Again, in *In re Bass, Ratcliff & Gretton, Ld.*, July 21st, 1882, Chitty, J., allowed the name of the above company to be substituted for "Bass & Co.," and in *In re Moeller & Schreiber*, Mar. 7th, 1888, Kay, J., allowed the initials of the existing firm, "M. & S.," to be substituted for other initials. The above were all old marks, and the same was the case in *In re Kirkpatrick*, Chitty, J., Feb. 21st, 1890, and *In re Brown*, Stirling, J., 11 P. R. 365. In *In re Henry Clay & Bock & Co.*, (1892) 3 Ch. 540, however, an old mark was not allowed to be altered by substituting the name of the new proprietors for the initials of the former owners. In the case of new marks alterations have also, in various instances, been authorized to be made in the name or initials on the mark. Thus, by substituting "N. W. T. S. A., Ld." for "A. J. S. & Co., Ld.": *In re National Wholesale Tea Supply Association, Ld.*, 10 P. R. 164; "Stockowners' Meat Company," for "Graziers' Meat Export Company": *In re Stockowners' Meat Company of New South Wales*, 14 P. R. 733. And see list below.

Alterations in respect of word "Limited."

In *In re Guinness, Son & Co., Ld.*, 5 P. R. 316, the firm of Arthur Guinness, Son & Co. had registered an oval label bearing, with other words and a device of an Irish harp, the printed signature "Arthur Guinness, Son & Co.," and the goodwill having been subsequently assigned to a limited company called "Arthur Guinness, Son & Co., Ld.," leave was given to alter the registered trade mark, which was an old one, by adding the word "Limited" in ordinary type, beneath the signature. The addition of the word "Limited" has in many similar cases been since permitted, the addition being sometimes made to a printed signature, as in *In re Burke*, W. N. 1891, p. 2, but more frequently to a name in ordinary print; and in *In re Bryant & May, Ld.*, 4 Times L. R. 675, Stirling, J., said that such leave would be given as a matter of course. In *In re Adshead*, Kekewich, J., Nov. 25th, 1892, the addition permitted was "& Co., Ld.," and in several cases the abbreviation "Ltd." or "Ld." has been sanctioned, *e.g.*, *In re Ind, Coope & Co., Ld.*, Stirling, J., June 22nd, 1888; *In re Younger*, Stirling, J., June 22nd, 1888; *In re Macintosh*, Stirling, J., Nov. 29th, 1889; *In re Foster*, Chitty, J., July 25th, 1890, but more recently Stirling, J., has expressed himself unwilling to allow the addition of the word "Limited" in the form of any abbreviation, preferring that it should be printed at full length: *In re Robert Porter & Co.*, W. N. 1895, p. 102; *In re Hayward*, 13 P. R. 729. The objection seems to have been founded on the supposition that the wish for the addition proceeded from a desire to comply with the provisions of § 42 of the Companies Act, 1862, which does not provide for the use of any abbreviation of the word. It seems, however, reasonably clear that this section of the Companies Act has no application to the case of a trade mark, and if a company is desirous of using a trade mark which had been used by the firm which preceded it in business, but with the addition of "Ld.," there seems to be no reason in law why it should not do so. Then, if it wishes to have the registration altered so as to correspond with the actual form in which the mark is lawfully used, it is not very easy to see what substantial objection there can be to it. On the occasions of the alteration of the marks in *In re Ind, Coope & Co., Ld.*, Stirling, J., June 22nd, 1888; *In re Younger*, Stirling, J., June 22nd, 1888; and *In re Orlando Jones & Co.*, 12 P. R. 278, the further addition was permitted of the words "This label is issued only by 'Ind, Coope & Company, Limited,' or 'Wm. Younger & Co., Limited, Brewers, Edinburgh,' or 'Orlando Jones & Co., Lim.'" In *In re Jones & Co.*, Chitty, J., July 20th, 1883, on the other hand, the word "Limited," which had been inserted by mistake, was allowed to be expunged.

Alterations in respect of "Trade Mark," "Patent."

After the decision of the Court of Appeal in *In re Apollinaris Co.*, (1891) 2 Ch. 186, 233—235, that the presence in a trade mark of the words "trade mark," so placed as to be likely to mislead the public into the belief that a part only of the trade mark, and not the whole, was registered and claimed, was sufficient to vitiate the registration, an application was made by Messrs. Colman (*In re Colman*, (1891) 2 Ch. 403) for leave to alter, under § 92, a considerable number of trade marks registered by them, by striking out of each mark the words "trade mark," except in one case in which the mark was intended for use in France, and the words sought to be removed were "marque de fabrique." Kekewich, J., acceded to the application, making it a condition that the applicants should undertake to endorse on their original applications for registration, and enter on the register, a statement of the essential particulars of each mark, and a disclaimer of the exclusive right to the added matter, if any, to the satisfaction of the comptroller, with liberty to apply to the Court in case of difference. All the marks had been registered under the Act of 1883, so that the effect of the order was to place them on the same footing as if they

had been registered under the Act of 1883, in which case the conditions now imposed by the Court would have been enforceable by virtue of the amended § 64. No further application was made to the Court in the matter, the terms of the claims and disclaimers being arranged between the applicants and the comptroller. The terms so arranged were advertised in Vol. 16 of the Trade Marks Journal, at p. 813 (August 16th, 1891). In this case all the marks sought to be altered were, with two exceptions only, registered as new marks, *i.e.*, as not having been in use prior to the Act of 1875. In the case of the two old marks no conditions were imposed. The words "trade mark" were again allowed to be removed from new trade marks in which they appeared, by Stirling, J., in *In re Badische Anilin & Soda Fabrik*, July 3rd, 1891, and by Romer, J., in *In re Franklyn, Morgan & Davey*, July 17th, 1891. When the same application, however, was made in *In re Phillips*, (1891) 3 Ch. 139, Chitty, J., refused leave to remove the words "trade mark" on various grounds, one of which was that the trade and the public were entitled to have on the register the same indication of a restricted claim as previously. He also expressed the view that the mark, being an old mark, ought not to be altered; but, for the reasons stated in an earlier part of this note, it seems reasonable to suppose that this was only intended to apply to alterations of so serious a character as that here sought.

In two comparatively early cases—*In re Muntz*, Kay, J., Dec. 13th, 1883, and *In re Beanes*, Chitty, J., May 16th, 1884—the word "Patent" was allowed to be removed from trade marks, the vacant space being filled up in the first instance by the introduction of the words "Yellow Metal." The presence in a trade mark of the word "Patent" seems, however, to be even more material than that of the words "Trade Mark," and the decision of Kekewich, J., in *In re Adams*, 9 P. R. 174, in which he refused to allow the alteration of an old mark by striking out the word "Patent," which had been improperly used, does not seem to be open to question. In fact, it would seem that the application should have met the same fate even if the mark had been a new one.

Alterations in addresses.

In numerous other cases, some of old marks, some of new marks, as may be seen by the list below, alterations of various kinds have been allowed to be introduced into registered trade marks. Frequently such alterations have consisted in varying the address given on the mark, *e.g.*, *In re Walker*, Dig. 624, where a trade mark consisting of the letter "W," a crown, and the word "Netherton," was allowed to be altered by substituting "Dudley" for "Netherton." So, in *In re Dunn*, Hall, V.-C., Dec. 20th, 1880, "Middlesboro'" was substituted for "Wolsingham." In *In re Hargreaves*, Stirling, J., Jan. 11th, 1890, the address, "Heywood, Manchester," was struck out, and in *In re Kinahan*, North, J., Dec. 16th, 1891, "Guildford Street, York Road, Lambeth, London, S.E.," was substituted for "20, Great Titchfield Street, Oxford Street, W.," and other cases will be found in the list.

Alterations in wording.

In some cases descriptive words have been struck out of a composite mark, *e.g.*, *In re Skinner*, Jessel, M. R., Aug. 3rd, 1881; *In re Burke*, North, J., Jan. 13th, 1891; but in *In re Orlando Jones & Co.*, 12 P. R. 278, Stirling, J., while allowing the words "superior quality" to be added to a new mark, in which they had always in practice been used, only did so upon condition that the applicants should disclaim, not merely the added words, but all the common words in the mark, as in *In re Colman*, (1891) 2 Ch. 403. So, prices of goods have been removed: *In re Clarkson & Finlay*, Kay, J., April 5th, 1889; *In re Scott & Bowne*, Stirling, J., May 4th, 1896. In *In re British Tea & Trading Association, Ld.*, North, J., Oct. 26th, 1886, the registered trade mark, which was an old mark, consisted of three sides of a wrapper for packets of tea, of which those on the right and left consisted of arrangements of Chinese words, and that in the centre of the head of a mandarin, with the words "The British Tea Association" above it, and below it the words "Imperial Mandarin Tea, imported direct from the Imperial district in China," and leave was given to alter it by substituting for the words "imported direct from the Imperial district in China" (which had never been used by the applicants themselves, and not by their predecessors in business since 1877) the words "This label is protected by registration as a trade mark." In *In re Reiss Brothers*, 5 P. R. 201, the registered mark consisted of a combination mark for cotton piece goods, which comprised various words and devices, including the applicants' name and address, "Reiss Brothers, Manchester," and the words "Grass Bleach, Best Quality." "Grass Bleach" was the name of a description of bleaching which had gone out of use, and leave was given to alter the word "Grass" to "Reiss," notwithstanding that another firm's combination mark, registered for similar goods, bore the name "Reiss & Co., Batavia," the remainder of the latter mark being quite dissimilar from the

applicants' mark. In one case—*In re Read*, Hall, V.-C., July 7th, 1881—the words "Dog's Head Bottling" were allowed to be substituted for "Bull Dog Bottling"; and in another case—*In re Smith*, Kay, J., Aug. 3rd, 1882—the whole of the mark, except the word "Glenlivet," was struck out, leaving that word to stand alone as the trade mark. But these two cases would hardly be followed now; *e.g.*, in *In re Orlando Jones & Co., Ld.*, 12 P. R. 278, Stirling, J., refused to alter a pictorial label by removing two curved lines common to the trade, but this was without prejudice to an application for the separate registration of the remaining portion of the label. However, in *In re Scott & Bowne*, May 4th, 1896, Stirling, J., allowed two side panels, in French and German, of a tripartite label to be struck out. In some cases, the size and arrangement of the printed matter on the label, or of some of it, have been altered, *e.g.*, *In re Lazenby*, Malins, V.-C., Feb. 26th, 1880; *In re Burham Brick, Lime & Cement Co.*, 9 P. R. 422.

Alterations in Russian inscriptions.

In *In re Ermen & Roby*, 4 P. R. 70, leave was given to alter a new mark on which were words in Russian, by changing a capital E from the English into the Russian character, and inserting the Russian word meaning "of" between "Roby" and "Manchester." Again, in *In re Le Coq* (Stirling, J., Dec. 19th, 1890), Russian words meaning "Deposited at the Department of Commerce and Manufactures," were allowed to be added between two circles which formed part of the mark, and a rim of two circular lines to be added to the outer circle. (But in *In re Orlando Jones & Co., Ld.*, 12 P. R. 278, as stated above, two oval lines were not allowed to be removed from a new mark.) On the other hand, where an old trade mark contained words partly in Russian and partly in English characters, North, J., refused to allow the mark to be altered by turning the bulk of the words into Russian characters, and making certain additions to and omissions from the name and place of business of the proprietor, on the ground that the alterations, whether in essential particulars or not, were in very material respects as regarded the appearance of the marks: *In re Savin*, 13 P. R. 21.

Alterations in name of proprietor.

In various instances the name entered in the register as that of the registered proprietor has been allowed to be altered under this section, usually on account of the name of the proprietor having been altered. Thus, in *In re Moet & Chandon*, Bacon, V.-C., Aug. 19th, 1882, "Chandon et Cie, successors to Moet & Chandon," was substituted for "Moet & Chandon"; in *In re Boott*, Kay, J., Dec. 21st, 1882, "Boott Cotton Mills" was substituted for "Boott Manufacturing Company"; in *In re Porous Plaster Co.*, Pearson, J., Feb. 6th, 1885, the words "trading as the Porous Plaster Co." were struck out; in *In re Patent Plumbago Crucible Co.*, 7 P. R. 282, "The Morgan Crucible Co., formerly trading as the Patent Plumbago Crucible Co." was substituted for "The Patent Plumbago Crucible Co."; in *In re Milne & Co.*, Kekewich, J., April 15th, 1890, "James Virtue McEntire" was substituted for "Milne & Co."; in *In re Birmingham Wagon Co., Ld.*, Chitty, J., Nov. 22nd, 1890, "The Birmingham Railway Carriage and Wagon Company, Limited," for "The Birmingham Wagon Co., Ld."; in *In re National Wholesale Tea Supply Association, Ld.*, 10 P. R. 164, the new name of the company for "Albert John Slaney, Ld."; in *In re W. Wilkinson & Sons, Ld.*, Kekewich, J., March 6th, 1896; 40 Sol. J. 336, "Burgess & Wilkinson, Limited," originally called "W. Wilkinson & Sons, Ld.," for "W. Wilkinson & Sons, Ld."; in *In re Findlater, Mackie & Co.*, North, J., April 24th, 1896, "Findlater, Gamble & Co." for "Findlater, Mackie & Co." But in *In re New Ormonde Cycle Co.*, (1896) 2 Ch. 520, North, J., pointed out that the language of § 92 only refers to leave being given to add to or alter a mark, and the alteration of the name of the proprietor not being an alteration in the mark, he did not consider that he would be justified in treating the section as enabling him to sanction the alteration proposed, but he suggested that the comptroller might make the alteration under § 87.

*For List of Cases, see next page.*

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(*c*) Notice must be given to the comptroller fourteen days before the application. See Rule 51.

(*d*) As to mode of notifying the order to the comptroller, see Rule 46 and Form N.

(*e*) *I. e.*, 10*s*. See First Schedule. Representations of the mark as altered are also to be supplied. See Rule 51.

## List of Alterations of the Register sanctioned by the Court under Sect. 92.

### I.—Marks in use before the 13th August, 1875 (Old Marks).

(1) *Alterations in the Name or Initials appearing on the Mark.*

| Name. | Date. | Judge. | Length of user before August, 1875. | Nature of order. |
|---|---|---|---|---|
| Re Dewhurst ..... | Feb. 23, '78. | Jessel, M.R. | 9½ yrs.<br>5½ yrs. | "G. & R. Dewhurst" substituted for "Alexr Collie & Co." |
| Re Dewhurst ..... | Mar. 19, '80. | Jessel, M.R. | 9½ yrs.<br>17 yrs. | "G. & R. Dewhurst" substituted for "Alexr Collie & Co." |
| Re Dewhurst ..... | July 9, '80. | Jessel, M.R. | 26 yrs. | "G. & R. Dewhurst" substituted for "Balfour, Heugh & Co." |
| Re Boord ..... | Mar. 25, '81. | Jessel, M.R. | 21 yrs. | "Swaine, Boord & Co." removed from mark, and note added to the registration that the mark may be used with the name of the person or firm entitled inserted in the place left vacant. |
| Re Bass, Ratcliff & Gretton, Ld. | July 21, '82. | Chitty, J. .. | 20 yrs.<br>18 yrs. | "Bass, Ratcliff & Gretton, Ld.," substituted for "Bass & Co." |
| Re Moeller & Schreiber | Mar. 7, '88. | Kay, J. .... | 1½ yrs. | "M. & S." substituted for "D. G. F. H." |
| Re Kirkpatrick .... | Feb. 21, '90. | Chitty, J. .. | 3 yrs. | "& Sons" added after "Thomas Kirkpatrick." |
| Re Brown ..... (11 P. R. 365.) | May 25, '94. | Stirling, J. . | 30 yrs.<br>5 yrs. | "and Son" added after "E. Brown." |

(2) *Alterations in respect of the Word "Limited," or Abbreviations of it.*

| | | | | |
|---|---|---|---|---|
| Re Jones ..... | July 20, '83. | Chitty, J. .. | 1 yr. | "Limited" struck out. |
| Re Guinness..... (5 P. R. 316.) | May 11, '88. | Chitty, J. .. | 13 yrs. | "Limited" added to signature. |
| Re Ind, Coope & Co., Ld. | June 22, '88. | Stirling, J. . | 6 yrs.<br>9 yrs.<br>12 yrs. | "Limited" added in some cases, "Ltd." in others. "This label is issued only by Ind, Coope and Company, Limited," in others. |
| Re Younger ..... | June 22, '88. | Stirling, J. . | 20 yrs. | Same as in *Re Ind, Coope & Co. Ld.* |
| Re Allsopp ..... | July 6, '88. | Chitty, J. .. | 13 yrs. | "Limited" added after name. |
| Re Schweitzer ..... | Mar. 25, '89. | North, J. .. | 7 yrs. | "Limited" added after name. |
| Re Macintosh ..... | Nov. 29, '89. | Stirling, J. . | 10 yrs. | "Ld." added after name. |
| Re Foster ..... | July 25, '90. | Chitty, J. .. | 13 yrs.<br>1 yr. | "Limited" added in some cases, "Ltd." in others. |
| Re Burke ..... (W. N. 1891, p. 2.) | Jan. 13, '91. | North, J. .. | 11 yrs.<br>7 yrs. | "Limited" added after signature. |
| Re Adshead ..... | Nov. 25, '92. | Kekewich, J. | 17 yrs. | "& Co., Ltd.," added after name. |
| Re Oakey ..... | Aug. 26, '93. | North, J. .. | 20 yrs.<br>15 yrs.<br>12 yrs.<br>10 yrs.<br>4 yrs. | "Limited" added after name. |

LIST OF ALTERATIONS OF THE REGISTER—*continued*.

| Name. | Date. | Judge. | Length of user before August, 1875. | Nature of order. |
|---|---|---|---|---|
| **Re Day & Martin, Ld.** | Aug. 2, '94. | Stirling, J. . | 75 yrs.<br>20 yrs.<br>5 yrs. | "Limited" added in some cases, "Ltd." in others. |
| **Re Jones** ..... (12 P. R. 278.) | Apr. 23, '95. | Stirling, J. . | 20 yrs.<br>10 yrs. | "This label is issued only by Orlando, Jones & Co., Ld." added on marks. |
| **Re Hayward** ..... (13 P. R. 729.) | July 24, '96. | Stirling, J. . | 86 yrs.<br>43 yrs. | "Limited" added after name. |
| *(3) Alterations in respect of Words "Patent" or "Trade Mark" on Mark.* | | | | |
| **Re Muntz** ..... | Dec. 13, '83. | Kay, J. .... | 10 yrs. | "Yellow metal" substituted for word "Patent." |
| **Re Beanes** ..... | May 16, '84. | Chitty, J. .. | 6 yrs.<br>5 yrs. | "Patent" struck out. |
| **Re Colman** ..... ((1891) 2 Ch. 403.) | Apr. 11, '91. | Kekewich, J. | 13 yrs. | "Trade mark" struck out. |
| *(4) Other Alterations in respect of Wording, Type, &c. appearing on Mark.* | | | | |
| **Re Walker** ..... (Dig. 624.) | Aug. 6, '79. | Malins, V.-C. | 3 mos. | "Dudley" substituted for "Netherton." |
| **Re Lazenby** ..... | Feb. 26, '80. | Malins, V.-C. | 15 yrs. | "Manufactory" and "Prepared by" struck out, and alterations made in type. |
| **Re Smith** ..... | Aug. 3, '82. | Kay, J. .... | 50 yrs. | The two circles and the plaid pattern on the inner circle struck out, leaving the word "Glenlivet" alone. |
| **Re Hanson** ..... | June 2, '85. | Bacon, V.-C. | 3 yrs. | Words "and Parisian relevé," also "et de relevé Parisien" and "agents" struck out. |
| **Re British Tea & Trading Association.** | Oct. 26, '86. | North, J. .. | 4 yrs. | Words "This label is protected by registration as a trade mark" substituted for words "Imported direct from the Imperial District in China" |
| **Re Bloxwich Iron & Steel Co., Ld.** | Nov. 24, '87. | Chitty, J. .. | 2 yrs. | "Bloxwich" substituted for "Birchills Hall." |
| **Re Reiss** ..... (5 P. R. 291.) | Apr. 11, '88. | North, J. .. | 5 yrs. | "Reiss" substituted for "Grass." |
| **Re Harris** ..... | Jan. 11, '89. | Stirling, J. . | 3 yrs. | "Charles" and "& Co." struck out, and position of word "Calne" altered. |
| **Re Schweitzer** ..... | Mar. 25, '89. | North, J. .. | 7 yrs. | "10, Adam St., Adelphi," struck out. |
| **Re Clarkson & Finlay.** | Apr. 5, '89. | Kay, J. .... | 24 yrs. | Prices of goods struck out of marks. |
| **Re Kirkpatrick** .... | Feb. 21, '90. | Chitty, J. .. | 3 yrs. | "& Hindley Green nr Wigan" added after "Tyldesley, Manchester." |
| **Re Lincoln, Bennett & Co.** | Apr. 18, '90. | Chitty, J. .. | 12 yrs. | "London" added. |

LIST OF ALTERATIONS OF THE REGISTER—*continued.*

| Name. | Date. | Judge. | Length of user before August, 1875. | Nature of order. |
|---|---|---|---|---|
| Re Melton & Co. .... | May 23, '90. | North, J. .. | 8 yrs. | "& Co." added after name, "to the Queen" struck out, "the late" inserted before "Napoleon," "London" substituted for "194, Regent St.," and "Trade mark" substituted for "London." |
| Re Le Coq ..... | Dec. 19, '90. | Stirling, J. . | 40 yrs. | Russian words meaning "Deposited at the Department of Commerce and Manufactures" added between the two circles, and a rim of two circular lines added to the outer circle. |
| Re Burham Brick, Lime & Cement Co. (9 P. R. 422.) | July 22, '92. | Stirling, J. . | { 9 yrs. 3 yrs. } | "Works" omitted after "Burham," also "Murston," and type of remaining words expanded. |
| Re Brown..... (11 P. R. 365.) | May 25, '94. | Stirling, J. . | { 30 yrs. 5 yrs. } | Numerous alterations in addresses. |
| Re Day & Martin, Ld. | Aug. 2, '94. | Stirling, J. . | { 75 yrs. 20 yrs. } | "Late" inserted before the address "High Holborn." |
| Re Foster ..... | Mar. 22, '95. | North, J. .. | { 13 yrs. 4 mos. } | "London" substituted for "27, Brook St., Bond St., London." |

(5) *Alterations in Name of Proprietor of Mark.*

| | | | | |
|---|---|---|---|---|
| Re Moet & Chandon.. | Aug. 19, '82. | Bacon, V.-C. | { 40 yrs. 9 yrs. 4 yrs. } | "Chandon et Cie, successors to Moet & Chandon" substituted for "Moet & Chandon." |
| Re Boott ..... | Dec. 21, '82. | Kay, J. .... | 30 yrs. | "Bcott Cotton Mills" substituted for "Boott Manufs Co." |
| Re Australian Wine Co. (61 L. T. N. S. 427.) | Jan. 23, '85. | Chitty, J. .. | 3 yrs. | "J. H. Symon and E. V. Joyner" substituted for "The Australian Wine Co." |
| Re Avril ..... | Apr. 20, '88. | Stirling, J. . | 3 yrs. | Names of Thomas Monckton and others, subsequent proprietors, removed, and name of "Louise Avril, widow," proprietor, restored. |
| Re Birmingham Wagon Co., Ld. | Nov. 22, '90. | Chitty, J. .. | 19 yrs. | "Birmingham Railway Carriage and Wagon Company, Limited," substituted for "Birmingham Wagon Company, Limited." |
| Re Wilkinson ..... (40 Sol. J. 336.) | Mar. 6, '96. | Kekewich, J. | 100 yrs. | "Burgon and Wilkinson, Limited," substituted for "William Wilkinson and Sons, Limited." |
| Re Findlater ..... | Apr. 24, '96. | North, J. .. | 2 yrs. | "Findlater, Gamble & Co." substituted for "Findlater, Mackie & Co." |

LIST OF ALTERATIONS OF THE REGISTER—*continued.*

## II.—MARKS NOT IN USE BEFORE THE 13TH AUGUST, 1875 (NEW MARKS).

### (1) *Alterations in the Name or Initials appearing on the Mark.*

| Name. | Date. | Judge. | Nature of order. |
|---|---|---|---|
| Re Bass, Ratcliff & Gretton, Ld. | July 21, '82. | Chitty, J. .. | "Bass, Ratcliff & Gretton, Ld." substituted for "Bass & Co." |
| Re May & Baker, Ld. | May 1, '91. | North, J. .. | "W. G. Baker," "R. C. Heath," "T. Tyrer," and "W. E. B. Blenkinsop" struck out. |
| Re National Wholesale Tea Supply Association, Ld. (10 P. R. 164.) | Apr. 11, '93. | Chitty, J. .. | "N. W. T. S. A. Ld." substituted for "A. J. S. & Co." |
| Re Explosives Co., Ld. | July 31, '96. | North, J. .. | "Explosives" substituted for "E. C. Powder." |
| Re Stock Owners' Meat Co. of N. S. W. (14 P. R. 733.) | July 9, '97. | Romer, J. .. | "Stock Owners' Meat" substituted for "Graziers' Meat Export." |

### (2) *Alterations in respect of the Word "Limited," or Abbreviations of it.*

| | | | |
|---|---|---|---|
| Re Allsopp ..... | July 6, '88. | Chitty, J. .. | "Limited" added after name. |
| Re Foster ..... | July 25, '90. | Chitty, J. .. | "Limited" added in some cases, "Ltd." in others. |
| Re Burke ..... (W. N. 1891, p. 2.) | Jan. 13, '91. | North, J. .. | "Limited" added after signature. |
| Re May & Baker .... | May 1, '91. | North, J. .. | "Limited" added after name. |
| Re Day & Martin, Ld. | Aug. 2, '94. | Stirling, J. . | Do. |
| Re Salt ..... | Nov. 23, '94. | North, J. .. | Do. |
| Re London Chemical Co., Ld. | Mar. 22, '95. | North, J. .. | Do. |
| Re Porter ..... (W. N. 1895, p. 102.) | June 12, '95. | Stirling, J. . | Do. |
| Re Scott & Bowne .. | May 4, '96. | Stirling, J. . | Do. |
| Re Hayward ..... (13 P. R. 729.) | July 24, '96. | Stirling, J. . | Do. |
| Re Thwaites ..... | Dec. 10, '97. | Kekewich, J. | Do. |

### (3) *Alterations in respect of Words "Trade Mark" on Mark.*

| | | | |
|---|---|---|---|
| Re Colman ..... ((1891) 2 Ch. 403.) | Apr. 11, '91. | Kekewich, J. | "Trade mark" and "Marque de Fabrique" struck out. |
| Re Badische Anilin & Soda Fabrik. | July 3, '91. | Stirling, J. . | "Trade mark" struck out. |
| Re Franklyn, Morgan, & Davey. | July 17, '91. | Romer, J. .. | Do. |

### (4) *Other Alterations in respect of Wording, Type, &c., appearing on Mark.*

| | | | |
|---|---|---|---|
| Re Dunn..... | Dec. 20, '80. | Hall, V.-C. | "Middlesboro'" substituted for "Wolsingham." |
| Re Read ..... | July 7, '81. | Hall, V.-C. | "Dog's Head Bottling" substituted for "Bull Dog Bottling." |
| Re Skinner..... | Aug. 3, '81. | Jessel, M.R. | Words "containing phosphates of iron, lime, soda, &c., for nourishing and invigorating the brain and nerves" struck out. |

LIST OF ALTERATIONS OF THE REGISTER—*continued.*

| Name. | Date. | Judge. | Nature of order. |
|---|---|---|---|
| Re Firmen & Roby.... (4 P. R. 70.) | Dec. 21, '86. | Chitty, J... | A capital E altered from the English into the Russian character, and the word "of" in Russian inserted between "Roby" and "Manchester." |
| Re Hargreaves ..... | Jan. 11, '90. | Stirling, J.. | Address "Heywood, Manchester," struck out. |
| Re Burke ..... (W. N. 1391, p. 2.) | Jan. 13, '91. | North, J. .. | Words "Refreshing, invigorating, and constituting an appetising tonic, while slightly stimulating. Easy of digestion. Specially selected and shipped only by" struck out. |
| Re Badische Anilin & Soda Fabrik. | July 3, '91. | Stirling, J.. | "Fabrik Zeichen" struck out. |
| Re Kinahan ..... | Dec. 16, '91. | North, J. .. | "Guildford Street, York Road, Lambeth, London, S.E.," substituted for "20, Great Titchfield Street, Oxford Street, W." |
| Re Day & Martin, Ld. | Aug. 2, '94. | Stirling, J.. | "Late" inserted before "High Holborn, London," and "Commercial Road, Liverpool." |
| Re Foster ..... | Mar. 22, '95. | North, J. .. | "London" substituted for "27, Brook Street, Bond Street, London." |
| Re Scott & Bowne.... | May 4, '96. | Stirling, J.. | Words "A reliable remedy for pulmonary *diseases, coughs, colds, and general debility*; contains the tonic and nutritive properties of these popular remedies in their fullest form, very pleasing to the taste, and easily digested, and is highly recommended by the medical faculty," substituted for words "A nutritive chemical food, contains all the tonic and nutritive properties of these valuable reconstructive agents, pleasing to the taste, easily digested, and is recommended and prescribed by physicians generally." "Price 2/6" struck out. Also two side panels in French and German struck out. |
| *(5) Alterations in Name of Proprietor of Mark.* | | | |
| Re Porous Plaster Co. | Feb. 6, '85. | Pearson, J.. | Words "trading as the Porous Plaster Co." struck out. |
| Re Patent Plumbago Crucible Co. (7 P. R. 282.) | Mar. 21, '90. | Stirling, J. . | "The Morgan Crucible Company lately trading as" inserted before "The Patent Plumbago Crucible Co." |
| Re Milne..... | Apr. 15, '90. | Kekewich, J. | "James Virtue McEntire" substituted for "Milne & Co." |
| Re National Wholesale Tea Supply Association. (10 P. R. 164.) | Apr. 11, '93. | Chitty, J. .. | "National Wholesale Tea Supply Association, Ld.," substituted for "Albert John Slaney and Co., Ld." |

Falsification of entries in registers.

93. If any person makes or causes to be made a false entry in any register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders, or causes to be produced or tendered, in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanour.

Exercise of discretionary power by comptroller.

94. Where any discretionary power is by this Act given to the comptroller, he shall not exercise that power adversely to the applicant for a patent, or for amendment of a specification, or for registration of a trade mark or design, without (if so required within the prescribed time by the applicant) giving the applicant an opportunity of being heard personally or by his agent (*a*).

(*a*) See Rules 17—19 as to the exercise by the comptroller of his discretionary powers.

Power of comptroller to take directions of law officers.

95. The comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to either of the law officers (*a*) for directions in the matter.

(*a*) The Attorney-General or Solicitor-General for England. See § 117.

Certificate of comptroller to be evidence.

96. A certificate purporting to be under the hand of the comptroller as to any entry, matter, or thing which he is authorised by this Act, or any general rules made thereunder, to make or do, shall be primâ-facie evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone (*a*).

(*a*) This section is somewhat modified from § 8 of the Act of 1875, by which the certificate of the registrar was made evidence. Now the certificate is to be *primâ facie* evidence only.

By § 77, *supra*, the comptroller is authorised to grant a certificate of refusal to register an old mark (see Forms L and T[1]), and by Rule 60 he *may* give a certificate, when required so to do, for the purpose of any legal proceeding or other special purpose, and on so doing *shall* specify on the face of it the purpose for which it is granted. See Forms R, S, and T[1].

See Instructions, *infra*, paragraphs 35—37, in which it is stated that the comptroller's certificate in relation to a trade mark is of four kinds, viz.:—

(*i.*) For use in legal proceedings.
(ii.) For use in applying for registration in foreign countries.
(iii.) Of any application made and of proceedings thereon.
(iv.) A certificate of refusal of a mark in use before the 13th August, 1875, and not registrable.

Applications and notices by post.

97.—(1.) Any application, notice or other document authorised or required to be left, made, or given at the Patent Office or to the comptroller, or to any other person under this Act, may be sent by a prepaid letter through the post; and if so sent shall be deemed to have been left, made, or given respectively at the time when the letter containing the same would be delivered in the ordinary course of post.

(2.) In proving such service or sending, it shall be sufficient to prove that the letter was properly addressed and put into the post (*a*).

(*a*) See Rule 16.

Provision as to days for leaving documents at office.

98. Whenever the last day fixed by this Act, or by any rule for the time being in force, for leaving any document or paying any fee at the Patent Office, shall fall on Christmas Day, Good Friday, or on a

Saturday or Sunday, or any day observed as a holiday at the Bank of England, or any day observed as a day of public fast or thanksgiving, herein referred to as excluded days, it shall be lawful to leave such document or to pay such fee on the day next following such excluded day, or days if two or more of them occur consecutively.

Declaration by infant, lunatic, &c.

99. If any person is, by reason of infancy, lunacy, or other inability, incapable of making any declaration or doing anything required or permitted by this Act or by any rules made under the authority of this Act, then the guardian or committee (if any) of such incapable person, or if there be none, any person appointed by any court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing such thing, may make such declaration or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person, and all acts done by such substitute shall for the purposes of this Act be as effectual as if done by the person for whom he is substituted (*a*).

(*a*) This section, so far as it relates to trade marks, comes from the old Rules.

Transmission of certified printed copies of specifications, &c.

100. Copies of all specifications, drawings, and amendments left at the Patent Office after the commencement of this Act, printed for and sealed with the seal of the Patent Office, shall be transmitted to the Edinburgh Museum of Science and Art, and to the Enrolments Office of the Chancery Division in Ireland, and to the Rolls Office in the Isle of Man, within twenty-one days after the same shall respectively have been accepted or allowed at the Patent Office; and certified copies of or extracts from any such documents shall be given to any person requiring the same on payment of the prescribed fee; and any such copy or extract shall be admitted in evidence in all courts in Scotland and Ireland and in the Isle of Man without further proof or production of the originals.

Power for Board of Trade to make general rules for classifying goods and regulating business of Patent Office.

101.—(1.) The Board of Trade may from time to time make such general rules (*a*) and do such things as they think expedient, subject to the provisions of this Act—

(a.) For regulating the practice of registration under this Act:

(b.) For classifying goods for the purposes of designs and trade marks (*b*):

(c.) For making or requiring duplicates of specifications, amendments, drawings, and other documents:

(d.) For securing and regulating the publishing and selling of copies, at such prices and in such manner as the Board of Trade think fit, of specifications, drawings, amendments, and other documents:

(e.) For securing and regulating the making, printing, publishing, and selling of indexes to, and abridgments of, specifications and other documents in the Patent Office; and providing for the inspection of indexes and abridgments and other documents:

(f.) For regulating (with the approval of the Treasury) the presentation of copies of Patent Office publications to patentees and to public authorities, bodies, and institutions at home and abroad:

(g.) Generally for regulating the business of the Patent Office, and all things by this Act placed under the direction or control of the comptroller or of the Board of Trade.

(2.) Any of the forms in the First Schedule to this Act may be altered or amended by the rules made by the Board as aforesaid (*c*).

(3.) General rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed.

(4.) Any rules made in pursuance of this section shall be laid before both Houses of Parliament, if Parliament be in session at the time of making thereof, or, if not, then as soon as practicable after the beginning of the then next session of Parliament, and they shall also be advertised twice in the official journal to be issued by the comptroller.

(5.) If either House of Parliament, within the next forty days after any rules have been so laid before such House, resolve that such rules or any of them ought to be annulled, the same shall after the date of such resolution be of no effect, without prejudice to the validity of anything done in the meantime under such rules or rule or to the making of any new rules or rule.

(*a*) The power of making rules was formerly, by § 7 of the Act of 1875, vested in the Lord Chancellor. For the rules which have been made by the Board of Trade, see *infra*.

(*b*) See classification in Third Schedule to Rules.

(*c*) See Forms in Second Schedule to Rules. A new Form F is thereby substituted for Form F appended to the Act.

Annual reports of comptroller.

102. The comptroller shall, before the first day of June in every year, cause a report respecting the execution by or under him of this Act to be laid before both Houses of Parliament, and therein shall include for the year to which each report relates all general rules made in that year under or for the purposes of this Act, and an account of all fees, salaries and allowances, and other money received and paid under this Act.

Proceedings of Board of Trade.

[102A.—(1.) All things required or authorised under this Act to be done by, to, or before the Board of Trade, may be done by, to, or before the President or a secretary or an assistant secretary of the Board.

(2.) All documents purporting to be orders made by the Board of Trade and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or by any person authorised in that behalf by the President of the Board, shall be received in evidence, and shall be deemed to be such orders without further proof, unless the contrary is shown.

(3.) A certificate, signed by the President of the Board of Trade, that any order made or act done is the order or act of the Board, shall be conclusive evidence of the fact so certified.]

This section was introduced by § 25 of the Act of 1888.

*International and Colonial Arrangements.*

International arrangements for protection of inventions, designs, and trade marks.

103.—(1.) If Her Majesty is pleased to make any arrangement with the government or governments of any foreign state or states for mutual protection of inventions, designs, and trade marks, or any of them, then any person who has applied for protection for any invention, design, or trade mark in any such state, shall be entitled to a patent for his invention or to registration of his design or trade mark (as the case may be) under this Act, in priority to other applicants (*a*); and such patent or registration shall have the same date as the *date of the protection obtained* [date of the application] in such foreign state.

Provided that his application is made, in the case of a patent within seven months, and in the case of a design or trade mark within four months (*b*), from his applying for protection in the foreign state with which the arrangement is in force.

Provided that nothing in this section contained shall entitle the patentee or proprietor of the design or trade mark to recover damages for infringements happening prior to the date of the actual acceptance of his complete specification, or the actual registration of his design or trade mark in this country, as the case may be.

(2.) The publication in the United Kingdom or the Isle of Man during the respective periods aforesaid of any description of the invention, or the use therein during such periods of the invention, or the exhibition or use therein during such periods of the design, or the publication therein during such periods of a description or representation of the design, or the use therein during such periods of the trade mark, shall not invalidate the patent which may be granted for the invention, or the registration of the design or trade mark:

(3.) The application for the grant of a patent, or the registration of a design, or the registration of a trade mark under this section, must be made in the same manner as an ordinary application under this Act: Provided that, in the case of trade marks, any trade mark the registration of which has been duly applied for in the country of origin may be registered under this Act (*c*):

(4.) The provisions of this section shall apply only in the case of those foreign states with respect to which Her Majesty shall from time to time by Order in Council declare them to be applicable, and so long only in the case of each state as the Order in Council shall continue in force with respect to that state (*d*).

(*a*) This section is new. The amendment in it was made by § 6 of the Act of 1885. In the case of trade marks used by aliens, the existence of a convention between the state to which the alien belongs and the British Government is not a necessary condition precedent to his registration here. The Act does not say that to obtain priority the application for registration in a foreign state with which there is a convention must have been made by a subject of that state. That is apparently the intention of the section; but there is nothing to say that the same priority is to be refused to a subject of a different state, with which there may possibly be no convention, or even to a British subject, who has applied in a country with which there is a convention. On the other hand, in the proviso in sub-s. (3) the term "country of origin" is employed. Again, in sub-s. (3) the words are "has been *duly* applied for," whereas in sub-s. (1) there is nothing about "duly," and for all that appears the application may be one which could not possibly succeed in the foreign country. The object of this section is to enable effect to be given to the International Convention of 1883. See Appendix C. The exceptional rights of

foreigners in respect of the registration of trade marks in the United Kingdom depend exclusively upon the terms of this Act, and the Court cannot have reference to the terms of the International Convention, 1883: *In re Californian Fig Syrup Co.*, 40 Ch. D. 620. Similarly, in the United States, the Courts cannot give effect to the convention without legislation. See opinion of the Attorney-General of the United States in 47 U. S. Pat. Gaz. 397.

(*b*) The application within four months is imperative, and if application is made after that time all special rights under this section are gone. And this is so though the foreign registration was effected before this section was made applicable to the particular foreign country: *In re Californian Fig Syrup Co.*, 40 Ch. D. 620. If a subject or citizen of a foreign state which is a party to the convention has registered in England a mark which is of doubtful validity according to English law, and is desirous of obtaining for it the benefits of this section (particularly sub-s. (3)), it seems that his proper course is to obtain its removal from the English register, and then to make an application for protection in his own country. Upon this being done, he will be in a position to apply again (within the four months) for registration in England under this section. See, *per* Kay, J., in *In re Vignier*, 6 P. R. 490.

(*c*) The proviso in this sub-section has been construed by North, J., as though the words "may be registered" were "may be the subject of an application for registration," and it seems that no trade mark will be registered under this section unless it is within the definition of a registrable trade mark in § 64: *In re Carter Medicine Co.*, (1892) 3 Ch. 472. See *In re Californian Fig Syrup Co.*, 40 Ch. D. 620. The proviso gives no independent right of registration, but must be read with sub-s. (1), which requires application within four months.

(*d*) For list of Orders in Council, see Appendix C.

Provision for Colonies and India.

104.—(1.) Where it is made to appear to Her Majesty that the legislature of any British possession (*a*) has made satisfactory provision for the protection of inventions, designs, and trade marks, patented or registered in this country, it shall be lawful for Her Majesty from time to time, by Order in Council, to apply the provisions of the last preceding section, with such variations or additions, if any, as to Her Majesty in Council may seem fit, to such British possession (*b*).

(2.) An Order in Council under this Act shall, from a date to be mentioned for the purpose in the Order, take effect as if its provisions had been contained in this Act; but it shall be lawful for Her Majesty in Council to revoke any Order in Council made under this Act.

(*a*) See the definition of "British possession" in § 117, *infra*.

(*b*) For list of Orders in Council, see Appendix C.

*Offences.*

Penalty on falsely representing articles to be patented.

105.—(1.) Any person who represents that any article sold by him is a patented article, when no patent has been granted for the same (*a*), or describes any design or trade mark (*b*) applied to any article sold by him as registered which is not so, shall be liable for every offence on summary conviction (*c*) to a fine not exceeding five pounds.

(2.) A person shall be deemed, for the purposes of this enactment, to represent that an article is patented or a design or a trade mark is registered, if he sells the article with the word "patent," "patented," "registered," or any word or words expressing or implying that a patent or registration has been obtained for the article stamped, engraved, or impressed on, or otherwise applied to, the article (*d*).

(*a*) This section, so far as it relates to an untrue representation as to the existence of a patent, is in substance a re-enactment of § 7 of 5 & 6 Will. IV. c. 83. In that

case, however, the penalty of £50 was imposed, recoverable in an action, and a fraudulent intention was of the essence of the offence. See *Myers* v. *Baker*, 3 H. & N. 802. This section appears to follow that in not imposing a penalty where there has been a patent, though it may have expired. Under the U. S. Revised Statutes a penalty is imposed for a misrepresentation as to the existence of a patent, but there is no offence if there has been a patent and the date of the patent is given. See *Wilson* v. *Singer Manufacturing Co.*, 16 U. S. Pat. Gaz. 1091. But it is an offence to represent that an article is patented, after application has been made for a patent and provisional protection has been obtained, but before the actual grant: *R.* v. *Wallis*, 3 P. R. 1: *R.* v. *Crampton*, 3 P. R. 367.

See § 3 (1) (c) of the Merchandise Marks Act, 1887.

(*b*) Hitherto no penalty has been recoverable for untruly representing that a trade mark is registered. An offence is committed if a trade mark is represented to be registered before it actually is so, even though application for registration has been made and advertised: *R.* v. *Morris*, Great Marlborough Street Police Court, Dec. 16th, 1886. In *Wright, Crossley & Co.* v. *William Dobbin & Co.*, 15 P. R. 21, the Irish Queen's Bench Division held that it was an offence within the section for an Irish trader to sell the goods of an American manufacturer under a label bearing the word "Registered" after the label had been expunged from the English register, although the label was still registered in America. And this decision was followed in the English Queen's Bench Division in a similar case: *MacSymons' Stores, Ld.* v. *Shuttleworth*, 15 P. R. 748. The use of the words "trade mark" is not necessarily a representation that the trade mark is registered so as to constitute an offence under this sub-section: *Sen-Sen Co.* v. *Britten*, (1899) 1 Ch. 692.

(*c*) As to "summary conviction" in Ireland, see § 117.

(*d*) See Ch. 7, *ante*.

*Penalty on unauthorised assumption of Royal Arms.*

106. Any person who, without the authority of Her Majesty, or any of the Royal Family, or of any Government Department, assumes or uses in connection with any trade, business, calling, or profession, the Royal Arms, or arms so nearly resembling the same as to be calculated to deceive, in such a manner as to be calculated to lead other persons to believe that he is carrying on his trade, business, calling, or profession by or under such authority as aforesaid (*a*), shall be liable on summary conviction (*b*) to a fine not exceeding twenty pounds (*c*).

(*a*) This section is new. For an offence against it to be committed it is not sufficient to prove that a person is using the Royal Arms without authority, or that what he is doing is calculated to lead to the belief that the user of the arms is authorised; but it must be proved that that user is calculated to lead to the belief that the trader is *carrying on his business* by Royal or Governmental authority.

(*b*) As to "summary conviction" in Ireland, see § 117.

(*c*) The following notice has been published in the *London Gazette*:—

"FRIDAY, FEB. 22ND, 1884.

"BOARD OF GREEN CLOTH, BUCKINGHAM PALACE, FEB. 19TH.

"Notice is hereby given that by section 106 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Victoria, cap. 57), a penalty of £20 is incurred by any persons who, without proper authority, assume the Royal Arms with a view to lead other persons to believe that they are employed under any department of Her Majesty's Household. "SYDNEY, Lord Steward."

It will be observed that the above notice treats fraudulent intention as of the essence of the offence; but this does not appear to be in accordance with the provisions of the section.

See § 20 of Merchandise Marks Act, 1887, as to false representations with reference to holding a Royal warrant.

*Scotland, Ireland, &c.*

*Saving for Courts in Scotland.*

107. In any action for infringement of a patent in Scotland the provisions of this Act, with respect to calling in the aid of an assessor, shall apply, and the action shall be tried without a jury, unless the

Court shall otherwise direct, but otherwise nothing shall affect the jurisdiction and forms of process of the Courts in Scotland in such an action or in any action or proceeding respecting a patent hitherto competent to those courts. For the purposes of this section "Court of Appeal" shall mean any court to which such action is appealed.

Summary proceedings in Scotland.

108. In Scotland any offence under this Act declared to be punishable on summary conviction may be prosecuted in the Sheriff Court.

Proceedings for revocation of patent in Scotland.

109.—(1.) Proceedings in Scotland for revocation of a patent shall be in the form of an action of reduction at the instance of the Lord Advocate, or at the instance of a party having interest with his concurrence, which concurrence may be given on just cause shown only.

(2.) Service of all writs and summonses in that action shall be made according to the forms and practice existing at the commencement of this Act.

Reservation of remedies in Ireland.

110. All parties shall, notwithstanding anything in this Act, have in Ireland their remedies under or in respect of a patent as if the same had been granted to extend to Ireland only.

General saving for jurisdiction of Courts.

111.—(1.) The provisions of this Act conferring a special jurisdiction on the Court as defined by this Act, shall not, except so far as the jurisdiction extends, affect the jurisdiction of any Court in Scotland or Ireland in any proceedings relating to patents or to designs or to trade marks; and with reference to any such proceedings in Scotland, the term "the Court" shall mean any Lord Ordinary of the Court of Session, and the term "Court of Appeal" shall mean either Division of the said Court; and with reference to any such proceedings in Ireland, the terms "the Court" and "Court of Appeal" respectively mean the High Court of Justice in Ireland and Her Majesty's Court of Appeal in Ireland (*a*).

(2.) If any rectification of a register under this Act is required in pursuance of any proceeding in a Court in Scotland or Ireland, a copy of the order, decree, or other authority for the rectification, shall be served on the comptroller, and he shall rectify the register accordingly.

(*a*) This provision does not exclude the jurisdiction of the High Court of Justice in England to expunge from the register a mark registered in the name of a domiciled Scotchman or Irishman: *In re King & Co.*, (1892) 2 Ch. 462. The question whether the Scotch and Irish Courts had a concurrent jurisdiction was there left open. The question has since been decided by the Court of Session in the affirmative as to Scotland (*Cowie* v. *Herbert*, 14 P. R. 436); and by the Master of the Rolls in Ireland in the negative with regard to that country: *Bayer* v. *Connell*, (1897) 1 I. R. 544.

Isle of Man.

112. This Act shall extend to the Isle of Man, and—

(1.) Nothing in this Act shall affect the jurisdiction of the Courts in the Isle of Man, in proceedings for infringement or in any action or proceeding respecting a patent, design, or trade mark competent to those Courts;

(2.) The punishment for a misdemeanour under this Act in the Isle of Man shall be imprisonment for any term not exceeding two years, with or without hard labour, and with or without a fine not exceeding one hundred pounds, at the discretion of the Court;

(3.) Any offence under this Act committed in the Isle of Man which would in England be punishable on summary conviction may be

prosecuted, and any fine in respect thereof recovered at the instance of any person aggrieved, in the manner in which offences punishable on summary conviction may for the time being be prosecuted.

Jurisdiction of Lancashire Palatine Court.

[112A.—The Court of Chancery of the County Palatine of Lancaster shall, with respect to any action or other proceeding in relation to trade marks, the registration whereof is applied for in the Manchester Office, have the like jurisdiction under this Act as Her Majesty's High Court of Justice in England, and the expression "the Court" in this Act shall be construed and have effect accordingly.

Provided that every decision of the Court of Chancery of the County Palatine of Lancaster, in pursuance of this section, shall be subject to the like appeal as decisions of that Court in other cases.]

This section was introduced by § 26 of the Act of 1888.

*Repeal; Transitional Provisions; Savings.*

Repeal and saving for past operation of repealed enactments, &c.

113. The enactments described in the Third Schedule to this Act are hereby repealed. But this repeal of enactments shall not—

(a.) Affect the past operation of any of those enactments, or any patent or copyright or right to use a trade mark granted or acquired, or application pending (*a*), or appointment made, or compensation granted, or order or direction made or given, or right, privilege, obligation, or liability acquired, accrued, or incurred, or anything duly done or suffered under or by any of those enactments before or at the commencement of this Act; or

(b.) Interfere with the institution or prosecution of any action or proceeding, civil or criminal, in respect thereof, and any such proceeding may be carried on as if this Act had not been passed; or

(c.) Take away or abridge any protection or benefit in relation to any such action or proceeding.

(*a*) Applications under the Act of 1875 had to be decided under that Act: *In re Hudson*, 32 Ch. D. 311. But § 63 applied to applications pending at the date of the passing of this Act, and not completed within twelve months by the applicants' default: *In re Hayward & Co.*, 54 L. J. Ch. 1003.

Former registers to be deemed continued.

114.—(1.) The registers of patents and of proprietors kept under any enactment repealed by this Act shall respectively be deemed parts of the same book as the register of patents kept under this Act.

(2.) The registers of designs and of trade marks (*a*) kept under any enactment repealed by this Act shall respectively be deemed parts of the same book as the register of designs and the register of trade marks kept under this Act.

(*a*) The register of trade marks was previously to this Act kept under the authority of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91, by § 1 of which it was established), and the amending Acts (39 & 40 Vict. c. 33, and 40 & 41 Vict. c. 37). These Acts placed the register under the superintendence of the then Commissioners of Patents, now abolished. See *In re Meikle*, 24 W. R. 1067; *In re Barrows*, 5 Ch. D. 353, 361; *In re Rotherham*, 11 Ch. D. 250; 14 Ch. D. 585.

115. All general rules made by the Lord Chancellor or by any other authority under any enactment repealed by this Act, and in force at the commencement of this Act, may at any time after the passing of this Act be repealed, altered, or amended by the Board of Trade, as if they had been made by the Board under this Act, but so that no such repeal, alteration, or amendment shall take effect before the commencement of this Act; and, subject as aforesaid, such general rules shall, so far as they are consistent with and are not superseded by this Act, continue in force as if they had been made by the Board of Trade under this Act (*a*). Saving for existing rules.

(*a*) Rule 63 repeals all the old Rules.

116. Nothing in this Act shall take away, abridge, or prejudicially affect the prerogative of the Crown in relation to the granting of any letters patent or to the withholding of a grant thereof. Saving for prerogative.

*General Definitions.*

117. In and for the purposes of this Act, unless the context otherwise requires,— General definitions.

"Person" includes a body corporate;

"The Court" means (subject to the provisions for Scotland, Ireland, and the Isle of Man) Her Majesty's High Court of Justice in England (*a*):

"Law Officer" means Her Majesty's Attorney-General or Solicitor-General for England:

"The Treasury" means the Commissioners of Her Majesty's Treasury:

"Comptroller" means the Comptroller-General of Patents, Designs, and Trade Marks:

"Prescribed" means prescribed by any of the Schedules to this Act, or by general rules under or within the meaning of this Act:

"British possession" means any territory or place situate within Her Majesty's dominions, and not being or forming part of the United Kingdom, or of the Channel Islands, or of the Isle of Man; and all territories and places under one legislature, as hereinafter defined, are deemed to be one British possession for the purposes of this Act:

"Legislature" includes any person or persons who exercise legislative authority in the British possession; and where there are local legislatures as well as a central legislature, means the central legislature only.

In the application of this Act to Ireland "summary conviction" means a conviction under the Summary Jurisdiction Acts, that is to say, with reference to the Dublin Metropolitan Police District the Acts regulating the duties of justices of the peace and of the police for such district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending it.

(*a*) See § 112A, *supra*.

## SCHEDULES.

### The First Schedule.

*Forms of Application, &c.* (*a*).

(*a*) The only form relating to trade marks is Form F., for which an amended Form F. is substituted by the Trade Marks Rules, *q.v. infra.*

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### The Second Schedule.

*Fees on Instruments for obtaining Patents and Renewal.*

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### The Third Schedule.

*Enactments Repealed.*

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38 & 39 Vict. c. 91 (1875).—The Trade Marks Registration Act, 1875.
39 & 40 Vict. c. 33 (1876).—The Trade Marks Registration Amendment Act, 1876.
40 & 41 Vict. c. 37 (1877).—The Trade Marks Registration Extension Act, 1877.

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# THE PATENTS, DESIGNS, AND TRADE MARKS (AMENDMENT) ACT, 1885.

48 & 49 Vict. c. 63.

*An Act to amend the Patents, Designs, and Trade Marks Act*, 1883.
[14th August, 1885.]

Construction and short title.

1. This Act shall be construed as one with the Patents, Designs, and Trade Marks Act, 1883 (in this Act referred to as the Principal Act).

This Act may be cited as the Patents, Designs, and Trade Marks (Amendment) Act, 1885, and this Act and the principal Act may be cited together as the Patents, Designs, and Trade Marks Acts, 1883 and 1885.

2.—5. [These sections relate exclusively to Patents.]

Amendment of § 103 of 46 & 47 Vict. c. 57.

6. In subs. 1 of § 103 of the principal Act, the words "date of the application" shall be substituted for the words "date of the protection obtained."

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# THE PATENTS ACT, 1886.

## 49 & 50 Vict. c. 37.

*An Act to remove certain doubts respecting the construction of the Patents, Designs, and Trade Marks Act*, 1883, *so far as respects the drawings by which specifications are required to be accompanied, and as respects exhibitions.* [25th June, 1886.]

Whereas (preamble).

Be it therefore enacted * * * * as follows:

1. This Act may be cited as the Patents Act, 1886, and shall be construed as one with the Patents, Designs, and Trade Marks Acts, 1883 and 1885, and, together with those Acts, may be cited as the Patents, Designs, and Trade Marks Acts, 1883 to 1886. Short title and construction.

[This Act relates exclusively to Patents and Designs.]

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# THE PATENTS, DESIGNS, AND TRADE MARKS ACT, 1888.

## 51 & 52 Vict. c. 50.

*An Act to amend the Patents, Designs, and Trade Marks Act*, 1883. [24th December, 1888.]

Whereas it is expedient to amend the Patents, Designs, and Trade Marks Act, 1883, hereinafter referred to as the principal Act: 46 & 47 Vict. c. 57.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. [This section establishes a register of patent agents.]

2.—5. [These sections relate to Patents.]

6, 7. [These sections relate to Designs.]

8.—(1.) In sub-s. 2 of § 62 of the principal Act for the words "the patent office in the prescribed manner" shall be substituted the words "such place and in such manner as may be prescribed." Amendments of 46 & 47 Vict. c. 57, § 62, as to application for registration.

(2.) To the same section of the principal Act the following subsection shall be added:

"(6.) Where an applicant for the registration of a trade mark otherwise than under an international convention is out of the United Kingdom at the time of making the application he shall give the comptroller an address for service in the United Kingdom, and if he fails to do so the application shall not be proceeded with until the address has been given."

§ 63, as to limit of time for proceeding with application.

9. In § 63 of the principal Act for the words "the application shall be deemed to be abandoned" shall be substituted the words "the comptroller shall give notice of the non-completion to the agent employed on behalf of the applicant; and, if at the expiration of fourteen days from that notice the registration is not completed, shall give the like notice to the applicant, and, if at the expiration of the latter fourteen days, or such further time as the comptroller may in special cases permit, the registration is not completed, the application shall be deemed to be abandoned."

§ 64, as to fancy words.

10.—(1.) For § 64 of the principal Act the following section shall be substituted, namely:

"64.—(1.) For the purposes of this Act, a trade mark must consist of or contain at least one of the following essential particulars:

(a.) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

(b.) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or

(c.) A distinctive device, mark, brand, heading, label, or ticket; or

(d.) An invented word or invented words; or

(e.) A word or words having no reference to the character or quality of the goods, and not being a geographical name.

"(2.) There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them; but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register.

"(3.) Provided as follows:

(i.) A person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof:

(ii.) Any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade mark before the thirteenth day of August one thousand eight hundred and seventy-five, may be registered as a trade mark under this part of this Act."

§ 67, as to colours of trade marks.

11. In § 67 of the principal Act the words "or colours" shall be added after the word "colour" in each place where that word occurs.

§ 68, as to advertisement of applications.

12. In § 68 of the principal Act after the word "comptroller" shall be added the words "unless the comptroller refuse to entertain the application."

§ 69, as to opposition to registration.

13.—(1.) In sub-s. 1 of § 69 of the principal Act for the words "two months" shall be substituted the words "one month or such further time, not exceeding three months, as the comptroller may allow."

(2.) In the same sub-section the word "first" shall be omitted.

(3.) In sub-s. 2 of the same section for the words "two months" shall be substituted the words "one month."

(4.) For sub-ss. 3 and 4 of the same section the following sub-sections shall be substituted, namely:

"(3.) If the applicant sends such counter-statement the comptroller shall furnish a copy thereof to the person who gave notice of opposition, and shall, after hearing the applicant and the opponent, if so required, decide whether the trade mark is to be registered; but his decision shall be subject to appeal to the Board of Trade, who shall, if required, hear the applicant and the opponent and the comptroller, and may make an order determining whether, and subject to what conditions (if any), registration is to be permitted.

"(4.) The Board of Trade may, however, if it appears expedient, refer the appeal to the Court, and in that event the Court shall have jurisdiction to hear and determine the appeal, and may make such order as aforesaid.

"(5.) If the applicant abandons his application after notice of opposition in pursuance of this section, he shall be liable to pay to the opponent such costs in respect of the opposition as the comptroller may determine to be reasonable.

"(6.) Where the opponent is out of the United Kingdom he shall give the comptroller an address for service in the United Kingdom."

§ 72, as to restrictions on registration.

14. In sub-s. 2 of § 72 of the principal Act the following words shall be added at the beginning of the sub-section, namely, "except as aforesaid," and for the words "so nearly resembling" shall be substituted the words "having such resemblance to."

§ 73, as to restriction on registration.

15. In § 73 of the principal Act the word "exclusive" shall be omitted.

§ 74, as to additions to trade marks.

16. For sub-s. 2 of § 74 of the principal Act the following sub-section shall be substituted, namely:

"(2.) The applicant for registration of any such addition must, however, state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register.

"Provided that a person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof."

§ 75, as to effect of registration.

17. For § 75 of the principal Act the following section shall be substituted, namely:

"Application for registration of a trade mark shall be deemed to be equivalent to public use of the trade mark, and the date of the application shall for the purposes of this Act be deemed to be, and as from the first day of January one thousand eight hundred and seventy-six to have been the date of the registration."

Certificate as to exclusive use and costs thereon.

18. After § 77 of the principal Act the following section shall be added and numbered 77A, namely:

"In an action for infringement of a registered trade mark the Court or a judge may certify that the right to the exclusive use of the trade mark came in question, and if the Court or a judge so certifies, then in any subsequent action for infringement, the plaintiff in that action, on obtaining a final order or judgment in his favour, shall have his full costs, charges, and expenses as between solicitor and client, unless the Court or judge trying the subsequent action certifies that he ought not to have the same."

§ 79, as to removal of trade mark from the register.

19.—(1.) In sub-s. 5 of § 79 of the principal Act for the words "five years" shall be substituted the words "one year."

(2.) To the same sub-section the following words shall be added; namely, "unless it is shown to the satisfaction of the comptroller that the non-payment of the fee arises from the death or bankruptcy of the registered proprietor, or from his having ceased to carry on business, and that no person claiming under that proprietor or under his bankruptcy is using the trade mark."

§ 81, as to Sheffield marks.

20.—(1.) For sub-s. 2 of § 81 of the principal Act the following sub-section shall be substituted:

"(2.) The Cutlers' Company shall enter in the Sheffield Register, in respect of metal goods as defined in this section, all the trade marks entered before the first day of January one thousand eight hundred and eighty-nine in respect of metal goods either in the register established under the Trade Marks Registration Act, 1875, or in the register of trade marks under this Act, belonging to persons carrying on business in Hallamshire or within six miles thereof. The Cutlers' Company shall also, on request made in the prescribed manner, enter in the Sheffield Register, in respect of metal goods, all the trade marks which shall have been assigned by the Cutlers' Company and actually used before the first day of January one thousand eight hundred and eighty-four, but which have not been entered in either of the said other registers."

38 & 39 Vict. c. 91.

(2.) In sub-ss. 3 and 8 of the same section for the words "on cutlery, edge tools, or on raw steel, or on goods made of steel, or of steel and iron combined, whether with or without a cutting edge," shall be substituted the words "on metal goods."

(3.) For sub-s. 7 of the same section the following sub-section shall be substituted:

"(7.) The provisions of this Act and of any general rules made under this Act with respect to the registration of trade marks, and all matters relating thereto, shall, subject to the provisions of this section, apply to the registration of trade marks on metal goods by the Cutlers' Company, and to all matters relating thereto; and this Act and any such general rules shall, so far as applicable, be construed accordingly with the substitution of the Cutlers' Company, the office of the Cutlers' Company, and the Sheffield Register, for the Comptroller, the Patent Office, and the Register of Trade

Marks, respectively; and notice of every entry, cancellation, or correction made in the Sheffield Register shall be given to the Comptroller by the Cutlers' Company: Provided that this section shall not affect any life estate and interest of a widow of the holder of any Sheffield mark which may be in force in respect of such mark at the time when it shall be placed upon the Sheffield Register."

(4.) To the same section the following sub-sections shall be added, namely:

"(14.) For the purposes of this section the expression 'metal goods' means all metals, whether wrought, unwrought, or partly wrought, and all goods composed wholly or partly of any metal.

"(15.) For the purpose of legal proceedings in relation to trade marks entered in the Sheffield Register a certificate under the hand of the Master of the Cutlers' Company shall have the same effect as the certificate of the comptroller."

§ 87, as to entry of assignments, &c.

21. In § 87 of the principal Act, after the words "subject to," shall be added the words "the provisions of this Act and to."

§ 88, as to inspection.

22. In § 88 of the principal Act, after the words "subject to," shall be added the words "the provisions of this Act and to."

§ 90, as to rectification of register.

23. In § 90 of the principal Act, after the words "of the name of any person," shall be added the words "or of any other particulars."

§ 91, as to correction of errors.

24. To § 91 of the principal Act the following sub-section shall be added, namely:

"(*d.*) Permit an applicant for registration of a design or trade mark to amend his application by omitting any particular goods or classes of goods in connection with which he has desired the design or trade mark to be registered."

Proceedings of Board of Trade.

25. After § 102 of the principal Act the following section shall be added and numbered 102A, namely:

"(1.) All things required or authorised under this Act to be done by, to, or before the Board of Trade, may be done by, to, or before the President or a secretary or an assistant secretary of the Board.

"(2.) All documents purporting to be orders made by the Board of Trade and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or by any person authorised in that behalf by the President of the Board, shall be received in evidence, and shall be deemed to be such orders without further proof, unless the contrary is shown.

"(3.) A certificate, signed by the President of the Board of Trade, that any order made or act done is the order or act of the Board, shall be conclusive evidence of the fact so certified."

Jurisdiction of Lancashire Palatine Court.

26. After § 112 of the principal Act the following section shall be added and numbered 112A, namely:

"The Court of Chancery of the County Palatine of Lancaster shall, with respect to any action or other proceeding in relation to trade marks the registration whereof is applied for in the Manchester Office, have the like jurisdiction under this Act as Her Majesty's High Court of Justice in England, and the

expression 'the court' in this Act shall be construed and have effect accordingly.

"Provided that every decision of the Court of Chancery of the County Palatine of Lancaster in pursuance of this section shall be subject to the like appeal as decisions of that court in other cases."

Construction of principal Act.

27. The principal Act shall, as from the commencement of this Act, take effect subject to the additions, omissions, and substitutions required by this Act, but nothing in this Act shall affect the validity of any act done, right acquired, or liability incurred before the commencement of this Act (*a*).

(*a*) In *In re Burgoyne*, 6 P. R. 227, Chitty, J., said that when an application was made before the commencement of this Act a right had been acquired to have the mark registered under the Act of 1883, subject to opposition and the like. But in *In re Baschiera*, 33 Sol. J. 469, the same learned judge said that the point must still be considered open. In *In re Apollinaris Co.*, (1891) 2 Ch. 186, 201, it was thought that where an application for the registration of a trade mark was made while the Act of 1883 was in force, but, being opposed, was not heard until after the amending Act had come into force, the applicants were entitled to avail themselves of whichever of the two Acts was the more favourable to their application.

The question whether a mark which has been registered under the Act of 1883 ought to be expunged if, though not complying with the Act of 1883, it complies with the later Act, was discussed, but not decided, in *In re Paine* (1), 9 P. R. 130; and see *In re Edge*, 8 P. R. 207, and *In re Talbot*, 11 P. R. 77; but it seems to be now settled that in determining whether or not a mark ought to be expunged from the register the Act to be regarded is the Act under which the mark was registered: *Hodgson* v. *Sinclair*, 9 P. R. 22; *In re Bovril T. M.*, (1896) 2 Ch. 600; *In re Harris*, 9 P. R. 492; *In re Banks & James*, 12 P. R. 333; *Meaby & Co. Ld.* v. *Triticine, Ld.*, 15 P. R. 1, 14.

Commencement of Act.

28. This Act shall, except so far as is by this Act otherwise specially provided, commence and come into operation on the first day of January one thousand eight hundred and eighty-nine.

Short title.

29. This Act may be cited as the Patents, Designs, and Trade Marks Act, 1888, and this Act and the Patents, Designs, and Trade Marks Acts, 1883 to 1886, may be cited collectively as the Patents, Designs, and Trade Marks Acts, 1883 to 1888.

# TRADE MARKS RULES, 1890,

*As amended by the Trade Marks Rules*, 1897 *and* 1898.*

By virtue of the provisions of the Patents, Designs, and Trade Marks Acts, 1883 to 1888, the Board of Trade do hereby make the following Rules:—

## Preliminary.

1. These Rules may be cited as the Trade Marks Rules, 1890, and shall come into operation from and immediately after the 31st day of December, 1889.

## Interpretation.

2. In the construction of these Rules any words herein used defined by the said Acts (*a*) shall have the meanings thereby assigned to them respectively. Interpretation.

(*a*) See § 117.

## Fees.

3. The fees to be paid in pursuance of the said Acts, so far as they relate to trade marks, shall be the fees specified in the First Schedule hereto (*a*). Fees.

(*a*) See § 80. The fees are to be paid in some cases by stamps and in other cases in cash. See Notice as to Fees, p. 415, *infra*. See Instructions, par. 2, *infra*.

## Forms.

4. The Form F in the First Schedule to the Patents, Designs, and Trade Marks Act, 1883, shall be altered or amended by the substitution therefor of the Form F in the Second Schedule to these Rules (*a*). Forms.

(*a*) For this Schedule see Appendix B, *infra*. See Instructions, par. 3, *infra*, for list of stamped forms.

5. (1) An application for registration of a trade mark shall be made in the Form F in the Second Schedule to these Rules; (2) the remaining forms in such schedule may be used in all cases to which they are applicable.

## Classification of Goods.

6. For the purposes of trade marks registration and of these Rules goods are classified in the manner appearing in the Third Schedule hereto. Classification of goods.

If any doubt arises as to what class any particular description of goods belongs to, the doubt shall be determined by the comptroller (*a*).

(*a*) See § 65. See Instructions, par. 19, *infra*, and Guide to Classification, *infra*, p. 424.

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* Under the Trade Marks Registration Acts three successive sets of Rules were made, one in 1875, one in 1876 (which was considerably altered from time to time), and the last in March, 1883. All these were repealed by the Rules of Dec. 1883, made under the Act of that year, to which later additions were made from time to time, especially in 1889. All these are now repealed (see Rule 63, *infra*). The repealed Rules as to cotton marks are printed in Appendix D, in order to enable the position of such marks to be understood. The Rules of 1890 have been amended by the Rules of 1897 and 1898. Such of the Rules of 1890 as have been repealed by the later Rules are omitted and the substituted Rules are printed in brackets.

## Application for Registration.

Application by firm.

7. An application (*a*) for registration of a trade mark, if made by any firm or partnership, may be signed (*b*) by some one or more members of such firm or partnership, as the case may be.

If the application be made by a body corporate it may be signed (*c*) by the secretary or other principal officer of such body corporate.

(*a*) See § 62. For mode of making application, see also Instructions, pars. 8—19, *infra*. A separate form is required for each class—par. 10. As to disclaimer of common or open marks, see § 74, and Instructions, par. 18.

(*b*) A member signing an application should add after his signature, "A member of the firm." See Instructions, par. 11.

(*c*) The officer signing should add after his signature and designation, "For the Company." See Instructions, par. 11.

Address of application.

8. Where a trade mark for registration of which application is made is in classes 23, 24 or 25 of the Third Schedule to these Rules, the applicant shall address and send his application to the Manchester Trade Marks Branch, 48, Royal Exchange, Manchester (*a*). Other applications (except applications which under § 81 of the said Acts should be made to the Cutlers' Company (*b*)), shall be addressed and sent to the Patent Office, Trade Marks Branch, 25, Southampton Buildings, Chancery Lane, London, W.C.

(*a*) See Instructions, par. 34.

(*b*) See Rules 56—59, and Instructions, par. 33.

Agency.

[9. An application for registration and all other communications between the applicant and the comptroller may be made by or through an agent duly authorized to the satisfaction of the comptroller (*a*), but the comptroller shall not be bound to recognize as such agent, or to receive further communications from, any person whose name, by reason of his having been adjudged guilty of disgraceful professional conduct, has been erased from the register of patent agents kept under the provisions of the Patents, Designs, and Trade Marks Act, 1888, relating to the registration of patent agents, and not since restored.]

The substituted Rule comes from Rule 2 of the Rules of 1898, *infra*, p. 460.

(*a*) An agent signing should add after his signature the word "Agent." See Instructions, par. 12.

Acknowledgment of application.

10. On receipt of the application the comptroller shall furnish the applicant with an acknowledgment thereof.

Contents of form of application.

11. Where application is made to register a trade mark which was used (*a*) by the applicant or his predecessors in business before the 13th of August, 1875 (*b*), the application shall contain a statement (*c*) of the time during which and of the person by whom it has been so used in respect of the goods mentioned in the application.

(*a*) *I.e.*, in respect of the same goods for which the application is being made. Registration must be applied for as for a new mark when the mark has been used on different goods. See *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *Edwards* v. *Dennis*, 30 Ch. D. 454.

(*b*) This is the date of the passing of the Act of 1875, and, at this point the line is drawn between old and new marks, various indulgences being allowed to the former and not to the latter. See notes to §§ 64 and 72.

(*c*) Prior to 1883 a statutory declaration was required, since then a mere statement has been sufficient, unless the comptroller requires, as he frequently does, a statutory declaration to be made. See pp. 93, 94, *ante*.

12. Subject to any other directions that may be given by the comptroller, all applications, notices, counter-statements, representations of marks, papers having representations affixed, or other documents required by the said Acts or by these Rules to be left with or sent to the comptroller or to the Cutlers' Company (*a*), shall be upon foolscap paper of a size of 13 inches by 8 inches, and shall have on the left-hand part thereof a margin of not less than one inch and a half. Size, &c. of documents.

(*a*) See § 81; also Rules 56—59, and Instructions, par. 33.

[13. Every application for registration of a trade mark shall contain a representation of the mark affixed to it in the square which the Form F contains for that purpose. Representations of trade mark.

Where the representation exceeds such square in size, the representation shall be mounted upon linen, tracing cloth, or other material that the comptroller may consider suitable. Part of the mounting shall be affixed in the space aforesaid, and the rest may be folded over (*a*).

With every application for registration sent to the Manchester Trade Marks Branch, there shall be supplied four additional representations of each mark on the Form G, exactly corresponding with that on the application Form F, and noted with all such particulars as may from time to time be required by the comptroller or by the keeper of cotton marks at Manchester. Such particulars shall, if required, be signed by the applicant or his agent.

In the case of marks applied for in any of the classes 5, 6, 7, 11, 12, 13, 14, 22, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, there shall be sent with the application four additional representations of each mark on the Form G, exactly corresponding with that affixed to the application in Form F, and noted with all such particulars as may from time to time be required by the comptroller. Such particulars shall, if required, be signed by the applicant or his agent.

In the case of marks applied for in any other class there shall be sent with the application three additional representations of each mark on the Form G, exactly corresponding to that affixed to the application Form F, and noted with all such particulars as may from time to time be required by the comptroller (*b*). Such particulars shall, if required, be signed by the applicant or his agent.

All representations of marks must be of a durable nature, but the applicant may in case of need supply in place of representations on the Form G, half sheets of strong foolscap of the size aforesaid with the representations affixed thereon, and noted as aforesaid.

Applications for the registration of the same mark in different classes shall be treated as separate and distinct applications.

The comptroller, if dissatisfied with any representation of a mark, may at any time require another representation satisfactory to him to be substituted before proceeding with the application.

Where a drawing or other representation or specimen cannot be given in manner aforesaid, a specimen or copy of the trade mark may be sent either of full size or on a reduced scale, and in such form as the comptroller may think most convenient.

The comptroller may also, in exceptional cases, deposit in the Patent

Office a specimen or copy of any trade mark which cannot conveniently be shown by a representation, and may refer thereto in the register in such manner as he may think fit (*c*).]

The substituted Rule comes from Rule 2 of the Rules of 1897.

(*a*) See Instructions, par. 16.

(*b*) See § 62 (3), and Instructions, par. 15.

(*c*) As to deposit, see note to § 67. All cotton marks are deposited, but other marks have been deposited in exceptional cases only. See *In re Robinson*, 29 W. R. 31; *Mitchell* v. *Henry*, 15 Ch. D. 181; *In re Jones Bros. & Co.*, Hall, V.-C., July 16th, 1880.

Representations of a series of trade marks.

[14. When application is made for the registration of a series of trade marks under § 66 of the Patents, Designs, and Trade Marks Act, 1883, a representation of each trade mark of the series shall be affixed, as aforesaid, to the application upon Form F, and to each of the accompanying Forms G (*a*).]

The substituted Rule comes from Rule 2 of the Rules of 1897.

(*a*) See Instructions, par. 17.

Translation of foreign characters.

[15. When a trade mark contains a word or words in other than Roman characters, there shall be endorsed on the application in Form F, and on each of the accompanying representations in Form G, a sufficient transliteration and translation to the satisfaction of the comptroller of each of such words, and every such endorsement shall be signed by the applicant or his agent (*a*).

Where a trade mark contains a word or words in a language other than English, the comptroller may ask for an exact translation thereof, and if he so requires such translation shall be endorsed and signed as aforesaid.]

The substituted Rule comes from Rule 2 of the Rules of 1897.

(*a*) See Instructions, par. 14, and *In re Rotherham*, 11 Ch. D. 250; 14 *ib.* 585. Also *In re Dewhurst & Sons, Ld.*, (1896) 2 Ch. 137.

Mode of sending notices, &c.

16. Any application, statement, notice, or other document authorised or required to be left, made, or given at the Patent Office, or to the comptroller, or to any other person under these Rules, may be sent by a prepaid letter through the post, and if so sent shall be deemed to have been left, made, or given respectively at the time when the letter containing the same would be delivered in the ordinary course of post (*a*).

In proving such service or sending, it shall be sufficient to prove that the letter was properly addressed and put into the post.

(*a*) See § 97, and Instructions, pars. 1, 8, and 33. Communications relating to different applications should be made in separate letters. See Instructions, par. 8.

## Exercise of Discretionary Powers.

Hearing by comptroller.

17. Before exercising any discretionary power (*a*) given to the comptroller by the said Acts adversely to the applicant for registration of a trade mark, the comptroller shall (if so required by the applicant within one month from the date of the comptroller's objection) give the applicant an opportunity of being heard personally or by his agent by sending the applicant ten days' notice of a time when he may be so heard.

(*a*) See § 94.

Notice of wish to be heard

18. Within five days from the date when such notice would be delivered in the ordinary course of post, the applicant shall notify to

the comptroller whether or not he intends to be heard upon the matter. before comptroller.

19. The decision of the comptroller in the exercise of any such discretionary power as aforesaid shall be notified to the applicant. Notification of decision.

## Appeal to the Board of Trade.

20. When any person intends to appeal to the Board of Trade (*a*) from a decision of the comptroller in any case in which an appeal is given by the said Acts, he shall, within one month from the date of the decision appealed against, leave at the Patent Office, Trade Marks Branch, a notice of such his intention. Notice of appeal.

(*a*) See §§ 62 and 69.

21. Such notice shall be accompanied by a statement in writing of the grounds of appeal, and of the appellant's case in support thereof (*a*). Grounds of appeal to be stated.

(*a*) See Form H (p. 473, *infra*) and Form 5 (p. 501, *infra*).

22. A copy of the notice of intention to appeal, accompanied by a statement of the case, shall also be forthwith sent to the Secretary of the Board of Trade, No. 7, Whitehall Gardens, London; and, where there has been an opposition before the comptroller, to the opponent or applicant as the case may be. Transmission of notice.

23. The Board of Trade may thereupon give such directions (if any) as they may think fit with respect to evidence, or otherwise, for the purpose of the hearing of the appeal by the Board of Trade, or for the purpose of their referring the appeal to the Court to hear and determine the same (*a*). Directions by Board.

(*a*) On an appeal from a decision of the comptroller referred to the Court, any statutory declaration used before the comptroller must, to be admissible as evidence before the Court, be verified by the declarant himself: *In re Kingsford & Son*, 15 P. R. 197.

24. Where the Board of Trade intend to hear the appeal, seven days' notice, or such shorter notice as the Board of Trade may in any particular case direct, of the time and place appointed for the hearing, shall be given to the comptroller and to the appellant, and, where there has been an opposition before the comptroller, to the opponent or applicant as the case may be. Hearing of appeal.

25. No appeal shall be entertained of which notice has not been given within one month from the date of the decision appealed against, or such further time as the comptroller may allow, except by special leave of the Board of Trade. No appeal unless notice duly given.

26. Subject to the directions and leave of the Board of Trade, the evidence to be used on an appeal to the Board of Trade in the matter of an opposition shall be the same as that used at the hearing before the comptroller. Evidence on appeal.

## Advertisement of Application.

27. Every application shall be advertised (*a*) by the comptroller in the official paper, during such times, and in such manner as the comptroller may direct, unless he refuse to entertain the application. Advertisement of application.

If no representation of the trade mark be inserted in the official paper in connection with the advertisement of an application, the comptroller shall refer in such advertisement to the place or places

where a specimen or representation of the trade mark is deposited for exhibition (*b*).

(*a*) As to advertisement, see § 68, and Instructions, pars. 20—27. "The object of the advertisement is to give to persons who might be claimants of the trade mark proposed to be registered the opportunity of coming forward and objecting," said Hall, V.-C., in *In re Meikle*, 24 W. R. 1067, and an advertisement is therefore indispensable: *ib.* It is not, however, incumbent on persons to see the advertisement, and if a common mark has been registered, after advertisement, and without opposition, it may be removed from the register on application by persons aggrieved (*In re Hyde & Co.*, 7 Ch. D. 724); and marks improperly registered may be removed from the register even after they have been there for five years: *In re Palmer* (3), 24 Ch. D. 504; *In re Leonard & Ellis*, 26 Ch. D. 288, and other cases. See notes to § 90. As to the importance of the advertisement, see *In re Apollinaris Co.*, (1891) 2 Ch. 186, 231.

(*b*) See Rule 13, *supra*.

Definition of official paper.

28. The official paper (*a*) for the purposes of these Rules shall be some paper published under the direction of the Board of Trade, or such other paper as such Board may from time to time direct.

(*a*) The official paper is "The Trade Marks Journal" published at short intervals. It contains illustrations of all the trade marks for which application is made, or a reference to the places where they may be seen, as well as the name, address, and calling of each applicant, the description of the goods, and the length of user as an old mark, if any, thus affording all persons interested in the use of trade marks authentic information as to the nature of the marks applied for in their respective trades. The journal may be obtained from the Patent Office, Sale Branch, 38, Cursitor Street, Chancery Lane. Copies of the journal are open to inspection at the Patent Office Library, Southampton Buildings, Chancery Lane. Upwards of 1,000 numbers of the journal have now been published. As to prices, see Instructions, par. 5.

Means of advertising trade mark to be supplied to official paper.

29. For the purposes of such advertisements the applicant may be required to furnish a wood-block or electrotype (or more than one, if necessary) of the trade mark, of such dimensions as may from time to time be directed by the comptroller, or with such other information or means of advertising the trade mark as may be required by the comptroller; and the comptroller, if dissatisfied with the block or electrotype furnished by the applicant or his agent, may require a fresh block or electrotype before proceeding with the advertisement (*a*).

(*a*) See Instructions, pars. 20—27.

Advertisement of series.

30. When an application relates to a series of trade marks differing from one another in respect of the particulars mentioned in § 66 of the said Acts, the applicant may be required to furnish a wood-block or electrotype (or more than one, if necessary) of any or of each of the trade marks constituting the series (*a*); and the comptroller may, if he thinks fit, insert with the advertisement of the application a statement of the manner in respect of which the several trade marks differ from one another.

(*a*) See Instructions, par. 22.

## Opposition to Registration.

Notice of opposition.

31. (1.) A notice of opposition (*a*) to the registration of a trade mark shall state the ground or grounds on which the opponent intends to oppose the registration, and be signed by him or by his solicitor, and shall also contain an address for service in the United Kingdom, and shall be in the Form J in the second schedule to these Rules, with such variations as circumstances may require.

(*a*) As to oppositions, see § 69, and Instructions, par. 32. The notice of opposition may be amended under Rule 54, even after the counter statement

has been put in (*In re Moet*, 7 P. R. 226); but not after an appeal has been presented to the Board of Trade: *In re Robertson, Sanderson & Co.*, (1892) 2 Ch. 245. Under the old Acts and Rules the practice was to require the opponent to take proceedings for the purpose of bringing the matter before the Court. The opponent thereupon took out a summons for directions as to the course to be followed, upon which it was usual for the applicant to be directed to apply for registration by way of motion or summons. In *In re Salamon*, Dig. 569, Jessel, M. R., said that the best mode of trying the case was by special case, when it was a simple question of law; by summons, when it was a question as to directions for carrying out the Act; by motion, when it was a question as to disputed facts. In *In re Simpson, Davies & Sons*, 15 Ch. D. 525, he said he usually directed a summons, but had in one or two cases directed a motion. In *Ex parte King of Saxony*, Dig. 598, Hall, V.-C., directed a motion. Latterly a summons was almost invariably directed. See also *In re Johnston*, 43 L. T. N. S. 672, as to the course of procedure where there was an action pending. Under the old Rules, and while the first step had to be taken by the opponent, who had to give notice thereof to the office, two cases occurred in which trade marks were registered, though the registration was opposed, in consequence of no notice having been given to the office by the opponents of their having brought the matter before the Court. In one of these cases, *In re The Patent Nut and Bolt Screw Co.*, Chitty, J., March 9th, 1883, with a view to remedying the slip, a consent order was taken to rescind the registration, without prejudice to the applicant's summons for leave to register, the object being to restore matters to their *statue quo ante* the registration. The opposition was subsequently withdrawn, but the registrar now objected to register, on the ground that the application had been finally disposed of, and that a new application was necessary. It was, however, held that the proper course was to discharge the former order for the removal of the mark from the register, and to direct the registrar to restore the register to its condition previous to such removal. In the other case, *In re Esbensen*, Pearson, J., Jan. 25th, 1883, the opponent moved to cancel the registration, with a view to the prosecution of the opposition as if there had been no registration; but it was held that the proper course was for the opponent to move to rectify the register in the ordinary way. See also *In re Paton*, Dig. 601. Under the Act of 1883 a summons for leave to register was taken out by the applicant, but the case will now only go to the Court on a reference from the Board of Trade.

Opposition on the ground of trade mark already on the register.

(2.) Where the ground, or one of the grounds, of opposition is that the applicant is applying for the registration of a trade mark identical with one already on the register with respect to the same goods or description of goods, or having such resemblance to a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive, the notice shall state the date of registration, and the number on the register of such trade mark already on the register.

Opponent's evidence.

(3.) Within two months after the expiration of one month or such further time not exceeding three months as the comptroller may allow (*a*) from the date of the advertisement of the application, the opponent shall leave at the Patent Office, Trade Marks Branch, such evidence by way of statutory declaration as he may desire to adduce in support of his opposition, and deliver to the applicant copies thereof.

(*a*) *I.e.*, within two months after the time allowed, under § 69 (1) of the Act of 1883, as amended by § 13 (1) of the Act of 1888, for putting in the notice of opposition.

Applicant's evidence.

(4.) Within one month (*a*) from the delivery of the opponent's copies of his statutory declarations the applicant shall leave at the Patent Office, Trade Marks Branch, his evidence by way of statutory declaration in answer, and deliver to the opponent copies thereof, and within seven days from such delivery the opponent shall leave at

Evidence in reply.

the Patent Office, Trade Marks Branch, his evidence by way of statutory declaration in reply, and deliver to the applicant copies thereof. Such last-mentioned evidence shall be confined to matters strictly in reply.

(*a*) The counter-statement required by the Acts must also be delivered by the applicant within one month from the date of the receipt of the opponent's notice of opposition.

Closing of evidence.

(5.) No further evidence shall be left on either side except by leave of the comptroller upon the written consent of the parties duly notified to him, or by special leave of the comptroller given on an application made to him.

Applications for leave to adduce further evidence.

(6.) Either party making such application shall give notice thereof to the opposite party, who shall be entitled to oppose the application.

Appointment of time for hearing.

(7.) On the completion of the evidence the comptroller shall, upon application by either party, upon Form E in the Second Schedule to these Rules, and upon payment of the prescribed fee, appoint a time for the hearing of the case, and shall give the parties at least seven days' notice of such appointment.

Disallowance of opposition in certain cases.

(8.) On the hearing of the case no opposition shall be allowed in respect of any ground not stated in the notice of opposition; and where the ground or one of the grounds of opposition is that registration is being applied for in respect of a trade mark identical with one already on the register with respect to the same goods or description of goods, or having such resemblance to a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive, the opposition shall not be allowed upon such ground, unless the date of registration and the number on the register of the said trade mark already on the register have been duly specified in the notice of opposition.

Decision to be notified to parties.

(9.) The decision of the comptroller in the case shall be notified to the parties.

## Register of Trade Marks.

Time of registration of trade marks.

32. As soon as may be after the expiration of one month from the date of the advertisement of the application, the comptroller shall, subject to opposition to the application and the determination thereof, if he is satisfied that the applicant is entitled to registration, and on payment of the prescribed fee (*a*), enter the name, address, and description of the applicant in the Register of Trade Marks as the registered proprietor of the trade mark in respect of the particular goods or classes of goods described in his application.

(*a*) See Form I and Schedule 1; also notice as to fees, p. 415, *infra*.

Where applicant dies before registration, the trade mark may be registered for successor to goodwill of business.

33. In case of the death of any applicant for a trade mark after the date of his application, and before the trade mark applied for has been entered on the register, the comptroller, after the expiration of the prescribed period of advertisement, may, on being satisfied of the applicant's death, enter on the register, in place of the name of such deceased applicant, the name, address, and description of the person owning the goodwill of the business, if such ownership be proved to the satisfaction of the comptroller.

Entries to

34. Upon registering any trade mark the comptroller shall enter in

the register the date on which the application for registration was received by the comptroller, and such other particulars (*a*) as he may think necessary. be made in register.

(*a*) As to entering "other particulars," see *In re Keep Bros.*, 26 Ch. D. 187, and *In re De Otaduy*, L. J. N. of C. 1885, p. 155.

35. The comptroller shall send notice to the applicant of the registration of his trade mark, together with a reference to the advertisement of such trade mark in the official paper. Notice of registration.

36. Where a person becomes entitled to a registered trade mark by assignment, transmission, or other operation of law, a request for the entry of his name in the register as proprietor of the trade mark shall be addressed to the comptroller, and left at the Patent Office, Trade Marks Branch (*a*). Request by subsequent proprietor.

(*a*) See Form K and Instructions, par. 38.

37. Such request shall in the case of an individual be made and signed by the person requiring to be registered as proprietor, and in the case of a firm or partnership by some one or more members of such firm or partnership, or in either case by his or their agent respectively duly authorised to the satisfaction of the comptroller, and in the case of a body corporate by their agent, authorised in like manner (*a*). Signature of request.

(*a*) See Rules 7, 9, *supra*.

38. Every such request shall state the name, address, and description of the person claiming to be entitled to the trade mark (hereinafter called the claimant), and the particulars of the assignment, transmission, or other operation of law, by virtue of which he requires to be entered in the register as proprietor, so as to show the manner in which, and the person or persons to whom, the trade mark has been assigned or transmitted, and so as to show further that it has been so assigned or transmitted, in connection with the goodwill of the business concerned in the particular goods or classes of goods for which the trade mark has been registered (*a*). Contents of request.

(*a*) See §§ 70 and 87 and cases in note (*g*) to § 90 and note (*b*) to § 92.

39. Every such request shall be accompanied by a statutory declaration (*a*) to be thereunder written, verifying the several statements therein, and declaring that the particulars above described comprise every material fact and document affecting the proprietorship of the trade mark as claimed by such request. Declaration to accompany request.

(*a*) See Form K.

40. The claimant shall furnish to the comptroller such other proof of title and of the existence and ownership of such goodwill as aforesaid as he may require for his satisfaction. Further proof of title if required.

41. A body corporate may be registered as proprietor by its corporate name. Body corporate.

42. The term "applicant" in Rules 17, 18 and 19 shall include each of several persons claiming to be registered as proprietor of the same trade mark (*a*). Definition of applicant.

(*a*) See § 71.

Comptroller may require statement from rival claimants.

43. Whether all such persons so claiming require to be heard before the comptroller or not, he may, before exercising the discretion vested in him by § 71 of the said Acts, require such persons, or any or either of them, to submit a statement in writing within a time to be notified by him, or to attend before him and make oral explanations with respect to such matters as the comptroller may require.

Submission to Court of conflicting claims.

44. Where each of several persons claims to be registered as proprietor of the same trade mark, and the comptroller refuses to register any of them until their rights have been determined according to law, the manner in which the rights of such claimants may be submitted to the Court by the comptroller, or if the comptroller so require, by the claimants, shall, unless the Court otherwise order, be by a special case (*a*); and such special case shall be filed and proceeded with in like manner as any other special case submitted to the Court, or in such other manner as the Court may direct.

(*a*) See note to § 71.

Settlement of special case.

45. Where the special case is to be submitted by the parties it may be agreed to by them, or if they differ, may be settled by the comptroller on payment of the prescribed fees (*a*).

(*a*) See Form T.

Order of Court.

46. Where an order has been made by the Court in either of the following cases, viz.:

(a.) allowing an appeal under § 62 of the said Acts;

(b.) disallowing an opposition to registration under § 69; or,

(c.) under the provisions of §§ 72, 90, or 92 of the said Acts, the person in whose favour such order has been made, or such one of them, if more than one, as the comptroller may direct, shall forthwith leave at the Patent Office, Trade Marks Branch, an office copy of such order (*a*). The register shall thereupon be rectified or altered, or the purport of such order shall otherwise be duly entered in the register, as the case may be.

(*a*) See Form N.

Removal of mark from register.

47. Where a trade mark has been removed from the register for non-payment of the prescribed fee or otherwise, under the provisions of § 79 of the said Acts, the comptroller shall cause to be entered in the register a record of such removal and the cause thereof.

Alteration of address in register.

48. If the registered proprietor of a trade mark send to the comptroller, together with the prescribed fee, notice of an alteration in his address, the comptroller shall alter the register accordingly (*a*).

(*a*) See Form M.

Notice to comptroller of applications to rectify register.

49. Four clear days' notice of every application to the Court under § 90 of the said Acts, for rectification of the register, shall be given to the comptroller.

50. Whenever an order is made by the Court for making, expunging, or varying an entry from or in the register, the comptroller shall, if he thinks that such rectification or variation should be made public, and at the expense of the person applying for the same, publish, by advertisement or otherwise, and in such manner as he thinks just, the circumstances attending the rectification or variation in the register. Publication of rectification or variation of register.

51. Whenever the registered proprietor of any trade mark intends to apply for the leave of the Court to add to or to alter such trade mark, under § 92 of the said Acts, the notice to be given to the comptroller shall be given fourteen days at least before such application. If leave be granted on such application, the applicant shall forthwith supply to the comptroller such a number of representations of the trade mark as altered as he may deem sufficient. Notice to comptroller of order of Court for alteration of trade mark under § 92 of Acts.

## Inspection of Register.

52. The Register of Trade Marks shall be open to the inspection of the public (*a*), on payment of the prescribed fee, on every week day, between the hours of ten and four, except on the days and at the times following: Hours of inspection.

(a.) Christmas Day, Good Friday, the day observed as Her Majesty's birthday, days observed as days of public fast or thanksgiving, and days observed as holidays at the Bank of England; or

(b.) Days which may from time to time be notified by a placard posted in a conspicuous place at the Patent Office;

(c.) Times when the register is required for any purpose of official use.

(*a*) See § 88.

## Power to Dispense with Evidence.

53. Where under these Rules any person is required to do any act or thing, or to sign any document, or to make any declaration on behalf of himself or of any body corporate, or any document or evidence is required to be produced to or left with the comptroller, or at the Patent Office, and it is shown to the satisfaction of the comptroller that from any reasonable cause such person is unable to do such act or thing, or to sign such document, or make such declaration, or that such document or evidence cannot be produced or left as aforesaid, it shall be lawful for the comptroller, with the sanction of the Board of Trade, and upon the production of such other evidence, and subject to such terms as they may think fit, to dispense with any such act or thing, document, declaration, or evidence. Dispensing with evidence.

## Amendments.

54. Any document or drawing or other representation of a trade mark for the amending of which no special provision is made by the said Acts may be amended, and any irregularity in procedure which in the opinion of the comptroller may be obviated without detriment Amendment of documents.

to the interests of any person may be corrected, if the comptroller thinks fit, and on such terms as he may direct (*a*).

(*a*) Under this rule leave may be given to amend a notice of opposition, even after the counter statement has been put in (*In re Moet*, 7 P. R. 226), but not after an appeal has been presented: *In re Robertson, Sanderson & Co.*, (1892) 2 Ch. 245, 252. As to the comptroller's power to correct clerical errors, see § 91. See also Form Q.

### Enlargement of Time.

Comptroller may enlarge time.

55. The time prescribed by these Rules for doing any act, or taking any proceeding thereunder, may be enlarged by the comptroller (*a*), if he think fit, and upon such notice to other parties, and proceedings thereon, and upon such terms as he may direct.

(*a*) See, however, the limitations imposed by § 69 (1), *supra*.

### Cutlers' Company.

Sheffield applications in duplicate.

56. All applications to the Cutlers' Company (*a*) for registration of a trade mark, under § 81 of the said Acts, shall be in duplicate, accompanied by the prescribed fees and representations.

(*a*) See § 81, and Instructions, par. 33, also Form W.

Notice to comptroller.

57. The Cutlers' Company shall, within seven days of the receipt by them of an application to register a trade mark, send the comptroller one copy of such application, by way of notice thereof, together with two representations of the mark for each class for which the applicant seeks registration.

Time within which comptroller may object to application made at Sheffield.

58.—(1.) The time within which the comptroller shall give notice to the Cutlers' Company of any objection he may have to the acceptance of an application for registration made to the said company shall be one month from the date of the receipt by the comptroller of the notice from the said company of the making of the application.

Advertisement of application made at Sheffield.

(2.) If no such objection is made by the comptroller, the Cutlers' Company shall require the applicant to send the comptroller a wood-block or electrotype as the comptroller may direct, and the comptroller shall, if satisfied with such wood-block or electrotype, advertise the application in the same manner as an application made to him at the Patent Office.

Manner of notifying to Cutlers' Company application received by comptroller.

(3.) The manner in which the comptroller shall notify to the Cutlers' Company an application and proceedings thereon made as mentioned in sub-s. 8 of § 81 of the said Acts shall be by sending to the Cutlers' Company a copy of the official paper containing the application of which notice is required to be given, with a note distinguishing such application.

Similarity of proceedings at London and at Sheffield.

59. The provisions of these Rules as to forms, representations, the proceedings in opposition to registration, registration, and all subsequent proceedings, shall, as far as the circumstances allow, apply to all applications to register made to the Cutlers' Company, and to all proceedings consequent thereon.

## Certificates.

Certificate by comptroller.

60. The comptroller, when required to give a certificate as to an entry, matter, or thing which he is authorised by the said Acts or any of these Rules to make or do, may, on receipt of a request in writing, and on payment of the prescribed fee, give such certificate, but every certificate of registration shall have specified on the face thereof, whether the same is to be used in legal proceedings, or for the purpose of obtaining registration in a foreign country, or for purposes other than use in legal proceedings or obtaining registration in a foreign country (*a*).

(*a*) See § 96, and Instructions, pars. 35—37.

## Declarations.

Manner in which, and persons before whom, declaration is to be taken.

61. The statutory declarations (*a*) required by the said Acts and these Rules, or used in any proceedings thereunder, shall be made and subscribed as follows:

(a.) In the United Kingdom, before any justice of the peace, or any commissioner or other officer authorised by law in any part of the United Kingdom to administer an oath for the purpose of any legal proceeding;

(b.) In any other part of Her Majesty's dominions, before any court, judge, justice of the peace, or any officer authorised by law to administer an oath there for the purpose of a legal proceeding; and

(c.) If made out of Her Majesty's dominions, before a British minister, or person exercising the functions of a British minister, or a consul, vice-consul, or other person exercising the functions of a British consul, or a notary public, or before a judge or magistrate.

(*a*) As to declarations by infants and other persons under disability, see § 99.

Notice of seal of officer taking declaration to prove itself.

62. Any document purporting to have affixed, impressed, or subscribed thereto or thereon the seal or signature of any person hereby authorised to take such declaration in testimony of such declaration having been made and subscribed before him, may be admitted by the comptroller without proof of the genuineness of any such seal or signature, or of the official character of such person or his authority to take such declaration.

## Repeal.

Previous rules repealed.

63. All general rules as to the registration of trade marks heretofore made by the Board of Trade under the Patents, Designs, and Trade Marks Acts, 1883 to 1888, and in force on the 31st day of December, 1889, shall be, and they are hereby repealed, as from that date, without prejudice, nevertheless, to anything done under such Rules, or to any application pending at the said date.

M. E. Hicks-Beach,
President of the Board of Trade.

# SCHEDULES.

## FIRST SCHEDULE.

### FEES.

| | £ | s. | d. |
|---|---|---|---|
| 1. On application to register a trade mark for one or more articles included in one class . . . . . | 0 | 5 | 0 |
| 2. For registration of a trade mark for one or more articles included in one class . . . . . | 1 | 0 | 0 |
| 3. For registering a series of trade marks, for every additional representation after the first in each class. | 0 | 5 | 0 |
| 4. On appeal from comptroller to Board of Trade—By appellant . . . . . | 1 | 0 | 0 |
| 5. On notice of opposition for each application opposed—By opponent . . . . . | 1 | 0 | 0 |
| 6. On hearing by comptroller—By applicant and by opponent respectively . . . . . | 1 | 0 | 0 |
| 7. On application to register a subsequent proprietor in cases of assignment or transmission, the first mark . | 1 | 0 | 0 |
| 8. For every additional mark assigned or transmitted at the same time . . . . . | 0 | 2 | 0 |
| 9. For continuance of mark at expiration of fourteen years | 1 | 0 | 0 |
| 10. Additional fee where fee is paid within three months after expiration of fourteen years . . . . | 0 | 10 | 0 |
| 11. Additional fee for restoration of trade mark where removed for non-payment of fee . . . . | 1 | 0 | 0 |
| 12. For altering address on the register, for every mark . | 0 | 5 | 0 |
| 13. For every entry in the register of a rectification thereof or an alteration therein, not otherwise charged . . | 0 | 10 | 0 |
| 14. For cancelling the entry or part of the entry of a trade mark upon the register, on the application of the owner of such trade mark . . . . . | 0 | 5 | 0 |
| 15. On request to comptroller to correct a clerical error, or permit amendment of application under § 91 . . | 0 | 5 | 0 |
| 16. For certificate of refusal to register a trade mark under § 77 . . . . . | 1 | 0 | 0 |
| 17. For certificate of refusal at the same time for more than one trade mark, for each additional trade mark after the first . . . . . | 0 | 10 | 0 |
| 18. For certificate of registration to be used in legal proceedings . . . . . | 1 | 0 | 0 |
| 19. For certificate of registration to be used for the purpose of obtaining registration in foreign countries . . | 0 | 5 | 0 |
| 20. For certificate of comptroller under § 96, other than certificate of registration to be used in legal proceedings, or for the purpose of obtaining registration in a foreign country . . . . . | 0 | 5 | 0 |
| 21. For copy of notification of registration . . . . | 0 | 2 | 0 |
| 22. Settling a special case by comptroller . . . . | 2 | 0 | 0 |
| 23. For inspecting register, for every quarter of an hour . | 0 | 1 | 0 |

FEES—*continued.*

| | £ | s. | d. |
|---|---|---|---|
| 24. For making a search amongst the classified representations of trade marks, for every quarter of an hour . | 0 | 1 | 0 |
| 25. For office copy of documents, for every 100 words (but never less than one shilling) . . . . . | 0 | 0 | 4 |
| 26. For certifying office copies, MS. or printed . . . | 0 | 1 | 0 |
| 27. In cases where the wood-block or electrotype of the trade mark exceeds two inches in breadth or depth, or in breadth and depth—For every inch or part of an inch over two inches in breadth . . . . | 0 | 2 | 0 |
| For every inch or part of an inch over two inches in depth . . . . . | 0 | 2 | 0 |
| 28. Manchester Trade Marks Office . . . . | Same as above | | |
| 29. Sheffield Marks . . . . . | Same as above | | |
| 30. On appeal from Cutlers' Company, Sheffield, to comptroller . . . . . | 1 | 0 | 0 |

M. E. HICKS-BEACH,
President of the Board of Trade.

Approved,
FRANK MOWATT,
Assistant Secretary
for the Lords Commissioners of Her Majesty's Treasury.

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## PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883 TO 1888.

### NOTICE AS TO FEES UNDER THE PUBLIC OFFICES FEES ACT, 1879.

WHEREAS by section 3 of the Public Offices Fees Act, 1879, it is provided that the Treasury may, from time to time, make, and, when made, revoke, alter, and add to regulations for all or any of the following purposes respecting fees in any public office, that is to say:—

1. Regulating the manner in which the fees taken in money are to be taken, accounted for, and paid over.

2. Determining the use of impressed or adhesive stamps, and the mode of cancellation of adhesive stamps.

3. Regulating the use of stamps, and prescribing the application thereof to documents from time to time in use, and requiring documents to be used for the purpose of such stamps.

Now we the undersigned, being two of the Lords Commissioners of her Majesty's Treasury, do hereby give notice, and order and direct:—

That, from and after the date of this Order, in lieu of any regulations on the subject heretofore in force, the fees and percentages set forth in the annexed Schedule, and imposed by the Patents, Designs, and Trade Marks Acts, 1883 to 1888, or by rules made under those Acts, shall be taken in stamps or cash, as stated in the said Schedule; and that fees and percentages hereafter imposed under the said Acts, or by any Act amending the same, or by any rule made under any or all of such Acts shall, unless otherwise directed, be taken in impressed stamps.

The stamps shall be of such a character as the Commissioners of Inland Revenue may from time to time adopt for the purpose.

The official forms required to be impressed with stamps in any proceedings under the said Acts or Rules or Amendments of the same shall be kept and

issued at the Inland Revenue Office, Royal Courts of Justice, and at such other places as the Commissioners of Inland Revenue may deem necessary or expedient.

And we do further give notice and direct that this Order shall be binding on all officers and persons whom it may in any way affect.

THOMAS E. ELLIS,
W. A. MCARTHUR,
Two of the Lords of Her Majesty's Treasury.

Dated the 14th day of December, 1892.

SCHEDULE.

[This schedule, so far as relates to trade marks, sets out the thirty items contained in the First Schedule (Fees) to the Trade Marks Rules, 1890, and provides that the fees, being items 1 to 22 and item 30, shall be taken by means of impressed stamps, and the fees being items 23 to 29, in cash.]

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## SECOND SCHEDULE.

### FORMS.

(*See Appendix B, infra.*)

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## THIRD SCHEDULE.

### GENERAL NOTE.

Any wares made of mixed materials (for example, of both cotton and silk) shall be included in such one of the classes appropriated to those materials as the comptroller may desire.

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### CLASSIFICATION OF GOODS.*

| | *Illustrations.* |
|---|---|
| | *Note.*—Goods are mentioned in this column by way of illustration, and not as an exhaustive list of the contents of a class. |
| *Class* 1. | |
| Chemical substances used in manufactures, photography, or philosophical research, and anti-corrosives. | Such as—<br>Acids, including vegetable acids.<br>Alkalies.<br>Artists' colours.<br>Pigments.<br>Mineral dyes. |

* For further information as to the classification of goods, see Guide to the Classification, *infra*, p. 424.

| | |
|---|---|
| *Class* 2. | |
| Chemical substances used for agricultural, horticultural, veterinary, and sanitary purposes. | Such as—<br>Artificial manure.<br>Cattle medicines.<br>Deodorisers.<br>Vermin destroyers. |
| *Class* 3. | |
| Chemical substances prepared for use in medicine and pharmacy. | Such as—<br>Cod liver oil.<br>Medicated articles.<br>Patent medicines.<br>Plasters.<br>Rhubarb. |
| *Class* 4. | |
| Raw or partly prepared vegetable, animal and mineral substances used in manufactures, not included in other classes. | Such as—<br>Resins.<br>Oils used in manufactures and not included in other classes.<br>Dyes, other than mineral.<br>Tanning substances.<br>Fibrous substances (*e.g.*, cotton, hemp, flax, jute).<br>Wool.<br>Silk.<br>Bristles.<br>Hair.<br>Feathers.<br>Cork.<br>Seeds.<br>Coal.<br>Coke.<br>Bone.<br>Sponge. |
| *Class* 5. | |
| Unwrought and partly wrought metals used in manufacture. | Such as—<br>Iron and steel, pig or cast.<br>Iron, rough.<br>,, bar and rail, including rails for railways.<br>,, bolt and rod.<br>,, sheet, and boiler and armour plates.<br>,, hoop.<br>Lead, pig.<br>,, rolled.<br>,, sheet.<br>Wire.<br>Copper.<br>Zinc.<br>Gold, in ingots. |

| | |
|---|---|
| *Class* 6. | |
| Machinery of all kinds, and parts of machinery, except agricultural and horticultural machines included in Class 7. | Such as—<br>Steam engines.<br>Boilers.<br>Pneumatic machines.<br>Hydraulic machines.<br>Locomotives.<br>Sewing machines.<br>Weighing machines.<br>Machine tools.<br>Mining machinery.<br>Fire engines. |
| *Class* 7. | |
| Agricultural and horticultural machinery, and parts of such machinery. | Such as—<br>Ploughs.<br>Drilling machines.<br>Reaping machines.<br>Thrashing machines.<br>Churns.<br>Cyder Presses.<br>Chaff cutters. |
| *Class* 8. | |
| Philosophical instruments, scientific instruments, and apparatus for useful purposes. Instruments and apparatus for teaching. | Such as—<br>Mathematical instruments.<br>Gauges.<br>Logs.<br>Spectacles.<br>Educational appliances. |
| *Class* 9. | |
| Musical instruments. | |
| *Class* 10. | |
| Horological instruments. | |
| *Class* 11. | |
| Instruments, apparatus, and contrivances, not medicated, for surgical or curative purposes, or in relation to the health of men or animals. | Such as—<br>Bandages.<br>Friction gloves.<br>Lancets.<br>Fleams.<br>Enemas. |
| *Class* 12. | |
| Cutlery and edge tools. | Such as—<br>Knives.<br>Forks.<br>Scissors.<br>Shears.<br>Files.<br>Saws. |

| | |
|---|---|
| *Class* 13. | |
| Metal goods not included in other classes. | Such as—<br>Anvils.<br>Keys.<br>Basins (metal).<br>Needles.<br>Hoes.<br>Shovels.<br>Corkscrews. |
| *Class* 14. | |
| Goods of precious metals (including aluminium, nickel, Britannia metal, &c.) and jewellery, and imitations of such goods and jewellery. | Such as—<br>Plate.<br>Clock cases and pencil cases of such metals.<br>Sheffield and other plated goods.<br>Gilt and ormolu work. |
| *Class* 15. | |
| Glass. | Such as—<br>Window and plate glass.<br>Painted glass.<br>Glass mosaic.<br>Glass beads. |
| *Class* 16. | |
| Porcelain and earthenware. | Such as—<br>China.<br>Stoneware.<br>Terra cotta.<br>Statuary porcelain.<br>Tiles.<br>Bricks. |
| *Class* 17. | |
| Manufactures from mineral and other substances for building or decoration. | Such as—<br>Cement.<br>Plaster.<br>Imitation marble.<br>Asphalt. |
| *Class* 18. | |
| Engineering, architectural, and building contrivances. | Such as—<br>Diving apparatus.<br>Warming apparatus.<br>Ventilating apparatus.<br>Filtering apparatus.<br>Lighting contrivances.<br>Drainage contrivances.<br>Electric and pneumatic bells. |

| | |
|---|---|
| *Class* 19. | |
| Arms, ammunition, and stores not included in Class 20. | Such as—<br>Cannon.<br>Small arms.<br>Fowling pieces.<br>Swords.<br>Shot and other projectiles.<br>Camp equipage.<br>Equipments. |
| *Class* 20. | |
| Explosive substances. | Such as—<br>Gunpowder.<br>Gun cotton.<br>Dynamite.<br>Fog-signals.<br>Percussion caps.<br>Fireworks.<br>Cartridges. |
| *Class* 21. | |
| Naval architectural contrivances and naval equipments not included in Classes 19 and 20. | Such as—<br>Boats.<br>Anchors.<br>Chain cables.<br>Rigging. |
| *Class* 22. | |
| Carriages. | Such as—<br>Railway carriages.<br>Waggons.<br>Railway trucks.<br>Bicycles.<br>Bath chairs. |
| *Class* 23. | |
| (a) Cotton yarn, and sewing cotton not on spools or reels.<br>(b) Sewing cotton on spools or reels. | |
| *Class* 24. | |
| Cotton piece goods of all kinds. | Such as—<br>Cotton shirtings.<br>Long cloth. |
| *Class* 25. | |
| Cotton goods not included in Classes 23, 24, or 38. | Such as—<br>Cotton lace.<br>Cotton braids.<br>Cotton tapes. |
| *Class* 26. | |
| Linen and hemp yarn and thread. | |
| *Class* 27. | |
| Linen and hemp piece goods. | |

*Class* 28.

Linen and hemp goods not included in Classes 26, 27, and 50.

*Class* 29.

Jute yarns and tissues, and other articles made of jute not included in Class 50.

*Class* 30.

Silk, spun, thrown, or sewing.

*Class* 31.

Silk piece goods.

*Class* 32.

Other silk goods not included in Classes 30 and 31.

*Class* 33.

Yarns of wool, worsted, or hair.

*Class* 34.

Cloths and stuffs of wool, worsted or hair.

*Class* 35.

Woollen and worsted and hair goods not included in Classes 33 and 34.

*Class* 36.

Carpets, floor-cloth, and oil-cloth.

Such as—
Drugget.
Mats and matting.
Rugs.

*Class* 37.

Leather, skins unwrought and wrought, and articles made of leather not included in other classes.

Such as—
Saddlery.
Harness.
Whips.
Portmanteaus.
Furs.

*Class* 38.

Articles of clothing.

Such as—
Hats of all kinds.
Caps and bonnets.
Hosiery.
Gloves.
Boots and shoes.
Other ready-made clothing.

*Class* 39.

| | |
|---|---|
| Paper (except paper-hangings), stationery, and bookbinding. | Such as—<br>Envelopes.<br>Sealing wax.<br>Pens (except gold pens).<br>Ink.<br>Playing cards.<br>Blotting cases.<br>Copying presses. |

*Class* 40.

| | |
|---|---|
| Goods manufactured from india-rubber and gutta percha not included in other classes. | |

*Class* 41.

| | |
|---|---|
| Furniture and upholstery. | Such as—<br>Paper-hangings.<br>Papier mâché.<br>Mirrors.<br>Mattresses. |

*Class* 42.

| | |
|---|---|
| Substances used as food, or as ingredients in food. | Such as—<br>Cereals.<br>Pulses.<br>Olive oil.<br>Hops.<br>Malt.<br>Dried fruits.<br>Tea.<br>Sago.<br>Salt.<br>Sugar.<br>Preserved meats.<br>Confectionery.<br>Oil cakes.<br>Pickles.<br>Vinegar.<br>Beer clarifiers. |

*Class* 43.

| | |
|---|---|
| Fermented liquors and spirits. | Such as—<br>Beer.<br>Cyder.<br>Wine.<br>Whiskey.<br>Liqueurs. |

*Class* 44.

| | |
|---|---|
| Mineral and aërated waters natural and artificial, including ginger-beer. | |

| | |
|---|---|
| *Class* 45. | |
| Tobacco whether manufactured or unmanufactured. | |
| *Class* 46. | |
| Seeds for agricultural and horticultural purposes. | |
| *Class* 47. | |
| Candles, common soap, detergents; illuminating, heating, or lubricating oils; matches; and starch, blue, and other preparations for laundry purposes. | Such as—<br>Washing powders.<br>Benzine collas. |
| *Class* 48. | |
| Perfumery (including toilet articles, preparations for the teeth and hair, and perfumed soap). | |
| *Class* 49. | |
| Games of all kinds and sporting articles not included in other classes. | Such as—<br>Billiard tables.<br>Roller skates.<br>Fishing nets and lines.<br>Toys. |
| *Class* 50. | |
| Miscellaneous, including—<br>(1.) Goods manufactured from ivory, bone, or wood, not included in other classes.<br>(2.) Goods manufactured from straw or grass, not included in other classes.<br>(3.) Goods manufactured from animal and vegetable substances, not included in other classes.<br>(4.) Tobacco pipes.<br>(5.) Umbrellas, walking-sticks, brushes and combs.<br>(6.) Furniture cream, plate powder.<br>(7.) Tarpaulins, tents, rick-cloths, rope, twine.<br>(8.) Buttons of all kinds, other than of precious metal or imitations thereof.<br>(9.) Packing and hose of all kinds.<br>(10.) Goods not included in the foregoing classes. | Such as—<br>Coopers' wares. |

(Signed) M. E. Hicks-Beach,
President of the Board of Trade.

# GUIDE

## TO THE CLASSIFICATION OF GOODS UNDER THE PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

*Printed by Order of the Comptroller-General.*

### CLASSES OF GOODS.

I.—Chemical substances used in manufactures, photography, or philosophical research, and anti-corrosives.

II.—Chemical substances used for agricultural, horticultural, veterinary, and sanitary purposes.

III.—Chemical substances prepared for use in medicine and pharmacy.

IV.—Raw, or partly prepared, vegetable, animal, and mineral substances used in manufactures, not included in other Classes.

V.—Unwrought and partly wrought metals used in manufacture.

VI.—Machinery of all kinds, and parts of machinery, except agricultural and horticultural machines included in Class 7.

VII.—Agricultural and horticultural machinery and parts of such machinery.

VIII.—Philosophical instruments, scientific instruments, and apparatus for useful purposes. Instruments and apparatus for teaching.

IX.—Musical instruments.

X.—Horological instruments.

XI.—Instruments, apparatus, and contrivances, not medicated, for surgical or curative purposes, or in relation to the health of men or animals.

XII.—Cutlery and edge tools.

XIII.—Metal goods, not included in other Classes.

XIV.—Goods of precious metals (including aluminium, nickel, Britannia metal, &c.) and jewellery, and imitations of such goods and jewellery.

XV.—Glass.

XVI.—Porcelain and earthenware.

XVII.—Manufactures from mineral and other substances for building or decoration.

XVIII.—Engineering, architectural, and building contrivances.

XIX.—Arms, ammunition, and stores, not included in Class 20.

XX.—Explosive substances.

XXI.—Naval architectural contrivances and naval equipments not included in Classes 19 and 20.

XXII.—Carriages.

XXIII.—(*a*) Cotton yarn, and sewing cotton not on spools or reels.
(*b*) Sewing cotton on spools or reels.

XXIV.—Cotton piece goods of all kinds.
XXV.—Cotton goods not included in Classes 23, 24, or 38.
XXVI.—Linen and hemp yarn and thread.
XXVII.—Linen and hemp piece goods.
XXVIII.—Linen and hemp goods not included in Classes 26, 27, and 50.
XXIX.—Jute yarns and tissues, and other articles made of jute, not included in Class 50.
XXX.—Silk, spun, thrown, or sewing.
XXXI.—Silk piece goods.
XXXII.—Silk goods not included in Classes 30 and 31.
XXXIII.—Yarns of wool, worsted, or hair.
XXXIV.—Cloths and stuffs of wool, worsted, or hair.
XXXV.—Woollen, worsted, and hair goods, not included in Classes 33 and 34.
XXXVI.—Carpets, floor-cloth, and oil-cloth.
XXXVII.—Leather, skins unwrought and wrought, and articles made of leather not included in other Classes.
XXXVIII.—Articles of clothing.
XXXIX.—Paper (except paper hangings), stationery, and book-binding.
XL.—Goods manufactured from india-rubber and gutta-percha, not included in other Classes.
XLI.—Furniture and upholstery.
XLII.—Substances used as food or as ingredients in food.
XLIII.—Fermented liquors and spirits.
XLIV.—Mineral and aërated waters, natural and artificial, including ginger beer.
XLV.—Tobacco, whether manufactured or unmanufactured.
XLVI.—Seeds for agricultural and horticultural purposes.
XLVII.—Candles, common soap, detergents; illuminating, heating, or lubricating oils; matches; and starch, blue, and other preparations for laundry purposes.
XLVIII.—Perfumery (including toilet articles, preparations for the teeth and hair, and perfumed soap).
XLIX.—Games of all kinds and sporting articles not included in other Classes.
L.—(1.) Goods manufactured from ivory, bone, or wood, not included in other Classes.
(2.) Goods manufactured from straw or grass, not included in other Classes.
(3.) Goods manufactured from animal and vegetable substances, not included in other Classes.
(4.) Tobacco pipes.
(5.) Umbrellas, walking sticks, brushes and combs.
(6.) Furniture cream, plate powder.
(7.) Tarpaulins, tents, rick-cloths, rope, twine.
(8.) Buttons of all kinds other than of precious metal or imitations thereof.
(9.) Packing and hose of all kinds.
(10.) Goods not included in the foregoing classes.

The numbers in the following list refer to the Class in which the particular goods named have been placed for the purpose of Trade Marks Registration.

If any person intending to apply for registration of a trade mark is, on examining the following enumeration of goods, uncertain as to the class to which his goods belong, he should send to the Comptroller-General a letter addressed—

The Comptroller-General,
The Patent Office, Trade Marks Branch,
25, Southampton Buildings,
Chancery Lane,
London, W.C.

giving a full description of the goods and of the purposes for which they are used. He will then be informed by the Comptroller-General what Class he should name in his application.

N.B.—For *metal* read *metal other than precious metal or imitation of the same.*

Abdominal supporters. 11.
Absinthe. 43.
Accordions. 9.
Account books. 39.
Accoutrements, Military and Naval (except clothing, saddlery, knapsacks and belts). 19.
Acetic acid for use in manufactures and philosophical research. 1.
——— prepared for use in medicine and pharmacy. 3.
Acid, Carbolic (prepared for sanitary purposes). 2.
——— use in medicine and pharmacy. 3.
Acid, Cresylic (prepared for use in medicine and pharmacy). 3.
Acids for use in manufactures, photography, or philosophical research. 1.
—— prepared for use in medicine and pharmacy. 3.
Actinometers. 8.
Adzes. 12.
Aërated beverages. 44.
——— coffee. 44.
——— tea. 44.
——— waters (natural and artificial, including ginger beer). 44.
Aerometers. 8.
Agricultural and horticultural implements of the smaller kind (metal) without a cutting edge. 13.
——— implements of the smaller kind (metal), with a cutting edge. 12.
——— machinery, and implements of the larger kind, and parts thereof. 7.
Agriculture, Chemical substances used in. 2.
Ague pads. 11.
Air beds and pillows (india-rubber or gutta-percha). 40.
— compressing engines. 6.
— guns. 19.
Air-proof cushions (india-rubber). 40.
Air-pumps (for steam-engines, and for supplying air). 6.
——— (philosophical). 8.
Air saddles for bicycles (india-rubber). 40.
Alarum clocks. 10.
Alarums (electric). 18.
Albumenized paper. 39.
Albums. 39.
Alcohol. 43.
Alcoholometers. 8.
Ale, Ginger (an aërated water). 44.
Ales. 43.
Alizarine (artificial). 1.
Alkalies. 1.
——— prepared for use in pharmacy. 3.
Alloys (unwrought or partly wrought). 5.
Almanacs, Desk. 39.
Alpaca, in the piece. 34.
Aluminium wares. 14.
Aluminous cake. 1.
Amber. 4.
——— goods. 50.
Ambulances. 22.
American leather cloth. 36.
Ammunition (explosive). 20.
——— (not explosive). 18.
Anchors. 21.
Angle iron. 5.
Aniline dyes (mineral). 1.
——— (not mineral). 4.
Animal and vegetable oils used in manufactures and not included in other classes). 4.

Animal substances, Goods manufactured from (not included in other classes). 50.
——— (raw or partly prepared), used in manufactures and not included in other classes. 4.
Animals, Chemical preparations for destroying noxious. 2.
Anklets for curative purposes. 11.
Annatto. 42.
———, Fluid. 42.
Anthracene dyes. 1.
Anti-asthmatic cigarettes (not containing tobacco). 3.
Anti-corrosives. 1.
Anti-friction grease. 47.
Anti-incrustation composition. 1.
Antimacassars (cotton). 25.
——— (silk). 32.
——— (woollen). 35.
Antiseptics. 2.
Anvils. 13.
Apparatus, Autotype. 8.
———, Baking. 18.
———, Ball trap. 49.
———, Cheese making. 7.
———, Chemical. 8.
———, Cooking. 18.
———, Diving. 18.
———, Draining. 18.
———, Filtering. 18.
———, Hatching. 50.
———, Heat utilizing. 18.
———, Hot water. 18.
———, Irrigation. 7.
———, Lighting. 18.
———, Microscopic. 8.
———, Magnetic (for medical purposes). 11.
———, Measuring. 8.
———, Photographic. 8.
———, Soda-water. 6.
———, Sounding. 8.
———, Surgical. 11.
———, Ventilating. 18.
———, Warming. 18.
Apparel, Wearing. 38.
Apple wine (an aërated water). 44.
Appliances, Educational. 8.
———, Surgical. 11.
———, (wood) for shops and shop windows. 50.
Applications, Medicinal; for human use. 3.
———, Veterinary and Sanitary. 2.
Aprons, Carriage (wholly or principally of india-rubber). 40.
——— (wearing apparel). 38.
Archery, implements for. 49.
Architectural contrivances. 18.
Argentina wares. 14.
Armour plates. 5.
Arms (in the nature of weapons). 19.
Arrowroot. 42.
Artificial butter. 42.
——— flowers. 50.
——— fuel. 50.
——— limbs. 11.
——— manure. 2.
——— stone. 17.
——— teeth. 11.
Artists' brushes. 39.
——— canvas. 39.
——— colours. 1.
——— materials (except colours). 39.
Asbestos. 4.
——— packing. 50.
——— prepared for preventing the radiation of heat. 1.
Ash Soda. 1.
Ash-pans (metal). 13.
Asphalt. 17.
Attachments or fastenings of metal for neckties, scarves, and similar articles. 13.
Autotype apparatus. 8.
Aviaries. 18.
Awnings. 50.
Axes. 12.
Axle plates, Grinders'. 13.
Axles, Grinders'. 13.
——— for locomotives and for machines (not being agricultural machines) along with locomotives in Class 6.
——— (metal), for railway waggons and common roads. 13.
——— (wood). 50.

Baby carriages. 22.
—— linen. 38.
Back protectors. 11.
Bacon. 42.
Badminton sets. 49.
Bags, Carpet. 50.
——, Leather. 37.
——, of textile material. 50.
——, Paper. 39.
—— (wholly or principally of india-rubber). 40.
Baize (woollen). 34.
Baking apparatus. 18.
——— powder. 42.
Balances (except Letter and Postal Balances). 6.
———, Letter. 39.
———, Postal. 39.
Bale studs (metal). 13.
Ball, Fake. 50.
——, Heel. 50.
Ball trap apparatus. 49.
Balls, Billiard. 49.
——, Foot. 49.
—— for games. 49.
Balsam for toilet purposes. 48.
——— use in pharmacy. 3.
Balusters (metal). 13.

Bandages (medical and surgical). 11.
————, Winders for. 11.
Bandboxes. 50.
Bands, Elastic, along with stationery in Class 39.
———, Galvanic. 11.
———, Machine (india-rubber or gutta-percha). 40.
———————— (leather). 37.
Bangles. 14.
Banjoes. 9.
Barges. 21.
Bar iron. 5.
Bark, Extract of (for tanning purposes). 4.
Barks (medicinal). 3.
Barometers. 8.
Barrels (rifle and pistol). 19.
———— (wood). 50.
Bars, Furnace. 6.
——, Refreshment. 18.
——, Tee. 5.
Basins (metal). 13.
———— (potteryware). 16.
Baskets (iron). 13.
———— (wicker), being room furniture. 41.
————————, not being room furniture. 50.
Bassinettes. 41.
Bate for tanning purposes. 4.
Bath chairs. 22.
—— gloves. 11.
—— mineral waters. 44.
Baths (india-rubber and gutta-percha). 40.
———— (metal). 13.
Batteries (medical). 11.
———— (not for medical purposes). 8.
Batting gloves. 49.
Bats for crickot. 49.
Bayonets. 19.
Bay rum. 48.
Bay-leaf water. 48.
Beads (glass). 15.
—— (ivory, wood, bone, horn, vegetable ivory, or mother-o'-pearl). 50.
—— (metal). 13.
—— (precious metal or imitations thereof). 14.
Beams, being parts of machinery other than agricultural machinery. 6.
———— (metal), not being parts of machinery. 13.
———, Plough. 7.
———— (wood). 50.
Bearings, Machine. 6.
Bears' grease, for toilet purposes. 48.
Beaters, Egg. 6.
Bed-coverlets (paper). 41.
———————— (textile), as small-wares, according to the class of the material.
—— tables. 41.
Bedding, not being bed clothing. 41.
Beds, Air (india-rubber or gutta-percha). 40.
——, Feather. 41.
Bedsteads. 41.
Beehives. 7.
Beeswax, for use in manufactures. 4.
Beer. 43.
——, Botanic. 44.
—— engines. 6.
——, Ginger. 44.
—— preservatives and finings. 42.
Bellows. 50.
Bells. 13.
——, Call. 13.
——, Dumb. 49.
——, Electric and Pneumatic. 18.
——, Exhausting. 11.
Belt clasps (jet or imitation jet). 50.
———————— (metal). 13.
———————— (precious metal or imitation thereof). 14.
—— composition. 50.
Belts, Electric (being for medical purposes). 11.
—— for wear. 38.
——, Medical or Surgical. 11.
——, Swimming. 21.
Belting, Machine (india-rubber or gutta-percha). 40.
———————— (leather). 37.
Bench screws (metal). 13.
Benches, Saw. 6.
———, Vice. 6.
Benzine collas. 47.
Benzoline. 47.
Berlin black for stoves and grates. 50.
—— wool. 33.
Bessemer steel plates. 5.
———— twyers (earthenware or porcelain). 16.
Bevels, Workmen's (metal). 13.
———————— (wood). 50.
Beverages, Aërated. 44.
———, Alcoholic. 43.
———, Medicated. 3.
———— (not alcoholic, not medicated, and not aërated). 42.
———, Preparations for. 42.
Bezique markers. 49.
Biarritz reps. 34.
Bicycles. 22.
Billets (steel). 5.
Bill files. 39.
— hooks. 12.
Billiard balls. 49.
———— cues. 49.
———— markers. 49.
———— table cushions (india-rubber). 40.
———— tables. 49.
Bills with a cutting edge. 12.
—— without a cutting edge. 13.
Binder belts. 11.
Bindings (cotton). 25.

Bindings (linen). 28.
——— (silk). 32.
——— (woollen, worsted, and hair). 35.
Binocular field glasses. 8.
Bins, Cabinet wine. 41.
—, Corn and Wine (metal). 13.
Bird cages (wood). 50.
——— (wood and metal combined). 13.
— food. 42.
— medicine. 2.
Biscuits. 42.
———, Dog. 42.
Bits, Kitchen and Furnace pan. 13.
— with a cutting edge. 12.
— without a cutting edge. 13.
Bitter alcohol. 43.
Bitters. 43.
——— (aërated). 44.
Bitts, Paddle. 13.
Blacking. 50.
———, Harness. 50.
Black-lead (for polishing). 50.
———— points, along with pencils in Class 39.
Black plates. 5.
— taggers. 5.
Blades, Sword. 12.
Blankets (woollen). 35.
Blanks (brass). 6.
——— for cartridges. 5.
——— coins. 5.
Blasting compounds. 20.
Bleaching powder. 47.
Blending glasses (graduated). 8.
Blinds (metal). 13.
—, Tumbler action for (metal). 13.
Blister steel. 5.
Blisters for human use. 3.
——— (horse, cattle, &c.). 2.
Blocked fronts (shoe leather). 37.
Blocks, Furnace. 16.
———, Paving (metal). 13.
———, Pulley (metal). 13.
———— (wood). 50.
Blotting cases. (39.)
Blouses. 38.
Blowers. 6.
Blowing engines. 6.
Blue, Washing. 47.
Boards, Chess. 49.
———, Drawing. 39.
———, Knife. 50.
———, Smoke (metal). 13.
———, Washing (wood). 50.
———, (wood). 50.
Boats. 21.
Bobbins of wood. 50.
Bog oak articles (not included in other classes). 50.
Boiler composition to prevent radiation of heat. 1.
— plates. 5.
— rivets. 13.
Boiler scale, Fluid for the prevention of. 1.
— tubes. 6.
Boilers, Steam, for agricultural purposes. 7.
————, not for agricultural purposes. 6.
——— (stove). 18.
Bolt iron. 5.
Bolts and nuts. 13.
— for doors. 13.
Bonbons. 42.
Bone. 4.
—, Fancy small wares of. 50.
— manure. 2.
— mills (portable). 7.
Bonnets. 38.
Book-binding. 39.
Book cases. 41.
— markers (silk). 32.
— slides. 39.
Books (parchment slate). 39.
Boot and Shoe linings (linen), in the piece. 27.
— hooks. 13.
— top powder. 50.
— uppers (leather). 37.
Boots. 38.
Borax. 1.
——— extract (a detergent). 47.
———— perfumed. 48.
——— glycerine. 47.
————, perfumed. 48.
——— mineral waters. 44.
Borderings, as small wares, according to the class of the material.
Botanic beer. 44.
Bottle brushes. 50.
— envelopes (grass or straw). 50.
— washing machines. 6.
Bottles (except feeding bottles or bottles of, or mounted in, precious metal or imitation thereof), in the class of the substance of which they are made.
———, Feeding. 50.
——— of precious metal, or mounted in precious metal or imitation thereof. 14.
Bottling gloves. 38.
——— machines. 6.
——— trays (wood). 50.
Bougies. 11.
Bowls, Hand (earthenware). 16.
———— (metal). 13.
———, Playing. 49.
Bows for archery. 49.
——— wear. 38.
Boxes, Despatch. 39.
——— (india-rubber). 40.
——— (leather). 47.
——— (metal). 13.
———, Musical. 9.
——— (wood, ivory, wicker-work, bone, straw, pasteboard or cardboard. 50.
Brace-bits, with a cutting edge. 12.

Brace-bits, without a cutting edge. 13.
Braces, Drill. 13.
——— for wear. 38.
———, Rachet and crank. 13.
Brackets (metal). 13.
——— (wood). 50.
Bradawls. 13.
Brads. 13.
Braid, Cotton. 25.
—— (gold and silver). 14.
—— (linen and hemp). 28.
——, Silk. 32.
—— (woollen, worsted, mohair, alpaca). 35.
Brakes, Vacuum. 6.
Branding stoves. 18.
Brandy. 43.
Brass cups, blanks, discs. 5.
—— foundry. 13.
—— sheets. 5.
Brattice cloth. 50.
Bread. 42.
Bread cutters, along with knives in Class 12.
—— platters. 50.
Breast-exhausters. 11.
Breasts, Plough. 7.
Breeches paste. 50.
Bricks. 16.
Bridges (iron). 18.
Bridles. 37.
Brimstone roll. 1.
Bristles. 4.
Britannia metal wares. 14.
Broad cloths. 34.
Brocade powder. 1.
Bronze (ingot and wire). 5.
——— powder. 1.
——— work and imitation bronze work. 14.
Bronzes. 14.
Brooches (ivory, wood, bone, horn, vegetable ivory, or mother of pearl). 50.
——— (jet or imitation jet). 50.
——— (precious metal or imitation of same). 14.
Brooms. 50.
Bruisers, Oat. 7.
Brushes, Artists'. 39.
———, except artists' brushes and brushes of metal. 50.
———, Gilders'. 50.
———, Wire. 13.
Brushware. 50.
Brussels carpets. 36.
Buckets, leather. 37.
——— (metal). 13.
——— (wood). 50.
Buckles (metal). 13.
——— (precious metal or imitation thereof). 14.
Buffers (india-rubber). 40.
Buffalo hides. 37.
Building contrivances. 18.
Bulbs. 46.
Bullet moulds. 19.
Bullion fringe (gold and silver). 14.
Bung bushes (metal). 13.
Bunting, Flags of. 35.
Burners, Gas and Lamp (metal). 13.
Burrs, Fire (of clay). 16.
Bushes, Bung (metal). 13.
Busks (metal). 13.
Bustles. 38.
Butter. 42.
———, Artificial. 42.
——— colouring. 42.
——— coolers (wood). 50.
——— workers. 7.
Butterine. 42.
Button hooks. 13.
——— plates. 5.
Buttons of all kinds (other than of precious metal or imitations thereof). 50.
——— (precious metal or imitations thereof). 14.
Butts (leather). 37.
—— (metal). 13.

Cables, Chain. 21.
———, Telegraph. 8.
Cabs. 22.
Caddies (wood). 50.
Cages, Bird (wood). 50.
——— (metal and wood combined). 13.
Cake, Aluminous. 1.
—— crushers. 7.
——, Hempseed; along with cattle food. 42.
Cakes. 42.
——, Compound linseed. 42.
Calcium, Chloride of. 1.
Calf skins. 37.
Callipers. 8.
Calomel. 3.
Cambooses. 18.
Cambric in the piece (cotton). 24.
——— (linen). 27.
——— smallwares. 28.
Camlets. 34.
Camp equipage. 19.
—— ovens. 18.
Camphor prepared for use in pharmacy. 3.
Camphorated chalk for toilet purposes. 48.
Canada plates. 5.
Candles. 47.
Candlesticks (metal). 13.
——— (precious metal or imitations thereof). 14.
——— (wood). 50.
Candy for food. 42.
——— (medicinal). 3.
Cane bills. 12.
Cannon. 19.

Canoes. 21.
Can openers having a cutting edge. 12.
——— without a cutting edge. 12.
Cans. 13.
—, Milk. 13.
Canvas, Artists'. 39.
———, Flags of. 28.
———, (flax, linen, hemp, and tow) in the piece. 27.
———, (flax, linen, hemp, and tow) not in the piece. 28.
———, Jute (small wares not included in other classes). 29.
Capers. 42.
Capes. 38.
Caps, Chimney (metal). 13.
—, Detonating. 20.
— for wear. 38.
—, Knee. 11.
Capstans for use on land. 6.
———, Ships'. 21.
Capsules (medicated). 3.
——— (metal). 13.
——— of gelatine, for containing medicine. 50.
——— (paper). 39.
Carbolic acid prepared for sanitary purposes. 2.
——————— use in medicine and pharmacy. 3.
Card-board. 39.
Card-racks. 39.
—- suspenders. 39.
Cards, Christmas, Sentiment, Menu and Programme. 39.
— (machine). 6.
—, Pattern. 39.
—, Playing. 39.
Cargo gins. 6.
Carpet bags. 50.
——— bindings (woollen). 35.
——— sweepers. 6.
Carpets. 36.
——— (moquette). 36.
Carriage and waggon metal work. 13.
——— aprons (wholly or principally of india-rubber). 40.
Carriages. 22.
———, Gun. 19.
Cars. 22.
Cart covers. 50.
Cartonage. 39.
Cartridge cases. 19.
——— dies. 19.
——— fillers. 19.
——— pouches. 19.
Cartridges. 20.
———, Blanks for. 5.
Carts. 22.
Carving tools. 12.
Casements (metal). 13.
Cases, Cigar (leather). 37.
—-, Clock (plate and precious metal). 14.
Cases, Clock (wood). 50.
— for cartridges. 19.
—, Music. 39.
—, Gun. 19.
—, Packing and Store (wood). 50.
—, Paper, and Blotting. 39.
—, Pipe. 50.
—, Pistol. 19.
—, Pencil (not precious metal or imitation thereof). 39.
——— (precious metal or imitation thereof). 14.
—, Stationery. 39.
Casks (glass). 15.
— (metal). 13.
— (potteryware). 16.
— (wood). 50.
Cask-stands (metal). 13.
——— (wood). 50.
Cassada plates (cooking, heating, and baking apparatus). 18.
Cassia, not for medical purposes. 42.
Cassimeres. 34.
Cassophy. 42.
Castor oil. 3.
Castors (metal). 13.
Cast steel. 5.
Cattle food. 42.
— medicines. 2.
— troughs and pans (metal). 13.
Caulking irons. 13.
Caustic soda. 1.
Cement, Diamond (for mending china). 50.
——— for preventing the radiation of heat. 1.
——— for tipping billiard cues. 50.
———, Portland, and other calcareous. 17.
Cerates prepared for use in pharmacy. 3.
Cereals for use as food. 42.
——————— seed. 46.
Chaff cutters. 7.
— knives (parts of agricultural machines). 7.
Chain cables. 21.
Chains. 13.
———, Galvanic (for curative purposes). 11.
———, Measuring. 8.
Chairs, Bath. 22.
———, Dentists' and Invalids'; along with furniture in Class 41.
——— (furniture). 41.
———, Garden; in the class of the material; either 13 or 50, according as they are made of metal or wood.
Chalk, Camphorated, for toilet purposes. 48.
——— (for drawing). 39.
———, Tailors'. 50.
Champagne. 43.
——————— nippers. 13.
Chandeliers (glass). 15.

Chandeliers (metal). 13.
Chapels (iron). 18.
Charcoal. 4.
Chasing machines. 6.
Checks (woollen). 34.
Cheese. 42.
——— making apparatus. 7.
——— tasters. 12.
——— tubs. 50.
Chemical apparatus. 8.
——— substances crude, or prepared, for use in manufactures, photography, or philosophical research. 1.
——— prepared for agricultural, horticultural, veterinary, and sanitary purposes. 2.
——— prepared for use in medicine and pharmacy. 3.
Chemises. 36.
Chenille silk. 32.
Cherry brandy. 43.
Chess boards. 49.
—— tables. 41.
Chest expanders. 49.
—— protectors. 11.
Chests (metal). 13.
——— (wood). 50.
Chicory. 42.
Chignons. 50.
Chillies. 42.
Chimney caps, cowls, and tops (metal). 13.
Chimneys, Lamp. 15.
China. 16.
——— crape (wool or worsted). 34.
Chisels. 12.
Chloride of calcium. 1.
——— gold. 1.
——— lime for disinfecting purposes. 2.
——— zinc. 1.
Chlorodyne. 3.
Chloroform. 3.
Chocolate. 42.
Cholera belts. 11.
Choppers. 12.
Chrome ores. 5.
——— salts. 1.
Chronometers. 10.
Churches (iron). 18.
Churns. 7.
Chutney. 42.
Cider. 43.
—— machines. 7.
Cigar holders and tubes (not of precious metal or of imitation precious metal). 50.
Cigarette papers. 39.
Cigarettes. 45.
———, Anti-asthmatic (not containing tobacco). 3.
Cigars. 45.
Cinder sifters for household use. 13.
——— (machines). 6.
Cinnamon. 42.
Cisterns (metal). 13.
——— (slate and stone). 50.
Citrate of Magnesia. 3.
Clamps. 13.
Claret. 43.
Clarifiers for articles of food. 42.
Clarionettes. 9.
Clay, Goods made of Fire. 16.
—— pipes (tobacco). 50.
Clasps (jet or imitation jet). 50.
——— (metal). 13.
——— (precious metal or imitations thereof). 14.
Cleaning furniture, leather, metals, jewellery, Preparations for. 50.
Cleansing fabrics, Preparations for. 47.
Cleavers. 12.
Clinical thermometers. 11.
Clips, Letter. 39.
Clippers, Horse. 12.
Cloaks. 38.
Clock and watch springs. 10.
—— gongs. 13.
—— weights. 13.
Clocks. 10.
———, Electric. 10.
Clogs. 38.
Closets, Water. 18.
Clothes horses. 41.
——— lines. 50.
Cloth, American. 36.
——, Brattice. 50.
—— (cotton). 24.
——, Emery. 50.
——, Enamelled leather. 36.
——, India-rubber. 40.
—— (jute). 29.
—— (linen). 27.
——, Oil. 36.
——, Sand. 50.
—— (wool, worsted, or hair). 34.
Clothing, Articles of. 38.
———, Horse. 37.
——— manufactured wholly or in part from india-rubber, gutta-percha, or their compounds. 38.
——— (waterproof). 38.
Cloths (polishing). 50.
——— (rick). 50.
——— (saddle). 37.
Clouts, Waggon and Cart (metal). 13.
Cloves. 42.
Coach ironmongery. 13.
Coaguline. 50.
Coal. 4.
—— scuttles (metal). 13.
—— tar fluid, along with detergents in Class 47.
Coatings (woollen and worsted). 34.
Coat rails. 41.
Coats. 33.
Cobblers' wax. 50.
Coburgs. 34.

Cocks (earthenware). 16.
—— (metal). 13.
—— (wood). 50.
Cocoa. 42.
Cocoa-nut fibre. 4.
——— oil for illuminating purposes. 47.
Cod-liver oil. 3.
Coffee. 42.
——— (aërated). 44.
——— mills. 6.
——— roasters. 6.
Coffins. 50.
Coils, Steam (apparatus for heating). 18.
Coke. 4.
Cold cream. 3.
—— sates. 13.
Collars for wear. 38.
——, Horse. 37.
Collas, Benzine. 47.
Collodion. 1.
——— articles not included in other classes. 50.
Colophony. 4.
Colouring, Butter. 42.
——— matters for use in manufactures (mineral). 1.
——— matters for use in manufactures (other than mineral). 4.
Colours. 1.
——, Artists'. 1.
——— for making liqueurs (containing alcohol). 43.
Combs, Currying (metal). 13.
——— for the hair. 50.
——, Graining. 13.
——, Machine. 6.
Comforters. 38.
Compasses (cutting). 12.
——— (drawing). 8.
——— (needle). 8.
——— (workmen's metal). 13.
Composition, *Anti-incrustation*. 1.
——— Belt. 50.
——— Harness. 50.
Compositions for cementing broken articles. 50.
——— for coating submerged structures. 1.
——— for covering steam boilers. 1.
——— for extinguishing and preventing fire. 50.
——— for indurating leather. 50.
——— for lubricating purposes. 47.
——— for preventing corrosion. 1.
——— ships' bottoms from fouling. 1.
——— the formation of scale in steam boilers. 1.
——— for ship and house painting. 1.
Compositions for tipping billiard cues. 50.
Compounds, Blasting. 20.
Concertinas. 9.
Condensed milk. 42.
Condensing machines. 6.
Condiments. 42.
Condition powder. 2.
Confectionery. 42.
Connecting links. 13.
Conservatories. 18.
Contrivances, Building, Drainage, Engineering. 18.
——— (not medicated) for surgical and for curative purposes. 11.
Cooking apparatus. 18.
——— *ranges*. 18.
Coolers for wine, water, &c. (glass). 15.
——— (metal). 13.
——— (pottery-ware). 16.
——— (precious metal or imitations thereof). 14.
Cooper. 43.
Coopers' wares. 50.
Copper. 5.
——— wire. 5.
——— regulus. 5.
——— tubes. 13.
Copperas. 1.
Copying paper. 39.
——— presses. 39.
Cord (elastic). 40.
——, Blind (not metal). 50.
—— for trimming (cotton). 25.
——— (linen). 28.
——— (silk). 32.
——— (woollen, worsted, and mohair). 35.
Cordage. 50.
Cordials (alcoholic). 43.
——— (non-alcoholic). 42.
Cork. 4.
—— drawing stands (wood). 50.
—— gripes (wood). 50.
—— soles. 38.
Corking machines. 6.
Corks. 50.
Corkscrews. 13.
Corn-bins (metal). 13.
—— drills. 7.
—— flour. 42.
—— meters. 8.
—— plasters. 3.
—— rubbers. 11.
*Cornets*. 9.
Cornices (metal). 13.
——— (wood). 50.
Corrosion, Composition for preventing. 1.
Corsets. 38.
——— for curative purposes. 11.
Cosaques. 42.

Cosmetics. 48.
Costumes. 38.
Cots. 41.
Cotter-pins. 13.
Cotton, Flags of. 25.
———, Gun. 20.
——— piece goods of all kinds. 24.
——— (raw or partly-prepared). 4.
——— sewing and other thread not wound on reels or spools. 23.
——— sewing thread wound on reels or spools. 23.
——— smallwares (not included in other classes). Including trimmings, cords for trimming, bindings, galloons, lace). 25.
——— wool (medicated). 3.
——— not prepared for curative purposes. 25.
——— prepared for surgical use. 11.
——— yarn of all kinds. 23.
Cotton-seed cake. 42.
——— oil, raw or partly prepared for use in manufactures. 4.
———, refined for edible purposes. 42.
Couches. 41.
Counters for shops. 41.
Counter-top metal. 5.
Couplings (railway), sold separately. 13.
Court markers. 49.
Coverlets, Bed (textile), as smallwares according to the class of the material.
——— (paper). 41.
Covers, Van, Rick, and Cart. 50.
Coverings (wall). 41.
Cowls, Chimney (metal). 13.
Crabs. 6.
Cramps. 6.
——— for guns. 19.
Cranes. 6.
Crank braces. 13.
Crape, China (wool or worsted). 34.
——— (silk). 31.
Crates (wood). 50.
Cravats. 38.
Crayons. 39.
——— holders (not of precious metal or of imitation precious metal). 39.
——— of precious metal or of imitation precious metal. 14.
Cream. 42.
———, Cold. 3.
——— for toilet use. 48.
———, Furniture. 50.
———, Salad. 42.
Creamometers. 8.
Cresylic acid, prepared for use in medicine and pharmacy. 3.
Cribs (furniture). 41.
Cricketing articles. 49.
Crinolettes. 38.
Crochet cotton. 23.
Croquet sets. 49.
Crossings, Railway, with rails in Class 5.
Crowbars. 13.
Crucibles (clay). 16.
Cruets (electro-plated). 14.
Crumb cloths (cotton), not in the piece. 25.
——— (linen), not in the piece. 28.
Crushers, Grain. 7.
Crutches. 11.
Crystal, Cleansing and Washing. 47.
Cues, Billiard. 49.
Cuffs. 38.
Culinary utensils (metal). 13.
Cultivators. 7.
Cups (brass). 5.
Curaçoa. 43.
Curative purposes, Contrivances for. 11.
Curative corsets. 11.
Curric powder and paste. 42.
Currying and tanning oils. 4.
Curtain rings and hooks (metal). 13.
——— (wood). 50.
Curtains, as smallwares, according to the class of the material or predominating material.
Cushions (india-rubber and gutta-percha). 40.
——— (leather). 37.
Cutch. 4.
Cutlasses. 19.
Cutlery. 12.
——— (electro-plated). 14.
——— (surgical). 11.
Cut nails. 13.
Cutters, Bread. 2.
———, Chaff. 7.
———, Tobacco. 12.
———, Wad. 19.
Cutting-out presses. 6.
Cyanide of potash. 1.
Cymbals. 9.

Dairy implements of the larger kind. 7.
Damask (linen). 27.
——— (silk). 1.
——— (woollen and worsted). 34.
Dandruff eradicator. 48.
Dates. 42.
Dauphines. 34.
Deals. 50.
Decanters. 15.
Decoctions (pharmaceutical). 3.
Denims, being cotton piece goods. 24.
Dental plates. 1.
Dentifrices. 48.
Deodorisers. 2.
Derricks. 6.
Desks, Office. 41.
———, School. 8.
———, Writing. 39.
Despatch boxes. 39.

Destruction of insects, Preparations for. 2.
Detergents. 47.
Detonating caps. 20.
Dhooties, being cotton piece goods. 24.
Dials (watch). 10.
Diamond cement. 50.
——— powder. 50.
Diapers (linen), in the piece. 27.
——————— not in the piece. 28.
Diaries. 39.
Dies, Cartridge. 19.
—— (metal). 13.
——, Screw-cutting. 12.
Differential pulleys. 6.
Digesters (metal hollow-ware). 13.
Dill water. 3.
Dipping powder. 2.
Dips, Sheep. 2.
Discs (brass). 5.
—— (cartridge). 5.
Disincrustants. 1.
Disinfectants. 2.
Disinfecting soap. 2.
Displacers. 8.
Distemper powder. 2.
Diving apparatus. 18.
——— dresses. 18.
Dog biscuits. 42.
—— calls (metal). 13.
—— kennels (structures of metal). 18.
—— medicines. 2.
—— soap & washers. 2.
Domestic labour-saving machines. 6.
Dolls. 49.
Domets. 34.
Door-fittings of metal. 13.
—— knockers. 13.
—— mats. 36.
—— pulls (metal). 13.
—— scrapers (metal). 13.
—— springs made wholly or principally of india-rubber. 40.
——————— (metal). 13.
—— straps (leather). 37.
Doors (iron). 13.
———(wood). 50.
Dowlas. 27.
Down. 4.
Doyleys (cotton). 25.
Drainage contrivances. 18.
——————— implements (of the larger kind). 7.
Draining apparatus. 18.
Draught excluders (india-rubber). 40.
Draw-pulls (metal). 13.
Drawers for wear. 38.
——— (furniture). 41.
Drawing boards. 39.
Drawings (pencil, water-colour, &c.). 39.
Dress-preservers (india-rubber). 40.
———suspenders (metal). 13.
Dresses. 38.
Dressing-cases (principally or wholly of leather). 37.
——————— (wood). 50.
Dressing, Leather. 50.
——————— machines, Grain. 7.
———————, Seed. 2.
———————, Sheep. 2.
Drill braces. 13.
Drilling machines (agricultural). 7.
——————————— (other than agricultural). 6.
Drills. 12.
——— (agricultural machines). 7.
——— (corn). 7.
——— (equilibrium). 6.
——— (linen). 27.
——— (rock). 6.
——— (shoe). 27.
Drinking flasks (not precious metal or imitation thereof). 50.
——————————— (precious metal or imitation thereof). 14.
——————— horns. 50.
Drinks (alcoholic). 43.
Drops (medicated). 3.
Drugget. 36.
Drugs. 3.
Drums (metal), for holding oil and pigments. 13.
——— (musical). 9.
——— (parts of machines). 6.
——— (porcelain or earthenware). 16.
Dry plates, chemically prepared, for use in photography. 1.
—— soap. 47.
Dumb bells. 49.
Dusters (cotton), not in the piece. 25.
——— (silk noils) sold separately, not in the piece. 32.
Dutch camlets. 34.
——— stoves. 18.
Dyes for the hair. 48.
——, Mineral. 1.
——, not mineral, and not for toilet purposes. 4.
Dyewood extracts. 4.
Dynamite. 20.

Earthenware. 16.
Easels. 39.
Eau de Cologne. 48.
Ebonite. 40.
Edge tools. 12.
Educational appliances. 8.
Egg beaters. 6.
—— flour. 42.
—— powder. 42.
Eggs. 42.
Ejectors. 6.
Elastic bands. 39.
——— sandallings. 40.
——— webs and cords (india-rubber). 40.

Elastic webs and cords (not of india-rubber) in the class of the material.
Electric bells, along with architectural contrivances and apparatus in Class 18.
——— belts, being medical belts. 11.
——— clocks. 10.
——— fittings of metal. 13.
——— insulators or fittings of india-rubber. 40.
——————— (porcelain and earthenware). 16.
——— lamps (philosophical). 8.
——————— of precious metals. 14.
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—— irons (plane, moulding and grooving). 6.
—— tools. 6.
Machinery, Agricultural; and parts of such machinery. 7.
——, Colliery. 6.
——, Emery wheel. 6.
——, Mining. 6.
—— of all kinds, and parts of such machinery (except machinery for agricultural purposes). 6.
——, Puddling. 6.
——, Rock-drilling. 6.
Machines, Bottle-washing. 6.
——, Bottling. 6.
——, Chasing. 6.
——, Cider. 7.
——, Cork-drawing. 6.
——, Corking. 6.
——, Cutting. 6.
——, Domestic labour-saving, of all kinds. 6.
——, Drilling (for agricultural purposes). 7.
—— (not for agricultural purposes). 6.
——, Electrical (medical). 11.
—— (philosophical). 8.
——, Freezing. 6.
——, Hydraulic. 6.
——, Meat salting. 6.
——, Mincing. 6.
——, Mortising. 6.
——, Planing. 6.
Machines, Pneumatic. 6.
——, Printing. 6.
——, Puddling. 6.
——, Punching. 6.
——, Quill-pen cutting. 12.
——, Riveting. 6.
——, Rolling. 6.
——, Sausage. 6.
——, Sawing. 6.
——, Screwing. 6.
——, Separating (not for agricultural purposes). 6.
——, Sewing. 6.
——, Shaping. 6.
——, Shearing. 6.
—— (for sheep). 7.
——, Slotting. 6.
——, Soda water. 6.
——, Sounding. 8.
——, Stone-breaking. 6.
——, Weighing. 6.
——, Winnowing. 7.
——, Wiring. 6.
——, Wood-working. 6.
Magnesia, Citrate of. 3.
—— prepared for use in medicine. 3.
—— water. 44.
Magnet for curative purposes. 11.
Magnetic apparatus for medical purposes. 11.
Magnifying glasses. 8.
Majolica. 16.
Mallets. 50.
Malt. 42.
—— liquors. 43.
—— vinegar. 42.
Manganese. 1.
—— bronze. 5.
Mangles. 6.
Mangling machines. 6.
Mantle cloth (woollen or worsted). 34.
Mantles. 38.
Manumotive vehicles. 22.
Manure. 2.
—— pumps. 7.
Marble imitation. 17.
Marine engines. 6.
—— glasses. 8.
—— or ships' chronometers. 10.
Markers, Billiard. 49.
——, Court. 49.
——, Ivory. 49.
——, Whist and Bezique. 49.
Marking gauges. 8.
—— ink. 39.
—— presses or stamps for linen. 39.
Marline spikes. 13.
Marmalade. 42.
Marocs. 34.
Marrow. 42.
Marquees. 50.
Maslins. 13.

Match-boxes (metal). 13.
Matches. 47.
Matchets. 12.
Mathematical instruments. 8.
Mats of all kinds. 36.
Mattocks. 13.
Mattrasses. 41.
———, Spring. 41.
Mauds. 35.
Meal. 42.
Measures, not being workmen's ordinary measures. 8.
———, Workmen's (metal). 13.
——————— (wood). 50.
Measuring apparatus. 8.
——————— tapes (for workmen's use). 50.
Meat, Extract of. 42.
——, Preserved. 42.
—— safes. 50.
Medical batteries. 11.
Medicated articles for human use, as wool, paper, soap, &c. in class. 3.
——————— beverages. 3.
Medicines for horses, cattle, or birds. 2.
——————— man. 3.
Melodeons. 9.
Meltons (woollen piece goods). 34.
Memorandum books. 39.
Menu cards. 39.
Merchant iron. 5.
Merino shawls. 35.
——— yarns. 33.
Merinos. 34.
Mesh pins (metal). 13.
Metal-work (carriage and wagon). 13.
Metallic ship's berth. 41.
Metals of all kinds used in manufactures (unwrought and partly wrought). 5.
Meteorological instruments. 8.
Meters, Corn. 8.
Mexican fibre. 4.
Microscopes. 8.
Microscopic apparatus. 8.
Military accoutrements and equipments, except clothing, explosives, saddlery, knapsacks, and belts. 19.
Milk. 42.
—— cans. 13.
——, Condensed. 42.
—— ferment (prepared for use in medicine). 3.
Millinery. 38.
Mills, Coffee. 6.
Millboard. 39.
Mincing machines.
Mineral dyes. 1.
——— oils for lighting, heating, and lubricating. 47.
——————— not included in other classes. 4.
——— substances used in manufactures (raw or partly prepared), not included in other classes. 4.
Mineral waters, Natural and Artificial. 44.
Minnows, Artificial. 49.
Mirrors. 41.
Mitres (metal). 13.
Models (educational). 8.
Mohair cloth. 34.
——— smallwares (not included in other classes) including laces, manufactured tresses, braids and bindings. 35.
Molasses. 42.
Moleskins (cotton pile). 24.
——————— (japanned). 36.
——————— (woollen). 34.
Mops. 50.
Moquette carpets. 36.
Mordants. 1.
Mortar mills. 6.
Mortars (earthenware or china). 16.
——— (glass). 15.
——— (metal). 13.
Mortising machines. 6.
Mosaic (glass). 15.
Mosquito powder. 2.
Mother-o'-pearl ornaments. 50.
Moulding irons (machine). 6.
Moulds, Bullet. 19.
———, Gold-beaters'. 50.
——— (metal), not for bullets. 13.
Moustache wash. 48.
Mouth protectors. 11.
——— wash. 48.
Movements, Watch. 10.
Mowing machines. 7.
Mule twist. 23.
Mungo piece goods. 34.
——— yarns. 33.
Music cases. 39.
Musical boxes. 9.
——— instruments. 9.
Muslin (cotton). 24.
——— (wool). 34.
Mustard. 42.
——————— leaves (for use in medicine). 3.
Muzzle stoppers. 19.
Muzzles (leather). 37.
———————(wire). 13.

Nail brushes. 50.
—— kegs (metal). 13.
—— rods. 5.
Nails. 13.
Name plates (metal). 13.
Naphthaline dyes. 1.
Napkin rings (electroplate and precious metal). 14.
——————— (ivory, wood, bone). 50.
Napkins (cotton), in the piece. 24.
——————————— not in the piece. 25.
———————(linen), in the piece. 27.
——————————— not in the piece. 28.
Nautical instruments. 8.

Naval accoutrements, except clothing, knapsacks, and belts. 21.
Necklets of precious metal or of imitations thereof. 14.
Neckties. 38.
———, Metal fastenings and attachments for. 13.
Needle books. 39.
Needles. 13.
Nets, Fishing. 49.
Netting pins of wood. 50.
——, Wire. 13.
Nickel silver. 5.
—— wares. 14.
Night lights. 47.
Nippers with a cutting edge. 12.
—— without a cutting edge. 13.
Nipple shields. 11.
Nipples. 19.
Non-intoxicating aërated drinks. 44.
Numnahs, along with saddlery in Class 37.
Nursing aprons. 38.
Nuts and bolts. 13.

Oakum. 4.
Oars. 21.
Oat bruisers. 7.
—cakes. 42.
—meal. 42.
Ochre. 1.
Office desks. 41.
Oil cake, 42.
— cans. 13.
— cloth. 36.
— feeders. 13.
— paintings. 39.
— skin. 36.
— stones. 50.
— tanks of metal. 13.
— varnishes of all kinds. 1.
Oiled silk. 11.
Oils for heating, lighting, and lubricating. 47.
——— toilet purposes. 48.
——— use as food. 42.
—— (mineral and vegetable) not included in other classes. 4.
—— prepared for use in medicine and pharmacy. 3.
——————— veterinary purposes. 2.
——, Rangoon. 47.
——, Rosin, for use in manufactures. 4.
Ointment for human use. 3.
———, Veterinary. 2.
Oleographs. 39.
Olive oil. 42.
Olives. 42.
Openers, Can (having a cutting edge). 12.
——————— (without a cutting edge). 13.
Opera glasses. 8.
Opium. 3.
Opodeldocs. 3.
Optical instruments. 8.
Orange quinine wine. 3.
——— wine. 43.
Orangeade. 44.
Ores. 5.
Organs. 9.
Orleans. 34.
Ormolu wares. 14.
Ornaments (bronze). 14.
——————— (china) not being jewellery. 16.
——————— (ivory, wood, bone, horn, vegetable ivory, mother-o'-pearl, jet, and imitation jet), not being jewellery. 50.
——————— (paper). 39.
——————— (precious metals and imitations thereof). 14.
Orsedew. 5.
Osnaburghs (flax and linen). 27.
Ostrich feathers (made up). 50.
——————— (not made up). 4.
Oval iron. 5.
Ovens. 18.
Overcoats. 38.
Oysters. 42.

Packing, Steam, of all materials. 50.
Paddle bits. 13.
Padlocks. 13.
Pads (ague, fever, [illegible] liver). 11.
—— (stamp inking). 50.
Pails (glass). 15.
—— (metal). 13.
—— (wood). 50.
Paintings, Oil. 39.
———, Water-colour. 39.
Paints. 1.
Paletots. 38.
Palettes. 39.
Palisading (metal). 13.
Palliasses. 41.
Palms, Sailmakers'. 13.
Pans (glass). 15.
—— (metal). 13.
—— (potteryware). 16.
Paper bags. 39.
—— bed-coverlets. 41.
—— cases. 39.
——, Chemical test. 39.
——, Cigarette. 39.
—— collars. 38.
——, Emery, Sand, and Glass. 50.
—— fasteners. 39.
—— for destroying insects. 2.
——————— writing, wrapping, drawing, and printing. 39.
——, Fumigating. 2.
——, Gold and Silver. 39.
—— hangings. 41.
—— knives. 39.
—— ornaments. 39.

Paper, Photographic. 39.
——— prepared for medical and pharmaceutical purposes. 3.
——— rosettes. 39.
———, Tracing. 39.
——— weights. 39.
Papier-mâché goods (being articles of furniture). 41.
Paraffin candles. 47.
——— oil (for illuminating purposes). 47.
——— wax for use in manufactures. 4.
Parasols. 50.
Parchment. 39.
———— slate books. 39.
Paris blue. 47.
Parquetry of wood. 50.
Paste, being an article of stationery. 39.
—— for cleaning and polishing. 50.
——— food. 42.
——— toilet use. 48.
——, Phosphor (for destroying insects). 2.
——, Razor. 50.
Pasteboard. 39.
————, Roofing. 50.
Pastilles (medical). 3.
——— for destroying mosquitoes. 2.
———— toilet purposes. 48.
Patent fuel. 50.
——— medicines for man. 3.
———————— veterinary purposes. 2.
Pattern cards. 39.
Paving blocks of metal. 13.
——— (mineral and other substances) not being metal. 17.
Peat fire-lighters. 50.
—— moss litter. 50.
Pelisses. 38.
Pencil cases (not of precious metal or imitation thereof), along with pencils in Class 39.
———— (precious metal or imitation thereof). 14.
——— protectors. 39.
Pencils. 39.
Penholders of all kinds (except of precious metal or imitation thereof). 39.
Penholders of all kinds (precious metal or imitation thereof). 14.
Penknives. 12.
Pen-making machines, Quill. 12.
Pens (not of precious metal or of imitation thereof). 39.
—— (gold and silver). 14.
Pepper. 42.
Perambulators. 22.
Percussion caps. 20.
Perforating presses, being articles of stationery. 39.
Perfumery. 48.
Perfumed soap. 48.
Perry. 43.
Pessaries. 11.
——— (medicated). 3.
Petrifying liquids. 1.
Petroleum for illuminating, heating, or lubricating purposes. 47.
Phosphor-bronze. 5.
——— paste for destroying insects. 2.
Phosphorus. 1.
Photographic apparatus. 8.
———————— chemicals. 1.
———————— glass. 15.
———————— paper. 39.
Photographs. 39.
Photometers. 8.
Pianinos. 9.
Pianofortes. 9.
Piassava fibre. 4.
Pickaxes. 13.
Pickers (hide). 37.
Pickles. 42.
Picks. 13.
Piece goods in the class of the material or predominating material, according as they are made of cotton, linen, silk, wool, jute.
Pieces, Fowling. 19.
———, Trunnion (ordnance). 19.
Pig medicines. 2.
Pigments. 1.
Pillars, Gas (metal). 13.
Pillows, Feather. 41.
——— (india-rubber and gutta-percha). 40.
Pills for man. 3.
——— veterinary purposes. 2.
Pimento. 42.
Pinafores. 38.
Pincers with a cutting edge. 12.
——— without a cutting edge. 13.
Pins. 1.
——, Cotter and Linch. 13.
——, Knitting (bone, ivory, or wood). 50.
——, Netting (wood). 50.
Pinoleum. 50.
Pipe organs. 9.
Pipes, Clay tobacco. 50.
——— (glass). 5.
——— (metal). 13.
———, Pitch. 8.
——— (potteryware). 16.
Pistol cases. 19.
Pistols, and parts thereof (metal). 19.
Piston rings. 6.
Pitch. 4.
——— pipes. 8.
Places, Fire. 18.
Plaits, Hair. 50.
Plane irons. 12.
Planes. 12.
Planing machines. 6.
Planks (wood). 50.
Plaster. 17.
——— of Paris. 17.
Plasters (surgical and medi[illegible]

Plate. 14.
— glass. 15.
— powder. 50.
Plated goods. 14.
Plates, Axle (Grinders'). 13.
——, Black. 5.
——, Boiler and Armour. 5.
——, Canada. 5.
——, Cassada (a cooking, heating and baking apparatus). 18.
——, Cooking. 18.
——, Dental. 11.
——, Dry (chemically prepared, for use in photography). 1.
——, Engravers' steel and copper. 13.
——, Knotter. 6.
——, Name (metal). 13.
——, Shovel, Spade, and Bowl. 13.
——, Side, for ploughs. 7.
——, Sole, for ploughs. 7.
——, Steucil. 39.
—— and dishes (metal). 13.
—— (precious metal and imitations thereof). 14.
Platinum. 5.
—— articles. 14.
Platters, Bread. 50.
Playing balls. 49.
—— cards. 39.
Pliers with a cutting edge. 12.
— without a cutting edge. 13.
Plough bits, for planing and grooving. 12.
—— breasts. 7.
Ploughs and parts of ploughs (agricultural). 7.
—— for woodworkers and bookbinders. 12.
——, Steam. 7.
Plumb bobs. 8.
—— levels, Workmen's (wood). 50.
Plumbago (blacklead). 50.
Plumbers' knives, with a cutting edge. 12.
—— without a cutting edge. 13.
Pneumatic bells, along with architectural contrivances in Class 18.
—— machines. 6.
Pocket books. 39.
Points, Black-lead (for pencil cases). 39.
——, Railway. 6.
Poison, Insect. 2.
Poleaxes. 12.
Poles, Lawn Tennis. 49.
— (wood). 50.
Polish powder. 50.
Polishing cloths. 50.
—— preparations and materials. 50.
Pomade for medical purposes. 3.
—— toilet purposes. 48.
Pontoons. 19.
Poplins. 34.
Porcelain. 16.
Portable bone mills. 7.
—— forges. 6.
Porter. 43.
Portfolios. 39.
Portland cement. 17.
Portmanteaus. 37.
Postal balances. 39.
Pot stretchers (wood). 50.
Potash and its preparations, for use in manufactures. 1.
—— water. 44.
Potassium, Iodide of; prepared for use in pharmacy. 3.
Potatoes. 42.
Pots (earthenware and china). 16.
— (metal). 13.
Pottery. 16.
Pouches, Cartridge or shot. 19.
—— other than cartridge or shot pouches, in the class of the material, as leather pouches in Class 37.
Poultry food. 42.
—— medicine. 2.
Powder and shot measures. 19.
——, Bleaching. 47.
—— blue for washing. 47.
——, Boot-top. 50.
——, Brocade. 1.
——, Bronze. 1.
——, Currie. 42.
——, Diamond. 50.
——, Egg. 42.
——, Face. 48.
—— flasks. 19.
—— for destroying insects and for veterinary purposes. 2.
——, Founders'. 4.
——, Ginger beer. 42.
——, Knife. 50.
——, Plate. 50.
——, Polish. 50.
——, Sharpening. 50.
——, Toilet. 48.
——, Violet. 48.
Powders for veterinary purposes. 2.
——(medicinal) for human use. 3.
Precious metals and imitations thereof, Wares of. 14.
Preparations for agricultural and veterinary purposes. 2.
—— beverages. 42.
—— toilet purposes. 48.
——, Frothing. 42.
Preserves. 42.
Presses, Cheese. 7.
——, Copying. 39.
——, Cutting-out. 6.
——, Cider. 7.
——, Eyeletting. 6.
——, Hand (for marking linen and paper). 39.
——, Hop. 7.
——, Perforating (articles of stationery). 39.

Presses, Printing. 6.
———, Screw. 6.
Pressure gauges and indicators. 8.
Prince's checks (woollen). 34.
Printers' rollers. 39.
———————— (parts of machines). 6.
Printing inks. 39.
———, Letter-press. 39.
——— presses. 6.
——— slabs, not parts of printing machines. 39.
Prints and engravings. 39.
Programmes (paper or card). 39.
Projectiles (explosive). 20.
——— (non-explosive). 19.
Protectors, Back, Mouth, Chest, &c. 11.
———, Sight (for guns). 19.
Prunellas (wool, worsted, or hair). 34.
Pruners, Tree. 12.
Puffs, Powder. 48.
Pulley blocks (metal). 13.
———————— (wood). 50.
Pulleys, Differential. 6.
Pullna water. 44.
Pulls, Drawer and Door (metal). 13.
Pulp, Wood. 50.
Pulses. 42.
Pump leathers. 37.
Pumping engines. 6.
Pumps. 6.
———, Air (philosophical). 8.
———————— (steam engine, and for supplying air). 6.
———, Garden. 7.
———, Manure. 7.
———, Stomach. 11.
Punch, an alcoholic liquor. 43.
Punches (metal). 13.
———, Saddlers', with a cutting edge. 12.
Punching machines. 6.
Punt guns. 19.
Purifying apparatus (gas). 6.
Purses in the class of the material.
Putty. 50.
——— knives. 13.
Pyretic saline. 3.
Pyrometers. 8.

Quarries. 16.
Quarrying tools without a cutting edge, 13.
Quill pen cutters. 12.
—— pens. 39.
Quilts (textile) as small wares in the class of the material or predominating material of the covering.
Quinine. 3.
——————— (aërated). 44.
——————— wine. 3.
Quoits. 49.

Racket balls. 49.
——— bats. 49.
Racks, Card. 39.
———, Hay (metal). 13.
Rag knives, not parts of machinery. 12.
————————, parts of machinery. 6.
Railings (metal). 13.
Rails, Coat. 41.
—— for railways. 5.
Railway carriages and trucks. 22.
——————— couplings (sold separately). 13.
——————— crossings, with rails in Class 5.
——————— points. 6.
——————— wrappers and rugs. 50.
Rakes (garden). 13.
—— (horse). 7.
Ramps. 13.
Ranges, Kitchen. 18.
Rangoon oil. 47.
Rape cake and meal. 42.
—— oil, for use in manufactures. 4.
Raspberry vinegar. 42.
Rasps. 12.
Ratchet-braces. 13.
Ratchets. 13.
Rattans. 50.
Razor paste. 50.
—— strops. 50.
Razors. 12.
Reamers. 12.
Reaping hooks. 12.
——— machines. 7.
Ready-made clothing. 38.
Recappers. 19.
Red lead. 1.
—— ochre. 1.
Reed instruments. 9.
Reflectors (metal). 13.
Refreshment bars. 18.
Refrigerators. 50.
Regulators, Gas. 8.
Regulus, Copper. 5.
Rennet. 42.
Reps, Biarritz. 34.
Resins. 4.
Respirators. 11.
Retorts (earthenware). 16.
Revolvers. 19.
Ribbons (silk and silk velvet). 32.
————————, Velvet (silk and cotton, silk predominating). 32.
———————————— (wool, worsted, or mohair predominating). 35.
Ribs, Umbrella (cane). 50.
———————————— (metal). 13.
Rice. 42.
Rick covers. 50.
Riddles (wire). 13.
——— (wood). 50.
Rifles and parts thereof (metal). 19.
Rigging. 21.
Rims or fellies (metal). 13.
———————— (wood). 50.
Ringflyers. 6.

Rings, Curtain (metal). 13.
——— (wood). 50.
——— (india-rubber), for umbrellas. 40.
——— (metal). 13.
———, Napkin (electroplate and precious metal). 14.
——— (bone, ivory, wood). 50.
Ripes or scythe-sharpening sticks (metal). 13.
Rippers, Slaters'. 12.
Rivet iron. 5.
Riveting machines. 6.
Rivets. 13.
Roasters (coffee). 6.
Roasting jacks. 6.
Rock drills. 6.
Rod iron and steel. 5.
Rods, Fishing. 49.
——, Gauge. 8.
——, Stair (metal). 13.
Rolled tombac. 5.
Roller skates. 49.
Rollers for sashes (metal). 13.
——, Garden. 7.
——, Printers'. 39.
——— (parts of machinery). 6.
Roofing felt. 50.
——— (metal). 13.
——— (pasteboard). 50.
Root-cutting machines. 7.
Roots for food. 42.
——— use in medicine and pharmacy. 3.
Rope (jute or hemp). 50.
—— (leather). 37.
—— (wire). 13.
Rosettes, Paper. 39.
———, Silk. 32.
Rosin oil, for use in manufactures. 4.
Rotten stone. 50.
Rouge for toilet purposes. 48.
——— Jewellers'. 50.
——— not for toilet purposes. 50.
Roughs (linen). 27.
Rubbers. 50.
Ruffles. 38.
Rugs for personal use. 50.
—— in the nature of carpets. 36.
Rulers. 39.
Rules, Workmen's (metal). 13.
——— (wood). 50.
Rum. 43.
——, Bay. 48.
Rusting, Compound to prevent. 1.

Saccharometers. 8.
Sacking (juto). 29.
Sacks. 50.
Saddlery. 37.
Saddle cloths. 37.
——— paste. 50.
Saddles, Air; for bicycles (india-rubber). 40.
Saddlers' ironmongery. 13.
Sad-irons. 13.
Safes, Ice. 50.
——, Meat. 50.
——— (metal) for money and valuables. 13.
Sago. 42.
Sailcloth (flax and hemp). 27.
Salad cream. 42.
——— oil. 42.
Saline, Pyretic. 3.
Salt for bathing. 3.
——— food. 42.
Saltpetre. 1.
Salts, Smelling. 3.
——— used in pharmacy. 3.
Salve. 3.
——, Eye. 3.
Sand cloth. 50.
——— paper. 50.
——, Silver. 50.
Sandallings, Elastic. 40.
Sanitary contrivances and appliances. 18.
——— preparations. 2.
Sardines. 42.
Sarsaparilla. 3.
Sash iron. 5.
Satchels. 50.
Sates, Cold. 13.
Satins in the piece. 31.
Sauce. 42.
Saucepans. 13.
Sausage machines. 6.
Sausages. 42.
Saw benches. 6.
——— sets. 13.
——— tables. 6.
Sawing machines. 6.
Saws. 12.
——— (surgical). 11.
Saxes, Slaters'. 12.
Scale, Fluid for the prevention and removal of boiler. 1.
Scales. 6.
Scantling (wood). 50.
Scarves. 38.
Scents. 48.
Schiedam. 43.
School desks. 8.
Scissors. 12.
——— (surgical). 11.
Scoops (imitation of precious metal). 14.
——— (metal). 13.
Scrap-books. 39.
Scouring liquids for fabrics. 47.
Scrapers, Door (metal). 13.
——— (india-rubber). 40.
——— with a cutting edge. 12.
——— without a cutting edge (metal). 13.

Screens, Fire (metal). 13.
——————— (furniture). 41.
——— (wire). 13.
Screw-drivers. 13.
——— jacks. 6.
——— machines. 6.
——— presses. 6.
Screwing tackle. 12.
Screws. 13.
Scrubbers, Hydraulic (for cleaning ships' bottoms when afloat). 21.
Scuttles, Coal. 13.
Scythe sneads (metal). 13.
——— stones. 50.
——— strickles. 50.
Scythes. 12.
Sealing wax. 39.
Seals. 39.
Sea-water for bathing and other purposes. 50.
Seed-drills. 7.
Seeds for agricultural and horticultural purposes. 46.
—— used as food. 42.
———————in manufactures. 4.
——————— medicine and pharmacy. 3.
Seidlitz powders. 3.
Seltzer water. 44.
Seltzogenes. 8.
Semolina. 42.
Separating machines (grain). 7.
Seraphines. 9.
Serges. 34.
Serviers, Plasterers'. 13.
Sewing machine needles. 13.
——— machines and parts of sewing machines. 6.
——— needles. 13.
——— silk. 30.
——— thread (cotton) not wound on spools or reels. 23.
——————————— wound on spools or reels. 23.
——————— (flax and linen). 26.
Sextants. 8.
Shafts (parts of machines). 6.
———(wood). 50.
Shalloons. 34.
Shaping machines. 6.
Sharpening powder. 50.
——————— sticks (metal). 13.
——— ——— stones. 50.
Shave hooks, Plumbers' (without a cutting edge). 13.
Shaves. 12.
Shaving brushes. 50.
———————paste. 48.
———————soap. 48.
Shawls (cotton). 25.
——— (linen). 28.
——— (silk). 32.
——— (woollen and worsted) in the piece. 34.
Shawls (woollen and worsted) not in the piece. 35.
Shear steel. 5.
Shearing machines (for sheep). 7.
———————(not for agricultural purposes). 6.
Shears. 12.
Sheathing metal. 5.
Sheep, Medicine and Dressings for. 2.
——— shearing machines. 7.
——— shears. 12.
——— washes. 2.
Sheet-metal. 5.
Sheetings (cotton) in the piece. 24.
——————— (linen and hemp) in the piece. 27.
Sheets (cotton) not in the piece. 25.
——— (india rubber). 40.
——— (linen) not in the piece. 23.
Sheffield and other plated goods. 14.
Shell, Articles of (not included in other classes). 50.
Shells (explosive). 20.
Shelves, Fret (metal). 13.
——— (wood). 50.
Sherbet. 42.
Sherry. 43.
Shields, Nipple. 11.
Ships' berths (metallic). 41.
——, Compositions for the bottoms of. 1.
—— equipments (except nautical instruments). 21.
—— logs. 8.
Shirt fronts. 38.
—— studs (not of precious metal or imitation of the same). 50.
——————— (precious metal or imitation of the same). 14.
Shirtings (cotton). 24.
——————— (linen). 27.
——————— (woollen). 34.
Shirts. 38.
Shives and spiles (wood). 50.
Shoddy piece goods. 34.
Shoe bills. 13.
—— drills. 27.
—— hides (calf and kip). 37.
—— horns (bone, ivory, wood). 50.
——————— (metal). 13.
—— thread (linen). 26.
Shoes. 38.
Shop counters. 41.
Shot. 19.
—— belts. 19.
—— pouches. 19.
Shovels (metal). 13.
Shutters (revolving). 18.
——————— (wood). 50.
Shuttlecocks. 49.
Shuttles of bone, ivory, and wood. 50.
——————— metal. 13.
Sickles. 12.
Side plates for ploughs. 7.

Sieves (wire). 13.
——(wood). 50.
Sifters, Cinder (being machines). 6.
————, for household use. 13.
—— (imitation of precious metal). 14.
Sight adjusters. 8.
—— protectors for guns. 19.
Signals, Fog (explosive). 20.
Silica furnace fittings. 16.
Silk antimacassars. 32.
—— braids, bindings, galloons, ribbons, webbing, and other silk smallwares (not included in other classes). 32.
——, Flags of. 32.
——, Oiled. 11.
—— piece goods. 31.
—— (raw or partly prepared). 4.
—— (spun, thrown, sewing, or knitting: twist, yarn, and thread). 30.
Silver and imitations of silver. 5.
————————, Wares of. 14.
—— German (in sheets, bars, and ingots). 5.
————(wire). 5.
—— leaf. 5.
——, Nitrate of. 1.
—— paper. 39.
—— sand. 50.
—— thread. 14.
—— wire. 5.
Silversmiths' soap. 50.
Singeing lamps. 13.
Singers, Horse. 13.
Sinks (metal). 13.
—— (slate and stone). 50.
Size along with paints and varnishes in Class 1.
Sizing machines. 6.
Skates. 12.
——, Roller. 49.
Skins, wrought and unwrought. 37.
Skirts. 38.
Skylights (metal). 13.
Slate. 4. *See* Slates.
Slaters' rippers, saxes, and horses. 12.
Slates (roofing and building). 17.
—— (writing). 39.
Slide rests. 6.
—— rules.
Slippers for wear. 38.
Slotting machines. 6.
Small-arms. 19.
Small wares not included in other classes (metal) in Class 13.
———— not included in other classes (precious metal or imitation thereof). 14.
———— not included in other classes (textile) according to the material or the predominating material. 25, 28, 29, 32, and 35.
———— not included in other classes (wood, ivory, bone, jet). 50.
Smelling-bottles mounted in precious metals or imitations of them. 14.
———— salts. 3.
Smiths' bellows. 50.
Smoke boards (metal). 13.
Snap caps. 19.
Sneads, Scythe (metal). 13.
Snuff. 45.
Snuffers. 13.
Soap, Common. 47.
——, Disinfecting. 2.
——, Extract of. 47.
—— (medicated), for human use. 3.
—— for dogs, cattle, &c. 2.
——, Perfumed. 48.
——, Shaving. 48.
——, Silversmiths'. 50.
Socks for curative purposes. 11.
———— wear. 38.
Soda and its preparations (for use in manufactures). 1.
—— water. 44.
———— apparatus and machines. 6.
———— bottles. 15.
Sofas (furniture). 41.
——, Garden (metal). 13.
Solder. 5.
Sole plates for ploughs. 7.
Soles (cork). 38.
Sounding machines and apparatus. 8.
Soups. 42.
Spades. 13.
Spangles of gold. 14.
Spanish stripes. 34.
Spanners. 13.
Spars for ships. 21.
Spectacles. 8.
Speed indicators and gauges. 8.
Spelter. 5.
Spice extracts (alcoholic). 43.
Spices. 42.
Spikes (marline). 13.
Spiles (wood). 50.
Spills (wood). 50.
Spirit indicators. 8.
—— levels. 8.
Spirits (beverages). 43.
———— of camphor. 3.
———— (perfumed). 48.
Spittoons (metal). 13.
———— (porcelain or earthenware). 16.
Spokeshaves. 12.
Spokes (metal). 13.
———— (wood). 50.
Sponges. 4.
———— (india-rubber). 40.
Spoons (brass and tin). 13.
———— (precious metal and imitations thereof). 14.
Spouting (metal). 13.
Spreaders (wood). 50.
Sprigs (flax and linen). 27.
Spring balances. 6.

Spring mattresses. 41.
——— steel. 5.
Springs (bell). 13.
———(door, railway waggon and carriage, buffing or buffer). 13.
———(machine). 6.
———(watches and clocks). 10.
Spuds. 13.
Spurs (iron or steel). 13.
Squares, Workmen's (metal). 13.
——————— (wood). 50.
Squeegees (india-rubber). 40.
Squeezers, Lemon. 6.
Stain powders. 1.
Stains, Wood. 1.
Stair cases (metal). 18.
—— rods (metal). 13.
Stakes (metal). 13.
Stamps, Hand (for marking linen and paper). 39.
Standard gauges. 8.
Standards, Gas (metal). 13.
Stands for casks, sewing machines, and similar articles, in the class of the material.
———, Umbrella, with furniture in Class 41.
Staples (metal). 13.
Starch, for laundry purposes. 47.
——————— use as food. 42.
Stationery. 39.
———————cases. 39.
Statuary (porcelain). 16.
Stay busks (metal). 13.
Stays. 38.
Steam boilers, Composition for preventing and removing scale in. 1.
———————, Composition for preventing radiation of heat from. 1.
——————— for agricultural purposes. 7.
——————— not for agricultural purposes. 6.
——— coils. 18.
——— engines, for agricultural purposes. 7.
——————— not for agricultural purposes. 6.
——— gauges. 8.
——— hammers. 6.
——— packing. 50.
——— pumps. 6.
——— traps. 6.
Stearine. 4.
——————— candles. 47.
Steatite articles. 50.
Steel. 5.
—— carboniser, for use in manufactures. 4.
—— pens. 39.
—— toys. 13.
—— wire ropes. 13.
Steels, Butchers'. 13.
Steelyards. 6.
Steering engines. 6.
——————— gear. 21.
Stencil plates. 39.
Stereotyping paper. 39.
Sticks, Walking (wood). 50.
———, Whip. 50.
Stills (experimental). 8.
Stirrups. 13.
Stockings. 38.
——————— (surgical). 11.
Stocks and dies. 12.
——— (being parts of guns). 19.
Stomach pumps. 11.
Stone, Artificial. 17.
—— bluo (for laundry purposes). 47.
—— breaking machines. 6.
——, Rotten. 50.
Stones, Sharpening. 50.
Stoneware. 16.
Stopping for teeth, of precious metal. 14.
———————, not of precious metal. 11.
Stops for organs. 9.
Stout. 43.
Stove boilers. 18.
—— ranges. 18.
Stoves. 18.
Strainer plates. 6.
Strainers (wire). 13.
Straps (leather). 37.
Straw boards and straw paper. 39.
—— elevators. 7.
—— envelopes (for bottles). 50.
——, Goods manufactured from (not included in other classes). 50.
—— hats and bonnets. 38.
Straws for sherry-cobblers. 50.
Stretchers, Linen (bone, wood, or ivory). 50.
———, Pot (wood). 50.
Strickles, Scythe. 50.
String. 50.
Strings for musical instruments. 9.
Strip iron. 5.
Stripes (woollen). 34.
Strong rooms. 18.
Strops, Razor. 50.
Structures (iron). 18.
Strychnine. 3.
Studs, Bale (metal). 13.
———, Shirt (precious metal or imitation thereof). 14.
——————— (not of precious metal or imitation thereof). 50.
Stuffing (woollen, worsted, or hair). 35.
Stuffs and cloths of wool, worsted, or hair. 34.
Submerged structures, Composition for coating. 1.
Sugar. 42.
——, Black (prepared for medicinal purposes). 3.
—— candy. 42.

Sugar-cane bills. 12.
Sulphur, Precipitated (for use in manufactures). 1.
Sun-burners. 13.
—— shades. 50.
Supporters, Abdominal. 11.
Suppositories (medical). 3.
Surgical instruments, apparatus, and contrivances. 11.
Surveying instruments. 8.
Suspenders, Card. 39.
——, Dress (metal). 13.
Suspensory bandages. 11.
Sweepers, Carpet. 6.
Sweetmeats. 42.
Swimming belts. 21.
Swivels. 13.
Sword bayonets. 19.
—— blades. 12.
Swords. 19.
Syphons. 6.
Syringes (surgical). 11.
Syrups (medicinal). 3.
—— (not medicinal). 42.

Table cloths and covers (cotton), in the piece. 24.
—— not in the piece. 25.
—— (linen), in the piece. 27.
—— not in the piece. 28.
—— (union, linen predominating) in the piece. 27.
—— (union, linen predominating) not in the piece. 28.
—— (woollen and worsted), in the piece. 34.
—— (woollen and worsted), not in the piece. 35.
—— (oil cloth). 36.
Tables, Billiard. 49.
——, Chess. 41.
—— (furniture). 41.
——, Saw. 6.
Tablets, Worm (for human use). 3.
Tackle, Fishing. 49.
Tacks. 13.
Taggers, Black. 5.
Tailors' Chalk. 50.
Tallow (edible). 42.
—— for use in manufactures. 4.
—— used for heating, illuminating, or lubricating. 47.
Tambourines. 9.
Tanks (metal). 13.
—— (slate and stone). 50.
Tanning substances. 4.
Tape (cotton). 25.
—— (linen). 28.
Tapers (wax). 47.
Tapes, Workmen's measuring. 50.
Tapioca. 42.
Taps (metal). 13.
—— (porcelain or earthenware). 16.
——, Screw-cutting. 12.
—— (wood). 50.
Tar. 4.
Targets for archery. 49.
—— guns. 19.
Tarpaulins. 50.
Tassels (gold and silver bullion). 14.
—— (not of gold and silver bullion) as smallwares according to the class of the material or predominating material.
Tasters, Cheese. 12.
Tatting cotton. 23.
—— shuttles (bone, ivory, wood). 50.
Tea. 42.
—— (aërated). 44.
—— caddies (wood). 50.
Tea cloths (linen) in the piece. 27.
—— not in the piece. 28.
Teaching instruments and apparatus. 8.
Tee-iron. 5.
Teeth, Artificial. 11.
—— Preparations for the. 48.
——, Stopping for (of precious metal). 14.
—— (not of precious metal). 11.
Teething bandages. 11.
—— pads for infants. 11.
—— powders. 3.
Telegraph wire. 5.
Telegraphic instruments. 8.
Telephonic instruments. 8.
Telescopes. 8.
Tennis, Lawn, poles. 49.
—— sets. 49.
—— shoes. 38.
Tent wine. 43.
Tents. 50.
Tern plates. 5.
Terra-cotta. 16.
Test paper (chemical). 39.
Testing gas, Instruments for. 8.
Thermometers (clinical). 11.
—— (not clinical). 8.
Thibet. 34.
Thimbles for sewing (metal). 13.
—— (precious metal or imitations thereof). 14.
——, Ship. 13.
Thread (cotton). 23.
—— (flax, hemp, tow, and china grass). 26.
—— (gold and silver). 14.
—— (india-rubber). 40.
——, Sewing and other cotton not wound on spools or reels. 23.
—— wound on spools or reels. 23.
—— (silk). 30.
Threshing machines. 7.

Thrown silk. 30.
Ticks (cotton piece goods). 24.
Ties for wear. 38.
Tiles. 16.
—— (iron). 13.
Timber. 50.
Time-keepers. 10.
Tinctures (medicinal). 3.
———— for toilet purposes. 48.
Tin. 5.
—— plates. 5.
Tins. 13.
Tips, Heel (metal). 13.
Tobacco cutters. 12.
———- pipes. 50.
———- pouches (india-rubber). 40.
———————— (leather). 37.
———-, manufactured and unmanufactured. 45.
Toe-tips (metal). 13.
Toilet powder. 48.
—— preparations. 48.
—— vinegar. 48.
Tombac. 5.
Tongs. 13.
Tongues. 42.
Tonics. 3.
Tools, Handles for (wood, ivory, bone). 50.
———, Machine. 6.
——— (metal), without a cutting edge. 13.
——— with a cutting edge. 12.
——— (wood). 50.
Tooth brushes. 50.
——— picks, not of metal. 50.
——— powder and paste. 48.
——— wash. 48.
Tops (woollen). 4.
Tow. 4.
—— hessians. 27.
Towels (cotton), in the piece. 24.
———————— not in the piece. 25.
——— (linen), in the piece. 27.
———————— not in the piece. 28.
Toys. 49.
——, Steel. 13.
Traces (leather). 37.
——— (metal). 13.
Tracing cloth. 39.
——— paper. 39.
Traction engines, not for agricultural purposes. 6.
Tramcars. 22.
Transfer picture albums. 39.
Transparent paint. 1.
Traps for animals (wire or wire and wood). 13.
———————— drains (earthenware). 16.
———————————— (metal). 13.
———, Steam. 6.
Traversing jacks. 6.
Trays (metal). 13.
——— (wood). 50.
Treacle. 42.
Tree pruners. 12.
Tresses (mohair). 35.
——— (spun silk). 32.
Trestle fire lighters. 50.
Tricycles. 22.
Trimmings (cotton). 25.
———————— (feather), made up. 50.
———————— (ivory, jet, pebble, mother-o'-pearl). 50.
———————— (linen). 28.
———————— (silk). 32.
———————— (woollen and worsted). 35.
Tripe. 42.
Troches. 3.
Troughs (metal). 13.
Trousers. 38.
Trowels (metal). 13.
Trucks. 22.
Truffles. 42.
Trumpets. 9.
Trunnion pieces (ordnance). 19.
Trusses. 11.
Tube expanders. 13.
—— wells. 18.
Tubes, Cigar and Cigarette (not of precious metal or of imitation precious metal). 50.
——— Copper. 13.
——— for medical purposes. 11.
———, Glass. 15.
——— (metal), not parts of machines. 13.
———————— parts of machines. 6.
Tubs. 50.
Tulle (silk). 31.
Tumbler action for blinds (metal). 13.
Tuning forks. 8.
Turbines. 6.
Turkey carpets. 36.
Turnery (wood). 50.
Turns (metal). 13.
Turnscrews. 13.
Turnstiles. 6.
Turpentine. 4.
Tussores (linen). 27.
———— (silk). 31.
Tuyeres (pottery ware). 16.
Tweeds. 34.
Tweezers. 13.
Twill (cotton). 24.
—— (woollen or worsted). 3.
Twine. 50.
Twist (cotton). 24.
—— (leather). 37.
—— (linen). 26.
—— (silk). 30.
Type metal. 5.
Tyre steel. 5.
Tyres for machinery. 6.
———— waggons and carriages. 13.

Ulsters. 38.
Umbrella furniture (metal). 13.
——— ribs (cane). 50.
——— (metal). 13.
——— rings (india-rubber). 40.
——— stands. 41.
Umbrellas. 50.
Underclothing. 38.
Unguents for medical purposes. 3.
Uniforms. 38.
Union goods (not being piece goods), wool or worsted predominating. 35.
——— (not in the piece), linen predominating. 28.
——— joints (metal). 13.
——— piece goods (cotton predominating). 24.
——— (linen predominating). 27.
——— (wool or worsted predominating). 34.
Upholstery. 41.
Uppers, Boot. 37.
Urinal basins (pottery ware). 16.
Urinals. 18.
——— for travellers and invalids. 11.
Utensils, Domestic, Culinary, Garden, and Stable (metal). 13.
——— Domestic, Culinary, Garden, and Stable (wood). 50.

Vacuum brakes. 6.
——— gauges. 8.
Valentines. 39.
Valves (metal), not parts of machines. 13.
———, parts of agricultural machines. 7.
——— machines other than agricultural machines. 6.
Van covers. 50.
Vans. 22.
Varnish for polishing purposes. 50.
Varnishes and paints. 1.
Vaseline for use in manufactures. 4.
——— prepared for use in medicine and pharmacy. 3.
Vases (porcelain or earthenware). 16.
—— (wood). 50.
Vegetable substances, Goods manufactured from (not included in other classes). 50.
——— raw or partly prepared, used in manufactures, and not included in other classes. 4.
Vegetables. 42.
Veils for wear. 38.
Velocipedes. 22.
Velvet, in the piece (silk). 31.
——— (wool, worsted, or mohair predominating). 34.
——— ribbons (silk and cotton, silk predominating). 32.
Velvet ribbons (wool, worsted, or mohair predominating). 35.
Velveteens in the piece (cotton). 24.
Venetian blinds (metal). 13.
——— (wood). 50.
Ventilating apparatus. 18.
Ventilators (metal). 13.
Verandahs. 18.
Vermicelli. 42.
Vermin-destroying preparations. 2.
——— traps (of metal). 13.
Verniers, Steel and iron. 8.
Vesicant or blistering preparations for veterinary purposes. 2.
Vestas. 47.
Vests. 38.
Vesuvians. 47.
Veterinary preparations. 2.
Vice benches. 6.
Vices. 13.
Vichy water. 44.
Vinegar. 42.
——— (medicated). 3.
———, Toilet. 48.
Violet powder. 48.
Violins. 9.
Violinas. 9.
Virginian silver wares. 14.
Vitrified porcelain enamel, a coating for metal. 1.
Voice lozenges. 42.
Vulcanite goods not included in other classes. 40.
Vulcanized india-rubber horse-shoes. 40.

Wad cutters. 19.
Wadding and stuffing (cotton). 25.
——— (woollen or worsted). 35.
Wads. 19.
Wafers. 39.
Waggon and carriage metal-work. 13.
——— covers. 50.
Waggons. 22.
Waistcoats. 38.
Walking-sticks (wood). 50.
Wall coverings. 41.
Wares, Small, not included in other classes (metal). 13.
——— not included in other classes (textile), according to the material or the predominating material, in Classes 25, 28, 29, 32, and 35.
——— (precious metal or imitation thereof). 14.
——— (wood, ivory, bone, jet). 50.
Warmers, Foot (metal). 13.
Warming apparatus. 18.
Washers (gutta-percha and india-rubber). 40.
——— (leather). 37.
——— (metal). 13.

Washes for toilet purposes. 48.
——— veterinary purposes. 2.
———, Medicated, for human use. 3.
———, Sheep. 2.
Washing boards (wood). 50.
——— machines for linen and other fabrics. 6.
——— powders and preparations for laundry use. 47.
Waste silk yarn. 30.
Watch cases (metal). 13.
——— (precious metal or imitation thereof). 14.
Watches, and parts thereof (except cases sold separately). 10.
Water-bars (metal). 13.
———, Bayleaf. 48.
——— beds (*india-rubber or gutta-percha*). 40.
——— colours. 1.
——— coolers in the class of the material of which they are made.
——— for bathing and other purposes. 50.
——— gauges. 8.
———, Lavender. 48.
———, Lithia. 44.
———, Magnesia. 44.
———, Pullna. 44.
——— purifying apparatus. 18.
——— stains. 1.
———, Seltzer. 44.
———, Vichy. 44.
Watercloset basins (earthenware). 16.
——— paper (medicated). 3.
Watercloseta. 18.
Waterproofing compounds for textile goods. 50.
Waters (distilled) for medical purposes. 3.
——— (mineral and aërated). 44.
——— (perfumed) for toilet purposes. 48.
Wax, Bees, for use in manufactures. 4.
—— candles. 47.
——, Paraffin, for use in manufactures. 4.
—— (raw). 4.
——, Sealing. 39.
—— vestas. 47.
*Wearing apparel.* 38.
Webbing (india-rubber). 40.
——— (linen). 28.
——— (silk). 32.
——— (woollen or worsted). 35.
Webs, Elastic (not of india-rubber), in the class of the material.
Wedges (metal). 13.
Weighing machines. 6.
Weights (bar, ring, and other), metal. 13.
———, Clock. 13.
———, Paper. 39.
Wells, Tube. 18.
Whalebone. 4.
Wheat. 42.
——— meal. 42.
Wheel-barrows (metal). 13.
——— (wood). 50.
——— hubs of wood. 50.
——— rims of wood. 50.
——— spokes of wood. 50.
Wheels, being parts of agricultural machinery. 7.
——— machinery other than agricultural machinery. 6.
———, Grinding. 50.
——— (metal), not being parts of machinery. 13.
——— (wood). 50.
Whipcord. 50.
Whip sticks. 50.
Whips. 37.
Whisk fibre. 4.
Whiskey. 43.
Whist counters. 49.
Whistles, Steam (parts of machinery). 6.
White lead. 1.
———, Zinc. 1.
Whiting. 17.
Whitewashes. 17.
Wickerwork not included in other classes. 50.
Wicks, Lamp. 47.
Wigs. 50.
Winches. 6.
——— (for use on board ship only). 21.
Wind gauges. 8.
Winding gear. 6.
Windlasses (for use on board ship only). 21.
Wind-mills. 6.
Window frames (metal). 13.
——— (wood). 50.
Window hollands (linen). 27.
Wine. 43.
—— bins, Cabinet. 41.
——— (metal). 13.
—— coolers, *according to the material.*
——, Ipecacuanha. 3.
—— (medicated). 3.
——, Tent. 43.
Winnowing machines. 7.
Winters (metal). 13.
*Wire.* 5.
——, Copper. 5.
—— covered with silk, cotton, &c., in the class of the covering material.
—— drawing, Jewels for. 50.
—— fencing. 5.
—— gauze, Articles of. 13.
——, German silver. 5.
—— netting and fencing. 13.
—— ropes. 13.
——, Telegraph. 5.
—— woven mattresses (spiral spring). 41.
Wiring machines. 6.
Wood bird-cages. 50.
——— cocks. 50.

Wood gates. 50.
——, Goods manufactured from (not included in other classes). 50.
—— parquetry. 50.
—— pencil cases. 39.
—— pulp. 50.
—— spirit. 4.
—— stains. 1.
—— working machinery. 6.
Wooden tools. 50.
Wool, Berlin (fleecy and embroidering). 33.
—— (medicated). 3.
—— (raw or partly prepared). 4.
Woollen antimacassars. 35.
—— bindings and other smallwares not in the piece. 35.
—— cloths in the piece. 34.
—— yarns and thread. 33.
Worm powder (for veterinary purposes). 2.
—— tablets (for human use). 3.
Worms (metal). 13.
Worsted braids and other smallwares, not in the piece. 35.
—— stuffs in the piece. 34.
—— yarns and thread. 33.
Wrappers, Railway. 50.
Wrenches. 13.
Wringing machines. 6.
Wristbands. 38.
Writing desks and cases. 39.
—— fluids. 39.
—— paper. 39.
—— slates. 39.

Yachts. 21.
Yaktails (furs). 37.
Yarns, Bagging (jute). 29.
——, China grass. 26.
——, Cotton. 23.
——, Granderello. 23.
——, Genappe. 33.
——, Jute. 29.
——, Linen, Hemp, and Flax. 26.
——, Silk. 30.
—— (worsted, merino, woollen, hair, mungo, and sheddy). 33.
Yeast. 42.
Yellow metal. 5.
—— ochre. 1.

Zephyrs (cotton piece goods). 24.
Zinc. 5.
—— nails. 13.
—— white. 1.
Zithers. 9.
Zoedone. 44.

# TRADE MARKS RULES, 1897.

By virtue of the provisions of the Patents, Designs, and Trade Marks Acts, 1883 to 1888, the Board of Trade do hereby make the following Rules :—

(1.) These Rules may be cited as the Trade Marks Rules, 1897, and shall come into operation from and immediately after the date hereof.

(2.) Rules 13, 14 and 15 of the Trade Marks Rules, 1890, are hereby repealed and instead thereof there shall be substituted the following :—

"13. Every application for registration of a trade mark shall contain a representation of the mark affixed to it in the square which the Form F contains for that purpose.

Where the representation exceeds such square in size the representation shall be mounted upon linen, tracing cloth or other material that the comptroller may consider suitable. Part of the mounting shall be affixed in the space aforesaid and the rest may be folded over.

With every application for registration sent to the Manchester Trade Marks Branch, there shall be supplied four additional representations of each mark on the Form G, exactly corresponding with that on the application Form F, and noted with all such particulars as may from time to time be required by the comptroller or by the Keeper of Cotton Marks at Manchester. Such particulars shall, if required, be signed by the applicant or his agent.

In the case of marks applied for in any of the Classes 5, 6, 7, 11, 12, 13, 14, 22, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, there shall be sent with the application four additional representations of each mark on the Form G, exactly corresponding with that affixed to the application in Form F, and noted with all such particulars as may from time to time be required by the comptroller. Such particulars shall, if required, be signed by the applicant or his agent.

In the case of marks applied for in any other class there shall be sent with the application three additional representations of each mark on the Form G, exactly corresponding to that affixed to the application Form F, and noted with all such particulars as may from time to time

be required by the comptroller. Such particulars shall, if required, be signed by the applicant or his agent.

All representations of marks must be of a durable nature, but the applicant may in case of need supply in place of representations on the Form G, half sheets of strong foolscap of the size aforesaid with the representations affixed thereon and noted as aforesaid.

Applications for the registration of the same mark in different classes shall be treated as separate and distinct applications.

The comptroller, if dissatisfied with any representation of a mark, may at any time require another representation satisfactory to him to be substituted before proceeding with the application.

Where a drawing or other representation or specimen cannot be given in manner aforesaid, a specimen or copy of the trade mark may be sent either of full size or on a reduced scale, and in such form as the comptroller may think most convenient.

The comptroller may also, in exceptional cases, deposit in the Patent Office a specimen or copy of any trade mark which cannot conveniently be shown by a representation, and may refer thereto in the register in such manner as he may think fit.

" 14. When application is made for the registration of a series of trade marks under section 66 of the Patents, Designs, and Trade Marks Act, 1883, a representation of each trade mark of the series shall be affixed, as aforesaid, to the application upon Form F, and to each of the accompanying Forms G.

" 15. When a trade mark contains a word or words in other than Roman characters, there shall be endorsed on the application in Form F, and on each of the accompanying representations in Form G, a sufficient transliteration and translation to the satisfaction of the comptroller of each of such words, and every such endorsement shall be signed by the applicant or his agent.

Where a trade mark contains a word or words in a language other than English, the comptroller may ask for an exact translation thereof, and if he so requires such translation shall be endorsed and signed as aforesaid."

Dated this 31st day of December, 1897.

CHAS. T. RITCHIE,
President of the Board of Trade.

# TRADE MARKS RULES, 1898.

By virtue of the provisions of the Patents, Designs, and Trade Marks Acts, 1883 to 1888, the Board of Trade do hereby make the following Rules:—

1. These Rules may be cited as the Trade Marks Rules, 1898, and shall come into operation from and immediately after the date hereof.

2. For Rule 9 of the Trade Marks Rules, 1890, shall be substituted the following Rule:—

> An application for registration and all other communications between the applicant and the comptroller may be made by or through an agent duly authorised to the satisfaction of the comptroller, but the comptroller shall not be bound to recognise as such agent, or to receive further communications from, any person whose name, by reason of his having been adjudged guilty of disgraceful professional conduct, has been erased from the register of patent agents kept under the provisions of the Patents, Designs, and Trade Marks Act, 1888, relating to the registration of patent agents, and not since restored.

Dated this 15th day of September, 1898.

CHAS. T. RITCHIE,
President of the Board of Trade.

# INSTRUCTIONS TO PERSONS WHO WISH TO REGISTER TRADE MARKS.

## PRELIMINARY.

1. All communications relating to trade marks, not being marks in Classes 23, 24, or 25 (*a*), or Sheffield marks (*b*), should be addressed to the Comptroller, the Patent Office, Trade Marks Branch. All applications for registration should be in the English language.

They may be made by post, or left at the Patent Office, Trade Marks Branch, 25, Southampton Buildings, Chancery Lane, London, W.C. (*See* also paragraphs 8 and 33.)

For further particulars as to the method of making applications, *see* paragraph 9.

(*a*) As to the Manchester Office, see par. 34, *infra*.
(*b*) As to the Sheffield Office, see par. 33, *infra*.

2. The fees in relation to trade marks registration cannot be received at the Patent Office. They should be paid in exchange for the *stamped forms* required, which may be obtained at the following places:—

(a.) The Inland Revenue Office, Royal Courts of Justice, London (Room No. 6).

(b.) The following post offices in London:—

The General Post Office, E.C.
District Post Office, Lombard Street, E.C.
" " 195, Whitechapel Road, E.
" " 239, Borough High Street, S.E.
" " Charing Cross, W.C.
" " 28, Eversholt Street, Camden Town, N.W.
Post Office, 12, Parliament Street, S.W., or

(c.) The Chief Post Office of the under-mentioned cities and towns:—

IN ENGLAND AND WALES.

Accrington.
Altrincham.
Ashton-under-Lyne.
Barnsley.
Barrow-in-Furness.
Bath.
Bedford.
Beverley.
Birkenhead.
Birmingham.
Blackburn.
Bolton.
Bradford.
Brighton.
Bristol.
Bromsgrove.
Burnley.
Burslem.
Burton-on-Trent.
Bury.
Cambridge.
Cardiff.
Carlisle.
Chatham.
Chester.
Clitheroo.
Congleton.
Coventry.
Crewe.
Croydon.
Darlaston.
Derby.
Dewsbury.
Doncaster.
Dorchester.
Driffield.
Droitwich.
Dudley.
Durham.
Exeter.
Gateshead.
Goole.
Greenwich.
Guildford.
Halifax.
Hartlepool.
Huddersfield.
Hull.
Ipswich.
Keighley.
Kendal.
Kidderminster.
Knaresbro'.
Knutsford.
Lancaster.
Leamington.
Leeds.
Leicester.
Lichfield.
Lincoln.
Liverpool.
Macclesfield.
Manchester.
Middlesbrough.
Nantwich.
Newcastle.
Newport (Mon.).
Northallerton.
Northampton.
Nottingham.
Nuneaton.
Oldbury.
Oldham.
Patrington.
Plymouth.
Pontefract.
Portsmouth.
Prescot.
Preston.
Reading.
Redditch.
Richmond (Yorks.).
Ripon.
Rochdale.
Rotherham.
Rugby.
Salford.
St. Helen's.
Scarborough.
Sedgley.
Sheffield.
Southampton.
Stafford.
Stalybridge.
Stockport.
Stoke-on-Trent.
Stourbridge.
Stourport.
Sunderland.
Swansea.
Tamworth.
Truro.
Tunstall.
Wakefield.
Walsall.
Warrington.
Wednesbury.
West Bromwich.
Whitby.
Widnes.
Wigan.
Wolverhampton.
Wolverton.
Woolwich.
York.

IN SCOTLAND.

Aberdeen.
Dumbarton.
Dundee.
Edinburgh.
Glasgow.
Greenock.
Inverness.
Lanark.
Leith.
Paisley.
Perth.
Renfrew.

IN IRELAND.

Belfast.
Cork.
Dublin.
Dundalk.
Galway.
Limerick.
Londonderry.
Waterford.
Wexford.

NOTE.—*Arrangements have also been made by which any of the forms required may be ordered at any Money Order Office in the United Kingdom not included in the above List.*

3. The following is a list of the stamped forms under the Patents, Designs, and Trade Marks Acts, 1883—1888, which relate to trade marks, and which may be obtained at the places mentioned above:—

TRADE MARKS.

| Letter. | Title of Form. | Fee. |
|---|---|---|
| | | £ s. d. |
| E | Application for Hearing by Comptroller, in Oppositions..... | 1 0 0 |
| F | Application for Registration of Trade Mark ..... | 0 5 0 |
| G | Additional Representation Form ..... | No stamp. |
| H | Appeal to Board of Trade from Decision of Comptroller..... | 1 0 0 |
| I | Registration Fee ..... | 1 0 0 |
| J | Notice of Opposition to Application for Registration ..... | 1 0 0 |
| K | Request to enter Name of Subsequent Proprietor, with Declaration in support thereof..... | 1 0 0 |
| L | Request for Certificate of Refusal to Register a Trade Mark .. | 1 0 0 |
| M | Notice of Application for Alteration of Address ..... | 0 5 0 |
| N | Notice of Order of Court for Alteration or Rectification of Register ..... | 0 10 0 |
| O | Application to Cancel Entry of Mark on Register..... | 0 5 0 |
| Q | Request for Correction of Clerical Error or for Amendment of Application under Section 91 ..... | 0 5 0 |
| R | Request for Certificate of Registration for use Abroad..... | 0 5 0 |
| S | Request for Certificate of Registration for use in Legal Proceedings ..... | 1 0 0 |
| T | Application for Settlement of a Special Case ..... | 2 0 0 |
| T¹ | Request for General Certificate of Comptroller ..... | 0 5 0 |
| V | Request for Copy of Official Notification ..... | 0 2 0 |
| W | Appeal from Cutlers' Company at Sheffield to Comptroller.... | 1 0 0 |
| X | Fee for Continuance of Trade Mark at expiration of fourteen years ..... | 1 0 0 |
| Y | Additional Fee where Fee is paid within three months after expiration of fourteen years ..... | 0 10 0 |
| Z | Additional Fee for Restoration of Trade Mark where removed for Non-payment of Fee ..... | 1 0 0 |

Of the above forms, those bearing the letters F, G, and I, are kept in stock at the various offices named in paragraph 2. Any of the others when required must be bespoken.

If it should not be convenient to apply in person at any of the above offices, the forms may be ordered by persons in this country or abroad *by post* from the Controller of Stamps Room, No. 7, Inland Revenue Office, Somerset House, London, W.C.

An application by post for forms must be accompanied by a banker's draft, or by a Money Order or Postal Order, payable to the Commissioners of Inland Revenue, and crossed "Bank of England," for the value of the stamp together with the cost of the postage and of the *registration* of the letter in which the forms will be forwarded to the applicant.

SALE OF OFFICIAL PUBLICATIONS.

4. The Patents, Designs, and Trade Marks Acts, 1883—1888, and the Trade Marks Rules, 1890, should be carefully studied. Copies of the Acts and of the Rules can be purchased at the Sale Branch of the Patent Office. The price of the Acts and Rules together is 2*s.* 6*d.*, postage 2*d.*; of the Acts alone, 2*s.*, postage 1½*d.*; and of the Rules alone, 6*d.*, postage 1*d.* Sums exceeding 1*s.* should be remitted by Postal Order or Post Office Order.

5. Copies of the *Trade Marks Journal* may also be obtained from the Sale Branch of the Patent Office, 25, Southampton Buildings, London, W.C.

The price of the *Trade Marks Journal* is:—

| | | |
|---|---|---|
| Nos. 1 to 509 (Years 1876 to 1887) - - - | 1*s.* | *per number.* |
| Nos. 510 to 561 (Year 1888) - - - - | 1*s.* 6*d.* | ,, |
| No. 562 and following Nos. from 1 January, 1889 | 6*d.* | ,, |

## Definition of a Trade Mark.

6. The definition of a trade mark is given in the 64th section of the Acts, as follows:—

"(1.) For the purposes of this Act, a trade mark must consist of or contain at least one of the following essential particulars:—

(a.) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

(b.) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or

(c.) A distinctive device, mark, brand, heading, label, or ticket; or

(d.) An invented word or invented words; or

(e.) A word or words having no reference to the character or quality of the goods, and not being a geographical name.

"(2.) There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them, but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register.

"(3.) Provided as follows:—

(i.) A person need not under this section disclaim his own name or the foreign equivalent thereof, or his place of business, but no entry of any such name shall affect the right of any owner of the same name to use that name or the foreign equivalent thereof;

(ii.) Any special and distinctive word or words, letter, figure, or combination of letters or figures or of letters and figures used as a trade mark before the thirteenth day of August one thousand eight hundred and seventy-five may be registered as a trade mark under this part of this Act."

## Searches.

7. A person wishing to adopt a trade mark should, before engraving a block and circulating impressions of the mark among his customers, make a search or a formal application for registration at the Trade Marks Branch of the Patent Office with the view of ascertaining

whether his proposed mark is already registered, or whether, from its being calculated to deceive by a resemblance to other marks already on record, it would be refused registration under the 72nd section of the Acts.

The fee payable by a person making a search amongst the classified representations of trade marks is 1*s.* for each quarter of an hour. The fee for a formal application for registration is 5*s.* *See* paragraphs 9 and 3 of these Instructions as to the mode of making a formal application.

Complete searches amongst classified collections of marks in the *Cotton Classes* (Classes 23, 24 and 25) can only be made at the Manchester Branch Office, 48, Royal Exchange, Manchester. *See* paragraph 34.

The comptroller does not undertake to make searches amongst the trade marks recorded at his office, *except in connection with formal applications for registration.*

## Applications for Registration.

8. Applications sent by post should be addressed—

The Comptroller,
The Patent Office, Trade Marks Branch,
25, Southampton Buildings,
London, W.C.

In the case of marks claimed in the Cotton Classes 23, 24, or 25, applications should be addressed—

The Comptroller,
Manchester Trade Marks Branch,
48, Royal Exchange,
Manchester.

Agents and other persons who may be interested in more than one application are particularly requested to make communications relating to different applications in *separate* letters.

9. An application for the registration of a trade mark consists of—

(a.) An application form (Form F) bearing an impressed stamp of 5*s.* (*see* paragraph 3).
(The applicant should, before filling up the form, carefully read the marginal notes.)

(b.) Certain additional representations of the trade mark, mounted on forms (Form G) (*see* paragraphs 3 and 15).

10. A *separate* application form is required for *each* class in cases where the same trade mark is claimed in more than one class of goods.

11. If the mark be the property of a firm, the Form F should be signed by a member of the firm, who should add, after his signature, "A member of the firm"; if of a company, by the secretary or other principal officer, who should add, after his signature and designation, "For the company."

12. Applications may be made by agents in the names of and on behalf of the owners of trade marks. The agent must be duly authorised in writing by the owner or owners; the authority to an agent

should be signed by the owner or owners; in the case of a firm or of a company the authority should be signed in the same manner as indicated in the paragraph next above.

Applications made by agents should have, after the name of the agent, the description "Agent" (*a*).

(*a*) The following official notices relating to the authorisation of agents have appeared in the Trade Marks Journal:—

Journal No. 726 (Feb. 24th, 1892), p. 153.

Any agent forwarding to the Patent Office an application for the registration of a trade mark must at the same time forward the applicant's authority to act as agent, unless he has already supplied a general authority, in which latter case he should, with the application, send a note of the date of such general authority. If no authority be supplied, the application may not be dealt with in the ordinary course, and communications respecting it will be sent to the applicant only.

In future an agent forwarding to the Patent Office an application for the registration of a trade mark in the name of an applicant carrying on business out of the United Kingdom must at the same time forward the applicant's authority to act as agent.

Journal No. 830 (Feb. 21st, 1894), p. 135.

As a rule the comptroller will, from this date, in the absence of any intimation of a contrary intention, consider that a person lodging a general authorisation on a given date intends to revoke all previous general authorisations, so far as regards all applications made after that date.

13. When an applicant for the registration of a trade mark, otherwise than under an International Convention, is out of the United Kingdom at the time of making the application, he must give the comptroller an address for service in the United Kingdom.

14. When the mark consists of or includes words printed in other than Roman characters, there should be given upon the forms a translation and a transliteration of such words, signed by the applicant or his agent.

In the case of marks claimed in Classes 23, 24, or 25, the applicant should state by what name the particular mark claimed would be referred to in the invoices of his house.

### *Additional Representations of Mark.*

15. Each of the additional representations should be placed in the centre of a separate Form G.

In the case of a trade mark which is claimed in any of the Classes 1 to 4, 8 to 10, 15 to 21, and 36 to 50, *three* additional representations are required for *each* class claimed.

In the case of a trade mark claimed in any of the Classes 5 to 7, 11 to 14, or 22 to 35, *four* additional representations should be sent for *each* of such classes.

The representations of the mark on the Forms G must agree *in every respect* with each other, and with that on the Form F.

16. Representations of a mark of a large size may be folded. In that case they must, however, be backed with linen and firmly affixed to the forms. Representations must in no case be executed *in pencil*. They should be not only of a durable nature, but of such a kind as

will admit of their being preserved and bound together in volumes as records of the property of the owners.

### Series of Trade Marks.

17. By section 66 of the Acts, the comptroller is empowered to register under one registration a "series" of trade marks which, whilst they resemble each other in the material particulars, differ from each other in respect of statements of the goods for which they are used, of numbers, of statements of price, of statements of quality, or of statements of names of places. When an application is made for such a "series," a representation of *each* of the marks included in the series must be affixed to the Form F, and also to each of the Forms G.

### Common or Open Marks.

18. In the case of a trade mark used since before the 13th August, 1875, common or open marks of any kind may be registered in connection with it; but in the case of a trade mark not so used, only such common or open marks as consist of *a word or of a combination of words* can be registered as a part of the mark.

In each case, the applicant for entry of such common particular or particulars must disclaim the right to the exclusive use of the same in a note at the foot of the application form, such note to be signed by the applicant or his agent.

*See* section 74 of the Acts, sub-section 3, for definition of common marks.

### Classification of Goods.

19. A guide to the classification of goods under the trade marks rules can be obtained on application at the Patent Office, Trade Marks Branch, and should be asked for if the applicant feels any difficulty in determining to which of the classes set out in the third schedule to the rules the goods for which he uses his mark belong (*a*).

(*a*) For Guide, see p. 424, *supra*. The comptroller has published an official notice in the Trade Marks Journal, *e.g.*, Journal No. 791 (March 15th, 1893), p. 245, by which he calls attention to the increasing practice of registering loosely in Class 50, and announces that the applications in respect of the same will in future be strictly scrutinized.

### Advertisement in the Trade Marks Journal.

20. A trade mark cannot in any case be entered upon the register until one month after its advertisement in the official paper.

21. A wood-block or electrotype must be furnished for each mark in each class claimed, except in the case of Classes 23, 24, and 25, for which no blocks are required.

No block or electrotype should be forwarded until a formal demand for it is sent by the comptroller.

22. In the case of a "series" of trade marks differing only in respect of the particulars mentioned in section 66 of the Acts, a wood-block or electrotype must be furnished for each mark in the series, for each class claimed.

23. The wood-blocks or electrotypes furnished must correspond *exactly* with the representations, must afford *perfectly distinct* impressions of the marks, and must be upon a scale sufficiently large to reproduce the marks faithfully. Worn or mutilated blocks or electrotypes cannot be accepted.

24. The largest space available for the insertion of any single block or electrotype is five and a half inches broad by seven and a half inches deep.

When a block or electrotype *exceeds two inches in depth or breadth*, a charge for additional space is made, at the rate of two shillings for every inch or part of an inch in depth or breadth beyond the two inches.

25. The official number given by the comptroller to a mark should *not* be cut on the face of the block or electrotype, but should be *marked upon the side* in such a manner as to secure identification.

26. All blocks or electrotypes should be sent to The Patent Office, Trade Marks Branch, together with the paper marked "Form 2," and with the representation of the mark sent for the guidance of the applicant in preparing the block or electrotype.

27. The blocks or electrotypes supplied for the advertisement of trade marks cannot in any case be returned to applicants.

## Restrictions on Registration.

28. Ornamental or coloured groundwork, such as tartans or checks, cannot be claimed as part of a mark unless such groundwork be included within the mark by some border or lines.

29. The words "Registered," "Registered Design," "Copyright," "Entered at Stationers' Hall," "To counterfeit this is Forgery," will not be registered under the Acts, and should not, therefore, appear upon the representations of trade marks forming part of an application (*a*).

(*a*) The following official notices have appeared in the Trade Marks Journal:—

Journal No. 570 (February 27th, 1889), p. 220:—

> After the 31st March, 1889, marks of the nature indicated below will not be accepted for registration as trade marks under the Patents, Designs, and Trade Marks Acts, 1883—1888:
>
> (1.) Pictorial representations of goods to which the marks are to be applied:
>
> (2.) Names of persons in the possessive case in combination with the names of goods.

Journal No. 606 (Nov. 6th, 1889), p. 1056:—

> In future, no mere surname or combination of surname and Christian name which might possibly be the name of an existing individual will be accepted for registration as a new trade mark under § 64 of the Patents, Designs, and Trade Marks Acts, 1883 to 1888, unless rendered in some particular and distinctive manner in accordance with sub-s. 1 (a) of that section; and the same will apply to any Christian name which is in use as a surname.

Journal No. 925 (Dec. 18th, 1895), p. 1039:—

> In consequence of difficulties which have arisen as to the interpretation which should be put on the words in sub-s. (1) of § 64 of the Act, "written signature of a firm," the comptroller has been advised thereon and is directed that they must be construed to mean a signature (actually used in the ordinary course of business) of the trading style under which the applicant has a *bonâ fide* right to trade, and which consists of *a personal name or of personal names*, and that they do not include mere descriptive trading styles such as "The Excellent Tea Company" or "The London Stout Company."

30. The following will not be registered as trade marks, or as prominent parts of trade marks, unless the marks have been used since before 13th August, 1875:—

The Royal Arms, or Arms so nearly resembling them as to be calculated to deceive.

Representations of Her Majesty the Queen, or of any Member of the Royal Family.

Representations of the Royal Crown (*a*).

The National Arms or Flags of Great Britain.

(*a*) Whether the rule forbidding representations of the Royal Crown was originally binding on the Court or not, a practice having been founded on it for many years without dispute, the Court will not depart from it: *In re König & Ebhardt*, (1896) 2 Ch. 236.

31. When there appears on the face of a trade mark an indication of the goods to which the mark is applied, the claim for its registration must be in respect of *those goods only*.

## Oppositions.

32. Notice of opposition to the registration of a trade mark (Form J) must be filed within one month (or such further time not exceeding three months, as the comptroller may allow) from the date of advertisement of the mark in the Trade Marks Journal.

The applicant's counter-statement must be filed within one month from the date of receipt of the opponent's notice of opposition.

The opponent's evidence, in support of the opposition, must be filed within two months after the expiration of one month (or such further time, not exceeding three months, as the comptroller may allow) from the date of advertisement of the mark in the Trade Marks Journal, and a copy of such evidence must be forthwith sent to the applicant.

The applicant's evidence must be filed within one month from the delivery of the opponent's evidence, and a copy of such evidence must be forthwith sent to the opponent.

The opponent's evidence in reply must be filed within seven days from the delivery of the applicant's evidence, and a copy of such evidence must be forthwith sent to the applicant.

On the completion of the evidence, a hearing is appointed by the comptroller. Each party attending the hearing must lodge the hearing fee form (Form E, with £1 stamp).

## Form of Counter-statement.

The following is a form of commencement for a counter-statement:—

[*For this form, see Appendix B., p. 485, infra.*]

## Cutlers' Company of Sheffield.

33. By section 81 of the Acts, application for the registration of trade marks used on metal goods shall, if made by a person carrying on

business in Hallamshire or within six miles thereof, be made to the Cutlers' Company of Sheffield. See Rules 56 to 59 (*a*).

Applications made to the Cutlers' Company in pursuance of section 81 of the Acts should be made on Form F, the address in the left-hand corner to be "To the Cutlers' Company, Sheffield," instead of "To the Comptroller," and should be left at, or sent by post to, the Cutlers' Hall, Sheffield.

Each application should be accompanied by an unstamped copy on foolscap paper. See Rule 56.

Applications sent by post should be addressed—

The Law Clerk to the Cutlers' Company,
The Cutlers' Hall,
Sheffield.

(*a*) A notice as to Sheffield marks has appeared in the Trade Marks Journal, *e.g.*, Journal No. 882 (February 20th, 1895), p. 138, by which it is announced that from January 1st, 1895, onwards, a complete collection of representations of pending applications in Classes 5, 6, 7, 11, 12, 13, and 14 will be kept at Cutlers' Hall, Sheffield, for public inspection, and applicants in those classes are accordingly asked to furnish *three* Forms "G."

## Manchester Office.

34. For the convenience of merchants and manufacturers engaged in the cotton trade, and for the purpose of facilitating the recording of trade marks used in respect of cotton goods, an office is open at 48, Royal Exchange, Manchester, where searches can be made, on payment of 1*s.* for each quarter of an hour, for marks in classes of textiles from Class 23 to Class 35.

## Certificates.

35. The comptroller's certificate in relation to a trade mark is of four kinds, viz.:—

(i.) For use in legal proceedings.
(ii.) For use in applying for registration in foreign countries.
(iii.) Of any application made and of proceedings thereon.
(iv.) A certificate of refusal of a mark in use since before 13th August, 1875, and not registrable.

36. A person desirous of obtaining any of the above certificates should forward Form S, Form R, Form T[1], or Form L (see paragraph 3), as the case may be, to the comptroller, giving the comptroller's official number of the mark, and stating whether the certificate is required for use in legal proceedings, or for use in applying for the registration of the mark in a foreign country, or for what other purpose.

37. In every case where a certificate is required in respect of a cotton mark, or in respect of any trade mark of which the representations or specimens forming part of the application for registration are *coloured*, or in respect of an application made, or in respect of an application refused, two unmounted copies of the mark must be supplied, agreeing *in every respect* with the representations forming part of the application for registration. Special attention should be paid

to this requirement, as the certificate cannot in any such case be prepared until these unmounted copies are received by the comptroller.

## Registration of Subsequent Proprietors of Registered Trade Marks.

38. The request and declaration to be made by a subsequent proprietor on application for the registration in his name of a registered trade mark must be made on Form K (see paragraph 3). In the case of a firm the Declaration K may be made by one member of the firm. In the case of a company the Declaration K should be made by a principal officer of the company.

C. N. Dalton,
Comptroller.

*May*, 1897.

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[N.B.—The rules and instructions under the Acts have been frequently added to and altered, and it will be advisable for intending applicants to take care to proceed in accordance with the rules and instructions for the time being in force.]

# APPENDIX B.

## FORMS AND PRECEDENTS.

## Part I.

### FORMS PRESCRIBED BY THE SECOND SCHEDULE TO THE RULES.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

**E.**

(TRADE MARKS.)

FORM OF APPLICATION FOR HEARING BY THE COMPTROLLER.

*In Cases of Opposition, &c.*

SIR,

I, of (*a*)

(a) Here insert full address.

hereby apply to be heard in reference to

and request that I may receive due notice of the day fixed for the hearing.

Sir,
Your obedient Servant,

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings, London.*

# PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

## F.

### APPLICATION FOR REGISTRATION OF TRADE MARK.

One representation to be fixed within this square, and two others to be sent on separate half-sheets of foolscap.*

Representations of a larger size may be folded, but must be mounted upon linen and affixed hereto.

You are hereby requested to register the accompanying trade mark in Class , in respect of (*a*) ,

in the name of (*b*) ,

who claims to be the proprietor thereof (*c*).

The essential particulars of the trade mark are the following (*d*)

and disclaim any right to the exclusive use of the added matter.

(Signed) (*e*)

Dated the day of 18 .

(*a*) Only goods contained in one and the same class should be set out here. A separate application form is required for each separate class.

(*b*) Here insert legibly the full name, address and description of the individual firm or company. Add trading style (if any).

(*c*) Alter to "claim to be the proprietors thereof" in the case of a firm or company.

(*d*) See sub-s. (2) and (3) of § 64 of the Acts.

(*e*) To be signed by the applicant or by an agent duly authorised.

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings, London.*

[Or where the application is for a mark in Classes 23, 24 or 25],

*To the Comptroller,*
*Manchester Trade Marks Branch,*
*48, Royal Exchange, Manchester.*

*Note.*—If the trade mark has been in use in respect of the goods since before August 13th, 1875, state length of such user.

* N.B.—The number of additional representations to be supplied to the comptroller is now determined by the new Rule 13. See p. 403, and see par. 15 of the Instructions, which has been altered so as to comply with the new Rule.

## PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

### G.

ADDITIONAL REPRESENTATIONS OF TRADE MARK TO ACCOMPANY APPLICATION FOR REGISTRATION.

One representation of the trade mark to be affixed within this square.

It must correspond *exactly*, in all respects, with the representation affixed to the application form.

Any representation of a larger size than foolscap may be folded, but must then be mounted upon linen and affixed hereto.

Two of these ADDITIONAL REPRESENTATIONS* of the trade mark must accompany *each* form of application.

In the case of a trade mark claimed in one of the Classes 23 to 35, THREE of these ADDITIONAL REPRESENTATIONS* of the mark must accompany the form of application.

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## PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

### H.

FORM OF APPEAL FROM THE COMPTROLLER TO THE BOARD OF TRADE.

I, (*a*)
of (*a*)
hereby give notice of my intention to appeal to the Board of Trade from (*b*)
of the Comptroller of the day of 18 ,
whereby he (*c*)

Accompanying this notice is a statement of my case for the decision of the Board of Trade.

(Signed)

Dated day of 18

(a) Here insert full name and address of appellant.

(b) Here insert "the decision" or "that part of the decision" as the case may be.

(c) Here insert the decision complained of.

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings, London.*
*and to*
*[Name of Respondent to Appeal.]*

* N.B.—These directions are no longer applicable, and the applicant must now supply the number of additional representations required by par. 15 of the Instructions. See p. 465.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

## I.

### FEE FOR REGISTRATION OF A TRADE MARK.

SIR,

In reply to your request I hereby transmit the prescribed fee for the registration of the trade mark No. in Class

I am,
Sir,
Your obedient Servant,

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

---

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

## J.

### NOTICE OF OPPOSITION TO APPLICATION FOR REGISTRATION.

[*To be accompanied by an unstamped duplicate.*]

In the matter of an application,
No. by
of

(a) Here state full name and full address.

I, (a)
hereby give notice of my intention to oppose the registration of the trade mark advertised under the above number for Class in the Trade Marks Journal of the day of 18 , No. , page .

The grounds of opposition are as follows (*):—

(Signed)

Dated the day of 18

Address for service:—

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

(*) See p. 494, *infra*, for forms of grounds of opposition.

# PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

## K.*

### Request to enter Name of Subsequent Proprietor of Trade Mark upon the Register, with Declaration in support thereof.

I, (a)

(a) *Or* We. Here insert name, full address, and description.

hereby request that you will enter (b) name (c) in the Register of Trade Marks as proprietor of the trade mark No. in Class .

(b) My *or* our.

(c) *Or* names.

(d) I am, *or* We are.

(d) entitled to the said trade mark and to the goodwill of the business concerned in the goods with respect to which the said trade mark is registered.

(e)

(e) Here state whether trade mark transmitted by death, marriage, bankruptcy, or other operation of law, and if entitled by assignment state the particulars thereof as *e.g.*, "by deed dated the day of 18 , made between So-and-so of the one part."

And I do solemnly and sincerely declare that the above several statements are true, and the particulars above set out comprise every material fact and document affecting the proprietorship of the said trade mark as above claimed.

(f) And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

(f) This paragraph is not required when the declaration is made out of the United Kingdom.

(g)

(g) To be signed here by the person making the declaration.

Declared at
this day of 18 .

Before me,

(h)

(h) Signature and title of the authority before whom the declaration is made.

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

* This form, with a short explanatory paragraph, is now used when the registered proprietor desires to have a change in his name or trading style recorded.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

## L.

REQUEST FOR CERTIFICATE OF REFUSAL TO REGISTER A TRADE MARK IN USE BEFORE 13TH AUGUST, 1875.

In the matter of an application for registration of an old trade mark, No.
in Class

SIR,

I,

of

the applicant in the above matter, hereby request you to furnish me with your certificate of refusal to register the said trade mark.

(a) Signature of applicant.

(a)

Dated this day of 18

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

---

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

## M.

NOTICE OF APPLICATION FOR ALTERATION OF ADDRESS ON REGISTER OF TRADE MARKS.

In the matter of the trade mark, No. , registered in Class .

SIR,

Notice is hereby given that I

of

the registered proprietor of the trade mark numbered as above, desire that my address on the Register of Trade Marks be altered to

Dated this day of 18 .

(a) Signature of proprietor.

(a)

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

## PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

### N.

(TRADE MARKS.)

NOTICE OF ORDER OF COURT FOR ALTERATION OR RECTIFICATION OF REGISTER OF TRADE MARKS.

In the matter of the trade mark No. , registered in Class in the name of

SIR,

Notice is hereby given that by an order of the Court made on the day of 18 , it was directed that the entry on the Register of Trade Marks in respect of the trade mark numbered as above should be rectified in the manner therein specified.

An office copy of the order of the Court is enclosed herewith.

Dated this day of 18 .

(a)

(a) To be signed by the person interested or his agent.

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

---

## PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

### O.

(TRADE MARKS.)

FORM OF APPLICATION BY PROPRIETOR OF REGISTERED TRADE MARK TO CANCEL ENTRY ON REGISTER.

Trade mark No. , Class , advertised in Trade Marks Journal, No. , page .

Name of registered proprietor or firm

Place of business

I, the undersigned
of

[*or* I, the undersigned,
a member of the firm of
of
on behalf of my said firm]
apply that the entry upon the Register of the Trade Marks in Class of the trade mark No. may be cancelled.

The day of 18 .

(Signed)

This is the statement marked "O" referred to in the declaration of
made before me the of 18 .

## PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

## P.

### Form of Declaration in Support of Application for Cancellation of Trade Mark by Owner.

I, of

; [*or*

I, a member of the firm of

of

]

do hereby solemnly and sincerely declare, to the best of my knowledge and belief, as follows :—

(1) The application signed by me, and dated the day of 18 , and marked with the letter "O," and shown to me at the time of making this declaration, is true.

(2) I am the person whose name appears on the Register of Trade Marks as the proprietor of the trade mark referred to in the said application marked with the letter "O."

[*or* My said firm is the firm whose name appears on the Register of Trade Marks as the proprietor of the trade mark referred to in the said application marked with the letter "O."]

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

(Signed)

Declared at

this day of

18 .

Before me,

If the declaration be made before a commissioner to administer oaths it will require to be stamped with a 2*s.* 6*d.* impressed Inland Revenue Stamp.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

Q.

(TRADE MARKS.)

FORM OF REQUEST FOR CORRECTION OF CLERICAL ERROR OR FOR PERMISSION TO AMEND APPLICATION UNDER § 91.

SIR,

I hereby request that

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

---

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

R.

(TRADE MARKS.)

REQUEST FOR CERTIFICATE OF REGISTRATION OF TRADE MARK FOR USE IN OBTAINING REGISTRATION ABROAD.

In the matter of the trade mark
No. , registered in
Class in the name of

SIR,

I,

of

the registered proprietor of the above trade mark, hereby request you to furnish me with your certificate of registration for use in obtaining registration of the same in (*a*)

(a) Here state name of country in which registration is to be sought.

(*b*)

(b) Signature.

Dated this day of 18 .

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

**S.**

REQUEST FOR CERTIFICATE OF REGISTRATION OF TRADE MARK TO BE USED IN LEGAL PROCEEDINGS.

In the matter of the trade mark
No. , registered in
Class in the name of

SIR,

I,
of
the registered proprietor of the above trade mark, hereby request you to furnish me with your certificate of registration to be used in legal proceedings.

(a) Signature. (a)

Dated this day of 18 .

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

---

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

**T.**

APPLICATION FOR SETTLEMENT OF A SPECIAL CASE ON APPLICATION TO REGISTER A TRADE MARK.

In the matter of the application
of and
of the application of

SIR,

Notice is hereby given that I, ,
of ,
and I,
of
are unable to agree upon the facts on which the opinion of the Court is to be taken, and that we request you to fix a day on which we may attend before you and obtain your finding on the matters of fact to be submitted to the Court as settled.

Dated this day of 18 .

(a) To be signed by both parties. (a)

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

## PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

### T[1].

REQUEST FOR GENERAL CERTIFICATE OF COMPTROLLER (OTHER THAN CERTIFICATE FOR USE IN LEGAL PROCEEDINGS OR FOR USE IN OBTAINING REGISTRATION ABROAD).

In the matter of the trade mark No.
in Class

SIR,

I,
of
hereby request you to furnish me with your certificate that (*a*)

(*b*)

Dated this day of 18 .

(*a*) Here set out the particulars which the comptroller is requested to certify.

(*b*) Signature.

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

---

## PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

### U.

GENERAL CERTIFICATE OF COMPTROLLER (OTHER THAN CERTIFICATE FOR USE IN LEGAL PROCEEDINGS OR FOR USE IN OBTAINING REGISTRATION ABROAD).*

Patent Office, Trade Marks Branch,
London,
18 .

I,
Comptroller-General of Patents, Designs, and Trade Marks, hereby certify

* In practice this form is usually employed as shown at p. 492, *infra*.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

## V.

REQUEST FOR COPY OF OFFICIAL NOTIFICATION OF REGISTRATION OF TRADE MARK.

In the matter of the trade mark No. , registered in Class .

SIR,

I,

of

the registered proprietor of the trade mark above named, hereby request that you will furnish me with a copy of the official notification of the registration of the same.

(a)

(a) Signature.

Dated this day of , 18 .

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

---

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

## W.

FORM OF APPEAL FROM CUTLERS' COMPANY AT SHEFFIELD TO COMPTROLLER.

[*To be accompanied by an unstamped duplicate.*]

SIR,

I hereby give notice of appeal against the decision of the Cutlers' Company of Sheffield in regard to my application for registration of a trade mark No. , in Class , for

and I beg to submit my case (a) for your decision accordingly.

(a) The statement of the case to be written upon foolscap paper (on one side only), with a margin of two inches on the left-hand side thereof.

(b)

(b) Signature.

Dated this day of , 18 .

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

## X.

CONTINUANCE OF MARK AT EXPIRATION OF 14 YEARS FROM THE DATE OF REGISTRATION.

SIR,

In pursuance of the notice received from you, I hereby transmit the prescribed fee of £1 for continuance on the Trade Marks Register of the trade mark No. , in Class .

Dated the day of 18 .

(a)

(a) Signature of proprietor.

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

---

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

## Y.

ADDITIONAL FEE OF 10s. TO ACCOMPANY "CONTINUANCE FEE" (FORM X), WITHIN 3 MONTHS AFTER EXPIRATION OF 14 YEARS.

SIR,

In pursuance of the notices issued by you, and of the provisions of § 79 (3) of the above Acts, I hereby transmit the additional fee of 10s. (along with Form X) for the continuance on the Trade Marks Register of the trade mark No. , in Class .

Dated the day of 18 .

(a) Signature of proprietor.

(a)

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(TRADE MARKS.)

## Z.

RESTORATION OF TRADE MARK WHERE REMOVED FOR NON-PAYMENT OF FEE.

*(To accompany Form X.)*

SIR,

In pursuance of the notices issued by you, and of the provisions of § 79 (4) of the above Acts, I hereby transmit the additional fee of £1 (along with Form X) for restoration to the Trade Marks Register of the trade mark No. , in Class .

Dated the day of 18 .

(a) Signature of proprietor.

(a)

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
25, *Southampton Buildings,*
*London.*

---

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

(CORPORATE TRADE MARK.)

APPLICATION FOR REGISTRATION OF OLD CORPORATE TRADE MARK.

You are hereby requested to register the accompanying old Corporate trade mark in Class , in respect of
in the name of
who claims to be the proprietor thereof.

(Signed)

Dated the day of 18 .

*To the Cutlers' Company,*
*Cutlers' Hall, Sheffield.*

## *FORM SUGGESTED BY THE COMPTROLLER.*

[*See Instructions, par.* 32.]

---

*a.*

FORM OF COUNTER-STATEMENT.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

TRADE MARKS.

In the matter of an application No. , and of the opposition thereto No. .

In reply to the notice of opposition in this matter by , of , I give notice by way of counter-statement that I rely for my application on the following grounds (*a*) :—

(To be dated and signed by the applicant or his solicitor.)

*To the Comptroller,*
*Patent Office, Trade Marks Branch,*
25, *Southampton Buildings,*
*London.*

(*a*) See page 497, *infra*, for forms of grounds of counter-statement.

## *FORMS IN USE IN THE PATENT OFFICE, TRADE MARKS BRANCH (SELECTED).*

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*b.*

FORM OF RECEIPT OF AN APPLICATION.

Patent Office, Trade Marks Branch,
London.

Received this day of , 18 , an application for the registration of trade mark in the name of

*Comptroller.*

---

*c.*

FORM OF AUTHORISATION OF AGENT.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

FORM OF AUTHORISATION.

SIR,

I beg to inform you that I have appointed (*a*) , of to act as my agent for the registration of (*b*)

I am,
Sir,
Your obedient servant,

(*c*)

(*a*) Here insert name and address of agent.

(*b*) If the authority is to be limited to one application, insert "of the Trade Mark" or as the case may be "sent herewith."

(*c*) To be signed by the proprietor.

*To the Comptroller,*
*The Patent Office,*
*25, Southampton Buildings,*
*London, W.C.*

*d.*

FORM OF ADVERTISEMENT.

## FORM FOR "TRADE MARKS JOURNAL."

18 .

| Class of Goods. | Number. | Description of Goods. | Name, Address, and Calling of Applicant. | Date of Application received. | If Mark used prior to 13th August, 1875, how long used. |
|---|---|---|---|---|---|
| | | | | | |

*N.B.*—This Paper is to be sent with the block or electrotype and the representation, *prepaid*, to—

The Comptroller,
The Patent Office, Trade Marks Branch,
25, Southampton Buildings,
London, W.C.

*e.*

FORM OF NOTIFICATION OF REGISTRATION.

PATENT OFFICE, TRADE MARKS BRANCH.

LONDON, , 18 .

*Notification of Registration.*

SIR,

I beg to inform you, pursuant to Rule 35 of the Trade Marks Rules, that the trade mark No. , advertised in the Trade Marks Journal, No. , has been registered in your name for the following goods in Class , viz.:—

The registration dates from the day of , 18 .

I am,

Your obedient servant,

Comptroller-General.

REPRESENTATION OF TRADE MARK AS ADVERTISED.

*f.*

FORM OF NOTIFICATION OF REGISTRATION OF SUBSEQUENT PROPRIETOR.

PATENT OFFICE, TRADE MARKS BRANCH.

*London,* , 18 .

SIR,

I have to inform you that, in pursuance of your application received at this office on the , 18 , your has been entered on the Register as proprietor of the trade mark

I am,

Your obedient servant,

Comptroller.

*g.*

FIRST NOTICE UNDER § 79.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

*Notice before removal of Trade Mark from the Register, under* § 79.

SIR,

I, , Comptroller-General of Patents, Designs, and Trade Marks, hereby give you notice that, in conformity with the provisions of § 79 of the above Acts (printed at back hereof), your trade mark No. , registered in Class , will be removed from the Trade Marks Register unless the prescribed fee of £1 (payable by Form X) be received at this office *before* the day of 18 .

A stamped Form X, for payment of the fee, may be obtained as directed at the back of this Notice.

Dated this day of 18 .

To

*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London, W.C.*

---

*h.*

SECOND NOTICE UNDER § 79.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

SECOND NOTICE.

*Notice before removal of Trade Mark from the Register, under* § 79.

SIR,

I, , Comptroller-General of Patents, Designs, and Trade Marks, hereby give you notice that, in conformity with the provisions of § 79 of the above Acts (printed at back hereof), your trade mark No. , registered in Class , will be removed from the Trade Marks Register unless the prescribed fee of £1 (payable by Form X) be received at this office *before* the day of 18 .

If the above fee be not paid *before* the date above named, the trade mark will, after the end of three months from such date, be removed from the Trade Marks Register, unless an *additional* fee of 10*s.* (payable by Form Y) be remitted.

Stamped forms for payment of renewal fees may be obtained as directed at the back of this notice.

Dated this day of , 18 .

To

## *i.*

### Form of Certificate of Registration granted to Original Proprietor for Use in Legal Proceedings, or in Applying for Registration in Foreign Countries.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

*Certificate of Registration.*

No.

In the matter of legal proceedings [*or*, in the matter of an application to register the trade mark No. of *A. B.*, in *France*.]

I, , Comptroller-General of Patents, Designs, and Trade Marks, hereby certify that *A. B.*, of , is entered on the Register of Trade Marks as proprietor of the trade mark No. in Class , in respect of , for the registration of which mark application was made on the day of 18 .

The user claimed for the said trade mark is [*one year before the 13th day of August*, 1875] (*a*).

A representation of the said trade mark is shown hereunder [*or*, is annexed hereto].

(*a*) No mention is made of user, unless this was prior to the 13th August, 1875.

REPRESENTATION OF TRADE MARK.

[Where registration has been renewed, a statement to that effect is inserted.]

Witness my hand and seal this day of 18 .

Comptroller-General.

*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

## *k.*

### Form of Certificate of Registration granted to Subsequent Proprietor for Use in Legal Proceedings, or in applying for Registration in Foreign Countries.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

*Certificate of Registration.*

No. In the matter of legal proceedings [*or*, in the matter of an application to register the trade mark No. of *A. B. & Co.*, in *France*].

I, , Comptroller-General of Patents, Designs, and Trade Marks, hereby certify that under date the day of 18 , *A. B. & Co.*, of , are entered on the Register of Trade Marks as proprietors of the trade mark No. in Class , in respect of , in succession to *A. B.*, of , in whose name the said trade mark was registered in the same class, and in respect of the same goods under date the day of 18 .

The user claimed for the said trade mark is [*one year before the 13th day of August*, 1875] (*a*).

A representation of the said trade mark is shown hereunder [*or*, is annexed hereto].

(*a*) No mention is made of user, unless this was prior to the 13th August, 1875.

REPRESENTATION OF TRADE MARK.

[Where registration has been renewed, a statement to that effect is inserted.]

Witness my hand and seal this day of 18 .

Comptroller-General.

*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

## *l.*

### Form of General Certificate.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

*General Certificate.*

In the matter of

No.

I, , Comptroller-General of Patents, Designs, and Trade Marks, hereby certify that

REPRESENTATION OF TRADE MARK.

Witness my hand and seal this day of 18 .

Comptroller-General.

*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

*m.*

FORM OF CERTIFICATE OF REFUSAL TO REGISTER.

PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1888.

*Certificate under* § 77.

No.

I, , Comptroller-General of Patents, Designs, and Trade Marks, hereby certify that on the day of 18 , of

applied to register the mark, of which a representation is below, in Class in respect of

stating that the same had been in use as a trade mark before the 13th day of August, 1875; and I also certify that it is a mark incapable of being registered under "The Patents, Designs, and Trade Marks Acts, 1883—1888."

REPRESENTATION OF TRADE MARK.

Witness my hand and seal this day of 18 .

Comptroller-General.

*Patent Office, Trade Marks Branch,*
*25, Southampton Buildings,*
*London.*

# Part II.

## FORMS FOR USE IN REGISTRATION PROCEEDINGS.

### 1. Grounds of Opposition (*a*).

(i.) The alleged trade mark to which the above-mentioned application relates is not a registrable trade mark within § 64 of the Patents, Designs, and Trade Marks Acts, 1883—1888.

(ii.) The alleged [as in (i.) to—relates] does not consist of or contain any essential particular as defined by § 64 of the Patents, Designs, and Trade Marks Acts, 1883—1888, or any special and distinctive word, or words, letter, figure, or combination of letters or figures, or of letters and figures used as a trade mark before the 13th August, 1875.

(iii.) It is not the fact, as alleged by the applicant in his application, that he has used the trade mark No. for years. The said trade mark has in fact been used exclusively for years past by the opponent, who is now applying to register the same. If there has been any user by the applicant, the same has been clandestine and unknown to the opponent.

(iv.) It is not the fact as alleged [as in (iii.) to—years]. The applicant has never used the said alleged trade mark otherwise than as a mere descriptive term, and he is not now entitled to register it as his old trade mark.

(v.) The goods in respect of which the above-mentioned applicant is seeking to register the alleged trade mark No. are not goods comprised in Class of the classes under the Patents, Designs, and Trade Marks Acts, 1883—1888.

(vi.) The alleged [as in (i.) to—relates] is a mere word in ordinary use in the English language descriptive of quality, and the applicant is not entitled to acquire an exclusive right therein by registration.

(vii.) The alleged [as in (i.) to—relates] is not distinctive of the above-named applicant's goods, but is merely descriptive of the character and quality of the goods to which it is applied.

(*a*) See Form J, p. 474, *supra*, for the formal parts of the notice of opposition. These forms are intended to be varied and combined as may be necessary, or they may suggest others more suitable to particular cases.

(viii.) The alleged [as in (i.) to—relates] is not a mark distinctive of the above-named applicant's goods, but has for many years past been in common use in the trade, and is generally understood by the trade and the public to denote a particular quality [*or* pattern] of goods [and was for that reason placed by the Manchester Committee of Experts in their second class or B. list], and no person is entitled to acquire an exclusive right therein by registration.

(ix.) The alleged [as in (i.) to—relates] consists of a name which has throughout the continuance of an expired patent been applied by the applicant as patentee, and by the trade and the public, to articles manufactured in accordance with the said patent. Upon the expiration of the said patent the trade became entitled to manufacture in accordance with the said patent, and to describe articles so manufactured by the name which was generally understood to be descriptive of them, and the applicant is not now entitled to exclude the trade from the use of the said name.

(x.) The alleged [as in (i.) to—relates] is identical with the opponent's trade mark No. registered with respect to the same goods or description of goods as those for which the applicant is now applying to register the same. If the applicant is allowed to register or use the said alleged trade mark, the trade and the public will be deceived and the opponent injured.

(xi.) The alleged [as in (i.) to—relates] has such a resemblance to the opponent's [as in (x.) to—register the same] as to be calculated to deceive. An action is now pending in the Chancery Division of the High Court of Justice in which the opponent is seeking to restrain the applicant from using the said alleged trade mark.

(xii.) The alleged [as in (i.) to—relates] has such a resemblance to the opponent's Sheffield mark No. , registered in the Sheffield register with respect to the same goods or description of goods as those for which the applicant is now applying to register the said alleged trade mark, as to be calculated to deceive.

(xiii.) The trade mark [as in (i.) to—relates] is the trade mark of the opponent, and has been used by him in his business for years last past, and an application by the opponent for the registration of the same is now pending. The applicant is a discharged servant of the opponent, in fraud of whose rights the present application is made.

(xiv.) The trade mark [as in (i.) to—relates] was months since adopted by the opponent and used upon his [describe the goods], and the applicant was employed by the opponent to obtain the registration of the same on his behalf, and he is not now entitled to obtain the registration of the same in his own name.

(xv.) The trade mark [as in (i.) to—relates] has for many years

past been the exclusive property in [France] of the opponent, and it has for the same period been exclusively used in the United Kingdom upon goods of the opponent imported into this country. [The opponent has not hitherto registered the said trade mark in the United Kingdom from ignorance of the requirements of British law, but he is now about to apply for the registration of the same.]

(xvi.) The alleged [as in (i.) to—relates] contains several material misstatements with respect to the nature and composition of the article to which it is applied by the applicant, and the said alleged trade mark is therefore calculated to deceive, and ought not to be registered.

(xvii.) The alleged [as in (i.) to—relates] contains a statement contrary to the fact, that the goods to which it is applied by the applicant are patented, and the said alleged trade mark ought not therefore to be registered.

(xviii.) By articles of partnership, dated , under which the opponent and the applicant carried on business until recently in partnership, it was agreed that on the dissolution of the partnership the goodwill of the partnership business and the trade marks used therein (of which the trade mark [as in (i.) to—relates] was one) should belong solely to the opponent. The said partnership is now dissolved, and the applicant is not entitled to use or register the said trade mark.

(xix.) By articles [as in (xviii.) to—dissolution of the partnership] neither of the partners should in any business carried on by him use the name or trade marks used by the said partnership. The trade mark [as in (i.) to—relates] is one of the trade marks which were used by the said partnership, and since the dissolution of the said partnership the applicant is not entitled to use or register the said trade mark.

(xx.) The word which forms part of the alleged [as in (i.) to—relates] is a word in common use in the trade, and the applicant is therefore not entitled to acquire any exclusive right in the said word by registration, or to obtain registration of the said alleged trade mark, except and unless he first disclaims any right to the exclusive use of the said word.

(xxi.) The device of a ["lion"] is in common use in the trade, and the applicant is therefore not entitled to obtain registration of the words ["Lion Brand"] as part of his alleged trade mark No. , except and unless he first disclaims any right to the exclusive use of the said words.

(xxii.) Goods of my manufacture [*or*, merchandise] of the same description as the goods for which the applicant is now applying to register his alleged trade mark, are constantly ordered and sold as ["Lion"] goods, and if the applicant is allowed to obtain registration of the device of a [lion]

as [*or* as part of] his trade mark, it will cause his goods to be passed off as and for my goods.

(xxiii.) The alleged [as in (i.) to—relates] has such a resemblance to the opponent's registered trade mark No. as to be calculated to deceive. The class of goods for the whole of which the above-mentioned applicant is now applying to register the said trade mark includes the goods in respect of which the opponent's said trade mark is registered, and the applicant is therefore not entitled to obtain registration of the said alleged trade mark except and unless the goods in respect of which registration is granted to him are so limited and defined as not to include the goods or description of goods for which the opponent's said trade mark is registered as aforesaid.

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### 2. Grounds of Counter-statement (*a*).

(i.) The trade mark to which the above-mentioned application relates has been exclusively used for years last past by the applicant, and is a good, valid, and registrable trade mark.

(ii.) The trade mark [as in (i.) to—relates] consists of [*or* contains] an essential particular as defined by § 64 of the Patents, Designs, and Trade Marks Acts, 1883—1888, viz., [a distinctive device, mark, or label], and is therefore registrable as a new trade mark.

(iii.) The trade mark [as in (i.) to—relates] consists of a special and distinctive word used by the applicant as a trade mark before the 13th day of August, 1875, and is therefore a good and valid trade mark and is registrable as an old mark.

(iv.) I have publicly used the trade mark [as in (i.) to—relates] in the United Kingdom for years, as alleged in my above-mentioned application. Such user has not been clandestine, but has been generally known to the trade in ; and if it has not been known to the opponent, that must have been either because he was not engaged in such trade, or else because he conducted his business negligently.

(v.) The goods in respect of which I am applying to register my above-mentioned trade mark No. are goods comprised in Class of the classes under the Patents, Designs, and Trade Marks Acts, 1883—1888, [as appears from the Guide to the Classification issued at the Patent Office].

(vi.) My above-mentioned trade mark is not a mere word in ordinary use in the English language descriptive of quality, but is a special and distinctive word by which my goods are

(*a*) See Form *a*, p. 485, *supra*, for the formal parts of the counter-statement.

generally recognized by the trade and the public, and I am entitled to register the same.

(vii.) My above-mentioned trade mark is not merely descriptive of the character and quality of the goods to which it is applied, but it was first adopted and has since been exclusively used by myself for the purpose of distinguishing goods of my manufacture [*or* merchandise], and it is generally recognized as being distinctive of such goods.

(viii.) It is not the fact that my above-mentioned trade mark has for many years past, or at all, been in common use in the trade. In instances I have obtained injunctions to restrain infringements thereof, and if there has been any user by persons not so restrained it has been without my knowledge, or I should have taken proceedings against them.

(ix.) It is not the fact that my above-mentioned trade mark is generally understood by the trade or the public to denote a particular quality of goods; on the contrary it is generally understood to denote goods of my manufacture [*or* merchandise], and the trade and the public would be deceived and I should be injured if any other manufacturer were to use it.

(x.) My above-mentioned trade mark was placed by the Manchester Committee of Experts in their second class, or B. list, in consequence of a misapprehension as to the principles by which their action was to be governed, and the said mark was wrongfully so placed, and ought to be admitted to registration.

(xi.) It is not the fact that I, or the trade, or the public, have used or understood my above-mentioned trade mark as describing articles made in accordance with my expired patent. On the contrary, I adopted it before the grant to me of the said patent, and it has always been used and understood as distinguishing goods of my make, and not goods of any particular pattern.

(xii.) My above-mentioned trade mark is not identical with the opponent's registered mark [*or* Sheffield mark], nor has it such resemblance to the same as to be calculated to deceive.

(xiii.) The goods with respect to which the opponent's trade mark [*or* Sheffield mark] is registered are not the same goods nor goods of the same description as the goods with respect to which I am applying for registration of my above-mentioned trade mark.

(xiv.) The opponent's trade mark No. is not a good or valid trade mark, but was registered by mistake and wrongfully, and I am now applying for the rectification of the register by the removal therefrom of the said mark.

(xv.) Whether the trade mark which I am now applying to register is or is not the property of the opponent in a foreign country, as to which I have no knowledge, the said trade

mark has not up to the present time been known in the United Kingdom in connection with [describe the goods], but the same is a new mark adopted for the first time by myself months since.

(xvi.) The statements contained in my above-mentioned trade mark are true, and my said trade mark is not calculated to deceive. If any such statements are exaggerated, such exaggerations are trifling and immaterial and not calculated to deceive.

(xvii.) The mention of a patent contained in my above-mentioned trade mark is not such as to lead to the belief that the patent there mentioned is an existing patent, and my said trade mark is not calculated to deceive.

(xviii.) The articles of partnership mentioned in the notice of opposition provided that the goodwill and trade marks of the partnership business should belong to the opponent only in the event of the partnership being dissolved by effluxion of time. The said partnership was dissolved at an earlier date by common consent, and the provisions of the said articles were varied in such manner that the goodwill and trade marks devolved upon the opponent and myself equally.

(xix.) The trade mark to which my above-mentioned application relates was used by me in my business concurrently with the opponent before the 13th day of August, 1875, and is an old trade mark, and was not used by any other person in the same trade, and I am therefore entitled to registration notwithstanding the opponent's registration.

(xx.) The opponent uses his trade mark No. only by stamping it on his goods. I only use mine by placing it on the wrappers in which the goods are placed; and the concurrent use of the two trade marks in such different ways is not calculated to deceive. I have used my trade mark for years, and am willing to undertake to use it in the future only as I have hitherto used it.

(xxi.) The opponent uses his trade mark No. only on goods exported by him to [the Colonies and the United States]. I only use mine in [the United Kingdom]; and the concurrent user of the two trade marks in such different parts of the world cannot deceive. I am willing [as in (xx.)].

(xxii.) The word , which forms part of my above-mentioned trade mark No. , and also of the opponent's registered mark No. , is a mere word of description, and is not an essential particular of the opponent's said registered mark, nor has he any exclusive rights therein by reason of his registration.

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### 3. Form of Statutory Declaration in Support of Application or Opposition.

Patents, Designs, and Trade Marks Acts, 1883—1888.

Trade Marks.

In the matter of an application by , for the registration of a trade mark No.
and
In the matter of the opposition thereto, No. , by

I of , a member of the firm of the above-named applicants [*or* opponents], do hereby solemnly and sincerely declare as follows:—

1.
2.
3.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

Signed

Declared at
this day of
before me, (*a*).

(*a*) See Rule 61.

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### 4. Form of Statutory Declaration to be made (if required by the Comptroller) by Applicant for Registration of an Old Mark.

[*Formal parts as in Form* 3.]

I [and my predecessors in business] have used the trade mark tendered by me for registration under the No. , a true copy whereof is [annexed to the sheet of paper] now produced to me and marked A, exactly as thereby shown, by itself and without addition, as a trade mark in respect of [the goods specified in the application] within the United Kingdom of Great Britain and Ireland, continuously since years before the 13th day of August, 1875. Save the said trade mark, there did not appear upon the said goods, or upon the [packages] containing the same, any device, words, numerals, letters, or other particulars whatsoever.

And I make, &c.

5. FORM OF CASE ON APPEAL TO THE BOARD OF TRADE.

[*Heading as in Form 3, but omitting the reference to the opposition, if the appeal is from the Comptroller's spontaneous refusal.*]

Case on appeal to the Board of Trade (*b*).

1. [*Set out the material facts of the case in numbered paragraphs.*]
2.
3.
4.

The appellants submit that, under the circumstances hereinbefore stated, the decision of the Comptroller should be reversed, and the appellants' trade mark No. above mentioned should be admitted to registration [*or* as the case may be] on the following grounds:—

1. Because, &c.
2. Because, &c.

[The matters with which this appeal is concerned are of great importance to the appellants, and the appellants are desirous that the same may be referred to the decision of the Court, under § 62 [*or* § 69] of the above-mentioned Acts.]

Signed

(*b*) To accompany Form H.

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6. FORM OF REFERENCE TO THE COURT BY THE BOARD OF TRADE OF APPEAL UNDER § 62, WITH DIRECTIONS THEREON.

Patents, Designs, and Trade Marks Acts, 1883—1888.

In the matter of an application No. of for the registration of a trade mark,
and
In the matter of a decision of the Comptroller, dated the day of , 18 ,
and
In the matter of an appeal dated the day of , 18 , to the Board of Trade from the above decision.

Reference of Appeal to the Court.

Whereas it appears expedient to the Board of Trade to refer the above-mentioned appeal to the Court, now therefore the Board of Trade by virtue of the provisions of sub-s. 5 of § 62 of the above-mentioned Act do hereby refer such appeal to the Court accordingly.

Dated this day of , 18 .

, *Secretary to the Board of Trade.*

## Directions on Reference of the above Appeal to the Court.

For the purpose of the above reference the Board of Trade, pursuant to Rule 23 of the Trade Marks Rules, 1890, hereby direct that the appellant make application by motion, summons, or otherwise as may be advised to the Chancery Division of the High Court of Justice (*a*) [the Court of Chancery of the County Palatine of Lancaster] (*b*) to hear and determine the said appeal, and that notice of such application be served upon the Comptroller-General of Patents, Designs, and Trade Marks [and upon ] (*c*) [and, when a day has been fixed for the hearing, to send a letter addressed to of accompanied by a copy of the summons, notice of motion, or otherwise, as the case may be, stating that an application will be made on the day fixed affecting interest] (*d*): And that upon the hearing and determination of the said appeal the appellant and the comptroller [and the said ] (*c*) be respectively at liberty to adduce such evidence by affidavit, examination or cross-examination of witnesses, and otherwise, as the Court may see fit to direct or permit [in addition to the statutory declarations used at the hearing before the comptroller, which for this purpose are, if necessary, to be verified by affidavit] (*e*).

Dated this day of , 18 .

, *Secretary to the Board of Trade.*

(*a*) Where the appellant and the comptroller are the only parties interested, and where no evidence is filed upon the hearing of the application before the comptroller, none of the words in brackets are inserted, unless some of the following notes are applicable.

(*b*) Where the circumstances are as above, but the application for registration is made at the Manchester Office in pursuance of Rule 8 of the Trade Marks Rules, 1890, these words are substituted for the reference to the High Court of Justice.

(*c*) Where there are parties interested, other than the appellant and the comptroller, resident in England, these words are inserted.

(*d*) Where there are other parties interested, resident out of England, these words are inserted.

(*e*) Where evidence is filed upon the hearing before the comptroller, these words are added. As to verifying declarations, see *In re Kingsford*, 15 P. R. 197.

## 7. Form of Reference to the Court by the Board of Trade of Appeal under § 69, with Directions thereon.

Patents, Designs, and Trade Marks Acts, 1883—1888.

In the matter of an application No. of for the registration of a trade mark,
and
In the matter of an opposition thereto, No. by ,
and
In the matter of a decision of the Comptroller, dated the day of , 18 ,
and
In the matter of an appeal, dated the day of , 18 , to the Board of Trade from the above decision.

Reference of Appeal to the Court.

Whereas it appears expedient to the Board of Trade to refer the above-mentioned appeal to the Court, now therefore the Board of Trade by virtue of the provisions of sub-s. 4 of § 69 of the above-mentioned Act do hereby refer such appeal to the Court accordingly.

Dated this day of , 18 .

, *Secretary to the Board of Trade.*

Directions on Reference of the above Appeal to the Court.

For the purpose of the above reference the Board of Trade, pursuant to Rule 23 of the Trade Marks Rules, 1890, hereby direct that the appellant make application by motion, summons, or otherwise as may be advised to the Chancery Division of the High Court of Justice (*a*) [the Court of Chancery of the County Palatine of Lancaster] (*b*) to hear and determine the said appeal, and that notice of such application be served upon the Comptroller-General of Patents, Designs, and Trade Marks, [and upon ] (*c*) [and when a day has been fixed for the hearing to send a letter addressed to of accompanied by a copy of the summons, notice of motion, or otherwise, as the case may be, stating that an application will be made on the day fixed affecting interest] (*d*) [And that the said , in default of being served within from the date hereof with notice of any such application as aforesaid by the appellant, be at liberty to apply to the Chancery Division of the High Court of Justice] (*e*) [The Court of Chancery of the County Palatine of Lancaster] (*b*): And that upon the hearing and determination of the said appeal the appellant and the comptroller and the said

be respectively at liberty to adduce such evidence by affidavit, examination or cross-examination of witnesses, and otherwise, as the Court may see fit to direct or permit in addition to the statutory declarations used at the hearing before the comptroller, which for this purpose are, if necessary, to be verified by affidavit (*f*).

Dated this day of , 18 .

, *Secretary to the Board of Trade.*

(*a*) Where none of the following notes are applicable, none of the words in brackets are inserted.

(*b*) Where the application for registration is made at the Manchester Office in pursuance of Rule 8 of the Trade Marks Rules, 1890, these words are substituted for the reference to the High Court of Justice.

(*c*) Where the respondents, other than the comptroller, are resident out of England, these words are omitted.

(*d*) Where the respondents, other than the comptroller, are resident out of England, these words are inserted.

(*e*) Where the appellant is the opponent to the application for registration, these words are inserted.

(*f*) As to verifying declarations, see *In re Kingsford*, 15 P. R. 197.

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## 8. Special Case.

In the High Court of Justice, 18 . B. No. .
Chancery Division.
Mr. Justice .

Between [*A. B.*], Plaintiff,
and
[*C. D.*], Defendant.

Special case stated for the opinion of the High Court of Justice, pursuant to the Patents, Designs, and Trade Marks Acts, 1883—1888, and the rules made thereunder.

1. [*The facts necessary to enable the Court to determine the rights of*
2. *the parties must be stated concisely in numbered paragraphs.*]
3.
4.

The questions submitted for the opinion of the Court are:

1. Whether the plaintiff *A. B.*, or the defendant *C. D.*, or either of them, is entitled to have his name entered in the Register of Trade Marks kept under the authority of the above-mentioned Acts as the proprietor of the said trade mark, or whether both of them are so entitled.
2. By whom the costs of this special case should be paid.

*E. F.*, Solicitor for Plaintiff.
*G. H.*, Solicitor for Defendant.

*Note.*—This special case is filed by *E. F.*, of , Solicitor for the above-named Plaintiff.

### 9. Summons for Leave to Register.

In the High Court of Justice,
Chancery Division.
Mr. Justice

In the matter of an application by *A. B.* for the registration of a trade mark No. ,
and
[In the matter of the opposition thereto, No. of *C. D.*,
and]
In the matter of the Patents, Designs, and Trade Marks Acts, 1883—1888.

Let *C. D.*, of , in the county of , and the Comptroller-General of Patents, Designs, and Trade Marks, within eight days after service of this summons on them respectively, inclusive of the day of such service, cause an appearance to be entered for him to this summons which is issued upon the application of the above-named *A. B.*, of , in the county of , that the appeal of the said applicant *A. B.* from the decision dated of [the Registrar of Trade Marks sitting for] the said Comptroller-General of Patents, Designs, and Trade Marks in the above-mentioned matters may be heard and determined by the Court and that the said decision of the [Registrar], whereby he refused registration of the applicant's trade mark No. , above-mentioned, may be reversed, and that the said Comptroller-General of Patents, Designs, and Trade Marks may be directed to proceed with the above-mentioned application of the said *A. B.* [notwithstanding the above-mentioned opposition thereto of *C. D.*] *or* [notwithstanding the registration of *C. D.'s* trade mark No. ], *or* [notwithstanding the registration of *C. D.'s* trade mark No. in the Sheffield Register].

Dated the day of 18 .

(Seal)

This summons was taken out by *E. F.*, of , Solicitor for the above-named *A. B.*

The respondents may appear hereto by entering appearance either personally or by solicitor at the Central Office, Royal Courts of Justice.

*Note.*—If the defendant does not enter appearance within the time and at the place above mentioned such order will be made and proceedings taken as the judge may think just and expedient.

## 10. Notice of Motion for Leave to Register.

[*Heading as in No.* 9.]

Take notice that the Court will be moved before the Hon. Mr. Justice. on the day of 18 , or so soon thereafter as counsel can be heard, by [Mr. , of ] counsel on behalf of the above-named *A. B.*, that [as in No. 9].

Dated the day of , 18 .

(Signed) *E. F.*, of , Solicitor for the above-named *A. B.*

To the Comptroller-General of Patents, Designs, and Trade Marks, *and, if there is an opposition,*
To *Mr. C. D.*

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## 11. Notice of Motion for Leave to Add to, or Alter, a Registered Trade Mark.

In the High Court of Justice,
Chancery Division.
Mr. Justice

In the matter of the registered trade mark No. of *A. B.*

and

In the matter of the Patents, Designs, and Trade Marks Acts, 1883—1888.

Take notice [as in No. 10 to—that] leave may be given to add to the above-mentioned trade mark in the register of trade marks [the words " ," *or*, as the case may be], *or*, that leave may be given to alter the registration of the above-mentioned trade mark in the following respects, that is to say by [diminishing the size of the words and altering the address from to , *or*, as the case may be].

[Dated and signed as in No. 10.]

To the Comptroller-General of Patents, Designs, and Trade Marks.

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12. NOTICE OF MOTION FOR THE RECTIFICATION OF THE REGISTER.

[*Heading as in No.* 11.]

Take notice [as in No. 10 to—behalf of] *C. D.*, of , that the Register of Trade Marks kept under the authority of the above-mentioned Acts may be rectified [by removing therefrom the above-mentioned trade mark No. ], *or* [by adding to the registration of the above-mentioned trade mark No. a note disclaiming any exclusive right in the above-named *A. B.* to the use of the word ], *or* [by limiting the registration of the above-mentioned trade mark No. to (describe the goods), and not allowing it to remain in respect of all the goods in Class ], *or* that such further or other order may be made for the rectification of the said register as to the Court shall seem just.

[Dated and signed as in No. 10.]

To Mr. *A. B.* and the Comptroller-General of
Patents, Designs, and Trade Marks.

# Part III.

## FORMS FOR USE IN ACTIONS FOR INFRINGEMENT (a).

### 1. Writ of Summons with Indorsement.

In the High Court of Justice, 18 . B. No. .
Chancery Division.
Mr. Justice .

Between *A. B.*, Plaintiff,
and
*C. D.*, Defendant.

Victoria, by the Grace of God, &c.

To *C. D.*, of , in the county of .
We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of *A. B.*; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, Hardinge Stanley Earl of Halsbury, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand hundred and .

*Memorandum to be subscribed on the writ.*

N.B.—This writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

The defendant [*or* defendants] may appear hereto by entering an appearance [*or* appearances] either personally or by solicitor at the Central Office, Royal Courts of Justice, London.

*Indorsement to be made on the writ before issue thereof.*

The plaintiff's claim is for an injunction to restrain the defendant from [*see forms of Injunction in Part IV. of this Appendix*], and for an account or damages;

*or*, The plaintiff's claim is for damages for wrongfully using [*or* imitating] the plaintiff's trade mark, and for an injunction to restrain, &c.

And for an order for delivery up on oath or (at the plaintiff's option) destruction of all documents, articles and things in the possession or power of the defendant or under his control which offend against any of the foregoing injunctions.

(a) See Schedules to Rules of Supreme Court.

This writ was issued by the said plaintiff, who resides at ;
*or*, This writ was issued by *E. F.*, of , whose address for service is , solicitor for the said plaintiff, who resides at ;
*or*, This writ was issued by *G. H.*, of , whose address for service is , agent for *E. F.*, of , solicitor for the said plaintiff, who resides at [*mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any*].

*Indorsement to be made on the writ after service thereof.*

This writ was served by me at on the defendant on the day of 18 .
Indorsed the day of 18 .
(Signed)
(Address)

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## 2. Notice of Motion for Injunction.

[*Heading as in No.* 1.]

Take notice that the Court will be moved before the Hon. Mr. Justice on the day of 18 , or so soon thereafter as counsel can be heard, by [Mr. of ] counsel for the above-named plaintiff, that an injunction may be granted to restrain the defendant, &c., until judgment in this action or further order, from [*see Part IV. of this Appendix*] [and take also notice that special leave to serve you with this [short] notice for the day aforesaid [with the writ of summons] has been obtained from the said Mr. Justice ].

Dated the day of 18 .

(Signed) *E. F.*, of ,
Solicitor for the above-named Plaintiff.

To the Defendant *C. D.*

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## 3. Statement of Claim.

[*Heading as in No.* 1, *inserting above the title of the action*—"Writ issued the day of , 18 ."]

Statement of Claim (*a*).

1. The defendant has infringed the plaintiff's trade mark.
2. The trade mark is [*describe it*].

(*If the plaintiff is not the original proprietor of the trade mark, show shortly how his title is derived.*)

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(*a*) The above is the form appended to the Rules of Court, 1883, but it is thought that fuller particulars will usually be required. Forms 3 (i.), 3 (ii.), and 3 (iii.) are therefore suggested.

3. The following are the acts complained of, viz.:—
(*Set them out.*)

The plaintiff claims an injunction to restrain the defendant, his servants and agents, from infringing the plaintiff's said trade mark, and in particular from [*see forms of Injunction in Part IV. of this Appendix*].

The plaintiff also claims an account or damages.

(Signed)
(Delivered)

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3. (i.) [*Heading as above.*]

Statement of Claim.

1. The plaintiff is the registered proprietor of a trade mark [consisting of ](*a*), which was advertised in the Trade Marks Journal of the day of , 18 , and is registered for in Class [the date of such registration being the day of , 18 ](*b*).

2. The defendant has infringed the plaintiff's said trade mark in manner following; that is to say [he has ].

[3. The plaintiff has applied to the defendant to desist from his wrongful acts aforesaid, but he has refused (*or* neglected) so to do](*c*).

4. The defendant has made considerable profits by selling goods not being the plaintiff's goods under the trade mark of which the plaintiff complains [*or* in manner aforesaid].

5. The plaintiff has sustained considerable damage from the defendant's wrongful acts aforesaid.

The plaintiff claims—

1. An injunction [as above].
2. An account of profits or damages and delivery up to him of all goods in the possession or power of the defendant having thereon the trade mark of which complaint is hereby made in order that such trade mark may be obliterated therefrom, and also delivery up to him for the purpose of destruction of all copies in the possession or power of the defendant of the said trade mark and of all blocks, dies, or other apparatus in the like possession or power adapted for the production of the said trade mark.
3. Costs.

(*a*) The trade mark need not be described unless the nature of the infringement renders it necessary.

(*b*) The date of registration may be omitted, if not more than five years before writ issued.

(*c*) Though previous application is not necessary, if it has been made it should be mentioned.

3. (ii.) [*Heading as above.*]

Statement of Claim.

1. [As in 3 (i.), omitting the description of the plaintiff's trade mark.]

2. The said trade mark consists of [*or* contains] the device of a [lion], and the plaintiff's goods bearing such trade mark are extensively known in the [Indian] markets as ["Lion"] goods, and are frequently ordered and invoiced under that name.

3. No other goods of the same kind are or ever have been known in the [Indian] markets as ["Lion"] goods.

4. The defendant is using on goods intended for export to the [Indian] markets a trade mark [*or* label, *or* wrapper] on which he places the device of a [lion], and such user is calculated to deceive by inducing purchasers to buy the defendant's goods in the belief that they are buying those of the plaintiff.

5. [As in 3 (i.), par. 4.]

6. [As in 3 (i.), par. 5.]

The plaintiff claims [as in 3 (i.). For form of injunction, see that in *Orr-Ewing & Co.* v. *Johnston & Co.*, Part IV., No. 5, *infra.*]

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3. (iii.) [*Heading as above.*]

Statement of Claim (*a*).

1. The plaintiff has for years last past and upwards offered for sale and sold [a preparation for the human hair] of his manufacture under the title of [Robinson's Hair Stimulant], and previously to the defendant commencing his wrongful acts hereinafter stated no other person except the plaintiff offered for sale or sold under that title any similar preparation.

2. The plaintiff offers for sale and sells and always has offered for sale and sold [his said preparation] in bottles of a peculiar and distinctive shape packed in cases which are also of a peculiar and distinctive shape; and previously to the defendant commencing his wrongful acts hereinafter stated no other person except the plaintiff used for the purposes of trade in any [preparation for the human hair] bottles or cases similar in shape to the plaintiff's bottles and cases.

3. The plaintiff has recently ascertained as the fact is that the defendant for the purpose of passing off his goods as and for the plaintiff's goods is offering for sale and selling [a preparation] not of the plaintiff's manufacture under the title of [Robinson's Hair Stimulant], and in bottles similar in shape to the plaintiff's bottles and packed in cases similar in shape to the plaintiff's cases, whereby

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(*a*) This is intended for a case in which no trade mark has been registered.

divers persons have been induced to purchase the defendant's [preparation] as and for the goods of the plaintiff [*or* and such acts are calculated to induce, &c.]

4. The defendant has made considerable profits by selling his goods as and for the goods of the plaintiff.

5. [As in 3 (i.), par. 5.]

The plaintiff claims—

1. An injunction to restrain the defendant, his servants and agents, from passing or attempting to pass off the defendant's goods as or for the plaintiff's goods, and in particular from offering for sale or selling any [preparation for the human hair] not of the plaintiff's manufacture by means of the use of the title [Robinson's Hair Stimulant], and by means of the use of bottles similar in shape to the plaintiff's bottles, and by means of the use of cases similar in shape to the plaintiff's cases, or by any of such means [*or* as may be].
2. An account of profits or damages.
3. Costs.

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## 4. Defence.

[*Heading as in No.* 1.]

Defence (*a*).

The defendant says that:—

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

(Signed)

(Delivered)

(*a*) The above is the form appended to the Rules of Court, 1883, but a fuller form varying with the nature of the defence will generally be required.

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## 5. Reply.

[*Heading as in No.* 1.]

Reply.

The plaintiff as to the defence says that:—

1.

2.

(Signed)

(Delivered)

### 6. Summons to Stay Proceedings by Consent, the Defendant submitting to an Injunction.

[*Heading as in No.* 1.]

Let all parties concerned attend at the chambers of Mr. Justice at the Royal Courts of Justice on the day of , 18 , at o'clock in the noon, on the hearing of an application on the part of the above-named defendant that the defendant submitting to a perpetual injunction restraining [*see forms of Injunction in Part IV. of this Appendix, infra*] and submitting to pay the plaintiff £ in respect of [damages and] his taxed costs of this action, all further proceedings in this action may be stayed, or that such further or other order may be made as to the judge shall seem just.

Dated the day of , 18 .

This summons was taken out by *G. H.* of , Solicitor for the above-named Defendant.

To the above-named Plaintiff.

# Part IV.

## PRECEDENTS OF INJUNCTIONS, &c.

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1. CROFT *v.* DAY, 7 Beav. 84, 90.

*Label on Blacking Bottles—Trade Cards—Injunction.*

INJUNCTION to restrain the defendant, his servants, &c., "from selling, or exposing for sale, or procuring to be sold, any composition or blacking described as, or purporting to be, blacking manufactured by Day and Martin, in bottles having affixed thereto such labels as in the complainant's bill mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by John Weston (the manager), for the benefit of the estate of Charles Day, the testator; and from using trade cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by John Weston" (*a*).

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2. SEIXO *v.* PROVEZENDE, L. R. 1 Ch. 192, 194.

*Brand on Casks of Wine—Injunction.*

Injunction to restrain the defendants, &c., "from affixing or causing to be affixed to any casks of wine shipped to their orders the brand or marks of a crown and the word *Seixo*, or any other combination of marks or words so contrived as, by colourable imitation or otherwise, to represent the marks or brands of the plaintiff, and from employing any marks or words which shall be so contrived as to represent, or induce the belief, that such wines are Crown Seixo, or the produce of the *Quinta do Seixo*, or otherwise using the word *Seixo* without clearly distinguishing the same from the wine produced by the *Quinta do Seixo*" (*b*).

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3. MAGNOLIA METAL CO. *v.* ATLAS METAL CO., 14 P. R. 389.

*Magnolia Metal—Injunction.*

Injunction restraining the defendants, &c., "from casting, packing, describing, advertising, offering for sale, selling, or dealing with any

(*a*) Lord Langdale, M. R.

(*b*) Wood, V.-C.; approved by Lords Watson and Macnaghten in *Montgomery* v. *Thompson*, (1891) A. C. 217, 221, 224. And see *Thompson* v. *Bent's Brewery Co.*, 8 P. R. 479; *Grezier* v. *Autran*, 13 P. R. 1; *Pinet* v. *Maison Pinet* (1), 14 P. R. 933.

anti-friction metal made up in such a way as not to be readily and clearly distinguishable from the 'Magnolia Metal' manufactured by the plaintiffs, and from using the word 'Magnolia' as descriptive of, or in connection with, any anti-friction metal manufactured by them or either of them, without clearly distinguishing such anti-friction metal from the anti-friction metal of the plaintiffs" (*a*).

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4. STEPHENS *v.* PEEL, 16 L. T. N. S. 145.

*Labels on Bottles of Ink—Injunction.*

Injunction restraining the defendant, &c., "from selling, or exposing, or advertising for sale, or procuring to be sold, any ink or writing fluid in bottles bearing thereon such labels as after mentioned, and from using any labels, or stamps, or advertisements so contrived or expressed as by colourable imitation or otherwise to represent or lead to the belief that the ink sold by the defendant is the ink or writing fluid manufactured by the plaintiffs, and sold by them under the name of 'Stephens' Blue Black Writing Fluid'" (*b*).

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5. ORR-EWING & Co. *v.* JOHNSTON & Co., 7 App. Cas. 219, 233.

*"Two Elephant" Yarn—Injunction.*

Injunction restraining the defendants, &c., "from affixing or causing to be affixed to any Turkey red yarn not dyed by the plaintiffs the ticket marked 'B.' and from using two elephants on any ticket used on Turkey red yarn, without clearly distinguishing such ticket from the plaintiffs' ticket mentioned in the pleadings, being the exhibit marked 'A' referred to in the depositions, or so as to represent or induce the belief that any of the said yarn was dyed by the plaintiffs" (*c*).

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6. READ BROTHERS *v.* RICHARDSON & Co., 45 L. T. N. S. 54, 60.

*"Dog's Head" Beer for Exportation—Undertaking—Injunction to the Hearing—Costs.*

"The plaintiffs by their counsel undertaking to abide by any order this Court may make as to damages in case this Court shall hereafter be of opinion that the defendants have sustained any by reason of this order which the plaintiffs ought to pay, this Court doth order that the defendants, &c., be restrained from using the figure of a dog's head upon any labels, tickets, or wrappers affixed or applied to bottles of beer or stout sold for exportation or exported by the defendants to any

(*a*) Collins, J., approved by the Court of Appeal.

(*b*) Wood, V.-C.

(*c*) House of Lords. See *Reddaway* v. *Banham*, (1896) A. C. 199, 221; and *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 P. R. 389, 404.

of the Australian Colonies or New Zealand, and from selling for exportation or exporting to any of the said colonies any bottles of beer or stout having affixed or applied thereto any such label, ticket, or wrapper, until judgment in this action or further order; and it is ordered that the plaintiffs' costs of this motion be their costs in the action" (*a*).

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7. BROADHURST *v.* BARLOW, L. J. N. of C., 1872, p. 183.

*Stamps on Shirtings—Injunction.*

Injunction restraining the defendants, &c., "from stamping, impressing, or affixing, or causing to be stamped, impressed, or affixed on or to any Spanish shirtings or pieces of white calico manufactured or sold by them, any mark consisting of words in the Turkish, Armenian, and Greek languages, meaning 'exactly 12 yards,' and placed between a figure or crest and the words 'Spanish Shirtings' enclosed in a scroll in the same manner as those are respectively placed in the plaintiff's trade mark, or in any manner only colourably differing therefrom" (*b*).

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8. WOTHERSPOON *v.* CURRIE, L. R. 5 H. L. 508, 523.

*"Glenfield Starch"—Injunction.*

Injunction restraining the respondent, &c., "from using the word 'Glenfield' in or upon any labels affixed to packets of starch manufactured by or for him, and from in any other way representing the starch manufactured by or for him to be 'Glenfield Starch,' and from selling or causing the same to be sold as 'Glenfield Starch,' and from doing any act or thing to induce the belief that starch manufactured by or for him, the respondent, is 'Glenfield Starch,' or starch manufactured by the appellant" (*c*).

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9. FORD *v.* FOSTER, L. R. 7 Ch. 611, 634.

*"Eureka" Shirts—Injunction.*

Injunction restraining the defendants, &c., "from applying the mark or title 'Eureka' to any shirts manufactured by them, or to any shirts sold by them, unless manufactured by the plaintiffs, and from selling any shirts already marked with the mark and title 'Eureka,' unless such mark or title has been applied with the sanction of the plaintiffs; and from issuing any boxes or packages on which the mark or title of 'Eureka' shall be applied to shirts not of the plaintiffs' manufacture; and from affixing or using any label, or card, or other mark containing the word 'Eureka' to or upon any shirts not of the plaintiffs' manufacture" (*d*).

(*a*) Court of Appeal.
(*b*) Wickens, V.-C.
(*c*) House of Lords.
(*d*) James, L. J.

10. APOLLINARIS Co. *v.* NORRISH, 33 L. T. N. S. 242.

*"Apollinaris Water"—Injunction.*

Injunction restraining the defendants, &c., "from selling, &c., any mineral or other waters, not being the genuine Apollinaris Water, under the name of 'Apollinaris Water,' or 'London Apollinaris Water,' or under any other name of which the word 'Apollinaris' so forms part as to be calculated to deceive the public" (*a*).

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11. CARUNCHO *v.* STEPHENSON, 25 SOL. J. 929.

*"La Intimidad" Cigars—Injunction.*

Injunction restraining the defendant, &c., "from selling or causing or allowing to be sold, and from in any manner representing, or causing or procuring to be represented, any cigars manufactured, sold, or dealt in by the defendant as 'La Intimidad' cigars, or as cigars manufactured, imported, or sold by the plaintiffs or either of them; and also from affixing, or procuring or causing or allowing to be affixed, to any boxes of cigars manufactured, or bought, or procured, or sold, or attempted to be sold by the defendant, or otherwise using, or employing, or permitting to be used or employed, any labels, wrappers, brands, or marks used by the plaintiffs or either of them, or so contrived or prepared as to represent or lead to the belief that the cigars manufactured or sold by the defendant are cigars manufactured or sold by the plaintiffs or either of them, and from using the words 'La Intimidad' on any cigars, or boxes or wrappers containing cigars, so as to induce the belief that such cigars are manufactured or imported by the plaintiffs or either of them, pending the trial of this action" (*b*).

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12. BEWLAY & Co., LD. *v.* HUGHES, 15 P. R. 290, 293.

*"Flor de Dindigul" Cigars—Injunction.*

Restrain defendant, &c., "from using the names 'Flor de Dindigul' or 'Cigarro de Dindigul' as the brand or title of any cigars not being the plaintiffs' cigars, and from supplying cigars, not being the plaintiffs' cigars, in response to orders for 'Flor de Dindigul' cigars; and from using the name 'Dindigul' in connection with the sale of cigars, not being the plaintiffs' cigars, without clearly distinguishing such cigars from the plaintiffs' cigars. This injunction is not to prevent the defendant from describing any cigars sold by him which are, in fact, made of 'Dindigul' tobacco, as being so made" (*c*).

(*a*) Bacon, V.-C. And see also forms of injunctions in *Apollinaris Co.* v. *Edwards*, Seton, 5th ed. 537; *Millington* v. *Fox*, 3 My. & Cr. 338; and Pemberton, 4th ed. 490; *Edelsten* v. *Vick*, 11 Hare, 78; *Collins Co.* v. *Walker*, 7 W. R. 222; and Seton, 5th ed. 535; *Harrison* v. *Taylor*, 11 Jur. N. S. 408; and Pemberton, 4th ed. 490; *Braham* v. *Bustard*, 1 H. & M. 447; *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; and Pemberton, 4th ed. 490; *Mickle* v. *Emery*, Seton, 5th ed. 534; *Siegert* v. *Findlater*, 7 Ch. D. 801, 814: *McLean* v. *Fleming*, 96 U. S. 245; 13 U. S. Pat. Gaz. 913, 914.

(*b*) Cave, J.

(*c*) North, J.

13. EDELSTEN *v.* EDELSTEN, 1 De G. J. & S. 185, 189.

*"Anchor Brand Wire"—Prayer of Bill—Injunction—Account—Delivery up.*

Prayer of Bill: "That an account may be taken of the gains and profits made and obtained by the defendants by the sale of wire having tallies or labels attached thereto with the plaintiff's trade mark, or a trade mark in imitation of, or only colourably differing from that of the plaintiff, stamped or impressed thereon; and that the defendants may be ordered to pay to the plaintiff the amount of such gains and profits. That the defendants may be restrained by injunction from attaching to wire, not the manufacture of the plaintiff, any tally or label with the plaintiff's trade mark, or any mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, and from otherwise using the plaintiff's trade mark, or any mark in imitation thereof, so as to denote or represent that the said wire is the 'Anchor Brand Wire,' or is the manufacture of the plaintiff; and from selling, or offering for sale, or procuring to be sold, any wire not being of the plaintiff's manufacture, having a tally or label attached thereto with the plaintiff's trade mark, or a mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, or otherwise in any manner having the said trade mark, or a mark in imitation thereof, or only colourably differing therefrom, attached thereto. That the defendants may deliver up to be cancelled all tallies, labels, and papers in their possession, or in the possession of their servants or agents, having the said trade mark so in colourable imitation of the plaintiff's as hereinbefore mentioned; and also all tallies, labels, and papers in their possession, or in the possession of their servants or agents, having the plaintiff's trade mark, or any mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, and also all dies for stamping or impressing the same; and that the defendants may pay all the costs of the suit" (*a*).

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14. GUINNESS *v.* ULLMER, 10 L. T. O. S. 127.

*Engraving Blocks for Printing Forged Labels—Injunction.*

Injunction restraining the defendant, &c., "from cutting, engraving, casting, or making, and from causing to be cut, engraved, cast, or made, and also from using or permitting to be used, and from selling or otherwise disposing of or parting with any blocks or plates adapted for printing labels or sheets of labels in imitation of the label furnished by Sparkes Moline to and used by the agents appointed by him

(*a*) Wood, V.-C., made a decree in the terms of the prayer of the bill. See 1 De G. J. & S. 196; Lord Westbury, C., affirmed the decree. As to the account, see also *Foster* v. *Mcgevand*, Pemberton, 4th ed. 492; and the full decree in *Ford* v. *Foster*, Seton, 5th ed. 536. As to order restraining exportation of goods with forged trade marks, see *Henderson* v. *Jorss*, Seton, 5th ed. 536. As to order restraining the bringing into the market of imported goods with forged trade marks, see *Upmann* v. *Elkan*, L. R. 12 Eq. 140; 7 Ch. 130; *Rivero* v. *Norris*, Seton, 5th ed. 536; *Del Valle* v. *Mayer*, *ib.*; *Moet* v. *Pickering*, 6 Ch. D. 770, 771; 8 *ib.* 372.

for sale of the plaintiffs' stout, as in the plaintiffs' bill mentioned, or any of them, or differing only colourably therefrom. And also from selling or otherwise disposing of, and from delivering over or parting with any of such blocks or plates as are now in their possession, custody, or power, to any person other than the plaintiffs or such person as they shall appoint to receive the same" (*a*).

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15. FARINA *v.* SILVERLOCK, 1 K. & J. 509.

*Printing Forged Labels—Injunction.*

Injunction restraining the defendant, &c., "from printing or selling, or exposing for sale, or procuring to be printed or sold, any labels similar to those in use by the plaintiff, as in the bill in this cause mentioned, or containing copies of the signature, or address, or flourish, seal, or stamp, or other marks invented and used by the plaintiff as therein mentioned, or any signature, address, flourish, seal, stamp, or other mark merely colourably differing therefrom, or any other papers or labels so printed or contrived as, by colourable imitation or otherwise, to represent or lead to the belief that Eau de Cologne prepared by other parties was Eau de Cologne prepared by the plaintiff" (*b*).

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16. LEVER *v.* GOODWIN, 4 P. R. 503.

*Order—Action dismissed as to Trade Mark—Injunction as to get-up of Goods—Account—Costs.*

Order "that this action so far as the same claims protection in respect of the trade mark No. , stand dismissed out of court. Order that the defendants, Goodwin Bros., their agents and servants, be restrained from selling, offering for sale, or disposing of any soap not being manufactured for or by the plaintiffs in the wrapper or of the form of any one of the three exhibits admitted in this action to have been issued by the defendants, and marked A, B, and C, or in any wrapper or in any form calculated or intended to pass off, or to enable others to pass off, such soap as or for the goods of the plaintiffs. Order that the following account be taken: that is to say, an account of the profits made by the defendants in selling or disposing of soap made by or for the defendants in any wrapper such as that contained in the exhibits marked A, B, and C, and in the form of those exhibits. Order that the defendants Goodwin Bros. do, within fourteen days after the date of the chief clerk's certificate to be made pursuant to this order, pay to the plaintiffs Lever & Co. the amount which upon taking such account shall be certified to be payable by the defendants to the plaintiffs. Order that it be referred to the taxing master to tax the costs of the plaintiffs of this action up to and including the trial, except so far as the same have been incurred by their claim for protection in respect of the trade mark aforesaid. Order that it be referred

(*a*) Shadwell, V.-C. of Eng. (*b*) Wood, V.-C.

to the taxing master to tax the costs of the defendants of this action so far as the same have been incurred by the plaintiffs setting up the said claim for protection in respect of the said trade mark, and the costs of the plaintiffs when so taxed are to be set off against the said costs of the defendants when taxed, and the taxing master is to certify to whom, after such set off, the balance is due. Order that the party from whom such balance shall be certified to be due do pay the amount thereof to the other party. And the question of the costs of this action incurred subsequent to the trial are reserved, and either of the parties are to be at liberty to apply as they may be advised" (*a*).

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17. CLEMENT *v.* MADDICK, 1 Giff. 98, 101.

*Name of Newspaper—Injunction.*

Injunction restraining the defendants, &c., "from printing, publishing, or continuing to print or publish, any newspaper or other periodical paper with or under the name or style of 'The Penny Bell's Life and Sporting News,' or with or under any name or style of which the name, style, or words of 'Bell's Life' shall form a part, or in any way occur [therein]; and from using the said name, style, or title of 'Bell's Life' by way of name, style, or title to any newspaper or periodical without the licence or consent of the plaintiff" (*b*).

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18. INGRAM *v.* STIFF, 5 Jur. N. S. 947.

*Name of Newspaper—Injuring Plaintiff's Paper—Injunction.*

Injunction restraining the defendant, &c., "from printing, publishing, or selling any newspaper or other periodical under the name of 'The Daily London Journal,' or under any other name or style of which the words 'London Journal' form part, and from doing or committing any act or default which may tend to lessen or diminish the sale or circulation of the plaintiff's periodical, called 'The London Journal'" (*c*).

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19. WALTER *v.* HEAD, 25 Sol. J. 757.

*Name of Newspaper—Injunction.*

Injunction restraining the defendant, &c., "from printing or publishing any newspaper or other publication in the form of a newspaper with or under the name or title of 'The Times,' and from doing any other act in invasion or infringement of the plaintiff's right or interest in the name or title of 'The Times'" (*d*).

(*a*) Chitty, J., affirmed by C. A.

(*b*) Stuart, V.-C. And see *Edmonds* v. *Benbow*, Seton, 5th ed. 539; *Corns* v. *Griffiths*, Pemberton, 4th ed. 489; *Mack* v. *Petter*, 41 L. J. Ch. 782.

(*c*) Wood, V.-C.

(*d*) Court of Appeal.

20. PROWETT *v.* MORTIMER, 2 Jur. N. S. 414.

*Name of Newspaper—Soliciting Customers—Injunction.*

Injunction restraining the defendant, &c., "from printing, or publishing, or exposing for sale, or procuring to be printed or sold, the newspaper publication called 'The True Britannia,' or any other newspaper or publication, as a continuation of the plaintiff's newspaper 'The Britannia,' in the bill mentioned, and from soliciting custom in the name of the plaintiff's trade and business as for 'The Britannia' newspaper" (*a*).

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21. HOGG *v.* KIRBY, 8 Ves. 215, 226.

*Publication of a Magazine as a Continuation of Plaintiff's Magazine —Injunction.*

Injunction restraining the defendant, &c., "from publishing or exposing for sale any copy or copies of the defendant's said work, and from printing, publishing, or exposing for sale, any other work or publication as or being a continuation of the plaintiff's work, or of the defendant's work which has been so published as such continuation as aforesaid; and from printing all or any part or parts of the plaintiff's said work"; and Ordered "that the injunction shall be continued as to any letters, &c., admitted by the Answer to have been received from correspondents by the defendant, while publishing for the plaintiff" (*b*).

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22. AINSWORTH *v.* BENTLEY, 14 W. R. 630.

*Publication of Magazine in Breach of Contract—Order—Injunction.*

Ordered, "That the defendant, &c., be restrained from carrying on, &c., the said 'Temple Bar Magazine,' but the order to be without prejudice to the publication of the said magazine until the hearing of the cause, so as the name of Bentley do not appear either in the title-page, or in any other part of the said publication, or in any advertisement of the said publication, and this order to be without prejudice to the right (if any) of the plaintiff to damages or profits in respect of any publication of the work" (*c*).

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23. PRINCE ALBERT *v.* STRANGE, 2 De G. & Sm. 652, 717.

*Etchings Improperly Obtained and Published—Catalogues Improperly Published—Decree—Delivery up—Injunction.*

Decree, by which—"Declared that the plaintiff is entitled to have delivered to him the impressions (by the Answer of defendant J. admitted to be in his possession) of such of the several etchings in the pleadings mentioned as in the catalogue and in the pleadings are

(*a*) Stuart, V.-C. (*b*) Lord Eldon, C. (*c*) Wood, V.-C.

stated to have been etched by the plaintiff; that is to say (description by reference to Nos. in the catalogue); Ordered, that J. shall, within four days after the service of the decree, deliver up the impressions above specified on oath, and leave them with the Clerk of Records and Writs at the Record Office. Ordered, that the defendant S. shall, within four days after the service of the decree, deliver to the Clerk of Records and Writs, at the said Office, the twenty-five copies of the catalogue, being the same as are mentioned in the decree in the other suit of even date. Similar directions as to six copies of the catalogue admitted by J. to be in his possession. Ordered, that the Clerk of Records and Writs shall destroy those copies of the catalogue, giving notice to the solicitors of the several parties of the time and place at which he intends to do so. Injunction restraining the defendants, &c., from making or permitting to be made any engraving or copy of such etchings, or any of them, and from publishing the same; and from parting with or disposing of them or any of them, except in obedience to the decree; and from selling or in any manner publishing the catalogue, or any work being or purporting to be a catalogue of the etchings made by the plaintiff. Provision made for costs. Liberty to apply reserved" (*a*).

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24. CHAPPELL *v.* SHEARD, 2 K. & J. 117, 122.

*Name and Title-page of Song—Injunction.*

Injunction restraining the defendants, &c., "from printing, publishing, selling, exposing for sale, or otherwise disposing of the song 'Minnie Dale,' or any copy or copies thereof, or any other publication containing a colourable imitation of the name, title, or title-page of the plaintiff's said song" (*b*).

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25. MORISON *v.* MOAT, 9 Hare, 241, 267.

*Name of Patent Medicine—Secret Recipe—Injunction.*

Injunction restraining the defendant, &c., "from selling, or causing or procuring to be sold, under the title or designation of 'Morison's Universal Medicine,' or 'Morison's Vegetable Universal Medicine,' any medicine made or manufactured by the defendant, or by or under his order or direction"; and restraining the defendant, &c., "from making or compounding any medicines according to the secret in, &c., and from in any manner using the secret of compounding the said medicines or any part thereof" (*c*).

(*a*) Knight-Bruce, V.-C.

(*b*) Wood, V.-C. And see *Emperor of Austria* v. *Day* (V.-C. Stuart, 2 Giff. 628, 631; Court of Appeal, 3 De G. F. & J. 217, 219), for injunction against printing spurious Hungarian notes, and order for delivery up of plates used in such printing.

(*c*) Turner, V.-C. And see *Ansell* v. *Gaubert*, Seton, 5th ed. 535; *Weston* v. *Hemmons*, 2 V. L. R. Eq. 121.

26. Estcourt *v.* Estcourt Hop Essence Co., 31 L. T. N. S. 567.

*Hop Essence—Secret Recipe—Trade Name—Representation of Succession in Business—Manufacturing Contrary to Agreement—Injunction.*

Injunction restraining the defendants C. Estcourt and the Estcourt Hop Essence Co., &c., "from manufacturing, or selling, or advertising for sale, an article called 'Hop Essence,' or any other substance identical with or only colourably differing from the 'Hop Supplement' manufactured and sold by the plaintiffs, and from using or disclosing to any persons the secret of compounding the said 'Hop Supplement'; and also restraining the defendant company from trading under the name of 'The Estcourt Hop Essence Co., Limited,' and from using any designation, either of the vendors or of the substance offered for sale, calculated to lead purchasers into the belief that such substance is the 'Hop Supplement' manufactured by the plaintiffs, or equivalent or substantially equivalent thereto, or that they, such defendants, or any of them, are the successors in business of the plaintiff's firm, or the original firm who manufactured and sold the said article; and also restraining the defendant C. Estcourt from carrying on or being connected with the business of manufacturing or selling any substance intended to be used as a substitute for hops in brewing" (*a*).

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27. Franks *v.* Weaver, 8 L. T. O. S. 510.

*Fraudulently using Another's Testimonials—Injunction.*

Injunction restraining the defendant, &c., "from making, vending, or offering for sale, or in any manner disposing of any preparation, mixture, compound, or nostrum, having around, or upon, or in connection with the same, or the bottles or other vessels containing the same, any cover, wrapper, envelope, label, bill, circular, notice, advertisement, or other formula, in the terms or to the purport or effect of the cover, wrapper, envelope, label, bill, circular, notice, advertisement, or other formula, in the plaintiff's bill stated to have been used by the said defendant, or any other cover, &c., containing any testimonial in favour of the plaintiff's medicine or medical preparation in the said bill described as 'Franks' Specific Solution of Copaiba,' or in which any statement or representation is made or contained indicating, or implying, or tending to induce the public or purchasers to suppose that such preparation, mixture, compound, or nostrum is the same as 'Franks' Specific Solution of Copaiba,' or referred to in connection with any preparation, mixture, compound, or nostrum, made, vended, or disposed of by the said defendant, or in which any use is made of the character and reputation of the plaintiff, or his said specific solution of copaiba, and from publishing or circulating, or causing to be published or circulated, or in any manner using such cover, &c., as aforesaid" (*b*).

(*a*) Malins, V.-C. The injunction was afterwards rescinded, but on grounds independent of the form of it: L. R. 10 Ch. 276. (*b*) Lord Langdale, M. R.

28. KNOTT *v.* MORGAN, 2 Keen, 213, 219.

*Imitating a Rival Line of Omnibuses—Injunction.*

Injunction restraining the defendant, &c., "from running, or in any manner using, or causing to be used, for the conveyance of passengers, his omnibus in the bill mentioned, or any other omnibus, having painted, stamped, printed, or written thereon the words or names 'London Conveyance' or 'Original Conveyance Company,' or any other names, words, or devices painted, stamped, printed, or written thereon, in such manner as to form or to be a colourable imitation of the names, words, and devices painted, stamped, printed, or written on the omnibuses of the plaintiff" (*a*).

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29. GLENNY *v.* SMITH, 2 Dr. & Sm. 476.

*Trade Name—Injunction.*

Injunction restraining the defendant, &c., "from continuing to use, or from exhibiting or using the words 'Thresher and Glenny,' or the name of the plaintiffs' said firm in any form in or about his said shop in such a way as to deceive the public, or to lead to the belief that his shop is a shop of the plaintiffs, or that the business carried on there is carried on by the plaintiffs, or is in any way connected with the business of the plaintiffs" (*b*).

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30. WOLMERSHAUSEN *v.* G. S. WOLMERSHAUSEN & CO., LD., W. N. 1892, p. 87.

*Trade Name—Misleading Advertisement—Injunction.*

Injunction restraining the defendant company "from carrying on their business of 'G. S. Wolmershausen & Co., Limited.,' without clearly distinguishing such business from the business of the plaintiff, and from publishing advertisements or issuing circulars in their name of 'G. S. Wolmershausen & Co., Limited,' without clearly distinguishing therein their business from the business of the plaintiff, and from otherwise representing in any way that their business is the business or a branch business of the plaintiff" (*c*).

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31. BRINSMEAD *v.* BRINSMEAD, 13 T. L. R. 3.

*Trade Name—Use of Defendant's own Name.*

Injunction restraining the defendant company "from using the name of 'Thomas Edward Brinsmead & Sons, Limited,' or the name of 'Brinsmead,' without adding thereto an express statement that the defendant company are distinct from and have no connection with the old firm of 'John Brinsmead & Sons" (*d*).

(*a*) Lord Langdale, M. R. The M. R. altered the form so as not to restrain all use of the words "London Conveyance Company."

(*b*) Kindersley, V.-C. And see *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Hookham* v. *Pottage*, L. R. 8 Ch. 92; *James* v. *James*, Seton, 6th ed. 539; *Montague* v. *Moore*, *ib.* 238; *Cave* v. *Myers*, *ib.* 238; *Fullwood* v. *Fullwood*, 38 L. T. N. S. 381.

(*c*) Chitty, J.

(*d*) Court of Appeal.

32. PINET *v.* MAISON PINET (1), 14 P. R. 933.

*Trade Name—Boots and Shoes—Injunction on the assumption that Name was Defendant's also.*

Injunction "To restrain the defendants from carrying on their business as manufacturers of boots or shoes under any name or description of which the name of 'Pinet' forms part, without clearly distinguishing the boots or shoes made or sold by the defendants from those made or sold by the plaintiffs" (*a*).

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33. PINET *v.* MAISON PINET (2), (1898) 1 Ch. 179; 15 P. R. 65.

*Trade Name—Boots and Shoes—Injunction where Name fraudulently adopted by the Defendant.*

Injunction restraining the defendants "from using the name 'Pinet' or any title or description including that name in connection with the manufacture or sale of boots or shoes, and from doing any other act or thing conferring, or purporting to confer, either directly or indirectly, upon any other person or persons any right to use the said name or other such title or description as aforesaid in such connection as aforesaid, and from selling or offering for sale any boots or shoes not of the plaintiffs' manufacture under the name of 'Pinet's Special Boots and Shoes,' or 'Pinet's Boots and Shoes'" (*b*).

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34. M. MELACHRINO & Co. *v.* R. MELACHRINO & Co., May 29th, 1888.

*Name of Firm—"Original"—Injunction.*

Injunction restraining the defendants, &c., "from carrying on business as dealers in cigarettes under the name of 'R. Melachrino & Co.,' or under any other name containing the name 'Melachrino' so arranged or contrived as to represent or lead to the belief that the business so carried on is the business carried on by the plaintiffs, or is in any way connected with the business of the plaintiffs, and from using the name 'Melachrino' in any other manner calculated to represent or lead to such belief; and from selling or offering or exposing for sale, or procuring to be sold, any cigarettes not of the manufacture or merchandise of the plaintiffs, with statements that such cigarettes are 'Original Melachrino Cigarettes,' and from in any other manner selling or passing off their cigarettes as or for 'Original Melachrino Cigarettes,' or cigarettes of the manufacture or merchandise of the plaintiffs" (*c*).

(*a*) Court of Appeal. (*b*) North, J. (*c*) Chitty, J.

35. ARMY AND NAVY CO-OPERATIVE SOCIETY, LD. *v.* ARMY AND NAVY AND CIVIL SERVICE CO-OPERATIVE SOCIETY OF INDIA, LD., 91 L. T. (Journal) 228.

*Name of Company—User on Goods—Injunction.*

Injunction restraining the defendants "from using on or in connection with any goods sold, exported, or supplied by them, the stamp or name of 'Army and Navy Co-operative Society, Limited,' either with or without the words 'of India,' or any other stamp or name so closely resembling the name of the plaintiff as would be calculated to lead the public in India and elsewhere to suppose that the goods sold, exported, or supplied by the defendants were goods sold, exported, or supplied by the plaintiffs" (*a*).

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36. HENDRIKS *v.* MONTAGU, 17 Ch. D. 638.

*Name of Company—Registration—User—Advertisement, &c.—Injunction.*

Injunction restraining the defendants "from applying to the Registrar of Joint Stock Companies in England for registration under the Companies Acts of any company to be incorporated under the name of 'The Universe Life Assurance Association,' or any other name likely to mislead or deceive the public into the belief that the company, being incorporated as aforesaid, is the same as 'The Universal Life Assurance Society'; from issuing or publishing advertisements, circulars, or prospectuses representing that a company is to be incorporated pursuant to the Companies Act, 1862, under the name of 'The Universe Life Assurance Association, Limited,' or any such other name as aforesaid; and from carrying on or commencing any business under the name of 'The Universe Life Assurance Association, Limited,' or any such other name as aforesaid" (*a*).

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37. LEE *v.* HALEY, L. R. 5 Ch. 155.

*Name of Company—Injunction against User in certain Locality.*

Injunction restraining the defendant, &c., "from continuing to use and from exhibiting or using the words 'The Pall Mall Guinea Coal Company,' in Pall Mall, or any other name or style so framed as to be a colourable imitation of the name or style in which the plaintiffs' branch business mentioned in the bill is carried on, or so as to deceive the public, or to lead to the belief that the business carried on by the defendant is the same as the business carried on by the plaintiffs under the name or style of 'The Guinea Coal Company,' or is in any way connected therewith" (*b*).

(*a*) Court of Appeal. (*b*) Malins, V.-C.

38. WHEELER *v.* JOHNSTON, 3 L. R. Ir. 284.

*Name of Mineral Springs—Injunction.*

Injunction restraining the defendant, &c., "from using the words 'Cromac Springs' in connection with his trade or business as a manufacturer or seller of mineral waters, so as to represent that his said waters are so manufactured or sold by the plaintiffs at their works in the bill mentioned, called 'The Cromac Springs,' and from using the words 'Cromac Springs' as the name of the defendant's place of business so as to represent as aforesaid" (*a*).

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39. BRAHAM *v.* BEACHIM, 7 Ch. D. 848, 857.

*Name of Collieries—Injunction until certain events.*

Injunction restraining the defendants, "unless and until they shall acquire a colliery or coal mine within the parish of Radstock, from trading under or using the name or style of 'The Radstock Colliery Proprietors,' or any other name or style signifying that the defendants, or either of them, are proprietors of any colliery or collieries at Radstock"; and restraining the defendants, "unless and until they shall become authorised to sell or supply any coals raised or gotten from any colliery or coal mine within the parish of Radstock, from using any style or name signifying or implying that the defendants are selling or supplying, or are authorised to sell or supply, any coal raised or gotten from any colliery or coal mine within the parish of Radstock" (*b*).

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40. SCOTT *v.* SCOTT, 16 L. T. N. S. 143.

*False Representation of Continuation of Business—Injunction.*

Injunction restraining the defendants, &c., "from allowing or permitting the brass plate affixed by the defendants to the door of the premises in Regent Street to remain affixed, with any inscription thereon representing or holding out to the customers of the late partnership of 'R. & W. Scott,' or to any other persons whatsoever, that they are carrying on business in continuation of, or in succession to, the business carried on by the late firm of 'R. & W. Scott'" (*c*).

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41. BURROWS *v.* FOSTER, 1 N. R. 156.

*False Representation of Continuation of Business—Soliciting former Customers—Injunction.*

Injunction restraining the defendant, &c., "from issuing or sending, and from causing or procuring to be issued or sent, to any person or persons any further copies or copy of the circular or letter bearing date

(*a*) Chatterton, V.-C. of I.
(*b*) Fry, J.
(*c*) Wood, V.-C. And see *Hoffman* v. *Duncan*, Seton, 5th ed. 589; *Witt* v. *Corcoran*, *ib.* 590; *Gravely* v. *Winchester*, *ib.* 591; *England* v. *Curling*, 8 Beav. 129.

the , in the plaintiffs' bill mentioned, or any other circular or letter signifying or importing that the business carried on by him the said defendant is, and from in any manner representing such business to be a continuation of the business formerly carried on by the firms of Foster, Lacy & Co., and Bashall, Lacy & Co., in the plaintiffs' bill mentioned, or by either of such firms, and from in any manner soliciting or inviting any person or persons who, at the date of the indenture of the , in the plaintiffs' bill mentioned, was or were a customer or correspondent, customers or correspondents, of the firms of Foster, Lacy & Co., and Bashall, Lacy & Co., or of either of such firms, and from causing or procuring any such person or persons to be solicited or invited to become or be a customer or correspondent or customers or correspondents of, or to employ him the said defendant in the business carried on by him, or to cease from employing or not to employ the said plaintiffs in the business formerly carried on by the said firms of Foster, Lacy & Co., and Bashall, Lacy & Co., or either of them" (*a*).

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42. MASSAM *v.* THORLEY'S CATTLE FOOD CO., 14 Ch. D. 748, 762.

*False Representation of Continuation of Business—Trade Name—Labels—Advertisements—Circulars—Injunction.*

Injunction restraining the defendants, &c., "from selling, shipping, or exporting, or causing or procuring or allowing to be sold, shipped, or exported, and from in any manner representing, or causing or procuring to be represented, any goods manufactured by the defendant company as the manufacture or goods of the late Joseph Thorley, or of the plaintiffs, his trustees and successors in business; and also from in any manner representing, or causing or procuring to be represented, or doing anything which shall lead to the belief that the defendant company have been or are carrying on the business of the late Joseph Thorley; and also from affixing, or permitting or causing to be affixed to any goods or articles manufactured, or bought, or procured, or sold, or shipped, or exported by the defendant company, or otherwise using or employing, or permitting to be used or employed, any labels, wrappers, or marks used by the late Joseph Thorley and the plaintiffs, his trustees and successors in business, or so contrived and prepared as to represent or lead to the belief that the goods or articles manufactured, or sold, or shipped, or exported by the defendant company, are the goods or manufacture of the late Joseph Thorley or of the plaintiffs; and also from employing, using, or circulating, or causing to be employed, used, or circulated, any circulars, pamphlets, notices, or advertisements of the late Joseph Thorley or of the plaintiffs, or which shall in any manner represent or lead to the belief that the defendant company have been or are carrying on the business of the late Joseph Thorley, or that they are his successors in business" (*b*).

(*a*) Turner, L. J. (*b*) James, L. J.

43. LABOUCHERE *v.* DAWSON, L. R. 13 Eq. 322, 327.

*Soliciting former Customers after Sale of Business—Injunction.*

Injunction restraining the defendant, &c., "from applying to any person who was a customer of the firm of B. Dawson & Co. prior to the , privately by letter, personally, or by a traveller, asking such customer to continue to deal with the defendant, or not to deal with the plaintiffs, the Kirkstall Brewery Co., Limited" (*a*).

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44. WHEELER & WILSON MANUFACTURING CO. *v.* SHAKESPEAR, 39 L. J. Ch. 36, 38, 41.

*False Representation of Agency—Injunction.*

Injunction restraining the defendant, &c., "from, in manner aforesaid, or in any other manner, calling, or describing, or representing, his said shop or place of business, No. 32, Union Street, Birmingham, or any other shop, warehouse, or place, not belonging to the plaintiffs, as 'The Original Wheeler & Wilson Sewing Machine Depôt,' or 'Wheeler & Wilson Sewing Machine Depôt, established in 1860,' or as a place of business of the plaintiffs, or of 'Wheeler & Wilson,' manufacturers of sewing machines; and from in manner aforesaid, or in any other manner, calling, or describing, or representing, himself or his said firm of T. Shakespear & Co., as the agent or agents for the American 'Wheeler & Wilson' sewing machines, in the same manner in which he has been since 1860, or as the agent of the 'Wheeler & Wilson' sewing machines; and from in any other manner representing himself as the agent of the plaintiffs, and from permitting the names 'Wheeler and Wilson' to remain over the door of his shop or business premises, at 32, Union Street, Birmingham, or on the brass plate under the window, or on the brass plate on the door jamb, or on any other part of his said shop or place of business, or on any placard in his said shop, or on the door, or in the window thereof; and from causing the names 'Wheeler & Wilson' to be inserted in any railway time-table, or directory, or other book or publication, under the head of, or described as, sewing machine manufacturers, as residing or carrying on business at No. 32, Union Street, Birmingham, or as in any other manner connected with that or any other shop or place of business of the said defendant, and from doing any other act, matter, or thing representing, or whereby the trade or the public may be led to believe that the defendant has any connection whatever in business with the plaintiffs" (*b*).

(*a*) Lord Romilly, M. R. Repeated by the House of Lords in *Trego* v. *Hunt*, (1895) App. Cas. 7, 30. See also *Leggott* v. *Barrett*, 15 Ch. D. 306; and *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191. As to opening letters containing orders intended for another firm, see *Scheile* v. *Brakell*, 11 W. R. 796; and Seton, 5th ed. 584; *Witt* v. *Corcoran*, Seton, 5th ed. 590; *England* v. *Curling*, 8 Beav. 129.

(*b*) James, V.-C.

45. JAMES *v.* JAMES, 41 L. J. Ch. 358.

*Fraudulent Disuse of Christian Name—Claim to be the "Only Genuine"—Injunction.*

Injunction restraining the defendant, &c., "from using the name of 'Robert James' singly, instead of 'Robert Joseph James,' or 'R. J. James'; also from stating or inserting in his advertisement or circular any words or expressions asserting or suggesting that the ointment manufactured and sold by the plaintiffs is spurious and not genuine" (*a*).

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46. LIEBIG'S EXTRACT OF MEAT CO. *v.* ANDERSON, 55 L. T. N. S. 206, 209.

*Claim to be the only Genuine—Injunction.*

Injunction restraining the defendant, &c., "from using the wrappers or making the advertisements complained of containing the words 'This is the only genuine' with reference to the Liebig's Extract of Meat sold or offered for sale by the defendant, and from using any other wrapper or making any other advertisement with reference to such extract sold or offered for sale by the defendant, representing that such extract or the defendant's brand of such extract is the only genuine" (*b*).

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47. THORLEY'S CATTLE FOOD CO. *v.* MASSAM, 14 Ch. D. 763, 781.

*Trade Libel—Representation that the Plaintiffs' Goods are Spurious—Injunction.*

Injunction restraining the defendants, &c., "from advertising, or representing, or suggesting in their advertisements or circulars that they are alone possessed of the secret for compounding the condiment known as 'Thorley's Food for Cattle,' and from representing, or suggesting, or doing anything calculated to represent or suggest, that the cattle food manufactured and sold by the plaintiffs is spurious or not genuine" (*c*).

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48. THOMAS *v.* WILLIAMS, 14 Ch. D. 864, 875.

*Trade Libel—Representation that the Plaintiff's Goods are Spurious—Injunction.*

Injunction restraining the defendants, &c., "from issuing or permitting the issue of the circular dated the , and from in any manner representing or suggesting that the goods now made or sold by the plaintiff are imitations of the goods made or sold by J. Thomas & Sons, or Edmund Holyoake" (*d*).

(*a*) Lord Romilly, M. R.
(*b*) Chitty, J.
(*c*) Malins, V.-C., affirmed by C. A.
(*d*) Fry, J.

49. Routh *v.* Webster, 10 Beav. 561, 563.

*Unauthorised and Injurious Use of a Person's Name—Injunction.*

Injunction restraining the defendants, &c., "from printing, publishing, or circulating, any prospectus or other document of, or relating to a certain company called 'The Economic Conveyance Company,' mentioned and referred to in the plaintiff's bill in this cause, with the plaintiff's name thereto, and from in any manner using the name of the plaintiff so as to identify him as a party interested in, or associated with, the said company" (*a*).

(*a*) Lord Langdale, M. R.

# APPENDIX C.

## INTERNATIONAL ARRANGEMENTS.

(*See Patents, &c. Acts*, 1883—1888, § 103, *supra*.)

### I.

### International Convention for the Protection of Industrial Property.

*Signed at Paris, March 20th*, 1883.

[*Ratifications exchanged at Paris, June 6th*, 1884.]

(*Official Translation.*)

His Majesty the King of the Belgians, His Majesty the Emperor of Brazil, His Majesty the King of Spain, the President of the French Republic, the President of the Republic of Guatemala, His Majesty the King of Italy, His Majesty the King of the Netherlands, His Majesty the King of Portugal and the Algarves, the President of the Republic of Salvador, His Majesty the King of Servia, and the Federal Council of the Swiss Confederation,

Being equally animated with the desire to secure by mutual agreement, complete and effectual protection for the industry and commerce of their respective subjects and citizens, and to provide a guarantee for the rights of inventors, and for the loyalty of commercial transactions, have resolved to conclude a convention to that effect, and have named as their plenipotentiaries, that is to say:—

(*Here follow the appointments of the plenipotentiaries.*)

Who, having communicated to each other their respective full powers, found in good and due form, have agreed upon the following Articles:—

#### Article I.

The Governments of Belgium, Brazil, Spain, France, Guatemala, Italy, Holland, Portugal, Salvador, Servia, and Switzerland constitute themselves into a union for the protection of industrial property.

### Article II.

The subjects or citizens of each of the contracting states shall, in all the other states of the union, as regards patents, industrial designs or models, trade marks and trade names, enjoy the advantages that their respective laws now grant, or shall hereafter grant, to their own subjects or citizens.

Consequently they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided they observe the formalities and conditions imposed on subjects or citizens by the internal legislation of each state.

### Article III.

Subjects or citizens of states not forming part of the union, who are domiciled, or have industrial or commercial establishments in the territory of any of the states of the union, shall be assimilated to the subjects or citizens of the contracting states.

### Article IV.

Any person who has duly applied for a patent, industrial design or model, or trade mark in one of the contracting states, shall enjoy, as regards registration in the other states, and reserving the rights of third parties, a right of priority during the periods hereinafter stated.

Consequently, subsequent registration in any of the other states of the union before expiry of these periods shall not be invalidated through any acts accomplished in the interval: either, for instance, by another registration, by publication of the invention, or by the working of it by a third party, by the sale of copies of the design or model, or by use of the trade mark.

The above-mentioned terms of priority shall be six months for patents, and three months for industrial designs and models and trade marks. A month longer is allowed for countries beyond sea.

### Article V.

(Relates only to Patents.)

### Article VI.

Every trade mark duly registered in the country of origin shall be admitted for registration, and protected in the form originally registered in all the other countries of the union (*a*).

That country shall be deemed the country of origin where the applicant has his chief seat of business.

If this chief seat of business is not situated in one of the countries

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(*a*) No effect can be given to this or any other article of the convention by the Courts of the United Kingdom, except so far as it is embodied in § 103 of the Patents Act, 1883: *In re Californian Fig Syrup Co.*, 40 Ch. D. 620. And it seems that, to entitle a foreign mark to protection in the United Kingdom, it must comply with the requirements of § 64: *In re Carter Medicine Co.*, (1892) 3 Ch. 472. And similarly in the United States legislation is necessary to enable effect to be given to it. See opinion of the Attorney-General of the United States, 47 U. S. Pat. Gaz. 397; and *Ex parte Zwack & Co.*, 76 U. S. Pat. Gaz. 1855.

of the union, the country to which the applicant belongs shall be deemed the country of origin.

Registration may be refused if the object for which it is solicited is considered contrary to morality or public order.

### ARTICLE VII.

The nature of the goods on which the trade mark is to be used can, in no case, be an obstacle to the registration of the trade mark.

### ARTICLE VIII.

A trade name shall be protected in all the countries of the union, without necessity of registration, whether it form part or not of a trade mark.

### ARTICLE IX.

All goods illegally bearing a trade mark or trade name may be seized on importation into those states of the union where this mark or name has a right to legal protection.

The seizure shall be effected at the request of either the proper public department or of the interested party, pursuant to the internal legislation of each country.

### ARTICLE X.

The provisions of the preceding Article shall apply to all goods falsely bearing the name of any locality as indication of the place of origin, when such indication is associated with a trade name of a fictitious character or assumed with a fraudulent intention.

Any manufacturer of, or trader in, such goods, established in the locality falsely designated as the place of origin, shall be deemed an interested party.

### ARTICLE XI.

The high contracting parties agree to grant temporary protection to patentable inventions, to industrial designs or models, and trade marks, for articles exhibited at official or officially recognized international exhibitions.

### ARTICLE XII.

Each of the high contracting parties agrees to establish a special Government Department for industrial property, and a central office for communication to the public of patents, industrial designs or models, and trade marks.

### ARTICLE XIII.

An international office shall be organised under the name of "Bureau International de l'Union pour la Protection de la Propriété Industrielle" (International Office of the Union for the Protection of Industrial Property).

This office, the expense of which shall be defrayed by the Governments of all the contracting states, shall be placed under the high authority of the Central Administration of the Swiss Confederation, and shall work under its supervision. Its functions shall be determined by agreement between the states of the union.

ARTICLE XIV.

The present convention shall be submitted to periodical revisions, with a view to introducing improvements calculated to perfect the system of the union.

To this end conferences shall be successively held in one of the contracting states by delegates of the said states. The next meeting shall take place in 1885 at Rome.

ARTICLE XV.

It is agreed that the high contracting parties respectively reserve to themselves the right to make separately, as between themselves, special arrangements for the protection of industrial property, in so far as such arrangements do not contravene the provisions of the present convention.

ARTICLE XVI.

States which have not taken part in the present convention shall be permitted to adhere to it at their request.

Such adhesion shall be notified officially through the diplomatic channel to the Government of the Swiss Confederation, and by the latter to all the others. It shall imply complete accession to all the clauses and admission to all the advantages stipulated by the present convention.

ARTICLE XVII.

The execution of the reciprocal engagements contained in the present convention is subordinated, in so far as necessary, to the observance of the formalities and rules established by the constitutional laws of those of the high contracting parties who are bound to procure the application of the same, which they engage to do with as little delay as possible.

ARTICLE XVIII.

The present convention shall come into operation one month after the exchange of ratifications, and shall remain in force for an unlimited time, till the expiry of one year from the date of its denunciation. This denunciation shall be addressed to the Government commissioned to receive adhesions. It shall only affect the denouncing state, the convention remaining in operation as regards the other contracting parties.

ARTICLE XIX.

The present convention shall be ratified, and the ratifications exchanged in Paris, within one year at the latest.

In witness whereof the respective plenipotentiaries have signed the same, and have affixed thereto their seals.

Dated at Paris the 20th March, 1883.

(*Signed by the Plenipotentiaries.*)

## II.

### Final Protocol.

*(Official Translation.)*

On proceeding to the signature of the convention concluded this day between the Governments of Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Servia, and Switzerland, for the protection of industrial property, the undersigned plenipotentiaries have agreed as follows:

1. The words "industrial property" are to be understood in their broadest sense; they are not to apply simply to industrial products properly so called, but also to agricultural products (wines, corn, fruits, cattle, &c.), and to mineral products employed in commerce (mineral waters, &c.).

2. (Relates only to Patents.)

3. The last paragraph of Article II. does not affect the legislation of each of the contracting states as regards the procedure to be followed before the tribunals, and the competence of those tribunals.

4. Paragraph 1 of Article VI. is to be understood as meaning that no trade mark shall be excluded from protection in any state of the union, from the fact alone that it does not satisfy, in regard to the signs composing it, the conditions of the legislation of that state; provided that on this point it comply with the legislation of the country of origin, and that it had been properly registered in said country of origin. With this exception, which relates only to the form of the mark, and under reserve of the provisions of the other articles of the convention, the internal legislation of each state remains in force.

To avoid misconstruction, it is agreed that the use of public armorial bearings and decorations may be considered as being contrary to public order in the sense of the last paragraph of Article VI.

5. The organisation of the special department for industrial property mentioned in Article XII. shall comprise, so far as possible, the publication in each state of a periodical official paper.

6. (After providing for the common expenses of the international office, continues:—)

The Swiss Government will superintend the expenses of the international office, advance the necessary funds, and render an annual account, which will be communicated to all the other administrations.

The international office will centralise information of every kind relating to the protection of industrial property, and will bring it together in the form of a general statistical statement which will be distributed to all the administrations. It will interest itself in all matters of common utility to the union, and will edit, with the help of the documents supplied to it by the various administrations, a periodical paper in the French language dealing with questions regarding the object of the union.

The numbers of this paper, as well as all the documents published by the international office, will be circulated among the administrations of the states of the union in the proportion of the number of contributing units as mentioned above. Such further copies as may be desired either by the said administrations, or by societies or private persons, will be paid for separately.

The international office shall at all times hold itself at the service of members of the union, in order to supply them with any special information they may need on questions relating to the international system of industrial property.

The administration of the country in which the next conference is to be held will make preparation for the transactions of that conference, with the assistance of the international office.

The director of the international office will be present at the meetings of the conferences, and will take part in the discussions, but without the privilege of voting.

He will furnish an annual report upon his administration of the office, which shall be communicated to all the members of the union.

The official language of the international office will be French.

7. The present final protocol, which shall be ratified together with the convention concluded this day, shall be considered as forming an integral part of, and shall have the same force, validity, and duration as the said convention.

In witness whereof the undersigned plenipotentiaries have drawn up the present protocol.

(*Signed by the Plenipotentiaries.*)

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## III.

### ACCESSION OF HER MAJESTY'S GOVERNMENT TO THE CONVENTION.

The undersigned, ambassador extraordinary and plenipotentiary of Her Majesty the Queen of the United Kingdom of Great Britain and Ireland to the French Republic, declares that her Britannic Majesty, having had the International Convention for the Protection of Industrial Property, concluded at Paris on the 20th March, 1883, and the protocol relating thereto, signed on the same date, laid before her, and availing herself of the right reserved by Article XVI. of that convention to States not parties to the original convention, accedes, on behalf of the United Kingdom of Great Britain and Ireland, to the said international convention for the protection of industrial property, and to the said protocol, which are to be considered as inserted word for word in the present declaration, and formally engages, as far as regards the President of the French Republic and the other high contracting parties, to co-operate on her part in the execution of the stipulations contained in the convention and protocol aforesaid.

The undersigned makes this declaration on the part of Her Britannic Majesty, with the express understanding that power is reserved to Her Britannic Majesty to accede to the Convention on behalf of the Isle of Man and the Channel Islands, and any of Her Majesty's possessions, on due notice to that effect being given through Her Majesty's Government.

In witness whereof the undersigned, duly authorised, has signed the present declaration of accession, and has affixed thereto the seal of his arms.

Done at Paris, on the 17th day of March, 1884.

(L.S.) (Signed) LYONS.

## IV.

### Declaration of Acceptance of Accession.

(*Official Translation.*)

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having acceded to the International Convention relative to the protection of industrial property, concluded at Paris, March 20th, 1883, together with a protocol dated the same day, by the declaration of accession delivered by Her Ambassador Extraordinary and Plenipotentiary to the Government of the French Republic; the text of which declaration is word for word as follows:—

(*Here is inserted the text of No. III. in English.*)

The President of the French Republic has authorised the undersigned, President of the Council, Minister for Foreign Affairs, to formally accept the said accession, together with the reserves which are contained in it concerning the Isle of Man, the Channel Islands, and all other possessions of Her Britannic Majesty, engaging as well in his own name as in that of the other high contracting parties to assist in the accomplishment of the obligations stipulated in the convention and the protocol thereto annexed, which may concern the United Kingdom of Great Britain and Ireland.

In witness whereof the undersigned, duly authorised, has drawn up the present Declaration of Acceptance and has affixed thereto his seal.

Done at Paris, the 2nd April, 1884.

(L.S.) (Signed) Jules Ferry.

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## V.

### Order in Council.

(*The Patents Act*, 1883.)

At the Court at Windsor, the 26th of June, 1884. Present, the Queen's Most Excellent Majesty in Council.

Whereas by the provisions of the Patents, Designs, and Trade Marks Act, 1883, it is, amongst other things, provided:—

That if Her Majesty is pleased to make any arrangement with the Government or Governments of any foreign State or States for mutual protection of inventions, designs, and trade marks, or any of them, then any person who has applied for protection for any invention, design, or trade mark in any such State shall, subject to the conditions further provided and set forth in the said Act, be entitled to a patent for his invention, or to registration of his design or trade mark (as the case may be) under the said Act in priority to other applicants, and such patent or registration shall have the same date as the date of the protection obtained in such foreign State:

And whereas it has pleased Her Majesty to make an arrangement of the nature contemplated by the said Act by and in virtue of a declaration signed and sealed by Her Majesty's Ambassador at

Paris on the 17th of March, 1884, duly conveying the accession of Great Britain to the International Convention and Protocol for the Protection of Industrial Property, signed by representatives of certain powers on the 20th of March, 1883, and duly ratified on the 6th of June, 1884, power being reserved to Her Majesty to hereafter accede to the provisions of the said Convention and protocol on behalf of the Isle of Man, the Channel Islands, and any of Her Majesty's possessions, which declaration of accession was duly accepted by the French Government on behalf of the signatory powers by and in virtue of a declaration dated the 2nd of April, 1884:

Now, therefore, Her Majesty, by and with the advice and consent of her Privy Council, and by virtue of the authority committed to her by the said Act, doth declare, and it is hereby declared, that the provisions of the said Act hereinbefore specified shall apply to the following countries, viz:—Belgium, Brazil, France, Guatemala, Italy, Netherlands, Portugal, Salvador, Servia, Spain, Switzerland, Ecuador,* and Tunis.*

And it is hereby further ordered and declared that this order shall take effect from the 7th of July, 1884.

C. L. PEEL.

* These States had acceded to the Convention and Protocol.

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## VI.

## SUBSEQUENT ORDERS IN COUNCIL.

### *Orders in Council under* § 103 *making that Section applicable.*

| | Date of Order. | To take effect from— | "London Gazette." |
|---|---|---|---|
| Santo Domingo ..... | Jan. 27th, 1885 .. | Jan. 27th, 1885 .. | 1885, p. 418. |
| Sweden and Norway..... | July 9th, 1885.... | July 1st, 1885 .... | 1885, p. 3173. |
| Paraguay and Uruguay .. | Sept. 24th, 1886 .. | Sept. 24th, 1886 .. | 1886, p. 4725. |
| United States of America.. | July 12th, 1887 .. | July 12th, 1887 .. | 1887, p. 3827. |
| Netherlands East Indies .. | Nov. 17th, 1888 .. | March 17th, 1889.. | 1888, p. 6412. |
| Mexico..... | May 28th, 1889 .. | Sept. 28th, 1889 .. | 1889, p. 2954. |
| Curaçao and Surinam .... | May 17th, 1890 .. | Sept. 17th, 1890 .. | 1890, p. 2891. |
| Santo Domingo ..... | Oct. 21st, 1890 .. | Feb. 21st, 1891 .. | 1890, p. 5661. |
| Roumania ..... | Aug. 5th, 1892 .. | Dec. 5th, 1892.... | 1892, p. 4554. |
| Ecuador ..... | May 16th, 1893 .. | Sept. 16th, 1893 .. | 1893, p. 2899. |
| Greece ..... | Oct. 15th, 1894 .. | Feb. 15th, 1895 .. | 1894, p. 5918. |
| Denmark..... | Nov. 20th, 1894 .. | March 20th, 1895.. | 1894, p. 6879. |

### *Orders in Council under* § 104 *making* § 103 *applicable.*

| | | | |
|---|---|---|---|
| Queensland ..... | Sept. 17th, 1885 .. | Sept. 17th, 1885 .. | 1885, p. 4429. |
| New Zealand ..... | Feb. 8th, 1890.... | June 8th, 1890 .. | 1890, p. 727. |
| Tasmania ..... | April 30th, 1894 .. | Aug. 30th, 1894 .. | 1894, p. 2578. |
| Western Australia ..... | May 11th, 1895 .. | Sept. 11th, 1895 .. | 1895, p. 2848. |

### *Orders in Council making* § 103 *cease to be applicable.*

| | | | |
|---|---|---|---|
| Ecuador ..... | April 16th, 1886 .. | Dec. 26th, 1886 .. | 1886, p. 1894. |
| Salvador ..... | Sept. 24th, 1886 .. | Aug. 17th, 1887 .. | 1886, p. 4726. |
| Santo Domingo ..... | May 28th, 1889 .. | May 28th, 1889 .. | 1889, p. 3035. |
| Guatemala ..... | Feb. 2nd, 1895 .. | Nov. 8th, 1895 .. | 1895, p. 754. |

# APPENDIX D.

## THE TRADE MARKS REGISTRATION ACTS, 1875—1877, WITH THE ORDERS IN COUNCIL THEREUNDER, AND THE COTTON MARKS RULES.

[*All repealed.*]

## THE TRADE MARKS REGISTRATION ACT, 1875.

### 38 & 39 Vict. c. 91 (*a*).

*An Act to establish a Register of Trade Marks.*

[13*th August*, 1875.]

*Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :*

Registration of trade marks.

1. *A register of trade marks as defined by this Act, and of the proprietors thereof, shall be established under the superintendence of the Commissioners of Patents, and from and after the first day of July one thousand eight hundred and seventy-six a person shall not be entitled to institute any proceeding to prevent the infringement of any trade mark as defined by this Act until and unless such trade mark is registered in pursuance of this Act.*

Characteristics of registered trade mark.

2. *A trade mark must be registered as belonging to particular goods, or classes of goods ; and when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in such particular goods or classes of goods, and shall be determinable with such goodwill ; but subject as aforesaid, registration of a trade mark shall be deemed to be equivalent to public use of such mark.*

Title of first proprietor of a trade mark.

3. *The registration of a person as first proprietor of a trade mark shall be primâ-facie evidence of his right to the exclusive use of such trade mark, and shall, after the expiration of five years from the date of such registration, be conclusive evidence of his right to the exclusive use of such trade mark, subject to the provisions of this Act as to its connection with the goodwill of a business.*

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(*a*) It is frequently necessary to refer to these Acts, though repealed, and they are consequently printed here, for facility of reference.

Title of proprietor claiming by transmitted proprietorship.

4. *Every proprietor registered in respect to a trade mark subsequently to the first registered proprietor shall, as respects his title to that trade mark, stand in the same position as if his title were a continuation of the title of the first registered proprietor.*

Rectification of register.

5. *If the name of any person who is not for the time being entitled to the exclusive use of a trade mark in accordance with this Act, or otherwise in accordance with law, is entered on the register of trade marks as a proprietor of such trade mark, or if the registrar refuses to enter on the register as proprietor of a trade mark the name of any person who is for the time being entitled to the exclusive use of such trade mark in accordance with this Act, or otherwise in accordance with law, or if any mark is registered as a trade mark which is not authorised to be so registered under this Act, any person aggrieved may apply in the prescribed manner for an order of the Court that the register may be rectified: and the Court may either refuse such application, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may award damages to the party aggrieved.*

*Where each of several persons claims to be registered as proprietor of the same trade mark, the registrar may refuse to comply with the claims of any of such persons until their rights have been determined by the Court, and the registrar may himself submit or require the claimants to submit in the prescribed manner their rights to the Court.*

*The Court may, in any proceeding under this section, decide any question as to whether a mark is or is not such a trade mark as is authorised to be registered under this Act, also any question relating to the right of any person who is party to such proceeding to have his name entered on the register of trade marks, or to have the name of some other person removed from such register, also any other question that it may be necessary or expedient to decide for the rectification of the register.*

*The Court may direct an issue to be tried for the decision of any question of fact which may require to be decided for the purposes of this section.*

*Whenever any order has been made rectifying the register the Court shall by its order direct that due notice of such rectification be given to the registrar.*

Restrictions on registry of trade marks.

6. *The registrar shall not, without the special leave of the Court, to be given in the prescribed manner, register in respect of the same goods or classes of goods a trade mark identical with one which is already registered with respect to such goods or classes of goods, and the registrar shall not register with respect to the same goods or classes of goods a trade mark so nearly resembling a trade mark already on the register with respect to such goods or classes of goods as to be calculated to deceive.*

*It shall not be lawful to register as part of or in combination with a trade mark 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; or any scandalous designs.*

Establishment of registry and general rules.

7. *Subject as aforesaid, a register office shall be established from and after such time (not being later than the first day of January one thousand eight hundred and seventy-six), in such manner, and with such officers, and at such salaries, to be paid out of moneys provided by Parliament, as the Lord Chancellor may, with the consent of the Treasury, direct; and the Lord Chancellor may, from time to time, with the assent of the Treasury as to fees, make, and when made, alter, annul, or vary, such general rules as to the registry of trade marks, and as to notices to be given by advertisement before the registration of trade marks, and as to the classification of goods for the purposes of this Act, and as to the registration of first and subsequent proprietors of trade marks, and as to the fees to be charged for registration, and also for the continuance of a trade mark on the register or otherwise, and as to the removal from the register of any trade mark, as to notices, and as to the persons entitled to inspect the register, and as to any proceedings to be taken to obtain the judgment or leave of the Court in any matter in which the judgment or leave of the Court is required to be obtained under this Act, and generally for the purpose of carrying into effect this Act, as he may deem expedient.*

*Any rules made in pursuance of this section shall be laid before both Houses of Parliament if Parliament be then sitting, or if not then sitting, then within ten days from the then next assembling of Parliament, and shall be of the same validity as if they had been enacted by Parliament; provided that if either House of Parliament resolve, within one month after such rules have been laid before such House, that any of such rules ought not to continue in force, any rule in respect of which such resolution has been passed shall, after the date of such resolution, cease to be of any force, without prejudice, nevertheless, to the making of any other rule in its place, or to anything done in pursuance of any such rules before the date of such resolution.*

Certificate of registrar to be evidence.

8. *The certificate of the registrar as to any entry, matter, or thing which he is authorised by this Act, or any general rules made thereunder, to make or do, shall be evidence of such entry having been made, and of the contents thereof, and of such matters and things having been done or left undone.*

Provision as to Cutlers Company and Sheffield corporate marks.

9. *With respect to the master, wardens, searchers, assistants, and commonalty of the Company of Cutlers in Hallamshire, in the County of York (in this Act called "the Cutlers Company"), and the marks or devices (in this Act called "Sheffield corporate marks") assigned or to be assigned by the master, wardens, searchers, and assistants of that Company, be it enacted as follows:*

(1.) *Within the prescribed time and in the prescribed manner the Cutlers Company shall at their own expense deliver to the registrar under this Act copies of all Sheffield corporate marks in force at the time of such delivery:*

(2.) *When any person, after the passing of this Act, applies to the said master, wardens, searchers, and assistants to assign to him any mark or device, notice of such application, with a copy of*

*such mark or device, shall, within the prescribed time and in the prescribed manner, be delivered to the registrar under this Act; and such mark or device shall not be assigned until after the expiration of the prescribed period from the giving of such notice. In like manner, when any person applies for the registration under this Act of a trade mark as belonging to any goods or class of goods specified in § 2 of the Cutlers Company's Act of* 1860, *notice of such application, with a copy of such trade mark, shall, within the prescribed time and in the prescribed manner, be delivered to the Cutlers Company; and such trade mark shall not be registered until after the expiration of the prescribed period from the giving of the last-mentioned notice:*

(3.) *Upon the assigning of any such mark or device, or the registration of any such trade mark as aforesaid, notice of the assignment or registration shall, within the prescribed time and in the prescribed manner, be given to the registrar under this Act, or to the Cutlers Company, as the case may be:*

(4.) *The registrar under this Act, without the special leave of the Court, to be given only in cases where the applicant proves his right, shall not in respect of any goods or classes of goods with respect to which a Sheffield corporate mark shall have been assigned and actually used, and of which mark a copy or description or notice of the assigning thereof shall have been delivered or given to the registrar as aforesaid, register a trade mark identical with such Sheffield corporate mark, or so nearly resembling the same as to be calculated to deceive:*

(5.) *The master, wardens, searchers, and assistants of the Cutlers Company shall not assign to any person a mark or device identical with any trade mark registered under this Act, and notice of the registration whereof shall have been given to the Cutlers Company as aforesaid, or so nearly resembling the same as to be calculated to deceive:*

(6.) *Any person to whom a Sheffield corporate mark legally belongs shall be entitled to have the same mark registered also as a trade mark under this Act, in respect of any particular goods or classes of goods, in the same manner and upon the same terms and conditions in and upon which he might have registered the same if it were not a Sheffield corporate mark:*

(7.) *Nothing in this Act shall prejudice or affect the rights and privileges of the Cutlers Company, nor, save as is otherwise in this Act expressly provided, shall any of the provisions of this Act apply to or in the case of any Sheffield corporate mark.*

10. *For the purposes of this Act:* **Definitions.**

*A trade mark consists of one or more of the following essential particulars; that is to say:*

*A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or*

*A written signature or copy of a written signature of an individual or firm; or*

*A distinctive device, mark, heading, label, or ticket;*

*and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures; also*

*Any special and distinctive word or words or combination of figures or letters used as a trade mark before the passing of this Act may be registered as such under this Act.*

"*Prescribed*" *means prescribed by general rules made in pursuance of this Act; and*

"*Court*" *means any of Her Majesty's superior courts of law or equity at Westminster, or any court to which the jurisdiction of such courts may be transferred, or any one or more of such courts which may be declared to be the court for the purposes of this Act by such general rules as aforesaid; but the provisions of this Act conferring a special jurisdiction on the court as above defined shall not, excepting so far as such jurisdiction extends, affect the jurisdiction of any court in Scotland or Ireland in causes, actions, suits, or proceedings relating to trade marks; and if the register requires to be rectified in consequence of any proceedings in any such court in Scotland or Ireland, due notice of such requirements shall be given to the registrar, and he shall rectify the register accordingly.*

Short title of Act.

11. *This Act may be cited for all purposes as the Trade Marks Registration Act*, 1875.

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## THE TRADE MARKS REGISTRATION AMENDMENT ACT, 1876.

### 39 & 40 Vict. c. 33.

*An Act for the Amendment of the Trade Marks Registration Act*, 1875. [*24th July*, 1876.]

*Whereas by the Trade Marks Registration Act*, 1875, *in this Act referred to as the principal Act, it is provided that from and after the first day of July one thousand eight hundred and seventy-six, a person shall not be entitled to prevent the infringement of any trade mark as defined by the principal Act until and unless such trade mark is registered in pursuance of that Act:*

*And whereas by reason of the number of trade marks, and especially by reason of the difficulties attending the registration of trade marks in relation to textile fabrics, it has been found impossible to complete the registration of existing trade marks within the time specified by the said section; and it is therefore expedient to prolong the time for the com-*

*pletion of such registration as aforesaid, and otherwise to amend the principal Act:*

*Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:*

Amendment of § 1 of the principal Act.

1. *There shall be repealed so much of* § 1 *of the principal Act as provides that from and after the first day of July one thousand eight hundred and seventy-six, a person shall not be entitled to institute any proceeding to prevent the infringement of any trade mark as defined by that Act until and unless such trade mark is registered in pursuance of that Act; and in place thereof be it enacted that—*

*From and after the first day of July one thousand eight hundred and seventy-seven, a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of any trade mark as defined by the principal Act, until and unless such trade mark is registered in pursuance of that Act, or until and unless, with respect to any device, mark, name, combination of words, or other matter or thing in use as a trade mark before the passing of the principal Act, registration thereof as a trade mark under the principal Act shall have been refused as hereinafter is mentioned.*

Saving of marks and devices not capable of being registered under Act.

2. *When an application by any person to register as a trade mark a device, mark, name, word, combination of words, or other matter or thing proposed for registration as a trade mark, which has been in use as a trade mark before the passing of the recited Act, has been refused, it shall be the duty of the registrar, on request, and on payment of the prescribed fee, to give to the applicant a certificate of such refusal, and a certificate so granted shall be conclusive evidence of such refusal.*

Short title.

3. *This Act may be cited for all purposes as the Trade Marks Registration Amendment Act,* 1876.

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## THE TRADE MARKS REGISTRATION EXTENSION ACT, 1877.

### 40 & 41 Vict. c. 37.

*An Act for extending the Time for the Registration of Trade Marks, in so far as relates to Trade Marks used in Textile Industries.*

[6*th August,* 1877.]

39 & 40 Vict. c. 33.

*Whereas by* § 1 *of the Trade Marks Registration Amendment Act,* 1876, *it is provided that from and after the first day of July one thousand eight hundred and seventy-seven, a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of any trade mark as defined by the Trade Marks Registration Act,* 1875 (*referred to in such Amendment Act and in this Act as the principal Act*), *until and unless such trade mark is registered*

38 & 39 Vict. c. 91.

*in pursuance of the principal Act, or until and unless, with respect to any device, mark, name, combination of words, or other matter or thing in use as a trade mark before the passing of the principal Act, registration thereof as a trade mark under the principal Act shall have been refused, as is in the said Act thereafter mentioned:*

*And whereas by reason of the difficulties attending the registration of trade marks used in the textile industries it has been found impossible to complete the registration of such trade marks within the time specified by the said section, and it is therefore expedient to prolong such time as aforesaid:*

*Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:*

Extension of time for registration of trade marks used in textile industries.

1. *In so far as relates to the registration of trade marks used in the textile industries, but not further or otherwise,* § 1 *of the Trade Marks Registration Amendment Act,* 1876, *shall be construed as if for the words "from and after the first day of July one thousand eight hundred and seventy-seven" there were substituted the words "from and after the first day of January one thousand eight hundred and seventy-eight, or such further time as Her Majesty may by Order in Council determine."*

Definition of "trade marks used in the textile industries."

2. *The expression in this Act "Trade marks used in the textile industries" means the trade marks relating to goods comprised in Classes* 23 *to* 35, *both inclusive, of the First Schedule to the Rules under the Trade Marks Registration Acts,* 1875, 1876, *dated September,* 1876.

Short title of Act.

3. *This Act may be cited for all purposes as the Trade Marks Registration Extension Act,* 1877; *and this Act and the Trade Marks Registration Amendment Act,* 1876, *and the Trade Marks Registration Act,* 1875, *may be cited together as the Trade Marks Registration Acts,* 1875—1877.

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# ORDERS IN COUNCIL

## EXTENDING THE TIME FOR REGISTRATION.

| | | | |
|---|---|---|---|
| Dec. 12th, 1877 | extension till | June 30th, 1878 (*a*). |
| June 29th, 1878 | ,, | ,, Dec. 31st, 1878 (*a*). |
| Nov. 27th, 1878 | ,, | ,, May 31st, 1879 (*b*). |
| May 17th, 1879 | ,, | ,, July 31st, 1879 (*b*). |

(*a*) These orders related only to trade marks used in the textile industries.
(*b*) These orders related only to trade marks used for cotton piece goods.

# RULES OF AUGUST, 1876, WITH RESPECT TO COTTON MARKS.*

## *Cotton Goods.*

Establishment of office for exhibition of cotton trade marks at Manchester.

57. *For the purpose of facilitating the granting of trade marks in respect of cotton goods in Classes* 23, 24 *and* 25, *there shall be established by the Commissioners of Patents* (*a*), *and subject to their control, an office at Manchester* (*b*) *for the exhibition of all devices, marks, headings, labels, tickets, letters, words, or figures, or combinations of letters, words, or figures used in the cotton trade, and in these Rules included under the expression "cotton marks"* (*c*).

(*a*) Previous to the coming into operation of the Patents Act, 1883, on January 1st, 1884, the registration of trade marks was under the control of the Commissioners of Patents, now no longer in existence.

(*b*) This was opened and is still maintained at No. 48, Royal Exchange, Manchester. See Instructions, par. 34.

(*c*) All cotton marks are treated as exceptional, and advertised and registered by deposit. See *In re Robinson*, 29 W. R. 31.

Representations of cotton marks to be sent by owners resident in the United Kingdom on or before Jan. 1, 1877; by owners resident abroad on or before Mar. 1, 1877.

58 (*a*). *Every person who at the date of the passing of the Act used any cotton mark shall, if resident in the United Kingdom, on or before the first day of January one thousand eight hundred and seventy-seven, and if resident elsewhere, on or before the first day of March, one thousand eight hundred and seventy-seven, send to the Manchester office three representations of such cotton mark, in such form and with such a description as may be from time to time required by the Commissioners of Patents.*

(*a*) This Rule was made on Dec. 1st, 1876, in substitution for the previous Rule 58, by which representations of old cotton marks were to be sent in at Manchester on or before Dec. 1st, 1876.

Extended time for sending representations of combination stamps for cotton piece goods.

58a (*a*). *Every person who at the date of the passing of the Trade Marks Registration Act*, 1875, *used any "combination stamp"* (*b*) *for cotton piece goods, shall on or before the first day of February, one thousand eight hundred and seventy-nine, send to the Manchester Branch of the Trade Marks Registry Office four representations of such "combination stamp," in such form and with such a description as may be from time to time required by the Commissioners of Patents.*

(*a*) This Rule was made on Dec. 28th, 1878.

(*b*) Combination stamps are combinations of several different trade marks which dealers in cotton goods habitually use on such goods, treating the combination as equivalent to a single trade mark. See *Robinson* v. *Finlay*, 9 Ch. D. 487, for an example of such a combination.

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* These Rules, though repealed, are given here in order that the position of cotton marks dealt with by the late Manchester Committee of Experts may be comprehended. Where it is not otherwise stated, the Rules were included in the set of Rules issued in August, 1876. Various additions were made from time to time, and in March, 1883, after the Committee of Experts had completed their labours, an entirely new set was substituted (see p. 551, *infra*). Those Rules were, in their turn, repealed, and the Rules now in force place cotton marks on the same footing as other trade marks, and this would seem to be the case even with B list marks.

Committee of experts to be appointed, and to divide cotton marks into two classes.

59. *A committee* (*a*) *of persons versed in the usages of the cotton trade shall be appointed by the Commissioners of Patents, consisting of such number of persons as may from time to time be determined by them; and it shall be the duty of such committee, on or before a time to be named by the Commissioners of Patents, to divide the cotton marks, representations of which have been so sent in to the Manchester office, into two classes, the first class consisting of such of the said cotton marks as are, in the opinion of the committee, trade marks within the meaning of the Act, and the second class consisting of such of the said cotton marks as are not, in the opinion of the committee, trade marks within the meaning of the Act* (*b*).

(*a*) A list of the Committee of Experts appointed under this Rule will be found in the Instructions issued during the existence of the committee.

(*b*) The committee were instructed by the Commissioners of Patents in a letter, dated April 4th, 1877, to act on the following principles in dividing the cotton marks into two classes, viz.: (i) To decide only from the evidence before them whether, in their opinion, a mark belonged to the first or second class of cotton marks; (ii) in case of further information being required, the keeper of the Manchester office was authorised to obtain such information for the use of the committee; (iii) in case of a difference of opinion among the committee as to the nature of marks applied for, their decision should be given according to the opinion of the majority, the chairman presiding at each meeting having a casting vote; (iv) single letters were not trade marks within the meaning of the Act; (v) in all cases where more than three persons applied for registration of the same mark for the same description of goods, such mark must be considered as a trade mark not within the meaning of the Act, and must consequently be placed in the second class. By supplementary directions, the committee were instructed that Rule (v) extended to marks so similar, or so nearly resembling each other, as to be substantially the same marks, or calculated to deceive, and was not to be confined to identical marks. And they were also instructed that, in dealing with individual cases, they should bring to bear upon them the knowledge which the members of the committee might have of the state of things in the trade, and to decide with reference to that knowledge, and not merely upon such evidence as might be formally brought before them in the individual cases. Also that borders of marks should not be treated as parts of the marks. See *In re Brook*, 26 W. R. 791.

Acting on the principles thus laid down, the committee divided the marks submitted to them into two classes, known as the A list and the B list, of which the former contained registrable, and the latter non-registrable, cotton marks.

By Rule 62, *infra*, the marks placed in the B list were not to be registered except in pursuance of an order of the Court; and in *In re Orr-Ewing & Co.*, 8 Ch. D. 794, the question was raised how far the decision of the committee was a binding decision. Hall, V.-C., decided that the marks there in question, which had been placed in the B list, were good and valid trade marks, and that they ought to be registered; but the Court of Appeal reversed his decision, holding that the decision of the committee should not be interfered with except under special circumstances, James, L. J., saying that the Court should not interfere, unless satisfied that the committee had proceeded upon some wrong principle or in some improper manner. When, however, the case was brought before the House of Lords (4 App. Cas. 479), the decision of Hall, V.-C., was restored, with the modification that only the essential particulars of the marks were admitted to registration, and the Lord Chancellor (Lord Cairns) said that "the Rules appear to provide a rough but useful way of separating, by means of the technical knowledge and judgment of the committee, the cotton trade marks into two classes. The first class is to consist of those marks which the committee is of opinion are trade marks within the Act; and proprietors in this class are to have the benefit, arising from this opinion, of being able at once to apply to be registered in respect of those marks. But in doing this they must satisfy the registrar that they are the proprietors, and comply with the conditions of registration as any other applicants would do. With regard to the second class, there is no decision pronounced against them, but the proprietors can-

not apply for registration as a matter of course. They must come to the Court, and it must be for the Court to say whether the registrar shall proceed on their application to register, or not. In deciding this the Court will have before it the circumstance that the opinion of the committee was adverse to the claim of a trade mark; but this would be an opinion only, and not a decision arrived at after hearing both sides, or rendered in any judicial proceeding": *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 483; and see *per* Lords O'Hagan and Blackburn. See also *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434; 7 App. Cas. 219; and the cases noted under Rule 62, *infra*.

The function of the committee was solely to decide on the question of registrability or non-registrability, and where they had assumed to decide a question of title, it was held by Jessel, M. R., that the registrar must proceed with the application, leaving it to the owners of other marks to oppose the registration: *Ex parte Ede Bros. & Co.*, 28 W. R. 436.

Committee to form list of marks sent in to Manchester office.

60. *The said committee shall form a list of the cotton marks sent to the Manchester office in each of the aforesaid classes* (a), *and shall transmit such lists to the Commissioners of Patents, accompanied by two representations of each of the marks specified in the second class in such list.*

*The third representation of each of the marks in the second class in such list shall be retained for reference in the Manchester office.*

(a) *I.e.*, the A list and the B list.

Marks may be added to list.

61. *The Commissioners of Patents may from time to time add to the aforesaid list any cotton marks as they may think just, and such addition shall be deemed to be part of the original list.*

Any person claiming to be the proprietor of a cotton mark in Class 1 may apply to be registered.

62. *Any proprietor of a cotton mark not specified in the second class in such list may apply to be registered as proprietor of such cotton mark in manner and subject to the conditions in which he may apply to be registered as proprietor of any other trade mark* (a), *but it shall not be lawful for the registrar to register* (b) *any person as proprietor of any cotton mark in the second class of the aforesaid list except in pursuance of an order of the Court* (c).

(a) After being passed by the committee, the marks in the A list had to be advertised, so that an opportunity for opposition might be afforded. In *In re Robinson*, 29 W. R. 31, an A list cotton mark was opposed, but without success.

(b) But he might grant a certificate of refusal to register, thus preserving any previous rights.

(c) For an order of the Court to be obtained for the registration of a B list mark, such a case had to be made out as, in the opinion of the Court, was sufficient to outweigh the opinion of the Committee of Experts: *per* Lord Blackburn in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 501. It is, however, believed that an application to the Court by an owner of a B list mark was never unsuccessful. Such applications were granted in *Ex parte Ede Bros. & Co.*, 28 W. R. 436; *In re Dugdale*, 49 L. J. Ch. 303; *In re J. Hoyle & Sons, Ld.* (1), Hall, V.-C., May 8th, 1880; S. C. (2), Chitty, J., Nov. 30th, 1883; *In re Dickinson, Ackroyd & Co.*, Hall, V.-C., July 8th, 1880; *In re Jones Bros. & Co.*, Hall, V.-C., July 10th, 1880; *In re Ward, Sturt & Sharp*, 50 L. J. Ch. 347; *In re Sykes*, 43 L. T. N. S. 626; *In re T. Ashton & Sons*, Hall, V.-C., Feb. 26th, 1881; *In re Framjee, Sands & Co.*, Bacon, V.-C., Nov. 30th, 1883. In *In re Brook*, 26 W. R. 791, which was decided against the applicants on the authority of the decision of the Court of Appeal in *In re Orr-Ewing*, 8 Ch. D. 794, an arrangement satisfactory to the applicants was afterwards arrived at.

"The Court" being the Chancery Division (now the High Court of Justice), the order of the House of Lords was made an order of the Chancery Division in *In re Orr-Ewing* (2), 28 W. R. 412. The comptroller will now register a B list mark in a proper case, without requiring the applicant to go to the Court.

Advertisement of cotton marks.

62a (*a*). *As soon as may be after the receipt of an application, made as provided by the Trade Marks Rules, for the registration of a mark in Classes* 23, 24, 25 *aforesaid, or in any one or more of such classes, the registrar shall insert in the official paper an advertisement of such application, showing the name and address of the applicant, the class in which he applies, the number given to the mark by the registrar, the places in London and Manchester respectively where a specimen of such mark is deposited for exhibition, and distinguishing whether the mark has or has not been used prior to the thirteenth day of August one thousand eight hundred and seventy-five.*

(*a*) This and the following Rule were made on Feb. 26th, 1877, in substitution, so far as related to cotton marks, for Rules 13, 15 and 17 of the General Rules of August, 1876, as to advertisement.

Time of registration of cotton marks.

62b (*a*). *On the expiration of three weeks from the date of the first appearance of the advertisement of a mark in Classes* 23, 24, 25, *or in any one or more of such classes, in the official paper, the registrar may, if he is satisfied that the applicant is entitled to registration, register such mark in respect of the description of goods for which he may be entitled to be registered, and the applicant as the proprietor thereof, on payment of the prescribed fee.*

(*a*) See note to previous Rule.

Cotton mark not to be registered except in manner herein prescribed.

63. *A cotton mark shall not be registered except in manner and subject to the conditions prescribed by these Rules with respect to the registry of cotton marks.*

Applications for registration of *new* trade marks for cotton goods (Classes 23, 24, and 25) to be made in the same manner as for all other classes of goods.

63a (*a*). *The Rules numbered* 57 *to* 63 *as aforesaid do not apply to such trade marks in respect of cotton goods in Classes* 23, 24 *and* 25 *as are not cotton marks which were in use at the date of the passing of the Trade Marks Registration Act*, 1875; *and applications for the registration of trade marks in respect of goods in Classes* 23, 24 *or* 25, *and which marks were not cotton marks in use at the date of the passing of the Trade Marks Registration Act*, 1875, *shall be made in manner and subject to the conditions in and subject to which applications for trade marks other than cotton marks may be made in conformity with the rules in that behalf for the time being in force.*

*Provided that where application is made for the registration as a trade mark in respect of any goods in Classes* 23, 24 *or* 25 *of any mark being a cotton mark contained in the second class of the list mentioned in Rule* 59 *aforesaid, such registration shall not take place except in pursuance of an order of the Court.*

(*a*) This Rule was made on Oct. 21st, 1879.

## RULES OF MARCH, 1883, WITH RESPECT TO COTTON MARKS.*

57. [*This Rule is identical with Rule* 57, *supra.*]

Establishment of office for exhibition of cotton trade marks at Manchester.

58 (*a*). *The Commissioners of Patents may from time to time add to the first and second class lists of cotton marks formed by the late Manchester Committee of experts any cotton marks as they may think just, and such addition shall be deemed to be part of the original lists.*

Marks may be added to the first and second class lists of cotton marks.

(*a*) This is taken from the old Rule 61.

Any person claiming to be the proprietor of a cotton mark in first class may apply to be registered.

59 (*a*). *Any proprietor of a cotton mark in the first class may apply to be registered as proprietor of such cotton mark in manner and subject to the conditions in which he may apply to be registered as proprietor of any other trade mark, but it shall not be lawful for the registrar to register any person as proprietor of any cotton mark in the second class aforesaid, except in pursuance of an order of the Court.*

(*a*) This is taken from the old Rule 62.

Advertisement of cotton marks.

60. [*This Rule is identical with Rule* 62a, *supra.*]

Time of registration of cotton marks.

61. [*This Rule is identical with Rule* 62b, *supra.*]

* See note, p. 547, *supra.*

# APPENDIX E.

EXTRACTS FROM THE REPORT, *dated the 16th March*, 1888, *of the* DEPARTMENTAL COMMITTEE *appointed by the Board of Trade on the 24th of February*, 1887, "*to inquire into the duties, organization and arrangements of the Patent Office under the Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *so far as relates to trade marks and designs.*"

LORD HERSCHELL, Chairman.

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## REPORT.

The complaints which have been made to us of the working of the Act of 1883, and the suggestions which have been submitted of amendments in the law and its administration, have had reference both to the registration of trade marks and designs. We propose to deal with these matters separately, directing attention first to the subject of trade marks.

### I.—TRADE MARKS.

1. We propose first to consider the suggestions which have been made for improvements of procedure in relation to the registration of trade marks.

* * * * * *

15. We have given very careful consideration to the evidence which has been laid before us by those interested in the trade of Lancashire. The number of marks registered in Classes 23, 24, and 25, which are commonly described as the Cotton Classes, is very large; and the administration of the Act in relation to these classes is of great importance to the trade. There can be no doubt that the working of the Trade Marks Act has not given satisfaction in Lancashire. Even if at times there may have been a disposition to expect too much, we think there have been substantial grounds for the dissatisfaction which has prevailed. The great bulk of the goods manufactured in Lancashire in respect of which trade marks are used is exported to other countries, and there can be no doubt that these marks fulfil important functions in the trade between Lancashire and India, and other countries. One chief complaint has been that the usages of the trade and the character

of the markets where the marks are intended to serve their purpose have not been sufficiently kept in view by the Patent Office. By § 72, sub-sect. 2, the Comptroller is directed not to register, with respect to the same description of goods, a trade mark so nearly resembling a trade mark already on the register with respect to such description of goods as to be calculated to deceive. It is on the question whether marks do so nearly resemble one another as to be calculated to deceive, and what extent of resemblance to an old mark ought to cause the rejection of an application, that the chief difference has arisen between the trade and those to whom the administration of the Act has been entrusted. The tendency of the office has been to construe the words of the enactment more favourably towards applicants for new marks than the trade have thought right. We think the difference has arisen in part from the wording of the Act. The comptroller has felt unable to say that the two marks "so nearly" resemble each other as to be calculated to deceive. He has thus not considered himself at liberty to take into consideration to the extent that he otherwise might, the character of the market in which the mark is to serve its purpose. Two marks, when placed side by side, may exhibit many and various differences, yet the idea left upon the mind by both may be the same, so that a person acquainted with the mark first registered, and not having the two side by side for comparison, might well be deceived, if goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted. Take, for example, a mark representing a game of football; another mark may show the players in a different dress, and in very different positions, and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trade-marked goods, and relying, as they frequently do, upon the marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing.

In order to avoid misapprehension in the future we recommend, even though it may not be absolutely necessary, a slight amendment of the Act, substituting for the words "so nearly resembling" the words "having such resemblance to"; and further we would suggest that when the question arises whether a mark applied for bears such resemblance to one on the register as to be calculated to deceive, it should be determined by considering what is the leading characteristic of each. The one might contain many, even most, of the same elements as the other, and yet the leading, or it may be the only, impression left on the mind might be very different, whilst, on the other hand, a critical comparison of two marks might disclose numerous points of difference, and yet the idea which would remain with any person seeing them apart at different times might be the same.

In this connection we may refer to a point which has been the subject of considerable controversy, namely, how far registered or common marks when combined together are to be regarded as a new mark. We think that the juxtaposition of two or more such marks is not, if there be nothing more than this, a combination constituting a new mark. An important test appears to be whether the existing marks are so combined as to suggest a new idea. For instance,

assuming a cat and a fiddle to be each an old mark, we do not think the mere representation of a cat and a fiddle together would be a new mark, but the representation of a cat playing upon a fiddle, the idea conveyed by which would be neither the cat nor the fiddle, but a cat playing upon a fiddle, would be a good combination, and might properly be registered. We think this view differs somewhat from that which has been at times, at all events, entertained by the Board of Trade, but it appears to us to be the sound one.

Where several common or open marks are worked into a single new design by being grouped together within a border or otherwise, we think that such a combination may be entitled to registration, but that it would be well to require that all the common elements should be disclaimed.

* * * * * *

18. We have had under our serious consideration the question whether it would be expedient and possible to provide for the registration of what are known in the cotton trade as line headings. It is clear that it could only be done by an alteration of the law, making in that case the colours used an essential part of the registered mark. There appears to be a somewhat general concurrence of view, that if it were practicable to provide effectually for the registration of these headings it would be desirable to do so, but the most opposite opinions were expressed by persons of large experience in the Manchester trade on the point whether it would be practicable. We are disposed to concur with those who pronounce it impracticable, but whether this view be correct or not, we clearly cannot recommend the adoption of a scheme the practicability of which is open to such serious doubt. At the same time we are fully conscious of the evils to which our attention has been directed. Woven line headings no doubt play an important part in many markets; they become associated in the minds of buyers with the make of a particular manufacturer, or the merchandize of a particular merchant, and goods bearing particular marks obtain, on account of their proved quality, a high reputation in the market. Thereupon, some other manufacturer or merchant sends to the very market where he knows this reputation has been acquired goods of an inferior quality bearing, not the identical heading, but one so resembling it as to leave on the mind of a person seeing it the same impression. He is thus enabled to undersell the merchant who originally introduced the mark to the market, whilst still securing a good profit for himself on account of the inferior quality of his goods, and this process often goes on until the very mark which gained the reputation is shunned by the buyers who at one time valued the goods to which it was attached.

Even those witnesses who have felt most strongly the impossibility of protecting line headings by registration have admitted the magnitude of the evil, and that these resemblances of headings, of which complaint is made, are not accidental, but intentional. We are satisfied that not only do individual traders incur loss from this cause, but that the trade of Lancashire suffers from it.

The imitation of headings, however, is not the only mode by which this kind of false representation is successfully carried on. We have had before us pieces of cloth, each of which bore different trade marks,

tickets, words, figures, and other marks, but on which those trade marks, tickets, &c., were so coloured and distributed as to convey the impression, in the absence of careful examination, that the goods bore the same marks. No one looking at those pieces of cloth could doubt that the resemblance was intentional, and was designed for the very purpose of deceiving. Although we arrived at the conclusion that it would not be possible to give to line headings the protection of registration, we felt that the fraudulent trading to which our attention had been called ought not to remain unchecked, and that something ought to be done to remedy a state of things so detrimental to sound and honest trading; we, therefore, procured the insertion in the Merchandise Marks Act of a clause having for its object to bring these frauds within the penalties of the law and thus to check their practice. The clause has been the subject of a good deal of criticism, and some alarm has been expressed lest it should press hardly on persons acting with perfect honesty. We do not think this is likely to be the case. It is, of course, difficult so to frame a law as to make it effectual against wrongdoers, and at the same time to guard those who have no unlawful intention from all possible risk of inconvenience. The operation of the Act must, no doubt, be carefully watched, and it may well be capable of amendment, but we could not resign ourselves to the conclusion that mischievous frauds must be allowed to continue without even an attempt to put a stop to them.

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24. We will next proceed to consider the objections which have been taken to the law which now governs what may be registered as trade marks, and the important suggestions which have been made for its amendment.

25. By section 64 (1) (c) of the Act a trade mark may be registered which consists of or contains "a distinctive device, mark, brand, heading, label, ticket, or fancy word, or words not in common use." Some controversy has arisen with reference to the meaning of the word "brand" as distinguished from the other words employed. There can be no doubt that the term derives its origin from the practice of producing some mark by means of burning, but it appears now to be in use in certain trades for the purpose of describing trade marks no longer produced in this way, and differing in no respect from the labels or tickets mentioned in the section; nevertheless a distinction has been made in the practice of the Office, and trade marks have been allowed registration in certain trades as brands when they would not be accepted in other classes as labels or tickets. We see no reason for this distinction. It does not appear to us to receive support from the language of the Act, and we think that in future brands should be dealt with in precisely the same way as labels or tickets.

26. The most difficult question which has arisen upon the enactment under consideration is to determine what may properly be regarded as "fancy words." Words are, undoubtedly, a most popular form of trade mark, but some limit must obviously be put upon the words which an individual may be permitted to register and claim the exclusive use of. The expression "fancy word" is certainly not a happy one, and has naturally given rise to considerable differences of opinion as to its meaning.

It will be convenient to consider first what words ought to be allowed as trade marks. There can be no objection to permitting the registration of an invented word not to be found in the vocabulary of our own or any other country. It seems to us further that existing words may with advantage be permitted as trade marks, subject to limitations which at once suggest themselves. It is manifest that no one ought to be granted the exclusive use of a word descriptive of the quality or character of any goods. Such words of description are the property of all mankind, and it would not be right to allow any individual to monopolise them and exclude others from their use. Again geographical words, which can be regarded as descriptive of the place of manufacture or sale of the goods, are open to obvious objections. One manufacturer or merchant cannot properly be allowed to prevent all his competitors from attaching to their goods the name of the place of their manufacture or sale. The mischief would not be the same where the person seeking to register was the first who had manufactured or sold the goods in the place the name of which he seeks to appropriate as a trade mark. But there are objections to giving a monopoly even in that case, and to attempt to draw any such distinction would be likely to lead to difficulty and litigation. We think, therefore, that geographical names ought only to be permitted where they clearly could not be regarded as indicative of the place of manufacture or sale. We would add upon this point that we think that where any English word would be rejected as not entitled to registration no person ought to be permitted to register its translation into any other language. The question has been raised whether a word having the same sound as one entered on the register, though differently spelt and with a different meaning should be registered. The question in such a case would seem to be whether the resemblance between the old mark and that applied for was such as to be calculated to deceive; if it were it ought, of course, to be rejected.

Our attention has been called to the rejection of words which it is said indicate the use to be made of the articles to which they are to be applied. As, for example, "Mariner's Rum." We think that if the word sought to be registered would be understood as suggesting a special use of the goods, or their adaptability to a particular purpose, it would be objectionable as descriptive of their character.

Registration, it appears, is sometimes sought of devices which are descriptive of the goods to which they are to be applied, *e.g.*, a representation of a hinge to be applied to doors. We think these are not legitimate marks.

Complaints have also been made that where words have been refused as not being distinctive, they have afterwards been allowed where the applicant has applied for a mark consisting of the same word preceded by the applicant's name with an apostrophe. We think this course ought not to be pursued. Little or no mischief might result where the name of the applicant was an uncommon one, but where the name was a common one the result would be to deprive all persons bearing the same name of their right to use a common word in connexion with their own name, and even if the name were an uncommon one it would be impossible to say that there were not other persons bearing it who

might wish to use in connection with it the common word which it is sought to monopolise.

Evidence has been given that marks consisting of a combination of the applicant's name with the article he manufactures or sells are highly valued. There can be no doubt that if a manufacturer or vendor has obtained for his goods a reputation amongst the public he could, by process of law, quite apart from the Trade Marks Act, prevent goods that were not his from being offered to the public on the representation that they were so. But it would be quite a different thing to give by virtue of registration under the Trade Marks Act a right to prevent another manufacturer or merchant honestly d ibing his own goods by his own name.

It is said that there is often a desire to register short phrases, such as proverbs, &c., and that owing to the difficulty of finding new marks it is expedient that they should be allowed. We see no objection to this, provided that they are in no way descriptive of the character or quality of the goods, or of their place of origin, sale, or manufacture.

There is said to be a general, if not unanimous, desire amongst those interested in the cotton classes that words should not be permitted to be registered as trade marks in Classes 23 and 24. If the desire be so general as is represented, we see no reason in principle why it should not be yielded to. But there appears to be a serious difficulty in the way of making such a change at present, owing to the International Convention which has been entered into. We understand that word marks are registered in the cotton classes in some of the countries which are parties to the Convention; and there would be an anomaly in permitting such marks to be registered here when first registered in those countries, whilst registration is denied them if first applied for in England.

27. By section 64, sub-section 2, there may be added to any one or more of the essential particulars "any letters, words, or figures, or combination of letters, words, or figures or of any of them." There is here, it will be seen, no limitation as to the letters, words, or figures, which may be combined with the essential part of a trade mark. By section 74, however, it is provided that nothing in the Act shall be construed to prevent the comptroller registering as an addition to any trade mark "any distinctive word, or combination of words, though the same is common to the trade in the goods with respect to which the application is made." But this section enacts, sub-section 2, that "The applicant for entry of any such common particular or particulars must however disclaim in his application any right to the exclusive use of the same, and a copy of the disclaimer shall be entered on the register." It has been said, and we think truly, that it is not easy to understand what is the exact status of the added matter provided for by section 64. Where the added words are not common to the trade in the goods with respect to which the application is desired, the right of exclusive use need not be disclaimed, yet it is presumed that the proprietor of the trade mark could not object to their use by any other person except in connection with the essential particular of his trade mark. What purpose then do they serve? Perhaps they may be useful in the case of a colourable imitation of the essential particular. If with such an imitation the same added words were used it would

assist the proprietor in establishing that his trade mark had been infringed. But the added matter may, it is assumed, be of so distinctive a character as to form an essential part of the trade mark, so that its use might be an infringement. We think it would clearly be desirable that the added matter, which the proprietor does not claim the exclusive use of, should be disclaimed so that the public may know exactly what is the trade mark registered. We think, too, that all disclaimers should appear in connexion with the mark in the Official Journal. Some misapprehension might perhaps arise if the person registering the mark were compelled to disclaim his own name or the foreign equivalent for it. We think, therefore, this might be excluded from the necessity of disclaimer, but it should be provided that the proprietor of the mark should not thereby acquire the right to prevent any other person *bonâ fide* using his own name in connexion with his goods.

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41. It has been suggested that there is a necessity for some statutory definition of the trade mark rights which are acquired in connection with words used as the names of patented articles. Where a patent has been obtained for some article of commerce, and the patentee gives it a name which he registers as his trade mark, has he a right at the end of the term of his patent to prevent other people from selling it under that name? It is clear that he obtains the patent upon the condition that at the expiration of the term of his monopoly the public should have the right to manufacture and use it, and if the only name by which it is known is that which the proprietor has registered as a trade mark, it would certainly seem inconsistent with the right thus intended to be conferred on the public if every one except the original patentee were prevented from calling it, or from selling it, by that name which alone it bears. The authorities appear, however, to show that such a claim could not be maintained.

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## II.—Designs.

* * * * * *

(Signed) Herschell.
Crawford.
Macnaghten.
A. J. Mundella.
H. de Worms.
James F. Hutton.

16th March, 1888.

# APPENDIX F.

## THE MERCHANDISE MARKS ACTS, 1887—1894, AND THE STATUTES, REGULATIONS AND ORDERS CONNECTED THEREWITH.

### THE MERCHANDISE MARKS ACT, 1887.

50 & 51 Vict. c. 28.

*An Act to consolidate and amend the Law relating to Fraudulent Marks on Merchandise.* [23rd August, 1887.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Merchandise Marks Act, 1887 (*a*). Short title.

(*a*) It was held that it was not against the policy of the law for proceedings taken under the Merchandise Marks Act, 1862, now repealed by this Act, to be compromised: *Fisher* v. *Apollinaris Co.*, L. R. 10 Ch. 297.

Offences as to trade marks and trade descriptions.

2.—(1.) Every person (*a*) who—

(a.) forges (*b*) any trade mark (*c*); or

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

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

(d.) applies any false trade description (*g*) to goods (*e*); or

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

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

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

(2.) Every person who sells, or exposes for, or has in his possession for sale, or any purpose of trade or manufacture, any goods or things

to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—(*i*)

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

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

(c.) That otherwise he had acted innocently (*k*);

be guilty of an offence against this Act.

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

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

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

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

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

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

(6.) Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted, and any articles liable to be forfeited under this Act by a court of summary jurisdiction may be forfeited in manner provided by the Summary Jurisdiction Acts: Provided that a person charged with an offence under this section before a court of summary jurisdiction shall, on appearing before the Court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires be so tried accordingly.

42 & 43 Vict. c. 49.

(*a*) Person includes any body of persons: see § 3 (1).
(*b*) Forgery of a trade mark is defined by § 4.
(*c*) Trade mark is defined by § 3 (1).
(*d*) Application and false application of a trade mark are defined by § 5; and see § 6.
(*e*) "Goods" is defined by § 3 (1).
(*f*) As to making dies and blocks, see § 6.
(*g*) Trade description and false trade description are defined by § 3 (1); and see also § 3 (2) and (3), and also § 6. Compare § 18.
(*h*) In *Gridley* v. *Swinborne*, 5 Times L. R. 71, the Court appears to have enter-

tained the view that the burden was on the prosecutor to prove a *mens rea* on the part of the defendant; but an intent to defraud a purchaser is not a necessary ingredient in the offence: *Wood* v. *Burgess*, 24 Q. B. D. 162; and in *Starey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90, it was held, in proceedings taken by a trade society, that though the article supplied was of the quality contracted to be supplied, and had been accepted by the purchaser without objection, and no pecuniary loss or injury of any kind had been suffered by the purchaser, yet, inasmuch as the vendors were known as manufacturers only, and not as dealers, and they had placed their own name on the goods, without any notification that the goods had been obtained by them from elsewhere, they were not entitled to say that there was no intent to defraud.

(*i*) This Act renders the master or principal criminally liable for the acts of his agents and servants in all cases within § 2, sub-ss. 1 and 2, where the act constituting the offence is done by the servant or agent within the scope or in the course of his employment, subject to this, that the master or principal may be relieved from criminal responsibility where he can prove that he has acted in good faith, and has done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act: *Coppen* v. *Moore* (2), (1898) 2 Q. B. 306; and it seems that *Budd* v. *Lucas*, (1891) 1 Q. B. 408, must be treated as overruled on this point.

(*j*) Under the present statute a person in possession of wrongfully marked goods for sale, &c., has to give information with respect to the persons from whom he obtained the goods, if he wishes to escape the penalties of the Act. By § 6 of the repealed Merchandise Marks Act, 1862, he was compellable to give the information under a special penalty.

(*k*) Clauses (a) and (b) of sub-s. 2 apply to cases where the goods in question are in the possession of the accused for sale, or are sold with the forged trade mark or false trade description already stamped upon them, and not to a case where the false trade description is applied upon the occasion and as part of the terms of the sale, in which case the accused must rely on Clause (c): *Coppen* v. *Moore* (2), (1898) 2 Q. B. 306.

(*l*) Whether a person charged with an offence under this Act is dealt with summarily or on indictment, the principles to be applied are the same: *per* Lord Coleridge, C. J., in *Gridley* v. *Swinborne*, 5 Times L. R. 71.

Definitions.

46 & 47 Vict. c. 57.

3.—(1.) For the purposes of this Act—

The expression "trade mark" means a trade mark registered in the register of trade marks, kept under the Patents, Designs, and Trade Marks Act, 1883, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of § 103 of the Patents, Designs, and Trade Marks Act, 1883, are, under Order in Council (*a*), for the time being applicable:

The expression "trade description" means any description, statement, or any other indication, direct or indirect (*b*),

(a.) as to the number, quantity, measure, gauge, or weight of any goods (*c*), or

(b.) as to the place or country in which any goods were made or produced (*d*), or

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

(d.) as to the material of which any goods are composed (*e*), or

(e.) as to any goods being the subject of an existing patent (*f*), privilege, or copyright,

and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act;

The expression "false trade description" means a trade description which is false in a material respect (*g*), as regards the goods to

which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act:

The expression "goods" means anything which is the subject of trade, manufacture, or merchandise:

The expressions "person," "manufacturer, dealer, or trader," and "proprietor" include any body of persons corporate or unincorporate:

The expression "name" includes any abbreviation of a name.

(2.) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

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

(a.) are not a trade mark, or part of a trade mark, and

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

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

(*a*) See Table of Orders in Council in Appendix C.

(*b*) See § 18. The Act does not apply to verbal descriptions, but it is not necessary that there should be any physical connection between the description and the goods to which it is applied. The false trade description may be found in the invoice: *Coppen* v. *Moore* (2), (1898) 2 Q. B. 306; *Budd* v. *Lucas*, (1891) 1 Q. B. 408. The definition of "trade description" has been held in two cases in the Manchester Police Court to be wide enough to reach a somewhat complicated system of fraud practised in the cotton trade. Cotton yarn is reeled into certain lengths called hanks, each hank containing by the custom of the trade 840 yards. In this country the yarn is sold by weight, and is usually made up in bundles of 5 lbs. or 10 lbs. The price is regulated by what is called "the count" of the yarn, or, in other words, by the number of times a hank is contained in a pound weight of yarn, the greater number of hanks in the pound the finer the yarn and the higher the price. For example, yarn containing twelve hanks to the pound is spoken of as twelves, and would fetch a smaller price than yarn containing sixteen hanks to the pound called sixteens. It is possible for any one acquainted with the trade to tell at a glance, from the make-up of the bundles, how many hanks the yarn contains to the pound, that is to say, the make-up affords an indication of the count of the yarn. In the first case, *Reg.* v. *Ananiadi* (Manchester Police Court, July 30th, 1889), the defendant, for the purposes of his export trade, caused bundles of yarn containing forty-five hanks to the pound to be made up as yarn containing sixty hanks to the

pound. This was effected by a process technically known as "short reeling," by which the length of the hank was reduced below its proper number of yards so far as was necessary to increase the number of hanks per pound from forty-five to sixty. In addition to this, the number "50" was placed on the outside of each bundle to indicate the count of the yarn, though this was done without the express instructions of the defendant, and the numbers were subsequently removed by his orders. In this way a double fraud was committed, since the yarn was made to appear to be of a finer quality than it really was, and the hank, instead of containing its normal number of yards, viz., 840, contained only about 630 yards, and was, in fact, a spurious hank. Consequently there was a misrepresentation both as to the length and as to the fineness of the yarn. The magistrate held that the make-up of the bundles afforded a sufficient indication of the measure of the goods within the definition of "trade description" in § 3, and that it was immaterial whether or not the number of the count was affixed to the wrappers of the bundles, and he convicted the defendant. In the second case, *Reg.* v. *Manoukian* (Manchester Police Court, May 10th, 1898), the defendant was also convicted upon a similar state of facts.

(*c*) See *Reg.* v. *Ananiadi* (Manchester Police Court, July 30th, 1889); *Hooper* v. *Balfour*, 62 L. T. N. S. 646; *Budd* v. *Lucas*, (1891) 1 Q. B. 408; *Reg.* v. *Manoukian* (Manchester Police Court, May 10th, 1898); *R.* v. *Lipton*, 32 L. R. Ir. 115.

(*d*) See *Stacey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90; *R.* v. *Lipton*, 32 L. R. Ir. 115; *Bischop* v. *Toler*, 65 L. J. M. C. 1, where a man who prepared in England a substitute for butter mainly consisting of margarine manufactured in France was held properly convicted of an offence under the Act in having described the product as manufactured in France. A thing is considered to be manufactured at the place where it first becomes a finished article: *Ibid.* See also § 7 as to watches.

(*e*) In *Gridley* v. *Swinborne*, 5 Times L. R. 71, it was held by the Q. B. D. that it was not a false trade description to apply the term "isinglass" to a material which, though not in the most strictly scientific sense isinglass, was yet very similar to it and was frequently called by that name.

(*f*) See § 105 of the Patents Act, 1883. The difference between that section and this appears to be that under that section no offence is committed if there has ever been a patent, while under this an offence is committed if there is not a patent still actually in existence. In *Gridley* v. *Swinborne*, 5 Times L. R. 71, an article had been sold for upwards of forty years as "Swinborne's Patent Refined Isinglass," there having originally been a patent granted in 1847; and it was held that to continue to use the word "Patent," as had so long been done, was not to apply to the article a false trade description. It has been held that a person who himself wrongfully inserted or retained the word "Patent" in his trade mark could not avail himself of the Merchandise Marks Act, 1862: *Morgan* v. *McAdam*, 36 L. J. Ch. 228.

(*g*) There is nothing to show what is meant by "in a material respect," but it would appear that a trade description which is inaccurate is not false in a material respect unless the inaccuracy would have some effect on the mind of a purchaser. *Stacey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90, seems to show that a very stringent interpretation will be placed on the Act. In that case a firm of English gunpowder manufacturers, who usually sold gunpowder of their own make only, had entered into a contract with the Government for the supply of a quantity of powder, the contract containing no stipulation that the powder was to be of their own or of English manufacture. They were unable, in consequence of an accident, to supply the powder of their own make, and they consequently supplied German powder in barrels marked with their name, but without any statement where or by whom the powder was made; and it was held that although the quality was correctly stated, and the powder was as good as if it had been made by them, and the Government had accepted it without objection, yet, inasmuch as the expectation would be that a firm known only as manufacturers and not as dealers would supply only gunpowder of their own make, the use of their name, without a statement as to the foreign origin of the powder, was an application to the goods of a false trade description. Again, in *Kirschenboim* v. *Salmon & Gluckstein*, (1898) 2 Q. B. 19, where machine-made cigarettes were falsely described as hand-made, it was held no answer to the question of materiality that the thing supplied was as good in quality as that which was asked for.

(*h*) See *Wood* v. *Burgess*, 24 Q. B. D. 162.

(*i*) Clauses (b) and (c) of this sub-section are to be read disjunctively: *R.* v. *Lipton*, 32 L. R. Ir. 115. In that case a trader who sold inferior qualities of his

own goods under his foreman's name was held properly convicted under Clause (c), the accused not having set up the plea that he acted innocently within the proviso in sub-s. 2 of § 2, and not having claimed the benefit of § 18.

Forging trade mark.

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

(a.) without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling that trade mark as to be calculated to deceive; or

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

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

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

Applying marks and descriptions.

5.—(1.) A person shall be deemed to apply a trade mark or mark or trade description to goods who—

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

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

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

(d.) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark or mark or trade description (*b*).

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

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

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

(*a*) For definition of "covering," see sub-s. (2) of this section.

(*b*) As to what is a false trade description, see *Budd* v. *Lucas*, (1891) 1 Q. B. 408: and *Coppen* v. *Moore* (2), (1898) 2 Q. B. 306; and notes to § 3.

Exemption of certain persons employed in ordinary course of business.

6. Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade

description, or causing any of the things in this section mentioned to be done, and proves—

(a.) That in the ordinary course of his business he is employed on behalf of other persons to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or, as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

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

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

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

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

Application of Act to watches.

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

Mark on watch-case.

8.—(1.) Every person who after the date fixed by Order in Council sends or brings a watch-case, whether imported or not, to any assay office in the United Kingdom for the purpose of being assayed, stamped, or marked, shall make a declaration declaring in what country or place the case was made. If it appears by such declaration that the watch-case was made in some country or place out of the United Kingdom, the assay office shall place on the case such a mark (differing from the mark placed by the office on a watch-case made in the United Kingdom), and in such a mode as may be from time to time directed by Order in Council (*a*).

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

(3.) Every person who makes a false declaration for the purposes of

this section shall be liable, on conviction on indictment, to the penalties of perjury, and on summary conviction to a fine not exceeding twenty pounds for each offence.

(*a*) See Order in Council of Nov. 28th, 1887, p. 573, *infra*.

Trade mark, how described in pleading.

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

Rules as to evidence.

10. In any prosecution for an offence against this Act,—

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

(2.) In the case of imported goods, evidence of the port of shipment shall be *prima facie* evidence of the place or country in which the goods were made or produced.

Punishment of accessories.

11. Any person who, being within the United Kingdom, procures, counsels, aids, abets, or is accessory to the commission, without the United Kingdom, of any act, which, if committed in the United Kingdom, would under this Act be a misdemeanour, shall be guilty of that misdemeanour as a principal, and be liable to be indicted, proceeded against, tried, and convicted in any county or place in the United Kingdom in which he may be, as if the misdemeanour had been there committed.

Search warrant.

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

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

person interested in the goods or things, shows cause to the contrary, may order such goods or things or any of them to be forfeited.

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

Extension of 22 & 23 Vict. c. 17, to offences under this Act.

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

Costs of defence or prosecution.

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

Limitation of prosecution.

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

Prohibition on importation.

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

(1.) All such goods (*a*), and also all goods of foreign manufacture bearing any name or trade mark being or purporting to be the name or trade mark of any manufacturer, dealer, or trader in the United Kingdom (*b*), unless such name or trade mark is accompanied by a definite indication (*c*) of the country in which the goods were made or produced, are hereby prohibited to be imported into the United Kingdom, and subject to the provisions of this section, shall be included among goods prohibited to be imported as if they were specified in § 42 of the Customs Consolidation Act, 1876 (*d*).

39 & 40 Vict. c. 36.

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

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

for any of the purposes of this section, and the mode of verification of such evidence.

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

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

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

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

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

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

46 & 47 Vict. c. 55.

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

(*a*) The only goods which are prohibited by this section to be imported are, in addition to foreign goods bearing a real or spurious British name or trade mark, goods which, if sold, would be liable to forfeiture under this Act. The goods liable to forfeiture are the goods in relation to which an offence against the Act has been committed (§ 2 (3) (iii.) ). Except, therefore, in the case of foreign goods with British marks, for goods to be seized it ought to be proved that an offence against the Act has been committed. But such an offence is not necessarily committed whenever the goods have on them a forged trade mark or a false trade description, and it would therefore appear that before goods bearing a forged trade mark or a false trade description are absolutely seized, it ought to be ascertained whether the owners can clear themselves of having committed an offence against the Act, under the provisions either of § 2 (1) or of § 2 (2), as may be applicable, since, if they can do so, the goods are not seizable even though they are improperly marked. See also § 12 (2) as to forfeiture.

(*b*) See 46 & 47 Vict. c. 55, § 2 (1) (a), also 39 & 40 Vict. c. 36, § 42, and 16 & 17 Vict. c. 107, § 44.

(*c*) See § 18.

(*d*) See p. 572. When goods have been wrongfully seized for an alleged offence, the owner's remedy is to bring an action against the officer who seized the goods. Such actions are now controlled by 39 & 40 Vict. c. 36, §§ 268—274, and 40 Vict. c. 13, §§ 4, 5. By §§ 268, 269 of the earlier Act one month's notice in writing is to be given before the action is commenced, and by § 270 the officer may tender amends within the month. By § 272 an action against an officer is to be commenced within one month (enlarged by 40 Vict. c. 13, § 4, to two months) after the day of seizure. After that time the only remedy appears to be to apply to the Commis-

sioners of Customs or to the Treasury, under sub-s. (6) of this section. In *Jacobsohn* v. *Blake*, 7 Scott, N. R. 772, the defendants, who were custom-house officers, took possession of and detained goods imported by the plaintiff, believing them to be subject to forfeiture; but the goods were never actually seized, and ultimately it turned out that the goods were not liable to forfeiture, and they were delivered over to the plaintiff. The latter thereupon commenced an action for trespass; but it was held that, the goods never having been actually seized, but having been only detained for examination, the action would not lie.

(*e*) See these Regulations at p. 575.

(*f*) See 46 & 47 Vict. c. 55, § 2 (1) (b), also 39 & 40 Vict. c. 36, § 42, and 35 & 36 Vict. c. 20, § 4.

(*g*) See 46 & 47 Vict. c. 55, § 2 (3), also 39 & 40 Vict. c. 36, § 42, and 35 & 36 Vict. c. 20, § 4.

(*h*) This is the date fixed by the Regulations, p. 578, *infra*.

Implied warranty on sale of marked goods.

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

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

18. Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods (*a*), the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied: Provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there.

(*a*) See *Marshall* v. *Ross*, L. R. 8 Eq. 651, "patent thread." In *Gridley* v. *Swinborne*, 5 Times L. R. 71, it was held that the defendant had a good defence under this section.

Savings.

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

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

(3.) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the United Kingdom who *bonâ fide* acts in obedience to the instructions of

such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master.

False representation as to Royal warrant.

20. Any person who falsely represents that any goods are made by a person holding a Royal Warrant, or for the service of Her Majesty, or any of the Royal Family, or any Government Department, shall be liable, on summary conviction, to a penalty not exceeding twenty pounds (*a*).

(*a*) See § 106 of the Patents Act, 1883, as to unauthorised use of the Royal Arms.

Application of Act to Scotland.

21. In the application of this Act to Scotland the following modifications shall be made:—

The expression "Summary Jurisdiction Acts" means the Summary Procedure Act, 1864, and any Acts amending the same.

The expression "justice" means sheriff.

The expression "court of summary jurisdiction" means the Sheriff Court, and all jurisdiction necessary for the purpose of this Act is hereby conferred on sheriffs.

Application of Act to Ireland.

22. In the application of this Act to Ireland, the following modifications shall be made:—

The expression "Summary Jurisdiction Acts" means, so far as respects the police district of Dublin metropolis, the Acts regulating the powers and duties of justices of the peace of such district, and as regards the rest of Ireland means the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.

14 & 15 Vict. c. 93.

The expression "court of summary jurisdiction" means justices acting under those Acts.

Repeal of 25 & 26 Vict. c. 88.

23. The Merchandise Marks Act, 1862, is hereby repealed, and any unrepealed enactment referring to any enactment so repealed shall be construed to apply to the corresponding provision of this Act: provided that this repeal shall not affect—

(a.) any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; nor

(b.) the institution or continuance of any proceeding or other remedy under any enactment so repealed for the recovery of any penalty incurred, or for the punishment of any offence committed, before the commencement of this Act; nor

(c.) any right, privilege, liability, or obligation acquired, accrued, or incurred under any enactment hereby repealed.

# THE MERCHANDISE MARKS ACT, 1891.

54 VICT. c. 15.

*An Act to amend the Merchandise Marks Act*, 1887.

[11th May, 1891.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Customs entry to be trade description.

1. The customs entry relating to imported goods shall, for the purposes of the Merchandise Marks Act, 1887, be deemed to be a trade description applied to the goods.

50 & 51 Vict. c. 28.

Official prosecutions.

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

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

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

Short title.

3. This Act may be cited as the Merchandise Marks Act, 1891, and the Merchandise Marks Act, 1887, and this Act may be cited together as the Merchandise Marks Acts, 1887 and 1891.

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# THE MERCHANDISE MARKS (PROSECUTIONS) ACT, 1894.

57 & 58 VICT. c. 19.

*An Act for enabling the Board of Agriculture to undertake Prosecutions in certain cases under the Merchandise Marks Act*, 1887.

[20th July, 1894.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Power of Board of Agriculture to prosecute in certain cases.

1. The powers exerciseable by the Board of Trade under the Merchandise Marks Act, 1891, with respect to the prosecution of offences under the Merchandise Marks Act, 1887, may in cases which appear

to the Board of Agriculture to relate to agricultural or horticultural produce be exercised by that Board, and in such cases the former Act shall apply as if the Board of Agriculture were referred to therein instead of the Board of Trade.

Extent of Act. 2. This Act shall not extend to Ireland.

Short title. 3. This Act may be cited as the Merchandise Marks (Prosecutions) Act, 1894, and shall be read with the Merchandise Marks Acts, 1887 and 1891.

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## CUSTOMS ACTS.

### The Customs Consolidation Act, 1876—39 & 40 Vict. c. 36.

Table of prohibitions and restrictions. § 42 (*a*). The goods enumerated and described in the following table of prohibitions and restrictions inwards are hereby prohibited to be imported or brought into the United Kingdom, save as thereby excepted, and if any goods so enumerated and described shall be imported or brought into the United Kingdom contrary to the prohibitions or restrictions contained therein, such goods shall be forfeited, and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct.

A TABLE OF PROHIBITIONS AND RESTRICTIONS INWARDS.

*Goods prohibited to be imported.*

* * * * * *

Clocks and watches, or any other article of metal impressed with any mark or stamp representing or in imitation of any legal British assay mark or stamp, or purporting by any mark or appearance to be of the manufacture of the United Kingdom (*b*).

* * * * * *

(*a*) This section was amended by 46 & 47 Vict. c. 55, now replaced by § 16 of the Merchandise Marks Act, 1887, and it has since been amended by 52 & 53 Vict. c. 42, 59 & 60 Vict. c. 28, and 60 & 61 Vict. c. 63.

(*b*) This is re-enacted from 16 & 17 Vict. c. 107, § 44.

Foreign manufactures with British marks. § 153. If any articles of foreign manufacture, and any packages of such articles, bearing any names, brands, or marks being or purporting to be the names, brands, or marks of manufacturers resident in the United Kingdom, shall be imported into any of the British possessions abroad, the same shall be forfeited (*a*).

(*a*) This is re-enacted from 16 & 17 Vict. c. 107, § 161.

### The Customs and Inland Revenue Act, 1879—42 & 43 Vict. c. 21.

PART I.—CUSTOMS.

Entry of British goods returned. § 6. * * Provided also, that if any British goods brought into the United Kingdom bear the name, brand, or mark of any British manufacturer, the same shall, either by bill of store, or by and with the consent in writing of the proprietor of such name, brand, or mark,

or his legal representative, or on proof to the satisfaction of the Commissioners of Customs, by declaration of the importer, that such goods are of British manufacture, be admitted to entry as British (*a*).

(*a*) This is re-enacted from 30 & 31 Vict. c. 82, § 6, and 39 & 40 Vict. c. 36, § 63.

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## ORDER IN COUNCIL UNDER § 8 OF THE MERCHANDISE MARKS ACT, 1887.

At the Court at Windsor, the 28th day of November, 1887.

PRESENT,

The QUEEN'S Most Excellent Majesty in Council.

WHEREAS by the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), it is amongst other things, provided that—

(1.) Every person who, after the date fixed by Order in Council, sends or brings a watch-case, whether imported or not, to any assay office in the United Kingdom for the purpose of being assayed, stamped, or marked, shall make a declaration declaring in what country or place the case was made. If it appears by such declaration that the watch-case was made in some country or place out of the United Kingdom, the assay office shall place on the case such a mark (differing from the mark placed by the office on a watch-case made in the United Kingdom) and in such a mode as may be from time to time directed by Order in Council.

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

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

Now, therefore, Her Majesty, by and with the advice of Her Privy Council, and in exercise of the powers vested in Her by the above-recited provisions of the said Act, is pleased to order and declare, and doth hereby order and declare, that where it appears by such declaration that such watch-cases have been made in some country or place out of the United Kingdom, then the following authorities, that is to say:—

The Wardens and Commonalty of the Mystery of Goldsmiths of the City of London;

The Guardians of the Standard of Wrought Plate, Birmingham;

The Company of Goldsmiths of the City of Chester;

The Guardians of the Standard of Wrought Plate, Sheffield;

The Incorporation of Goldsmiths of the City of Edinburgh;
The Goldsmiths' Company of the City of Glasgow;
The Fraternity or Company of Goldsmiths of the City of Dublin;

shall respectively cause to be placed on such watch-cases the marks more particularly described and delineated in Schedule II. hereunto annexed, and no other mark or marks, and such marks are hereby authorised accordingly.

And it is hereby further ordered and declared that the declaration to be made shall be in the form set forth in Schedule I. hereunto annexed.

This order shall come into operation on the first day of January, one thousand eight hundred and eighty-eight.

C. L. PEEL.

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SCHEDULE I.

*Form of Declaration.*

I (*a*) do hereby declare that the [watch-case] *or* [watch-cases] [brought] *or* [sent] by me this day to the Assay Office at in number and in a parcel marked [was] [were] made in

(*b*)

Declared at this day of 18 .

Before me (*c*)

Officer of the aforesaid Assay Office appointed in that behalf , *or*, Justice of the Peace for , *or*, Commissioner having power to administer oaths in the Supreme Court of Judicature in England.

[Supreme Court of Judicature in Ireland].

[Court of Session in Scotland].

(*a*) Here insert name and address of declarant.
(*b*) Signature of declarant.
(*c*) Signature and title of person before whom the declaration is made.

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SCHEDULE II. (*a*).

On a foreign gold case:—

Within a shield of the form of a Cross, and of the size shown in Figure I. of the Appendix hereto, the word "Foreign," over which a hall mark particular to each office shown in Figure III. and the carat value of the gold, and under which the decimal equivalent of the carat value of the gold together with the variable annual date letter.

On a foreign silver case:—

Within a shield of the form of a regular octagon and of the size shown in Figure II. of the Appendix hereto, the word "Foreign," over which a hall mark particular to each office shown in Figure III. and under which the variable annual date letter.

The particular hall mark above referred to for each of the seven assay offices at which foreign cases may be stamped is shown in Figure V. of the Appendix hereto.

(*a*) See a table of the marks prescribed by this Schedule in Appendix H., *infra*.

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## REGULATIONS MADE BY THE COMMISSIONERS OF CUSTOMS UNDER § 16 OF THE MERCHANDISE MARKS ACT, 1887.

WHEREAS by the Merchandise Marks Act, 1887 (hereinafter called "the Act"),

After various provisions against the sale, or exposure for sale, or possession for sale, trade or manufacture, of goods with forged trade marks or false descriptions, or trade marks falsely applied to them:

And after defining (amongst other things) the expression "trade mark" in manner therein set forth, with reference to "The Patents, Designs, and Trade Marks Act, 1883," and the law of indicated British Possessions and Foreign States:

And after defining the expression "trade description" as any description, statement or other indication, direct or indirect, as to number, quantity, measure, gauge, or weight, of goods, as to place or country in which any goods were made or produced, as to the mode of manufacturing or producing any goods, or as to the material of which any goods are composed, or as to any goods being the subject of any existing patent, privilege, or copyright:

And after defining the expressions "false trade description" and "goods," "apply," and "falsely apply";

It is provided by § 16 that—

(i.) All such goods as above mentioned, and

(ii.) All goods of foreign manufacture, bearing any name or trade mark, being or purporting to be the name or trade mark of any manufacturer, dealer, or trader, in the United Kingdom, unless such name or mark be accompanied by definite indication of the country in which such goods were made or produced,

shall be prohibited to be imported, and, subject to the provisions of the said section, shall be included among goods prohibited to be imported, as if they were specified in § 42 of "The Customs Consolidation Act, 1876":

And whereas by § 18 of the Act, after authorising the continued use of trade descriptions lawfully and generally applied to goods of the particular class, or manufactured by a particular method, to indicate such class or method, it is provided that, where such trade description includes the name of a place or country calculated to mislead as to where the goods were actually made or produced, such goods not having been actually made or produced there, the said reciting section should not apply (and, consequently, goods so marked

would be prohibited), unless there be added to the trade description, immediately before or after the name of the place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there:

And whereas it is also provided, by the said § 16, that the Commissioners of Customs (hereinafter called "the Commissioners") may, from time to time, make, revoke and vary regulations, either general or special, respecting the detention and forfeiture of goods the importation of which is prohibited as hereinbefore mentioned, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of the said section, and the mode of verification of such evidence:

And it is further provided by the said last-mentioned section:—

That before detaining goods or taking proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners may require that such regulations as aforesaid shall be complied with, and satisfy themselves as to the liability of the goods to forfeiture:

That such regulations may apply to all goods, the importation of which is prohibited by the said section, or different regulations may be made respecting different classes of such goods:

And also that the regulations may provide for the informant reimbursing the Commissioners all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention:

And it is also provided, by the said section, that § 2 of the Revenue Act, 1883, shall be repealed from a day to be fixed by regulations under the said reciting sections, such day not being later than the first day of January, 1888, without prejudice to anything done or suffered thereunder:

And whereas § 2 of the Revenue Act, 1883, is the law under and by virtue of which goods of foreign manufacture infringing the proprietary rights of British subjects in names, addresses, and trade marks, or bearing or having upon them, under certain conditions, the name of a place in or a part of the United Kingdom, are, at the present time, detected and stopped by officers of customs acting on their own observation and responsibility, under directions laid down by the Commissioners, and without the requirement of previous information, security, or other conditions:

Now, therefore, the Commissioners under and by virtue of the hereinbefore recited power in that behalf, hereby make and require to be complied with the following regulations, viz.:

1. Goods prohibited to be imported as hereinbefore recited, having applied to them forged trade marks, false trade descriptions, or marks, names, or descriptions otherwise illegal, which, upon examination, are detected by the officers of customs, are to be detained by them without the requirement of previous information.

2. In giving information with a view to detention an informant must fulfil the following conditions, viz.:—

(i.) He must give to the collector or superintendent, or the chief

officer of customs of the port (or sub-port) of expected importation, notice in writing stating,

the number of packages expected, as far as he is able to state the same;

the description of the goods by marks or other particulars sufficient for their identification;

the name or other sufficient indication of the importing ship;

the manner in which the goods infringe the Act;

the expected day of the arrival of the ship.

(ii.) He must deposit with the collector or other officer as aforesaid a sum sufficient, in the opinion of that officer, to cover any additional expense which may be incurred in the examination required by reason of his notice.

3. If, upon arrival and examination of the goods, the officer of customs is satisfied that there is no ground for their detention, they will be delivered. If he is not so satisfied, he will decide either to detain the goods, as in a case of detention upon ordinary examination, or to require security from the informant, for reimbursing the Commissioners or their officers all expenses and damages incurred in respect of the detention made on his information, and of any proceedings consequent thereon.

4. The security thus required must be an immediate *ad valorem* deposit of ten pounds per cent. on the value of the goods, as fixed by the officer from the quantities of value shown by the entry; and, also, subsequently a bond to be completed within four days in double the value of the goods, with two approved sureties. The *ad valorem* deposit will be returned upon completion of the bond, and will not be required if, as an alternative where time permits, the informant prefers to give a like bond before examination, upon estimated value of the goods declared to by him under statutory declaration. If the security is not duly given as above required, there will be no further detention of the goods.

5. In the above regulations the words "officer of customs" mean an officer acting under the general or special direction of the Commissioners, and the words "value of the goods" mean value irrespective of duty.

6. The "notice" and "bond" required as above shall be in the forms contained in the Schedule to these regulations, or in such other forms as the Commissioners may from time to time order and direct.

7. The security taken under these regulations will be given up at the times following, that is to say:—

Where given before examination, and if no detention, forthwith.

Where given on detention:—

If the forfeiture is completed, either by lapse of time or ultimate condemnation by the Court of Justice, then on such completion of forfeiture.

If the forfeiture is not completed, then

If the goods are released by the Commissioners, and no action or suit has been commenced against them, or any of their officers, in respect of the detention, then at the expiration of three months from the time of detention; or, if the goods are

released for failure of proceedings taken for the forfeiture and condemnation thereof upon information under § 207 of "The Customs Consolidation Act, 1876," and no action or suit has been commenced against the Commissioners, or any of their officers, in respect of the detention, then at the expiration of three months from the trial of such information.

If within such periods as aforesaid any such action or suit as aforesaid has been commenced, then upon the ultimate conclusion of such action or suit, and the fulfilment of the purpose for which the security was given.

8. These regulations apply to transhipment and transit goods as well as to goods landed to be warehoused, or for home consumption.

9. The 1st day of January, 1888, is, by these "regulations," fixed as the day from which § 2 of the "Revenue Act, 1883," shall be repealed, subject to the terms of the recited Act; and these regulations will take effect from the date of such repeal.

CHARLES DU CANE
H. MURRAY
HORACE SEYMOUR
} Commissioners of H. M. Customs.

Custom House, London,
1*st December*, 1887.

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## SCHEDULE.

(*Notice.*)

THE MERCHANDISE MARKS ACT, 1887.

To the Collector, Superintendent, or
Chief Officer of Customs at the
Port [*or* Sub-Port] of

I hereby give you notice that the under-mentioned goods, that is to say, (*a*)

are about to be imported into your port on or about the
day of next, in the (*b*)
from

That such goods are liable to detention and forfeiture being (*c*)

---

(*a*) Describe the goods, number of packages, marks used, and any other particulars necessary for their identification.

(*b*) Describe the ship, and give name or indication.

(*c*) State how the goods infringe the Act, and if the infringement is one as to a forged trade mark protected in a British Possession or Foreign State, state the Possession or State, or if the infringement is one as to place or country of origin, state the name of the place or country falsely used.

That Mr. of
and Mr. of
are prepared to become my sureties in such bond as may be required upon detention of the goods.

And I request that the said goods may be detained and dealt with accordingly.

Dated this day of , 18 .

A. B.
(or Agent for)

NOTE.—Mr. refers to his Bankers (or) Solicitors, and Mr. to his Bankers (or) Solicitors as to his sufficiency for the penalty of the bond.

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(*Bond.*)

THE MERCHANDISE MARKS ACT, 1887.

KNOW ALL MEN BY THESE PRESENTS, THAT WE A.B. and are firmly bound unto Our Sovereign Lady Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, in the sum of Pounds to be paid to our said Lady the Queen, her heirs or successors. For which payment well and truly to be made we bind ourselves, jointly and severally, our heirs, executors, and administrators, firmly by these presents. Sealed with our Seals. *Dated this* day of , in the year of our Lord one thousand eight hundred and

WHEREAS the above named A. B. has by a notice dated the day of , informed the Collector of Customs at that the undermentioned goods, that is to say,

were about to be imported into the port of contrary to § 16 of the Merchandise Marks Act, 1887, and requested that the said goods should be detained and dealt with accordingly. And whereas the said goods duly arrived in the said port on the day of last, and are now detained pursuant to the said notice. Now the condition of *this obligation is such that if the said* A. B. his executors or administrators, shall well and effectually indemnify, save harmless, and keep indemnified, Her Majesty, her heirs and successors, and all her and their officers of customs, and their executors or administrators, from and against all loss or damage, payment or payments, and all costs and expenses which Her said Majesty, her heirs or successors, and her and their officers of customs, their executors or administrators, shall or may sustain or incur by

reason or on account of any detention of the said goods following upon the information contained in such notice and any proceedings consequent upon such detention, then this obligation shall be void, or otherwise shall be and remain in full force and virtue.

Signed, sealed, and delivered

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## GENERAL ORDERS made by the Commissioners of Customs for carrying into Effect the Merchandise Marks Act, 1887.

### General Order $\frac{81}{1887}$.

Custom House, London,
20*th October*, 1887.

Sir,

Herewith you will receive the usual number of copies of the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28).

You are carefully to note the meanings given by the Act to the following expressions, viz.:—

"Goods," § 3.
"Applied," § 5; sub-ss. 1 & 2.
"Falsely applied," § 5; sub-s. 3.
"Trade Mark,"
"Trade Description"
"False Trade Description"
"Person"
"Manufacturer"
"Dealer" or "Trader"
"Proprietor"
"Name"
"Name or Initials"
} § 3.

You will also especially note, as applying to imported goods, the provisions of § 10, sub-s. (2), and § 18 of the Act.

You will observe that by § 5 of the Act the word "applies" in connection with goods is extended to "applying" the name or mark to any "covering, label, reel, or other thing."

You will understand that, in future, as hitherto, this will not be held to extend to "coverings" or other such things, including boxes, bottles, or the like, imported alone and with the intention of using them as auxiliary means of carrying into the market goods really British or goods (such as wine) incapable of being mistaken as British goods, where the description applied to the coverings or such other things does not relate to *them*, but has reference to the goods which they are to cover to carry into the market.

There is, however, on this point one article to be specially noticed, viz., "Watch-cases;" and, as to this, your attention is called to § 7 of the Act, which lays down that, in the absence of a counter-description

of the watch itself, the description on the watch *case* shall be always held to describe the watch.

Under § 16 of the Act, regulations have been prepared by the Board which are now under the consideration of the Lords of the Treasury.

As soon as these regulations are finally approved, a copy will be sent to you, together with instructions as to the manner in which you are to carry them into effect.

These regulations will come into force on a date to be fixed under them, but not later than the first day of January next.

It is highly desirable, therefore, that in the meanwhile you should make yourself familiar with the general scope of the Act, and especially with the provisions contained in § 16 as to the importation of goods coming within its powers, and with the points to which your attention is now more particularly directed.

I am, Sir,
Your obedient Servant,
E. Goodwyn.

To the Collector.

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General Order $\frac{99}{1887}$.

Custom House, London,
*22nd December*, 1887.

Sir,

1. As a sequel to G. O. 81/1887 you will receive herewith a copy of the regulations made by the Board under § 16 of the Merchandise Marks Act, 1887, published in the London Gazette of the 2nd of December, 1887, and in the Board of Trade Journal for the present month.

2. You will observe that the regulations do two things: Twofold object of regulations.
(i.) They direct that goods prohibited by the Act which are detected by the officers upon examination (that is to say, upon ordinary examination for revenue purposes), are to be detained without previous information.
(ii.) They provide what is to be done in cases where prohibited importation, and the ground of such prohibition, are matters not of detection, in the ordinary way, but of information by an informant.

3. You will require guidance as to what goods, in the opinion of the Board, the officers ought to detect as mentioned in sub-paragraph (i.); and as to the action to be taken by officers, after information, as mentioned in sub-paragraph (ii.). General points on which guidance is necessary.

4. The Act extends so largely the area of prohibited goods, for the benefit not only of British subjects, but also of the subjects and citizens of foreign states, that as to a considerable proportion of goods liable to prohibition on importation, the officers cannot be expected to act without some guidance by information. It must not be, however, held or worked so as in any way to diminish the care at present taken As to the scope of the Act with reference to "British marks."

by the officers in respect to "British Marks," involving names of British places, or indications of British manufacture, and to this extent, at least, the officers must continue to act without previous information.

Reference to particular provisions as to place or country of origin.

5. You will observe that names or trade marks of British manufacturers, dealers, or traders on imported foreign goods (§ 16, sentence beginning "all goods of foreign manufacture") are to be only admissible if distinctly qualified, not merely, as heretofore, by words showing manufacture abroad, but by a definite indication of the country in which the goods were made or produced; and this same principle is contained, even more emphatically, in § 18 of the Act, as regards lawful and general "trade descriptions," which include the name of a place or country.

Classification of goods specially indicated for detection without information.

6. The goods, therefore, which the Board distinctly expect the officers themselves to detect upon ordinary examination, and without previous information, will be as follows, viz.:—

Class (a). Goods of foreign manufacture, by whomsoever imported, having applied to them, either,

A name or trade mark which is or purports to be the name or trade mark of a manufacturer, dealer, or trader in the United Kingdom; or

A trade description which indicates a particular class or method of manufacture, and includes the name of a place in, or a part of the United Kingdom, and is thereby calculated to mislead as to the place of the manufacture or production of goods which have not been manufactured or produced in the United Kingdom;

unless such name, mark, or description is accompanied by a definite indication of the place or country in which the goods were made or produced, that is to say, an addition immediately before or after the said name, mark or description, in an equally conspicuous manner therewith, of the name of the place or country in which the goods were actually made or produced, with, in the case of a trade description including name of place, a statement that they were made or produced there.

Class (b). Goods of foreign manufacture, by whomsoever imported, having applied to them any description, figures, words, or marks, or arrangement or combination thereof, so as to constitute, by being or including, either expressly or by reference, the name of a place in or a part of the United Kingdom, or in any other way, a statement or other indication, direct or indirect, that the goods were made or produced in the United Kingdom.

7. On the above classification you will note this paragraph and the paragraphs to 10 inclusive.

As to the requirement of a definite indication of place or country of origin.

It will obviously not be in the power of the officers, nor are they expected, to decide whether goods falling within Class (a) were actually made or produced in the country from which they come; but, in practice, it will be sufficient if the officers satisfy themselves that the name of *some* foreign country, or of some place in *a* foreign country, is applied to the goods in a manner equally indelible or irremovable, and as equally conspicuous, as the name or trade mark itself, and in close proximity to it.

8. The word "purports," also in (a), is to be understood as referring to any name or names reasonably suggesting a British manufacturer, dealer, or trader, without regard to the fact of whether the name is or is not known to the officer; or as referring to a trade mark not being merely matter of decoration or ornament, which reasonably suggests itself as British by containing English wording, or national devices or figures distinctly indicating British manufacture.

As to the meaning of the word "purports."

9. The words "a trade description which indicates a particular class or method of manufacture, and includes the name of a place in or a part of the United Kingdom, and is thereby calculated to mislead" mean such terms as Kidderminster Carpets, Windsor Soap, "Balbriggan" on hosiery, or "Shetland" on shawls, and the like, which, although they might be held to be merely phrases descriptive of method of manufacture, are yet caculated to mislead as to place of origin.

As to "trade description," including name of place calculated to mislead.

10. Class (b) refers to and includes such inscriptions as "present from such and such a place," and the like; or, even without a name, any phrases, words, language or devices, which state or indicate, directly or indirectly, make or production in the United Kingdom; and the words "by reference" mean that "Irish," for instance, is equivalent to "of Ireland." Any goods bearing such marks will be detained, and you will refer the matter to the Board.

As to other, less definite, inscriptions indicating in any way make or production in the United Kingdom.

11. Passing from the goods thus specially mentioned, those generally prohibited by the Act to be imported may be summarised as follows:—

Classification, generally, of goods prohibited by the Act.

(Head i.). Goods, whether of foreign manufacture or British goods brought back, having a false trade description as to name or initials, or a forged trade mark applied to them.

(Head ii.). Like goods having applied to them a false trade description as to the place or country in which they were made or produced; or as to number, quantity, measure, gauge or weight, mode of manufacture or production, or material of which composed; or as to the goods being the subjects of any existing patent, privilege, or copyright.

A false trade description is a description or indication, whether original or by addition, effacement or otherwise, and whether by figures, words, or marks, or any arrangement or combination thereof, directly or indirectly false in a material respect.

12. With regard to Head (i.). This is the protection of a manufacturer, dealer, or trader against the fraudulent or unfair use of his name or trade mark by any other person. It would not be possible for officers to enter into examination of all names and marks in respect to their use as between various importers. At the same time, a manufacturer, dealer, or trader who has reason to believe that his name or trade mark is one not unlikely to be imitated, so as to constitute a false trade description, or forged trade mark, is entitled to ask that, without the requirement of special information, such description or mark may, upon any importation, be stopped.

Scope of Head (i).

13. For this purpose the Board sanction the system of registration of names or marks in a way *similar* to that which has hitherto existed; and a manufacturer, dealer, or trader may register his name or mark at such port or ports as he desires. In respect of names or marks so

Registration for this purpose.

registered, it will be the duty of the officers, at the particular port or ports, to prevent the delivery of goods to which such names or marks are applied, unless the delivery is authorised by the registered proprietor. Apart from names or marks as to which such registration exists, the officers are not expected to examine goods with reference to Head (i.).

Who may register, and on what terms.

14. Any manufacturer, dealer, or trader, whether British or foreign, may register his name or mark; but you may refuse registration to any name or mark which you consider to be of a character too indefinite or indistinct for officers to recognise, referring to the Board in any case of doubt. An applicant for registration must prove his proprietorship of the name or mark by declaration; and if, in order to avoid delay, he desires to do so, he may appoint an agent to give authority for delivery of his goods, and prove (also by declaration) the appointment of such agent.

See par. 32.

Registration to be subject to provisions mentioned in par. 6.

15. You must understand, very distinctly, that the use by the British manufacturer, dealer, or trader of even his *own* name on foreign goods, and the use by *any* manufacturer, dealer, or trader, on like goods, of words, figures, or marks of any kind stating or indicating, directly or indirectly, make or production in the United Kingdom, are prohibited unless the qualifying conditions specified in paragraph 6 are complied with. You must, therefore, clearly explain to every person registering a name or mark which involves any such statement or indication, as will probably often be the case, that, while the name or mark will be guarded by such registration, it will not be rendered admissible unless duly qualified, as the law may require, in every case. The register at your port under the law now expiring will cease to be operative with the expiry of that law.

Notwithstanding classification in par. 6, any other infringement detected is to be followed by detention.

16. As regards Head (ii.); if (apart from the goods specially mentioned in paragraph 6, and notwithstanding that classification) the officers should in any case upon that ordinary examination for revenue purposes, detect anything constituting an infringement of any of the prohibitions of the Act as thus set forth, you will detain such goods and refer the matter to the Board.

Indication as to where such detection may happen.

17. Such detection by officers may happen, for instance, as to number, quantity, measure, gauge, or weight; while, on the other hand, as to mode or material of manufacture, as to any patent, privilege, or copyright,* or foreign trade marks, the officers, upon ordinary examination, may probably, in the absence of special knowledge, fail in detecting false descriptions or forged trade marks.

Directions as to question of place or country of origin.

18. False descriptions as to place of origin affecting the interests of "British Possessions" or "Foreign States" are matters which, unaided by information, officers will not generally be expected to trace; but wherever they observe goods conspicuously known as the usual product of a particular place or country, and marked with that name, shipped from a port in another country altogether—as, for instance, Wine marked "Xeres" or "Spanish" from Belgium, or Cigars marked "Havana" from Germany—such goods may, in the absence of proof

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* As to copyright, this instruction in no way affects the practice under §§ 42 and 44 of the Customs Consolidation Act, 1876.

of make or produce at the place or in the country named on them, be properly detained.

Action upon information—two stages of such action.

19. Some directions (beyond what is shown in the Regulations) are desirable as to your action upon "information"; and you will observe that there are two stages of procedure in this: viz., one up to and including the arrival and examination or identification of the goods; and the other after the examination or identification.

As to special examination of goods in such case.

20. With regard to the first stage—the two points for consideration are, whether any, and if so what, special examination of the goods should be made, and what deposit should be taken to cover the expense of such examination, if it is made.

On what it will depend.

21. The character and extent of examination will require careful discretion on your part, and will depend on the manner in which the goods are alleged in the notice to infringe the Act. An indication has been given you above as to what the Board consider that officers can detect and what they cannot, upon ordinary examination; and this will furnish you with a guide as to what they may be able to trace upon fuller examination after information.

Course where such examination would not be serviceable.

22. Wherever, in accordance with such indication, you are of opinion that the officers could not, even on fuller examination, discover whether the goods infringe the Act, you need not order a special examination, and consequently you will not require any deposit in respect of such examination, but you may at once order detention of the goods as if the officers had seen cause to detain them, and proceed to require security, in conformity with directions given in paragraph 29 of this Order.

Course where such examination would be serviceable.

23. Wherever, on the other hand, you are of opinion that a fuller examination than that ordinarily directed for revenue purposes may reasonably enable the officers to discover whether or not there is the infringement alleged—as, for instance, by careful weighing, measuring, counting, or gauging—you will direct that such an examination shall take place, examining as to free goods, for this purpose, not less than twice the usual number of packages, and in the case of goods imported in bulk, such as machinery and the like, treating each piece imported as a package.

Deposit to cover such examination.

24. Assuming examination to be ordered by you in accordance with the lines above indicated, you will take, as a deposit to cover the additional expense of this examination, such sum as you may think necessary, having regard to the nature of the goods, and to the number of packages which, according to the informant's knowledge, will have been stated in the notice.

Special rules in such examination in regard to place or country of origin as affecting British Possessions or foreign states.

25. The case of false description as to place of origin affecting the interests of "British Possessions" or "Foreign States" is here again one for special mention. As above stated, it is one which, as a rule, officers cannot be expected to detect without information; but, for an officer examining upon information, the following rules may be laid down: viz., if it is ascertained that the name of the place or country complained of is not applied to the goods at all, or, if applied, is accompanied by a definite indication or addition, as contemplated by the Act, of make or production elsewhere, the officer may be satisfied that there is no ground existing to justify the notice received; but if the name complained of is found to be applied to the goods, and is the

name of a country, or of a place in a country, not the country of a port or shipment, the officer may, in the absence of proof of make or produce at the place or in the country named on them, be satisfied that the alleged infringement clearly exists.

As to British Possessions and foreign states to which the provisions in relation to forged trade marks apply.

26. In the case of a notice alleging the application of a forged trade mark where the mark is one protected in a British Possession or foreign state, such a notice will only be good, and need only be accepted by you, if it relates to possessions or states included in the definition of trade marks.

Up to the present time the British Possessions and foreign states so included are:

| | |
|---|---|
| British Possession .. | Queensland. |
| Foreign States in Europe | Belgium.<br>France.<br>Italy.<br>The Netherlands.<br>Norway.<br>Portugal.<br>Servia.<br>Spain.<br>Sweden.<br>Switzerland. |
| In N. and S. America and the W. Indies | Brazil.<br>Guatemala.<br>Paraguay.<br>San Domingo.<br>The United States of America.<br>Uruguay. |
| In Africa .. .. | Tunis. |

Transhipment and transit.

27. As to transhipment and transit goods; where information and "notice" relate to these goods you will deal with them exactly as if they were goods for home use. Apart from information you will not, as regards the ordinary examination of such goods for revenue purposes, examine more packages than at present; but the Board, in addition to the existing rules as to transhipment and transit goods, direct that, as to all such goods, no marks of any kind or description shall be allowed to be applied to them in this country, and you will see that this is strictly carried out in your port.

Rules as to special examination generally.

28. As to goods examined upon information generally, you will be guided by the following rules. If upon examination the officer is satisfied that there is no ground existing to justify the notice received, he will pass the goods; if he is satisfied that the alleged infringement clearly exists, he will detain the goods as in a case of detention upon ordinary examination; but in cases where the officer is not so satisfied, and in cases where you may have considered that official examination cannot test the point, you will order the detention of the goods at the risk of the informant, and thus arrive at the second stage of the procedure upon information—viz., the taking of security.

As to security where detention ordered.

29. You will observe that (except in cases where the informant prefers to give a bond, and where time allows such a step to be taken before the goods arrive and are examined), there are two things to be

done in taking security: first, to take an *ad valorem* money deposit to cover the possibility of the bond not being completed; and secondly, to see that the bond is completed, after which you will return the deposit. The amount of both the deposit and the bond will depend on the value of the goods.

Inquiries as to sufficiency of sureties.

30. The form of notice given in the Schedule to the regulations requires a statement of the names of persons proposed as sureties. As to the sufficiency of these you will make inquiries in the usual way, and have the bond completed as in other transactions.

As to goods after security taken, and as to delivery up of security.

31. The security having once been taken, the goods will, without further special examination, remain in charge; and the regulations contain definite provisions as to when, in the various contingencies that may arise, the security will be delivered up.

Supply of forms.

32. A form is annexed of the declaration mentioned in paragraph 14; and also of a bond, when it is preferred to give one before examination, as mentioned in paragraph 29. Supplies of these forms, and of those given in the Schedule to the regulations, can be obtained in the usual way.

33. A General Order as to watch-cases and watches will shortly be issued; and further directions will be given, from time to time, as decisions are arrived at, under paragraphs 9 and 10, and paragraphs 16, 17, and 18 of this Order.

I am, Sir,
Your obedient Servant,
E. GOODWYN.

The Collector at .

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Merchandise Marks Act, 1887.

50 & 51 Vict. c. 28.

DECLARATION ON REGISTRATION UNDER PARAGRAPH 13 OF GENERAL ORDER $\frac{99}{1887}$.

*Port of*

I (*a*) hereby declare that (*b*)
(*c*) the proprietor , of (*d*) viz.:—

which (*e*) expect to be applied to goods imported, from time to time, at this Port; and that (*f*) have appointed Mr. (*g*) of to be (*h*) agent, to give authority for the delivery of such goods.

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(*a*) Full name and address of declarant.
(*b*) "I" or "I and my partners, trading as Messrs. " or "such and such a Company, of which I am the representative official," or "so and so of such and such a place abroad, whom I represent in this country."
(*c*) "Is" or "are."
(*d*) "The following name as a trade description," or "the following trade mark," or "the following name as a trade description and trade mark."
(*e*) "I" or "we." (*f*) "I" or "we."
(*g*) This portion as to appointment of agent may be erased, where such appointment is not desired.
(*h*) "My" or "our."

I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Statutory Declarations Act, 1835.

Signed

Declared this day of 18 ,
at

Before me

A Commissioner to administer Oaths, &c.

N.B.—Registration in pursuance of this declaration is subject to the provisions of the Act which forbid the importation, by a registered proprietor, even of his own goods which bear, in name or mark, any statement or indication, direct or indirect, of make or produce in the United Kingdom, unless qualified as the Act requires.

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KNOW ALL MEN by these Presents that we

are held and firmly bound unto our Sovereign Lady Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, in the sum of pounds to be paid to our said Lady the Queen, Her Heirs or Successors; for which payment well and truly to be made we bind ourselves jointly and severally, our heirs, executors and administrators, firmly by these Presents. Sealed with our seals. Dated this day of in the year of our Lord one thousand eight hundred and .

WHEREAS the above-named has by a notice dated the day of informed the Collector of Customs at that the undermentioned goods, that is to say,

are about to be imported into the port of contrary to § 16 of the Merchandise Marks Act, 1887, and has requested that the said goods shall be detained and dealt with accordingly. Now the condition of this obligation is such that if the said , his executors or administrators, shall well and effectually indemnify, save harmless, and keep indemnified Her Majesty, Her Heirs and Successors, and all Her and Their Officers of Customs and their executors or administrators, from and against all loss or damage, payment or payments, and all costs and expenses which Her said Majesty, Her Heirs or Successors, and Her or Their Officers of Customs, their executors and administrators, shall or may sustain or incur by reason or on account of any detention or delay in the delivery of the said goods, following upon the information contained in such notice and any proceedings consequent upon such detention or delay, then this obligation shall be void, otherwise shall be and remain in full force and virtue.

Signed, sealed and delivered }

GENERAL ORDER $\frac{9}{1888}$.

CUSTOM HOUSE, LONDON.
18*th January*, 1888.

SIR,

In accordance with paragraph 33 of General Order 99/1887, I now transmit to you the directions of the Board, to enable you to deal with watch-cases and watches, under the Merchandise Marks Act; the latter term, watches, meaning as provided by § 7 of the Act, "all that portion of a watch which is not the watch-case."

Your attention has already, by G. O. 81/1887, been called to the position in which watch-cases, under this section, stand in relation to watches; and the consequent importance of the assay mark on watch-cases, which mark, by virtue of § 3 (1) of the Act, would be deemed a trade description as to place or country of origin.

You will note, in addition, that by § 8 (1) of the Act provision is made for preventing foreign-made watch-cases from obtaining the mark placed on a watch-case made in the United Kingdom: and it is enacted that a different mark shall be placed on foreign watch-cases of such pattern, and in such mode as directed by Order in Council.

An Order in Council to this effect, dated the 28th November last (*a*), was published in the London Gazette of 9th December last; and a copy of this order, together with sheets 1 and 2 of Appendix to Schedule II. therein referred to, which contain diagrams of the required new marks, are sent to you herewith.

You will carefully study these sheets, and note how the marks apply variously to the different assay offices in the United Kingdom.

The directions to be observed by you in applying this new law will relate to—

(a.) Watch-cases with assay marks imported alone.
(b.) Like watch-cases imported with the watches, that is to say, watches of foreign manufacture in them.

(a.) *Watch cases with Assay Marks imported alone.*

If the cases are wholly unmarked, or are duly marked in accordance with the Order in Council, or with a foreign assay mark, and there is not, in addition, any wording on any part of the case proper, or on the dome, indicating make or produce in the United Kingdom, the goods may be delivered. If, on the other hand, there is any such wording, the goods must be detained and the matter referred to the Board.

If the cases are marked with a British Hall Mark as placed on watch-cases made in the United Kingdom, you will detain the goods unless they are entered as "British goods brought back," in which case they may be admitted under the usual regulations.

(b.) *Watch-cases imported with the Watches in them.*

If the cases are wholly unmarked, or are marked either
In accordance with the Order in Council, or
With a foreign assay mark, or

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(*a*) See p. 573, *supra*.

With a British assay mark as placed on a watch-case made in the United Kingdom, and with an equally conspicuous statement either above or below the assay mark, that the watch is of foreign make;

And if there is no wording either as an addition on the case or dome, or upon the watch itself, whether on the dial or the plate, or any part of the works, indicating make or produce in the United Kingdom, then the goods may be delivered.

If, on the other hand, there is any such wording, the goods must be detained and the matter referred to the Board.

If the cases are marked with a British assay mark as placed on a watch-case made in the United Kingdom, and with no statement of foreign make on the cases, as required above, you will detain them as a seizure, unless there is upon the dial of each watch and also on the top "plate" (where the watch is of that construction) or on the bottom "plate" (where the watch is of that construction) visibly, between the "bridges," an indelible and definite indication of the place or country in which the watches were made. Such an indication will be considered definite, if it is, or contains only the name of the place or country of origin; if in addition, it contains the name of a place in, or a part of the United Kingdom, as, for instance, "Geneva and London," or if there is anywhere on the watch an indication by figures, words, or otherwise, that the watch might be the make or produce of the United Kingdom, then, in addition to the name of place or country of origin, there must be a distinct statement that the watches were there made.

I am, Sir,
Your obedient Servant,
E. Goodwyn.

The Collector at .

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## General Order $\frac{14}{1888}$.

Custom House, London.
*4th February*, 1888.

Sir,

With reference to paragraph (b) of § 5 of the Merchandise Marks Act, 1887, I am desired to acquaint you that a name of a port or place of destination applied to mere packing-cases, in which goods are clearly not intended to be sold, or exposed for sale, either wholesale or retail, will not render the goods liable to detention; but, where a package containing goods is not of this description, the port or place of destination should be accompanied by a definite indication of the country of origin.

I am, Sir,
Your obedient Servant,
E. Goodwyn.

To the Collector.

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## General Order $\frac{26}{1888}$.

Custom House, London.
10*th March*, 1888.

Sir,

I am desired to acquaint you, for the information and guidance of yourself and of the officers under your survey, that, with reference to paragraph 6 (b) and to paragraph 10 of General Order 99/1887, the Board are of opinion that inscriptions applied to goods by means of labels or tickets, or applied to boxes, cartons, parcels, or other ultimate packages containing goods, manifestly only for the purpose of distinguishing the goods for the convenience of dealers and shopkeepers, and not specially intended to attract the eye of the consumer, should not be practically treated as trade descriptions, whenever the inscription consists simply of the bare name of the goods or indication of number, quantity, size, and the like.

For instance,—

on Hosiery,
"Hose"
"White Cotton—size 10";
on Textile Fabrics,
"No.—Qual.—Colour—Dess.—Yards,"
or
"No.—Size—Quality—Shade";
on Goloshes,
"1 Doz. pairs—Men's 2nd Quality—No. 7."

Goods bearing labels, tickets, &c., of this character only are not to be detained, whatever may be the language in which the inscriptions are printed or written.

You are to cause these directions to be carried into effect accordingly.

It is to be understood that this order does not apply to wording on the goods themselves, nor to any wording which includes the name of a place or country, the name of any trader, manufacturer or dealer, or a trade mark.

I am further to acquaint you that the last clause of General Order 14/1888 is not to be read as applying to the names of ports of unshipment, used for the mere purpose of indicating where the goods are to be unladen, as required frequently in bills of lading, whatever may be the description of package used. The officers are to exercise their discretion in distinguishing whether those names are used solely for the purpose specified above.

I am, Sir,
Your obedient Servant,
R. T. Prowse.

To the Collector.

## General Order $\frac{33}{1888}$.

Custom House, London.
*24th March*, 1888.

Sir,

With reference to paragraph 33 of the General Order 99/1887, I am desired to acquaint you that Swedish iron bearing the words "Lancashire Swedish," or the abbreviation thereof, "Lancash. Swedish," is to be admitted into this country without question so far as the provisions of the Merchandise Marks Act, 1887, are concerned.

This arrangement is sanctioned upon the understanding that the words of the mark shall not be inverted, and that under no circumstances will Swedish iron marked "Lancashire" alone be admitted into this country.

I am, Sir,
Your obedient Servant,
R. T. Prowse.

To the Collector.

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## General Order $\frac{44}{1888}$.

Custom House, London.
*9th April*, 1888.

Sir,

With reference to § 33 of the General Order 99/1887, I am desired to acquaint you that packages used for the importation from any place of natural flowers, fresh fruit, vegetables and potatoes, and bearing upon them marks which the officers are satisfied are merely address marks, such as "Wm. Evans, Leeds," "Thos. Jones, London," are to be treated as packing cases to which the provisions of the General Orders 14/1888 and 26/1888 apply, and are not to be detained under the Merchandise Marks Act on account of such marks only.

Moreover, packages of the above description coming from the Channel Islands, Malta, Gozo, and Gibraltar, and bearing on them, in addition to address marks, any words in the English language describing the goods contained in the packages, are not to be detained on this account, provided such words do not constitute a trade mark, nor include the name of a place in the United Kingdom to which the General Orders quoted above do not apply.

I am, Sir,
Your obedient Servant,
R. T. Prowse.

To the Collector.

## Board's Order on No. $\frac{37366}{1888}$.

### Merchandise Marks Act, 1887.

*Sardine Trade.*

Sardines from Spain and Portugal imported into *this country, marked with names of French places or in the French language*, but without the qualification required by the Merchandise Marks Act, 1887, may be delivered up to the 30th of June, 1889 (inclusive).

After that date Sardines which are not imported from France will not be admitted to this country, unless duly qualified, when they bear upon them the names of places in France, or descriptions in the French language other than the trade description "Sardines à l'huile," which will be admissible on Sardines from whatever part of the world they may be imported.

By Order,
(Signed) E. Goodwyn.

Custom House, London,
18*th December*, 1888.

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## General Order $\frac{147}{1888}$.

Custom House, London,
31*st December*, 1888.

### Merchandise Marks Act.

*Grain.*

The Board direct that grain, of a description which is grown in the United Kingdom, imported in sacks, be delivered without reference to the marks upon them, for a period of six months from the 1st proximo, provided such marks constitute correct descriptions and do not include the name of a place in the United Kingdom. The Board make this concession with the view of allowing importing merchants time in which to add to the marks on their sacks an indication that the grain is of foreign production.

The officers are informed that descriptions of grain which are not grown in this country, including linseed and rapeseed, do not require to have an indication merely of British origin qualified by an indication that the grain is of foreign production, nor are descriptions in the English language on grain from English-speaking countries, including India, to be considered open to objection, provided they are correct descriptions and do not include the name of a place in the United Kingdom.

The officers are also informed that on and after the 1st July next the name *and address* of a merchant in this country, on grain sacks, will be dealt with as an indication that the grain is of British origin.

The Board have directed that, in the case of grain imported in bulk and transferred into sacks on board the importing ship, the marking of the sacks need not be qualified with a statement of the foreign origin of the grain.

By Order,
R. T. Prowse.

## General Order $\frac{7}{1889}$.

Custom House, London,
1*st February*, 1889.

### Merchandise Marks Act, 1887.

*Certain Discretionary Powers given to Officers.*

The importation sections of the Merchandise Marks Act, 1887, having now been in force for over twelve months, and its provisions having become familiar both to importers of goods and to the officers of customs, the Board have considered whether some discretionary power may not be given to the collectors, surveyors, or other superior officers in releasing goods which, although at first sight they appear to be liable to detention, yet on further explanation from the importer may properly be released, so far as the Merchandise Marks Act is concerned—such, for instance, as genuinely marked British returned goods, or private property in actual use.

The Board accordingly give to the collectors and surveyors at the Outports, and to the inspectors and surveyors in London, a discretionary power to deliver goods without a special order when they are satisfied that they come under any one of the following heads :—

(1.) Articles for private use.

(1.) Articles not dutiable, however marked, sent over to one individual as presents or for personal use, and not in any process of sale or purchase, on the officers satisfying themselves that the importer's statement in this respect is correct.

(2.) Used articles either private property or sent for repairs.

(2.) Articles which are not new and which are manifestly private property, such as clothing or other personal effects, and old, used, and damaged articles sent to this country for repairs and imported by or consigned to the persons whose names are on the goods. Under this head, however, such goods as old lace, old china, or old violins, and similar articles sent by dealers for sale as antiquities, are not included; goods of this kind are strictly merchandise. Wherever age, apparent or real, adds to the value of the goods, they are not to be delivered under this paragraph, unless they are private property, not in any process of sale or purchase, but the directions of the Board must be obtained.

(3.) British samples returned.

(3.) Samples of *no value*, made by competing firms in the United Kingdom, and sent to manufacturers in this country for the purposes of trade, may be delivered on a statement being made in writing by the importer that the articles are samples of no value, and that they are imported for trade purposes, as samples, and not for sale or use, provided the officers are satisfied that they are of British manufacture.

(4.) Foreign samples.

(4.) Foreign samples *not* bearing the names or trade marks of manufacturers or dealers in the United Kingdom, but bearing trade descriptions which are misleading in language as to the country from which they come, may be also admitted upon being duly qualified, and

on the officers being satisfied that they are imported for purposes of manufacture or comparison in this country. Foreign samples, however, bearing the names or trade marks of British manufacturers or dealers, or indirect indications of British manufacture, without qualification, sent for the purpose of soliciting orders for sale in this country, are to be placed under detention, and not delivered without the Board's sanction.

(5.) British returned goods.

(5.) British returned goods, not dutiable, or in respect to which no drawback can have been received, may be released under § 6 of the Act 42 & 43 Vict. c. 21, without a special order of the Board, so far as the marks are concerned, either by a bill of store, or by declaration of the importer that the goods are within his knowledge British returned, so long as the collector or surveyor sees no reason to doubt its truth.

Should, however, the goods be admitted to entry as British under the second alternative allowed by the section, viz.: "by and with the consent in writing of the proprietor of such name, brand, or mark, or his legal representative," such consent in each case must be accompanied by a statement from the persons whose names appear upon the goods that the articles have been manufactured by them in this country.

Should the officer who examines the goods have any doubt as to the truth of the statement, the matter is to be reported to the Board.

The officers will not call for statutory declarations made under the Statutory Declarations Act, 1835, without the Board's sanction in each case.

(6.) In London, goods which have been placed under detention on account of illegal marks, and in respect of which no applications have been made by the importers or no steps taken to carry out the conditions imposed by the Board on their release, within two months from the date of the Board's order for their detention, are to be removed to the Queen's Warehouse, without special directions in each case, should the officers see no circumstances which call for exceptional treatment.

(7.) The officers are to take care that, in all cases where the Board allow qualifying words to be added before the delivery of goods, such words are applied in characters clear, conspicuous, and as indelible as the marks requiring qualification, and in close proximity to those marks.

By Order,

E. GOODWYN.

To the Collector.

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GENERAL ORDER $\frac{8}{1890}$.

CUSTOM HOUSE, LONDON,
*25th January*, 1890.

## Merchandise Marks Act.

### *As to marking of imported Bales of Wool.*

The officers are informed that wool imported from New Zealand and the Australian and Cape Colonies, in bales marked with the names of the stations upon which the wool is grown, or the breed of sheep, such as "Bridgwater," "Cheviot," "Lincoln Slipes," &c., and which are often identical with the names of towns or districts in the United Kingdom, need not, until further orders, be detained for want of an accompanying indication of the country of origin.

By Order of the Board,
R. T. PROWSE.

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GENERAL ORDER $\frac{50}{1893}$.

CUSTOM HOUSE, LONDON,
*12th July*, 1893.

## Merchandise Marks Act, 1887.

### *The Proprietor of a Registered Mark to be apprized, when Goods have been detained for an infringement of such Mark.*

With reference to the provisions contained in the regulations made by the Commissioners of Customs under § 16 of the Merchandise Marks Act of 1887, and to those of General Order 99/1887, the Board direct that, when goods are detained on account of names or marks which have been registered in this department, care be taken in every case that, in addition to the usual notice of seizure required under § 207 of the Customs Consolidation Act, information of the detention, and of the cause of such detention, be at once given in writing to the person who has so registered his name or mark, or to the representative appointed by him to authorize delivery of the goods, who is at the same time to be called upon to enter into the required security without delay, and informed that unless immediate attention is given to the matter the goods will be released.

If, at the end of four days, the collector (or other principal officer concerned) does not receive a reply he will release the goods; but collectors will observe that the limit to the time of detention here laid down does not apply in cases where the marks are such as to render the goods liable to detention irrespective of the question of registration; and in such cases the above clause intimating an early release of the goods in the absence of due attention being paid to the matter is to be omitted from the notice given to the owner of the mark or his representative.

By Order of the Board,
JOHN COURROUX.

## General Order $\frac{68}{1893}$.

Custom House, London,
31*st August*, 1893.

### Merchandise Marks Acts.

*Saumur Champagne.*

The Board, having had their attention recently called to the marks on French Sparkling Wines, hereby inform officers for their guidance, that on and after 1st October next, the words "Saumur Champagne," or the like words, when applied as a description to Sparkling Wines of Saumur, will not be admissible under the provisions of the Merchandise Marks Acts. Any such importations marked descriptively with expressions involving the word "Champagne," or otherwise than merely "Saumur," "Saumur Mousseux," "Sparkling Saumur," or the like, must therefore, on and after the date above named, be detained for the Board's directions.

By Order of the Board,
John Courroux.

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## General Order $\frac{4}{1895}$.

Custom House, London,
21*st January*, 1895.

### Merchandise Marks Act, 1887.

*Amendment of General Order* 44/1888.

Officers are informed, with reference to General Orders 14/1888 and 44/1888, respecting marks on packages of imported goods, that the Board have directed that the latter order be amended by the insertion of the words "imported otherwise than in sacks" after the word "potatoes" in line 3, and the attention of the officers is again drawn to the fact that the concessions made in that order are subject to the limitation contained in General Order 14/1888 to those packing cases in which goods are clearly not intended to be sold, or exposed for sale, either wholesale or retail.

By Order of the Board,
John Courroux.

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## General Order $\frac{34}{1895}$.

Custom House, London,
17*th May*, 1895.

Merchandise Marks Act, 1887.

*Butter bearing Swedish Marks but imported* viâ *Denmark, not to be detained.*

With reference to the provisions of § 10 (2) of the Merchandise Marks Act, 1887, the Board direct that, in future, butter bearing indications of Swedish origin, but imported into the United Kingdom by way of Denmark, is not to be detained for proof of origin.

The officers concerned are to govern themselves accordingly.

By Order of the Board,
Fredk. W. Chaplin.

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## General Order $\frac{82}{1895}$.

Custom House, London,
12*th November*, 1895.

Merchandise Marks Acts, 1887 and 1891.

*Instructions as to Treatment of Samples and Patterns.*

The Board instruct officers not to detain in future, so far as the provisions of the Merchandise Marks Acts are concerned, samples or patterns, whether British returned or of foreign manufacture, provided such samples or patterns are valueless in themselves, do not form whole or complete articles, and can be readily distinguished by the officers as samples or patterns.

Circular Letter 1/1889 and General Order 7/1889 are to be noted accordingly.

By Order of the Board,
John Courroux.

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## General Order $\frac{9}{1896}$.

Custom House, London,
18*th March*, 1896.

Merchandise Marks Act, 1887.

*Further Discretionary Powers given to Officers.*

In addition to the powers conferred upon them by General Order 7/1889, the Board now give collectors and surveyors at the out-ports, and inspectors and surveyors in London, discretionary powers in the following cases:—

(1.) They may deliver coverings, such as capsules, paper bags, &c., marked with indications of British origin, such as the Royal Arms, trade descriptions in the English language, &c., when they are satisfied that the coverings are to be used in connection with British goods, or with goods of a kind not produced in the United Kingdom, and that the indications on the coverings have reference to the goods with which the coverings are to be used, and not to the coverings themselves.

Coverings marked with the names of firms in the United Kingdom, with whose goods the coverings are to be used, and consigned directly to such firms, may be delivered. If not so consigned, the written consent of the firms whose names they bear must be produced before delivery is allowed.

(2.) Immediate reports of detentions of goods under the Merchandise Marks Acts, required by General Order 39/1888, may be dispensed with when such detentions are made in consequence of the absence of evidence that the marks on the goods are correct, provided that the officers have reason to believe that such evidence will be forthcoming within a reasonable time. On production of the evidence, the officers, if satisfied therewith, will deliver the goods. This direction will include British returned goods bearing marks which would be open to objection on goods of foreign origin; also goods bearing marks indicative of origin in some country other than that from which the goods are imported, when such marks are believed to be authentic.

(3.) Goods bearing a mark registered in this department under paragraphs 12—15 of General Order 99/1887, may be delivered by the officers without reference to the Board on receipt by them of the authority of the proprietor of the mark, or of his duly appointed agent, provided the mark be properly qualified.

By Order of the Board,
R. T. Prowse.

## General Order $\frac{63}{1897}$.

Custom House, London,
30*th December*, 1897.

### Merchandise Marks Acts.

With reference to §§ 3 and 16 of the Merchandise Marks Act, 1887, issued with General Order 81/1887, the Board direct that Trade Descriptions in the English Language applied to foreign goods imported for home consumption from non-English speaking countries are not to be regarded as indirect indications that the goods are of British or Irish origin, unless the officers have good ground for considering that such trade descriptions are specially designed to convey, and do in fact convey, an impression of British or Irish origin for the goods.

General Order 99/1887 is to be noted accordingly.

Trade descriptions on imported goods in a Foreign language which is not that of the country from which the goods are imported are to continue to be dealt with as heretofore.

By Order of the Commissioners,
John Courroux.

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## MEMORANDUM

*Respecting Marks on Goods imported for Home Consumption.*

1. Foreign goods imported into the United Kingdom which do not bear any marks whatever, either on the goods themselves or on the packages or wrappers containing them, are not required to bear any qualifying statement or indication, such as "Made abroad," "Made in Germany," &c.

2. Foreign manufactured goods bearing a name or trade mark, being, or purporting to be, the name or trade mark of a manufacturer, &c., in the United Kingdom, must have that name or trade mark accompanied by a definite indication of the country of origin of the goods. The name of the country is a sufficient indication, without the words "made in," if a name or trade mark only appears, *e.g.*, "John Smith, Germany," would be satisfactory. If such a mark as "John Smith, Sheffield," is used, then the qualification must be "Made in Germany," or similar wording.

3. If foreign imported goods bear the name of a place identical with, or a colourable imitation of, the name of a place in the United Kingdom, the name should be accompanied by the name of the country in which the place is situated. Thus Boston, in Massachusetts, should be accompanied by the name "United States," or by the initials "U.S.A."

4. If a trade description includes the name of a place, and the goods on which it appears are not the produce of that place, or of the country in which it is situated, the trade description must be accompanied by a statement indicating the actual country of production. For instance, a wine, the produce of Germany, and described as "port" or "sherry" (which words include the names of the places Oporto and Xeres), should have that description accompanied by the statement "produced in Germany," or should be described as "German Port" or "German Sherry." An exception to this rule is made in cases where the name of a place in a trade description is indicative merely of the character of the goods, and is not calculated to mislead as to the country of origin. Thus such a description as "Brussels Carpet," or "Portland Cement," need not be accompanied by a statement of the country of actual production.

5. Trade descriptions in the English language applied to foreign goods imported for home consumption from non-English-speaking countries are not regarded as indirect indications that the goods are of British or Irish origin, unless the officers have good ground for considering that such trade descriptions are specially designed to convey, and do in fact convey, an impression of British or Irish origin for the goods.

Trade descriptions on imported goods in a foreign language, which is not that of the country from which the goods are imported, must be accompanied by a statement of the actual country of production of the goods, *e.g.*, "Made in Germany."

6. As regards watches, any mark on the case is deemed to extend to the watch. If, therefore, a watch case is made in this country, and bears any statement or indication of such origin (as, for instance, a British hall-mark), and the watch itself is made in Switzerland, then there must appear on the plate of the watch a statement or indication that it is of Swiss origin.

7. All qualifying statements or indications must be distinct, in equally conspicuous characters with, and in proximity to, the marks they are intended to qualify.

8. Marks on samples or patterns, whether of British or foreign manufacture, are not required to be accompanied by any qualification, provided such samples or patterns are valueless in themselves, do not form whole or complete articles, and can be readily distinguished as samples or patterns.

Custom House, London,
28*th January*, 1898.

## GENERAL ORDER $\frac{45}{1898}$.

CUSTOM HOUSE, LONDON,
*6th July*, 1898.

*Revised Transhipment and Transit Regulations.*

* * * * * *

Application of Merchandise Marks Acts on information.

(3.) Transhipment goods are not to be specially examined for the purpose of scrutinising marks. If, however, information as to any such goods is given, under Regulations B of General Order 99/1887, that they infringe the provisions of the Merchandise Marks Acts in one or other of the following ways:—

(a) By reason of their bearing marks which raise a clear and direct claim to British origin; or

(b) By reason of their bearing the name or trade mark of a manufacturer, dealer, or trader in the United Kingdom without qualification; or

(c) By reason of their bearing a trade mark specially registered at the Customs,

the goods are to be examined and, if found to be illegally marked, detained.

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## GENERAL ORDER $\frac{70}{1898}$.

CUSTOM HOUSE, LONDON,
15*th October*, 1898.

*Marks on imported Chinaware.*

Officers are informed that representations have reached the Board from persons interested in chinaware, to the effect that importations are made into this country of china bearing marks indicative of the manufacture of certain well-known factories abroad and in this country, such marks being spurious.

The marks which are most commonly used for the purpose are as follows, viz.:—

The Worcester Mandarin Mark (a grating) always printed in blue, slightly blurred, on the bottom of articles. It is the mark used by the Royal Worcester Porcelain Co. (*a*).

The Crown Derby Mark: always printed in red, and generally on the bottom of articles. It was a mark used by the Royal Crown Derby Porcelain Co. (*b*).

The Royal Chelsea Gold Anchor Mark: printed in gold, generally on the back, but sometimes on the side of articles. There is now no factory at Chelsea (*c*).

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(*a*) Illustrations of the marks referred to are included in the order. The Worcester mark is a grating with five bars.

(*b*) A crown surmounting a capital D in cursive type.

(*c*) An anchor.

(Similar to Worcester.) The Lowestoft Mark: printed always in red. There is now no factory at Lowestoft (*d*).

A Sèvres Mark: printed in very dark blue on vases, generally with ormolu mounts (*e*).

A Sèvres mark: printed in black (with two other changeable marks) on tea sets, plates, and small goods generally (*f*).

A Dresden (Meissen) Mark: printed in dark blue or green (*g*).

A Capo di Monte Mark: printed in gold (*h*).

It is further stated that it is frequently the custom to cover the mark on the Chinaware with a paper label, bearing the words "made in Germany," &c., printed on it.

Officers are accordingly instructed that such paper labels should be viewed with suspicion, and that china goods to which they are applied should occasionally be examined to see whether they bear other marks below the labels.

Where marks are found on the china itself under such circumstances, the goods should be detained, and instructions sought from the Board.

By Order of the Board,
R. T. PROWSE.

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REGULATIONS, *dated May* 21*st*, 1892, *made by the Board of Trade, with the concurrence of the Lord Chancellor, under* § 2 *of the Merchandise Marks Act*, 1891, *with regard to the prosecution of offences under the Merchandise Marks Act*, 1887.

1. The prosecution of offences under the Merchandise Marks Act, 1887, shall, subject to the condition hereinafter prescribed, be undertaken by the Board of Trade in cases which appear to the Board to affect the general interests of the country, or of a section of the community, or of a trade.

2. Every application to the Board to undertake a prosecution shall be accompanied by the following documents:—

(a) A statement showing the nature and circumstances of the case and sufficient to enable the Board to form an opinion whether the case affects the general interests of the country, or of a section of the community, or of a trade.

(b) A statement showing the facts which, if the Board undertake the prosecution, will be capable of proof, and setting out the proofs and names of the witnesses available to prove such facts.

The Board may require the above statements to be supplemented or additional evidence to be furnished.

3. If, on the evidence, the Board is of opinion that there is no reasonable prospect of a conviction being obtained, the Board will not, unless it thinks fit, undertake the prosecution.

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(*d*) A grating with three bars.
(*e*) Two capital L's in cursive type, placed back to back.
(*f*) A crown surmounting two conjoint letters, placed back to back, each composed of a combination of P and L.
(*g*) Two swords crossed.
(*h*) A coronet surmounting a capital N.

4. If the Board is of opinion that the prosecution would be better or more properly conducted under some Act of Parliament other than the said Acts, the Board will not undertake the prosecution.

5. The Board may, before undertaking a prosecution, require the applicant to give security for costs on such terms and in such manner as it thinks proper.

6. For the purpose of carrying these regulations into effect the Board may, from time to time, prescribe the use of such forms and give such directions as it may deem expedient.

M. E. Hicks-Beach,
President of the Board of Trade.

I concur,
Halsbury, C.

21*st May*, 1892.

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Regulations, *dated October 27th*, 1894, *made by the Board of Agriculture, with the concurrence of the Lord Chancellor, pursuant to* § 1 *of the Merchandise Marks (Prosecutions) Act*, 1894, *with regard to the prosecution of offences under the Merchandise Marks Act*, 1887, *relating to agricultural or horticultural produce.*

1894. No. 400.

1. The Board of Agriculture shall, where it appears to them from the statements hereinafter mentioned, that there is a reasonable prospect of a conviction being obtained, and subject to the other conditions in the next following regulation prescribed, undertake the prosecution of offences under the Merchandise Marks Act, 1887, in cases which appear to the Board to relate to agricultural or horticultural produce, and to affect the general interests of the country, or of a section of the community, or of a trade.

2.—(i.) Every application to the Board to undertake a prosecution shall be accompanied by the following documents:—

(a) A statement showing the nature and circumstances of the case, and sufficient to enable the Board to form an opinion whether the case relates to agricultural or horticultural produce, and affects the general interests of the country, or of a section of the community, or of a trade.

(b) A statement of the facts capable of proof, with the names and addresses of the witnesses available to prove such facts.

(ii.) The Board may require the above statements to be supplemented, or additional evidence to be furnished.

3. For the purpose of carrying the foregoing regulations into effect, the Board may, from time to time, prescribe the use of such forms and give such directions as they may deem expedient.

(Signed) T. H. Elliott,
Secretary to the Board of Agriculture.

I concur,
(Signed) Herschell, C.

27*th October*, 1894.

# APPENDIX G.

## STATUTORY ENACTMENTS WITH RESPECT TO MARKS ON GOODS, &c.

### WEIGHTS AND MEASURES.

### The Weights and Measures Act, 1878.
### 41 & 42 Vict. c. 49.

#### PART I.—LAW OF WEIGHTS AND MEASURES.

*Stamping and Verification of Weights and Measures.*

Stamping of weights and measures with denomination.

§ 28. Every weight, except where the small size of the weight renders it impracticable, shall have the denomination of such weight stamped on the top or side thereof in legible figures and letters.

Every measure of capacity shall have the denomination thereof stamped on the outside of such measure in legible figures and letters.

A weight or measure not in conformity with this section shall not be stamped with such stamp of verification under this Act as is hereinafter mentioned.

Stamping of verification on measures and weights.

§ 29. Every measure and weight whatsoever used for trade shall be verified and stamped by an inspector with a stamp of verification under this Act.

Every person who uses or has in his possession for use for trade any measure or weight not stamped as required by this section, shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and shall be liable to forfeit the said measure or weight; and any contract, bargain, sale, or dealing made by such measure or weight shall be void.

Lead or pewter weights.

§ 30. A weight made of lead or pewter, or of any mixture thereof, shall not be stamped with a stamp of verification or used for trade, unless it be wholly and substantially cased with brass, copper, or iron, and legibly stamped or marked "cased":

Provided that nothing in this section shall prevent the insertion into a weight of such a plug of lead or pewter as is *bonâ fide* necessary for the purpose of adjusting it and of affixing thereon the stamp of verification.

A person guilty of any offence against or disobedience to the provisions of this section, shall be liable to a penalty not exceeding five pounds, or in case of a second offence ten pounds.

Stamping of verification on weights for coin.

§ 31. Every coin weight, not less in weight than the weight of the lightest coin for the time being current, shall be verified and stamped by the Board of Trade with a mark of verification under this Act, and otherwise shall not be deemed a just weight for determining the weight of gold and silver coin of the realm.

Every person who uses any weight declared by this section not to be a just weight shall be liable to a fine not exceeding fifty pounds.

Forgery, &c., of stamps on measures or weights.

§ 32. If any person forges or counterfeits any stamp used for the stamping under this Act of any measure or weight, or used before the commencement of this Act for the stamping of any measure or weight, under any enactment repealed by this Act, or wilfully increases or diminishes a weight so stamped, he shall be liable to a fine not exceeding fifty pounds.

Any person who knowingly uses, sells, utters, disposes of, or exposes for sale any measure or weight with such forged or counterfeit stamp thereon, or a weight so increased or diminished, shall be liable to a fine not exceeding ten pounds.

All measures and weights with any such forged or counterfeit stamp shall be forfeited.

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## The Coal Mines Regulation Act, 1887.

### 50 & 51 Vict. c. 58.

Application of 41 & 42 Vict. c. 49, to weights, &c., used in mines.

§ 15.—(1.) The Weights and Measures Act, 1878, shall apply to all weights, balances, scales, steelyards, and weighing machines used at any mine for determining the wages payable to any person employed in the mine according to the weight of the mineral gotten by him, in like manner as it applies to weights, balances, scales, steelyards, and weighing machines used for trade.

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## The Weights and Measures Act, 1889.

### 52 & 53 Vict. c. 21.

Verification of weighing instruments.

§ 1.—(1.) Every weighing instrument used for trade shall be verified and stamped by an inspector of weights and measures with a stamp of verification under this Act.

(2.) Every person who, after the expiration of twelve months from the commencement of this Act, uses or has in his possession for use for trade any weighing instrument not stamped as required by this Act, shall be liable to a fine not exceeding two pounds, or in the case of a second offence five pounds.

(4.) Section 32 of the principal Act (*a*) shall apply to weighing instruments in like manner as it applies to weights and measures.

(*a*) The principal Act is the Weights and Measures Act, 1878.

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## The Weights and Measures (Ireland) Amendment Act, 1862.

### 25 & 26 Vict. c. 76.*

PART III.—PREVENTION OF FRAUDS.

Penalty on counterfeiting brand.

§ 14. If any person commit any of the following offences, he shall for each offence be liable to a penalty not exceeding five pounds:

(1.) If he, with intent to defraud, counterfeit or procure to be counterfeited any brand or stamp used by or under the authority

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* This Act was repealed in part by 41 & 42 *Vict. c.* 49.

of the owner or lessee of a market or fair, or of any person having by law the control of a market or fair, to denote the weight, measure, or quality of any article sold in the market or fair, or within the prescribed limits, during the holding of the market or fair, or of any cask, firkin, or other vessel, covering, or thing in which such article is sold, or the impression of any such brand or stamp:

(2.) Or, with the like intent, use or procure to be used any such counterfeit brand, or stamp, or impression:

(3.) Or, with the like intent, alter an impression of any such genuine brand or stamp:

(4.) Or, with the like intent, have in his possession anything having thereon an impression of any such counterfeit brand or stamp, or a fraudulently altered impression of any such genuine brand or stamp:

(5.) Or, with the like intent, transfer or apply any cask, firkin, or other vessel, covering, or thing, having thereon an impression of any such genuine brand or stamp, to any article other than that for denoting the weight, measure, or quality whereof such impression was made on such cask, firkin, or other vessel, covering, or thing, or in any other manner alter the *bonâ fide* application of an impression of any such genuine brand or stamp:

(6.) *Or knowingly weigh or caused to be weighed, contrary to the provisions of this Act, or act or assist in committing or connive at any fraud respecting the weighing or the weight or measure of any such article as in Part II. of this Act is mentioned* (*a*):

(7.) Or, with intent to defraud, alter any ticket specifying the weight of any such article:

(8.) Or, with intent to defraud, make or use, or be privy to the making or using of any such ticket, falsely stating the weight of any such article, or of any covering, cart, or load:

(9.) Or shall dispose of, sell, or cause to be sold any weight or measure having a false or counterfeit stamp, or a stamp purporting to resemble a genuine stamp.

Penalty for fraudulently increasing weight of butter in casks.

§ 15. If any person shall wilfully pack up or mix, or cause to be packed up or mixed, with or in any butter contained in any firkin or cask, any salt pickle, or other substance, with intent to increase the weight of such butter, and shall bring or send any butter so packed or mixed to any market for sale, he shall be liable to pay a fine not exceeding forty shillings, or be imprisoned for any period not exceeding one month, as the justice or justices shall determine.

Penalty for fraudulently increasing weight of fleeces.

§ 16. If any person shall wind or cause to be wound in any fleece any wool not being sufficiently rivered or washed, or wind or cause to be wound within any fleeces any deceitful locks, cots, skin, or lamb's wool, or any substance, matter, or thing, whereby the fleece may be rendered more weighty, to the deceit and loss of the buyer, such person shall be liable to a penalty of two shillings for every fleece so fraudulently made up.

(*a*) This clause is repealed by the Statute Law Revision Act, 1893.

## THE EXHIBITION MEDALS ACT, 1863.

26 & 27 VICT. c. 119.

Penalty on false representations.

As to having obtained medals.

§ 1. If any trader commits any of the offences following, that is to say:

(1.) Falsely represents that he has obtained a medal or certificate from the Exhibition Commissioners (*a*) in respect of any article or process for which a medal or certificate has been awarded by the Commissioners:

(2.) Falsely represents (knowing such representation to be false) that any other trader has obtained a medal or certificate from the Exhibition Commissioners:

(3.) Falsely represents (knowing such representation to be false) that any article sold or exposed for sale has been made by, or by any process invented by, a person who has obtained in respect of such article or process a medal or certificate from the Exhibition Commissioners:

he shall incur the following penalties, that is to say:

(1.) For the first offence he shall forfeit to Her Majesty a sum not exceeding five pounds:

(2.) For any subsequent offence he shall forfeit to Her Majesty a sum not exceeding twenty pounds, or be imprisoned for a period not exceeding six months.

By § 2, in proceedings under this Act, it is not necessary to prove that any person has sustained damage by the false representations.

By § 5 no provision of this Act is to affect any right or civil remedy.

(*a*) Of 1851 or 1862. See § 3.

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## REGISTERED DESIGNS.

THE PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883.
46 & 47 VICT. c. 57.

Marking registered designs.

§ 51. Before delivery on sale of any articles to which a registered design has been applied, the proprietor of the design shall cause each such article to be marked with the prescribed mark, or with the prescribed word or words or figures, denoting that the design is registered; and if he fails to do so the copyright in the design shall cease, unless the proprietor shows that he took all proper steps to ensure the marking of the article (*a*).

(*a*) Under the old Copyright of Designs Acts it was held that the copyright was lost by the sale of pattern pieces of wall paper containing the whole of the registered design, unmarked (*Heywood* v. *Potter*, 1 E. & B. 439); by the sale in France of lace bearing the design, unmarked (*Sarazin* v. *Hamel*, 32 Beav. 151); by the sale of a small number of articles bearing the design, unmarked (*Pierce* v. *Worth*, 18 L. T. N. S. 710); by the sale of one such article unmarked (*Hunt* v. *Stevens*, W. N. 1878, p. 79). But it was held that the copyright was not lost by the sale of a book containing patterns of registered designs, the book being unmarked (*De la Branchardière* v. *Elvery*, 4 Ex. 380); nor by the sale of a butter-dish with a cover, the dish being marked but the cover not (*Fielding* v. *Hawley*, 48 L. T. N. S. 639). And it seems that if the design were applied, but obscured in the process of manufacture, the same would have been the result (*ib.*; but see *Johnson* v. *Bailey*, 11 P. R. 21).

Under the present Act it has been held that where a manufacturer was instructed by his principal to place the right mark on the goods, but by mistake placed on them an old and incorrect mark, the proprietor's right was saved by the proviso in

the section, especially as each mark bore the abbreviation "Rd" (*Wittman* v. *Oppenheim*, 27 Ch. D. 260). Also that where a narrow trimming was sold in lengths round each of which was placed a paper band bearing the proper mark, the marking was sufficient (*Blank* v. *Footman*, 39 Ch. D. 678). On the other hand, it has been held, following *Heywood* v. *Potter* (1 E. & B. 439), that where a design was registered for dusters, the marking of each piece containing a dozen dusters is not a compliance with the statute (*Hothersall* v. *Moore*, 9 P. R. 27). The right of a manufacturer who had registered a design for lace has been held to be lost by the sale of the article in an unfinished state unmarked to a finisher, under an arrangement by which the finisher was to mark the article before putting it on the market, notwithstanding that the mark on the unfinished article would be destroyed in the finishing, and that there was no retail trade in such article (*Woolley* v. *Broad*, 9 P. R. 429). The copyright is not lost by marking an article required by the Rules to be marked "Rd" with the fuller abbreviation "Regd" (*Heinrichs* v. *Bastendorff*, 10 P. R. 160). It has been held in Scotland (*Johnson* v. *Bailey*, 11 P. R. 21), that it is not enough for the registered proprietor to give general instructions that the protected article shall be marked in compliance with the statute; he must see that adequate means are taken to carry out his instructions, and that every article is examined before being sent out; and where the marking was made from a mould, which was so far worn out that the mark had ceased to be legible, the rights of the proprietor were held to be forfeited (*ib.*; cf. *Fielding* v. *Hawley*, 48 L. T. N. S. 639); and it would appear that, under the present Act, as under the former, the sale of a single article unmarked may be a ground for depriving the registered proprietor of his right (*ib.*; see also *Wedekind* v. *General Electric Co.*, 14 P. R. 190).

The proprietor of a registered design is not deprived of his right to protection merely because he places on the articles which he sells, besides the registered number of his design, other registered numbers which ought not to be there; consequently, where a design was registered for a stove, and two other designs were registered for certain adjuncts of the stove, the placing by the proprietor of all three marks upon the stove, though improper, was held no bar to an action to restrain an infringement of the design for the stove (*Harper & Co.* v. *Wright & Butler Lamp Manufacturing Co.*, (1896) 1 Ch. 142). The proprietor of a design may so acquiesce in the public delivery on sale of the registered article unmarked as to deprive himself of his copyright, although no formal relationship of principal and agent exists between him and the person who delivers the goods on sale (*Wedekind* v. *General Electric Co.*, 14 P. R. 190). Where, owing to the mistake of a die-sinker employed by the proprietor, the wrong number was stamped on the registered article, a "5" being substituted for a "3," and the mistake was not discovered for two years, but was then immediately rectified; it was held by the House of Lords, affirming Kekewich, J., and the Court of Appeal, that the proprietor had taken all proper steps to ensure the marking of the article within the proviso (*In re Rollason*, (1898) A. C. 499; (1898) 1 Ch. 237). The object of the section being to give the public warning of the registration, a proprietor needs a much stronger case to escape the loss of his copyright where the article is not marked at all than where there is some error in the marking, if there be such compliance as plainly to denote that the design is a registered one (*ib.*, *per* Lord Herschell).

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## The Designs Rules, 1883.

Registration mark.

32. Before the delivery on sale of any article to which a registered design has been applied, the proprietor of such design shall, if such article is included in any of the Classes 1 to 12 in the Third Schedule hereto, cause each such article to be marked with the abbreviation "Rd." and the number appearing on the certificate of registration, and shall, if such article is included in the Classes 13 or 14 in the Third Schedule hereto, cause each such article to be marked with the abbreviation "Regd."

Class 13 includes "Printed or woven designs on textile piece goods."

Class 14 includes "Printed or woven designs on handkerchiefs and shawls."

The first twelve classes include all other goods.

# APPENDIX H.

## STATUTORY ENACTMENTS WITH RESPECT TO MARKS ON SPECIAL CLASSES OF GOODS (*a*).

### CUTLERY.

59 *Geo.* 3, *c.* 7 (1819). "An Act to regulate the Cutlery Trade in England."

§ 1. Manufacturers may mark with the figure of a hammer articles of cutlery made by them by means of the hammer.

§ 3. No person is to mark articles of cutlery not made by means of the hammer with the figure of a hammer, or to possess for the purpose of sale, or offer for sale such articles so marked, under penalty of forfeiture of the articles so marked, together with a fine of 5*l.* a dozen.

§ 4. No person is to mark articles of cutlery, or possess for the purpose of sale, or offer for sale articles marked with any words indicative of a quality other than the true one, under similar penalties.

§ 5. No person is to mark articles, or possess, &c., articles marked with the words "London" or "London made," unless such articles were made within the City of London, or twenty miles distance therefrom, under the penalty of forfeiture, together with a fine of 10*l.* a dozen.

§ 14. Articles of cutlery subject to forfeiture by virtue of the Act may be seized and destroyed, &c., by order of justices.

The remaining provisions refer chiefly to forms of procedure, recovery of penalties, &c.

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### *The Cutlers' Company of Hallamshire.*

21 *Jac.* 1, *c.* 31 (1623).

§ 1 (*b*). The cutlers living in Hallamshire, or within six miles distance therefrom, are incorporated under the corporate name of "The Master, Wardens, Searchers, Assistants and Commonalty of the Company of Cutlers in Hallamshire in the county of York."

(*a*) The Acts abstracted in the text are in force at present.

(*b*) The remainder of this Act is repealed by 31 Geo. 3, c. 58.

31 *Geo.* 3, *c.* 58 (1791) (*a*).

§ 1. The company to consist of the trades hereinafter mentioned, and of none other.

§ 3 enumerates "the arts or trades of makers of knives, sickles, shears, scissors, razors, files and forks."

§ 7. Apprentices who have served for seven years are to have, at twenty-one years of age, their freedom of the company and a mark to be assigned them.

§ 17. Members of the company counterfeiting marks assigned to others are for every offence to pay a penalty not exceeding 20*l.* nor less than 4*l.*

§ 26. Penalties may be sued for by the company, or by the party aggrieved, in the Courts at Westminster.

§ 27. One or more justice or justices of the peace for the West Riding of the county of York, or for the county of Derby, shall, upon information of an offence for which a penalty is imposed, summon the parties and witnesses, and hear and determine the matter in a summary way, and give judgment with costs, and issue a warrant for levying the penalties by distress, and if the goods are insufficient, then shall commit the offender to the House of Correction for one month. Costs may be given to a person wrongly accused.

§ 28 contains a form of conviction.

§ 29. An appeal is given to the Court of Quarter Sessions at Sheffield, Rotherham, Barnsley, Wakefield, or Pontefract.

§ 31. The penalties which come to the company are to be distributed among the poor of the company.

The Act contains other provisions with respect to the constitution of the company, procedure, &c.

41 *Geo.* 3, *c.* 97 (1801), (Local).

§ 2. A freeman of the company is empowered to give his mark by will to any person or persons, in the same manner as his other personalty, subject to the life estate therein which his widow is to have during her widowhood or any future coverture, and which she may sell, though on her death the provisions of the husband's will take effect.

§ 3. In default of a will, the mark is to pass in the same manner as its owner's other personalty, subject to the widow's life estate (*b*).

§ 5. Parish apprentices who shall prove to the satisfaction of a justice that they have regularly served a freeman for seven years shall be entitled to their freedom and a mark.

54 *Geo.* 3, *c.* 119 (1814), (Local).

This Act repeals several of the provisions of the Act of 1791, in favour of free trade.

§ 3. Any person carrying on any of the specified trades within the specified limits has a right to have a mark assigned to him by the company on application, which mark is not to be one that is the

(*a*) Considerable portions of this Act have been repealed by the Acts which follow.

(*b*) And see § 6 of the Act of 1814.

property of another, nor a surname (*a*); and for such mark he is to pay forty shillings, and if the mark be one previously assigned but surrendered, 3*l.* in addition, besides, in either case, any stamp duty imposed by Act of Parliament (*b*).

§ 4. No mark is to be assigned by the company if they have notice that it is in common use, or in the use of any person within the district (*c*).

§ 5. Members of the company, or any other persons carrying on any of the specified trades within the specified limits, who shall use a mark assigned by the company to another person, with intent to counterfeit, shall for every offence forfeit and pay a sum not exceeding 20*l.*, half of the fine to go to the injured person, the other half to the company. The fine is to be recovered and applied as under the Act of 1791.

§ 6. The provisions made by § 2 of the Act of 1801, for the devolution of marks on the deaths of their owners, are to apply to marks assigned under the present Act (*d*), but not more than one person of the family shall be entitled to use the mark at the same time.

23 *Vict. c. xliii.* (1860), (Local).

§ 1. The provisions of the previous Acts are extended to "the arts or trades of manufacturers of steel and makers of saws and edge-tools and other articles of steel, or of steel and iron combined, having a cutting edge."

§ 2. Any person exercising any of the trades formerly or now specified, within the specified limits, may and shall, on application to the company and payment of 20*l.* in addition to any other fees payable, become a freeman of the company and have a mark assigned to him.

§ 3. The former and present Acts may be cited as "The Cutlers' Company's Acts, 1623, 1791, 1801, 1814, 1860," respectively.

The rights of the Cutlers' Company were expressly reserved by the Merchandise Marks Act, 1862 (*e*), § 25, and also by the Trade Marks Registration Act, 1875, § 9.

See also the special provisions in regard to the Cutlers' Company contained in the Trade Marks Registration Act, 1875, § 9, and in 46—56 of the Rules under that Act, now repealed; the effect of which was that the registrar of trade marks was to be supplied with copies

(*a*) The similar provision in § 24 of the Act of 1791 (repealed by the present Act), with respect to non-freemen, provided that, on a non-freeman having a mark assigned to him, he should become a freeman of the company. This is not repeated here.

(*b*) A mark assigned to a non-freeman is assignable by him. See *Bury* v. *Bedford*, 4 De G. J. & S. 352. But where a person to whom a Sheffield mark had been assigned had assigned it to another, and had not gone through the process of surrendering it to the company for reassignment to his assignee, the latter was not recognised by the company as the proprietor of the mark, nor admitted to registration under the Trade Marks Registration Act, 1875, until he had perfected his title: *In re Rabone*, Dig. 643.

(*c*) By the Trade Marks Registration Act, 1875, § 9, no mark was to be assigned by the company which had been registered under the Trade Marks Registration Acts, notice of the registration having been given to the Cutlers' Company. And see the Patents, &c. Acts, 1883—1888, § 81.

(*d*) Thus including non-freemen in possession of company's marks.

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

of all Sheffield corporate marks, and the Cutlers' Company with copies of all trade marks registered for goods or classes of goods within § 2 of the Cutlers' Company's Act, 1860; that notice of applications for assignment or registration of such marks, and of such assignment or registration, when complete, was to be given by the Cutlers' Company to the registrar and *vice versâ*; that marks identical with or similar to marks already assigned or registered, were not to be registered or assigned respectively (except, in the former case, with the special leave of the Court), and that Sheffield marks might be registered under the Trade Marks Registration Acts.

By § 81 of the Patents, &c., Act, 1883, and Rules 53—56 of the Trade Marks Rules, 1883, the Sheffield Cutlers' Register was reorganised. A new "Sheffield Register" was established, in which are to be entered all trade marks for cutlery, edge-tools, raw steel, or goods made of steel, or of steel and iron combined, whether with or without a cutting edge, belonging to persons carrying on business in Hallamshire, or within six miles thereof, and registered under the Act of 1875, or assigned by the Cutlers' Company and actually used before the commencement of the Act of 1883. All applications for marks for similar goods are, when made by persons trading within the specified limits, to be made to the company. Notice of such applications is to be given by the company to the comptroller, who may give notice of objection; and notice of applications by persons trading outside the specified limits for marks for similar goods is to be given by the comptroller to the company. Notice of registrations in the Sheffield Register is to be given to the comptroller, who is to enter the marks in the general register; and notice of all other entries is also to be given to him. The practice at Sheffield is to follow generally that at London, and an appeal is given from the company's decisions to the comptroller, and from him to the Court. The provisions of the company's Acts for the summary punishment of persons counterfeiting Sheffield corporate marks are to apply to marks entered in the new Sheffield Register. The old Cutlers' register of corporate marks was closed after five years from the commencement of the Act (*i.e.*, after five years from December 31st, 1883). The net result is to make the Sheffield Register an exact duplicate of the general register, so far as that relates to marks used for the specified goods within the specified limits.

The provisions of § 81 were altered to some extent by § 20 of the Act of 1888, the principal alteration being the enlargement of the class of goods to which the section is made applicable. Such goods are now described by the term "metal goods," which is defined as meaning "all metals, whether wrought, unwrought, or partly wrought, and all goods composed wholly or partly of any metal." The Sheffield Register is now governed by § 81 of the Act of 1883, as amended by the Act of 1888, and the Trade Mark Rules 56—59 of 1890.

# GOLD AND SILVER PLATE.

## ENGLAND.

2 *Hen.* 6, *c.* 17 (in Ruffhead's ed. c. 14) (1423) (*a*).

No goldsmith or silversmith in the city of London to sell wrought silver of less than sterling fineness. No harness of silver to be offered for sale in that city, until touched with the touch of the leopard's head, if it may reasonably bear the same, and also with the workman's mark, under penalty of forfeiture of double value. The mark of every goldsmith to be known to the wardens of the same craft. In the cities of York, Newcastle-upon-Tyne, Lincoln, Norwich, Bristol, Salisbury, and Coventry, to be divers touches. In other places, where no touch is ordained, silver not to be worked of less than sterling fineness, nor to be offered for sale without the worker's mark. Penalty of double value (*b*).

18 *Eliz.* *c.* 15 (1576) (*c*).

If plate marked by the Goldsmiths' Company be found deceitful, the Company to forfeit the value.

8 & 9 *Will.* 3, *c.* 8 (1697).

§ 8 (in Ruffhead's ed. § 9) (*d*). No silver plate to be made of less fineness than 11 oz. 10 dwt. in the lb. troy (*e*), nor offered for sale until marked (*f*).

If plate marked by the Goldsmiths' Company be found deceitful, the Company to forfeit the value, half to the Crown, half to the informer.

12 & 13 *Will.* 3, *c.* 4 (1700), "An Act for appointing wardens and assay masters for assaying wrought plate in the cities of York, Exeter, Bristol, Chester, and Norwich" (*g*).

§ 2. Goldsmiths, &c., of the cities of York, Exeter, Bristol, Chester,

(*a*) The earliest statute on the subject was 28 Edw. 1, c. 20 (1300), by which it was provided, among other things, that no vessel of silver should pass out of the worker's hands until assayed by the wardens of the craft, and marked with the leopard's head, and that no worse gold should be worked than that of the touch of Paris. This Act was repealed, saving the King's prerogative, by 19 & 20 Vict. c. 64.

(*b*) 4 Hen. 7, c. 2 (1487) (repealed by 19 & 20 Vict. c. 64) required finers of gold and silver to put their marks upon the metal.

(*c*) It was provided by the earlier part of this Act (repealed by the Statute Law Revision Act, 1863) that gold should not be made or sold under 22 carats in fineness, nor silver under 11 oz. 2 dwt.; and that no silver plate should be sold without the worker's mark, under penalty of forfeiting the value.

(*d*) The remainder of the Act was repealed by the Statute Law Revision Act, 1867.

(*e*) The standard was thus raised from that fixed by the preceding Act (11 oz. 2 dwt.), but by 6 Geo. 1, c. 11, both standards were established. See *infra*.

(*f*) The following marks are appointed by this Act:—

The worker's mark, to be expressed by the two first letters of his surname.

The mark of the mystery or craft of the goldsmiths, which, instead of the leopard's head and the lion, shall for this plate be the figure of a lion's head erased, and the figure of a woman commonly called Britannia.

A distinct variable mark to denote the year of manufacture of the plate.

Penalty—Forfeiture of the plate or its value, half to the Crown, half to the informer. See 12 Geo. 2, c. 26, § 5.

(*g*) Bristol never exercised the powers hereby conferred. York and Norwich have discontinued doing so.

and Norwich, incorporated into respective companies, to be called respectively "The Company of Goldsmiths of——".

§ 3. No goldsmith, &c., in those cities to make silver plate of less fineness than the standard for the time being, nor sell it until marked with—

The worker's mark, to be expressed with the two first letters of his surname.

The lion's head erased and the figure of Britannia.

The arms of that one of the above cities in which the plate is assayed and marked.

A distinct variable mark or letter in Roman character to denote the year (*a*).

Penalty—Forfeiture of the plate or value, half to the Crown, half to the informer.

The Act also contains provisions with respect to the appointment of wardens and assayers, procedure, &c.

1 *Anne*, *c.* 3 (1 Anne, stat. 1, c. 9, in Ruffhead's ed.) (1701).

The provisions of the last Act extended to Newcastle-upon-Tyne, and "The Company of Goldsmiths of Newcastle-upon-Tyne" incorporated.

6 *Geo.* 1, *c.* 11 (1719) (*b*).

§ 1. The old silver standard of 11 oz. 2 dwt. restored.

§ 3. No goldsmith, &c., to work silver plate of less fineness than 11 oz. 2 dwt., nor to sell it, &c., until touched, assayed and marked, under the former penalties.

§ 41. Two standards of silver, 11 oz. 10 dwt. and 11 oz. 2 dwt., continued (*c*).

12 *Geo.* 2, *c.* 26 (1739) (*d*).

§ 1. Gold plate not to be made under 22 carats in fineness, nor silver plate under 11 oz. 2 dwt. Penalty, 10*l.*

§ 5. Gold and silver plate not to be sold or exported until marked as follows:—

Gold plate of 22 carats fine and silver plate of 11 oz. 2 dwt., with—

The worker's mark, which shall be the first letters of his Christian and surname.

These marks of the Company of Goldsmiths in London, viz., the leopard's head, the lion passant (*e*), and a distinct variable mark or letter to denote the year. Or,

The mark of the wardens of the Goldsmiths' Company.

The figure of a lion passant.

The figure of a leopard's head.

See 12 Geo. 2, c. 26, § 5.

(*a*) See 12 Geo. 2, c. 26, § 5.

(*b*) The whole of this Act but §§ 1–3 and § 41 was repealed by the Statute Law Revision Act, 1870.

(*c*) Silver plate of 11 oz. 10 dwt. to be marked with—

The workman's mark.

The mark of the wardens of the Goldsmiths' Company.

The figure of the lion's head erased.

The figure of Britannia.

Silver plate of 11 oz. 2 dwt. to be marked with—

The workman's mark.

The mark of the wardens of the Goldsmiths' Company.

The figure of a lion passant.

The figure of a leopard's head.

See 12 Geo. 2, c. 26, § 5.

(*d*) Repealed in part, 30 Geo. 3, c. 31, § 1; Statute Law Revision Acts, 1867 and 1887.

(*e*) By 38 Geo. 3, c. 69, § 2, gold plate of 18 carats fine is to be marked with a crown and 18, instead of the lion passant, and by 7 & 8 Vict. c. 22, § 15, gold of 22 carats with a crown and 22.

The worker's mark, and
The marks appointed to be used by the assayers at York, Exeter, Bristol, Chester, Norwich, or Newcastle-upon-Tyne.

Silver plate of 11 oz. 10 dwt., with—
The worker's mark as before.
These marks of the said Company, viz., the lion's head erased, the figure of Britannia, and the mark or letter to denote the year. Or,
The worker's mark, and
The mark of one of the said cities or towns.

Penalty—10*l.* fine, or, in default, hard labour not exceeding six months (*a*).

§ 21. All goldsmiths, &c., to enter their new marks, names, and places of abode in one of the assay offices at London, York, Exeter, Bristol, Chester, Norwich, or Newcastle-upon-Tyne. Such new marks to be of a character or alphabet different from their old marks; all old marks to be broken. Penalty—10*l.* fine, and 10*l.* more for using any other mark; in default, hard labour not exceeding six months.

13 *Geo.* 3, *c.* 52 (1772), "An Act for appointing wardens and assay-masters for assaying wrought plate in the towns of Sheffield and Birmingham" (*b*).

§ 2. Incorporation of "The Guardians of the Standard of Wrought Plate for Birmingham" (*c*).

§ 4. No silversmith or plate worker in either of these towns, or within twenty miles thereof, to sell or export silver plate made in these towns and the specified limits until marked as follows:—

Silver plate of 11 oz. 2 dwt., with—
The mark of the worker or maker, which shall be the first letters of his Christian and surname.
The lion passant.
The mark of the company in whose assay office the plate was assayed and marked.
A distinct variable mark or letter to denote the year.

Silver plate of 11 oz. 10 dwt., with—
The worker's mark.
The figure of Britannia.
The mark of the company, and
The mark or letter to denote the year.

Penalty—Forfeiture of the plate or value, half to the Crown, half to the informer.

§ 5. The peculiar mark of the Birmingham company to be an anchor, of the Sheffield Company a crown.

The Act also contains provisions for the election of wardens and assayers, the process of assaying, punishment of counterfeiting, &c.

24 *Geo.* 3, *sess.* 2, *c.* 20 (1784), relates to Sheffield.

§ 2. Manufacturers of goods plated with silver, within Sheffield or

(*a*) See *Robinson* v. *Currey*, 6 Q. B. D. 21; 7 *ib.* 465.

(*b*) Repealed as to Birmingham by 5 Geo. 4, c. lii. (local). As to Sheffield, see 24 Geo. 3, sess. 2, c. 20. The present Act only deals with silver.

(*c*) Or "Sheffield."

100 miles thereof, may strike upon such goods their surname or the name of their firm, together with some other mark, figure, or device.

§ 3. Names to be in legible characters and struck with only one punch, and marks to be approved and registered by the Guardians for Sheffield.

24 *Geo.* 3, *sess.* 2, *c.* 53 (1784) (*a*).

§ 5. *The assaying officer to mark with an additional new mark, of the King's head, all gold and silver plate sent to be touched, marked and assayed, but to ask and receive duty before touching, marking, or assaying.*

§ 8. *Gold and silver plate not to be sold or exported until marked with the King's head. Penalty—50l., or, in default, hard labour of not more than one year, nor less than six months. Also, forfeiture of the unmarked plate, half to the Crown, half to the informer.*

30 *Geo.* 3, *c.* 31 (1790).

This Act regulates the exemptions from marking.

38 *Geo.* 3, *c.* 69 (1798).

§ 1. Gold plate may be manufactured down to 18 carats fine.

§ 2. Such gold plate not to be sold or exported until marked with a crown and the figures 18, instead of the lion passant. Penalty—10*l.*

§ 3. Gold plate of 18 carats fine may be marked by the various goldsmiths' companies, &c., as before, with the exception of the alteration of this mark.

§ 4. Gold plate of 22 carats may still be made, sold, exported, &c.

§ 5. This Act not to authorise the application of the mark used before the Act to gold plate of less than 22 carats fine.

§ 6. Penalty of 50*l.* for selling, exporting, &c., gold plate not marked with one of the marks.

§ 8 (*b*). Previous regulations for gold of 22 carats, except as to the mark of the lion passant, to apply to gold of 18 carats.

55 *Geo.* 3, *c.* 185 (1815) (*a*).

§ 7 (*c*). *Penalties for forging duty marks on plate, or selling or exporting plate so marked, or possessing dies, &c.*

5 *Geo.* 4, *c. lii.* (1824) (Local—Birmingham and thirty miles round).

§ 1. 13 *Geo.* 3, *c.* 52, repealed, so far as relates to Birmingham.

§ 4. Re-incorporation of "The Guardians of the Standard of Wrought Plate in Birmingham," with authority within a radius of thirty miles.

§ 20. No goldsmith, silversmith, &c., within Birmingham or thirty

(*a*) These Acts are now repealed by the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8).

(*b*) § 7 provided penalties for counterfeiting, but this was repealed as to England by 7 & 8 Vict. c. 22, § 1, though still unrepealed for Scotland.

(*c*) Already before 53 & 54 Vict. c. 8, the greater part of this Act was repealed by 33 & 34 Vict. c. 99, and 36 & 37 Vict. c. 91.

miles thereof, to sell or export gold or silver plate made within the specified limits until marked as follows :—

Gold of 22 carats fine with the lion passant (*a*).
" 18 " " crown and 18.
Silver of 11 oz. 2 dwt. fine with the lion passant.
" 11 oz. 10 dwt. " Britannia.

And all gold and silver alike with the following additional marks:—
The worker's mark (the first letters of his Christian and surname, or in case of any partnership, the initials of the name or firm of such partnership).
The company's mark (an anchor).
A distinct variable mark or letter, to denote the year.

Penalty—Forfeiture of the plate or its value, half to the Crown, half to the informer.

§ 21. Goldsmiths, silversmiths, &c., within Birmingham and thirty miles, to enter their names, marks, and places of abode with the company. Penalty—100*l*., half to the informer, half to the purposes of the Act.

§ 22. Penalties of counterfeiting, &c.

The Act also contains numerous provisions with respect to the constitution of the company, the election of its officers, its procedure, &c.

*7 & 8 Vict. c. 22* (1844).

This Act (which see) regulates the punishments and penalties for counterfeiting, &c., hall marks (*b*).

§ 15. Gold plate of 22 carats fine to be marked with a crown and 22, instead of the lion passant.

*17 & 18 Vict. c. 96* (1854).

This Act authorizes Her Majesty, by Order in Council, to allow any standard for gold plate, not being less than one-third part of the whole, and to approve thereby of the instrument for stamping such plate, setting forth in figures the actual fineness of the metal (*c*).

*18 & 19 Vict. c. 60* (1855) (*d*).

Gold wedding rings are to be assayed and marked in the same way as other gold plate.

(*a*) By 7 & 8 Vict. c. 22, § 15, a crown and 22.

(*b*) Repealed in part by the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8). See *R.* v. *Lee*, 1 Leach, 416, and *R.* v. *Ogden*, 6 C. & P. 631, decided on the earlier statutes; also *R.* v. *Suter & Coulson*, 10 Cox, 577; and *R.* v. *Ardley*, L. R. 1 C. C. R. 301; 12 Cox, 23, in which a spurious hall mark was made the means of obtaining money by false pretences. In *R.* v. *Roberts*, 70 L. T. (Journal) 265, the jury found that the marks used by the defendant were not imitations of the genuine hall mark. An action by the Goldsmiths' Company for penalties under this Act is not an action by a common informer within 31 Eliz. c. 5, nor an action by a "party grieved" within 3 & 4 Will. 4, c. 42, § 3, and can, therefore, be maintained after the lapse of two years from the commission of the offence, but (in the opinion of Lush, L. J.) not after twenty years: *Robinson* v. *Currey*, 6 Q. B. D. 21; 7 *ib.* 465.

(*c*) Accordingly the following reduced standards were ordered by the Council:—
15 carats, to be marked with 15 and 625.
12 " " " 12 " 500.
9 " " " 9 " 375.
The crown is not placed on plate of these qualities.

(*d*) Repealed in part by the Statute Law Revision Act, 1875.

## ENGLISH HALL MARKS AT THE PRESENT DAY (*a*).

| | GOLD. | | | | | SILVER. | |
|---|---|---|---|---|---|---|---|
| | 22 *Carats.* | 18 *Carats.* | 15 *Carats.* | 12 *Carats.* | 9 *Carats.* | 11 *oz.* 2 *dwt.* | 11 *oz.* 10 *dwt.* |
| Quality Mark ..... | 22 | 18 | 15·625 | 12·5 | 9·375 | None (*b*). | None. |
| Standard Mark..... | Crown. | Crown. | None. | None. | None. | Lion passant. | Britannia. |
| Date Mark ..... | Letter. | Letter. | Letter. | Letter. | Letter. | Letter. | Letter. |
| Maker's Mark ..... | Initials. | Initials. | Initials. | Initials. | Initials. | Initials. | Initials. |
| Duty Mark (*c*) ..... | Sovereign's head. | Sovereign's head. | None. | None. | None. | Sovereign's head. | Sovereign's head. |
| Assay Town Mark (*d*)..... | On all qualities of gold and silver the special mark of the town. | | | | | | |

(*a*) Gold and silver of all these qualities are manufactured at London, Chester, Newcastle-on-Tyne, and Birmingham. At Exeter, only gold of 22 carats and silver of 11 oz. 2 dwt. are manufactured; at Sheffield, only silver of 11 oz. 2 dwt. and 11 oz. 10 dwt. At York and Norwich no plate is now manufactured. At Bristol, the powers conferred by 12 & 13 Will. 3, c. 4, were never exercised.

(*b*) Except at Newcastle, where the mark of a leopard's head crowned is used.

(*c*) Disused since 53 & 54 Vict. c. 8.

(*d*) The special marks of the assay towns are as follows:—London, a leopard's head (except for silver of 11 oz. 10 dwt., for which it is a lion's head erased); Exeter, a castle; Chester, a dagger and 3 sheaves; Newcastle, 3 castles; Sheffield, a crown; Birmingham, an anchor. The marks for York and Norwich (now discontinued) were:—York, 5 lions on a cross; Norwich, a castle and a lion passant.

5 & 6 *Vict. c.* 47 (1842) (Customs Act) (*a*).

§ 59. Foreign gold and silver plate imported from abroad shall be of the respective standards required for plate wrought in England, and it shall not be sold, &c., until assayed, stamped and marked in England, Scotland, or Ireland, as plate of the same description made in that country.

5 & 6 *Vict. c.* 56 (1842) (Customs Act).

§ 6 (*b*). Foreign ornamental plate, manufactured before 1800, and imported, is exempted from the operation of the last Act.

39 & 40 *Vict. c.* 35 (1876) (Customs Act).

§ 2 (*c*). Foreign gold and silver plate imported and sent to an assay office in the United Kingdom for assay shall be marked, in addition to the marks ordinarily used at that offce for British plate, with an F. on an oval escutcheon, to denote the foreign origin of the plate.

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## Scotland (*d*).

13 *Geo.* 3, *c.* 59 (1773) (*e*).

§ 2, which provided penalties for counterfeiting, &c., the marks for plate, is unrepealed in Scotland.

38 *Geo.* 3, *c.* 69 (1798) (see p. 617, *supra*).

§ 7 (*f*), which provided penalties for counterfeiting, &c., the marks for plate, is unrepealed in Scotland.

6 & 7 *Will.* 4, *c.* 69 (1836).

§ 1. Gold plate not to be made, sold, or exported, under 18 carats fine, nor silver under 11 oz. 2 dwt. fine. Penalty—Fine not exceeding 100*l.*

§ 2. Scotch goldsmiths to send their names, descriptions, and marks (to consist of the initial letters of their Christian and surnames, or, in the case of a partnership, of the initial letters of the firm name) for registration to the Goldsmiths' Company of Edinburgh, or of Glasgow.

§ 3. Gold plate of 22 carats fine, and silver plate of 11 oz. 2 dwt. to be sent, marked with the maker's mark, to the assay office, and to be there marked with—

The mark of the thistle.
A distinct variable letter to denote the year.
The mark of the assaying company.

(*a*) The entire Act but §§ 59 and 60 is repealed.

(*b*) The remainder of the Act is repealed by 8 & 9 Vict. c. 84, § 2.

(*c*) Repealed in part by 53 & 54 Vict. c. 8, § 36. This re-enacts 30 & 31 Vict. c. 82, § 24, the whole of which Act is repealed by the present one. See also 46 & 47 Vict. c. 55, § 10, as to foreign plate. As to foreign watch-cases, see Merchandise Marks Act, 1887, § 8, and the order in council thereunder, also the table opposite.

(*d*) In the reign of James III. of Scotland (1483) gold 22 carats fine, and silver 11 penny fine were to be marked with the maker's mark, the mark of the deacon of the craft, and the mark of the town.

(*e*) This Act was repealed as to England by 7 & 8 Vict. c. 22, § 1. The first section was repealed by the Statute Law Revision Act, 1871.

(*f*) Repealed as to England by 7 & 8 Vict. c. 22, § 1.

## HALL MARKS FOR IMPORTED FOREIGN WATCH-CASES (*a*).

| | GOLD. | | | | | | SILVER. |
|---|---|---|---|---|---|---|---|
| | 22 *Carats.* | 20 *Carats.* | 18 *Carats.* | 15 *Carats.* | 12 *Carats.* | 9 *Carats.* | |
| Quality Mark ..... | 22·917 | 20·833 | 18·75 | 15·625 | 12·5 | 9·375 | None. |
| Date Mark ..... | Letter. | Letter. | Letter. | Letter. | Letter. | Letter. | Letter. |
| Foreign Mark ..... | "Foreign." | "Foreign." | "Foreign." | "Foreign." | "Foreign." | "Foreign." | "Foreign." |
| Shape of Shield ..... | Cross. | Cross. | Cross. | Cross. | Cross. | Cross. | Octagon. |
| Assay Town Mark ..... | On all qualities of gold and silver the special mark of the town. | | | | | | |

The special marks for this purpose of the assay towns are as follows:—London, Phœbus; Birmingham, an equilateral triangle; Chester, an acorn and two leaves; Sheffield, four crossed arrows; Edinburgh, a St. Andrew's cross; Glasgow, a bishop's mitre; Dublin, a shamrock.

(*a*) Prescribed by the Order in Council of Nov. 28th, 1867, p. 575, *supra*.

Gold plate of 18 carats fine to be marked in addition with 18.

Silver plate of 11 oz. 10 dwt. fine to be marked in addition with the figure of Britannia.

§§ 16 and 17 contain certain exemptions from marking.

§§ 18, 19 and 21 contain penalties for selling or exporting plate not duly marked, counterfeiting marks, &c., marking base metal, &c.

The Act also contains provisions with respect to the assaying, recovering penalties, &c.

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The following statutes mentioned above under the head of "England" are also in force in Scotland: 6 *Geo.* 1, *c.* 11; 24 *Geo.* 3, *sess.* 2, *c.* 53; 38 *Geo.* 3, *c.* 69; 5 & 6 *Vict. c.* 47; 5 & 6 *Vict. c.* 56; 17 & 18 *Vict. c.* 96; 18 & 19 *Vict. c.* 60; and 39 & 40 *Vict. c.* 35.

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## Ireland.

3 *Geo.* 2, *c.* 3 (1730) (Irish Act) (*a*).

§ 32. Gold and silver plate not to be sold until assayed, touched and marked.

§ 33. Plate to be assayed by the Dublin Company of Goldsmiths. Gold of 22 carats, and silver of 11 oz. 2 dwt., to be touched by the wardens of the company, and marked with "the marks now usual for that purpose." On payment of duty, the plate to be marked with a mark to be appointed by the Commissioners of His Majesty's Revenue (*b*).

§ 38. Penalties for counterfeiting, &c., provided.

23 & 24 *Geo.* 3, *c.* 23 (1783) (Irish Act).

§ 2. No gold plate to be made, sold, &c., except of 22 carats, 20 carats, or 18 carats fine. Penalty—forfeiture and fine of 10*l.*

§ 3. The following marks appointed for gold of 22 carats:

The mark of the maker, which is the number 22, and the first letter of the maker's Christian and surname. And,

For Dublin a harp crowned.

For New Geneva (*c*), a like harp with a bar across the strings.

§ 4. Marks for gold of 20 carats:

The number 20.

The maker's initials. And,

For Dublin, a plume with three feathers.

For New Geneva, a plume with two feathers.

§ 5. Marks for gold of 18 carats.

The number 18.

The maker's initials. And,

For Dublin, an unicorn's head.

For New Geneva, an unicorn's head with a collar round the neck.

(*a*) This Act was repealed as to gold by 23 & 24 Geo. 3, c. 23, § 1 (Irish). It fixed a standard of 22 carats for gold (§ 33).

(*b*) The figure of Hibernia was accordingly appointed.

(*c*) This was a company of Genevа watchmakers, who established themselves in co. Waterford. They carried on operations only from about 1784 to 1790.

## SCOTCH HALL MARKS AT THE PRESENT DAY (*a*).

| | GOLD. | | | | | SILVER. | |
|---|---|---|---|---|---|---|---|
| | 22 *Carats.* | 18 *Carats.* | 15 *Carats.* | 12 *Carats.* | 9 *Carats.* | 11 *oz.* 2 *dwt.* | 11 *oz.* 10 *dwt.* |
| Quality Mark ..... | 22 | 18 | 15 | 12 | 9 | None. | Britannia. |
| Standard Mark— | | | | | | | |
| Edinburgh ..... | Thistle. | Thistle. | None. | None. | None. | Thistle. | Thistle. |
| Glasgow ..... | Lion rampant. | Lion rampant. | Lion rampant. | Lion rampant. | Lion rampant. | Lion rampant. | Lion rampant. |
| Date Mark ..... | Letter. | Letter. | Letter. | Letter. | Letter. | Letter. | Letter. |
| Maker's Mark ..... | Initials. | Initials. | Initials. | Initials. | Initials. | Initials. | Initials. |
| Duty Mark (*b*) ..... | Sovereign's head. | Sovereign's head. | None. | None. | None. | Sovereign's head. | Sovereign's head. |
| Assay Town Mark (*c*) ..... | On all qualities of gold and silver the special mark of the town. | | | | | | |

(*a*) Gold and silver of all these qualities are manufactured at Edinburgh and Glasgow.
(*b*) Disused since 53 & 54 Vict. c. 8.
(*c*) The special marks of the assay towns are:—Edinburgh, a castle; Glasgow, a tree, fish, and bell.

§ 6 contains exemptions.
§ 11 provides for the registration of new marks.
§ 28 provides penalties for counterfeiting, &c.

47 *Geo.* 3, *sess.* 2, *c.* 15 (1807).

§ 3. Irish gold plate of 22, 20, or 18 carats, and silver plate of 11 oz. 2 dwt., to be assayed by the Goldsmiths' Company of Dublin, touched and marked with "the marks now or hereafter to be used."

§ 6. On payment of duty, gold and silver plate to be marked with the King's head to denote that this has been done (*a*).

§§ 14, 15, and 16 provide penalties for persons selling or buying unmarked plate, or counterfeiting, &c., the marks used.

The Act also provides for the manner in which duty is to be paid, books kept, &c.

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The following statutes mentioned above under the head of "England" are also in force in Ireland: 5 & 6 *Vict. c.* 47; 5 & 6 *Vict. c.* 56; 17 & 18 *Vict. c.* 96; 18 & 19 *Vict. c.* 60; 39 & 40 *Vict. c.* 35.

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N.B.—For very full information on all points connected with Hall Marks, see Mr. Chaffers' book on Hall Marks, 8th ed., London, 1896.

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## PRINTS AND ENGRAVINGS.

8 *Geo.* 2, *c.* 13 (1735).

§ 1. Copyright for fourteen years given to "every person who shall invent and design, engrave, etch, or work, in mezzotinto or chiaro-oscuro, or from his own works and invention shall cause to be designed and engraved, etched, or worked in mezzotinto or chiaro-oscuro" any print, "to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints" (*b*). Penalties for Piracy.

(*a*) The figure of Hibernia continued to be used in addition.

(*b*) It is clearly settled law that both the date of publication and the name of the proprietor must appear with the engraving, in order to enable the proprietor to assert his statutory rights, notwithstanding *Blackwell* v. *Harper*, 2 Atk. 95; Barnard. 210; and *Roworth* v. *Wilkes*, 1 Camp. 94. See *Sayer* v. *Dicey*, 3 Wils. 60; *Harrison* v. *Hogg*, 2 Ves. jun. 323; *Thompson* v. *Symonds*, 5 T. R. 41; *Bonner* v. *Field*, 5 T. R. 44; *Macmurdo* v. *Smith*, 7 *ib.* 518; *Newton* v. *Cowie*, 4 Bing. 234; *Colnaghi* v. *Ward*, 12 L. J. Q. B. 1; *Brooks* v. *Cocks*, 3 Ad. & Ell. 138; *Graves* v. *Ashford*, L. R. 2 C. P. 410; *Rock* v. *Lazarus*, L. R. 15 Eq. 104. The requirements of 8 Geo. 2, c. 13, must be complied with in the case of engravings sought to be protected under the International Copyright Act, 1844 (7 & 8 Vict. c. 12), § 4: *Avanzo* v. *Mudie*, 10 Ex. 203.

## IRISH HALL MARKS AT THE PRESENT DAY (*a*).

| | GOLD. | | | | | | SILVER. |
|---|---|---|---|---|---|---|---|
| | 22 *Carats.* | 20 *Carats.* | 18 *Carats.* | 15 *Carats.* | 12 *Carats.* | 9 *Carats.* | 11 *oz.* 2 *dwt.* |
| Quality Mark ..... | 22 | 20 | 18 | 15·625 | 12·5 | 9·375 | None. |
| Standard Mark ..... | Harp crowned. | Plume of 3 feathers. | Unicorn's head. | None. | None. | None. | Harp crowned. |
| Date Mark ..... | Letter. | Letter. | Letter. | Letter. | Letter. | Letter. | Letter. |
| Maker's Mark ..... | Initials. | Initials. | Initials. | Initials. | Initials. | Initials. | Initials. |
| Duty Mark (*b*) ..... | Sovereign's head. | Sovereign's head. | Sovereign's head. | None. | None. | None. | Sovereign's head. |
| Dublin Mark ..... | Hibernia. | Hibernia. | Hibernia. | Hibernia. | Hibernia. | Hibernia. | Hibernia. |

(*a*) The only assay town in Ireland is Dublin, where gold is manufactured of a standard (20 carats) not used in England or Scotland, but silver only of the earlier standard of 11 oz. 2 dwt., and none of 11 oz. 10 dwt.

(*b*) Disused since 53 & 54 Vict. c. 8.

7 *Geo.* 3, *c.* 38 (1766).
The former Act extended in various respects, including an extension of the term to twenty-eight years.

17 *Geo.* 3, *c.* 57 (1777).
The former Acts further extended in various respects.

6 & 7 *Will.* 4, *c.* 59 (1836).
The former Acts extended to Ireland.

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## SOULPTURES.

54 *Geo.* 3, *c.* 56 (1814) (*a*).
§ 1. Copyright for fourteen years given to "every person or persons who shall make or cause to be made any new and original sculpture, or model, or copy, or cast," to commence from the "first putting forth or publishing the same: Provided, in all and evory case, the proprietor or proprietors do cause his, her, or their name or names, with the date, to be put on all and every such new and original sculpture, model, copy, or cast, and on every such cast from nature, before the same shall be put forth or published" (*b*).

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## CLOCKS AND WATCHES, &c.

39 & 40 *Vict. c.* 36, § 42 (*c*), (1876).
Clocks and watches and other metal articles marked in imitation of British marks are forbidden to be imported into the United Kingdom (*d*).

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## METAL BUTTONS.

36 *Geo.* 3, *c.* 60 (*e*) (1796).
§ 1 provides penalties for ordering metal buttons to be falsely marked in indication of quality, and for purchasing buttons so marked.

(*a*) The earlier Act, 38 Geo. 3, c. 71 (1798), was repealed by the Statute Law Revision Act, 1861 (24 & 25 Vict. c. 101).

(*b*) By the Registration of Designs Act, 1850 (13 & 14 Vict. c. 104, §§ 6, 7) sculptures, &c., were allowed to be registered under that Act, and penalties were imposed for infringement, but this was subject to the provision that every copy or cast of the sculpture, &c., must be marked with the word "registered" and the date of registration. By the Patents, &c., Act, 1883, the Act of 1850 is repealed, and sculptures, &c., within the protection of the Act of 1814, are excluded from registration for the future (see § 60). Existing registrations at the commencement of the Act are, however, preserved (§ 113). The requirements of 54 Geo. 3, c. 56, must be complied with in the case of sculptures, &c., sought to be protected under the International Copyright Act, 1844 (7 & 8 Vict. c. 12, § 4).

(*c*) This is a re-enactment, with some variations, of 16 & 17 Vict. c. 107, § 44.

(*d*) See p. 572. As to watches and watch-cases, see also §§ 7 and 8 of the Merchandise Marks Act, 1887, and the Order in Council thereunder, p. 573.

(*e*) Repealed in part, Statute Law Revision Act, 1871.

§ 2 provides penalties for falsely marking buttons in indication of quality, and for offering them for sale so marked.

§ 3. No marks indicative of quality are to be placed upon metal buttons, except the words "gilt," or "plated," respectively.

§ 4. The words "double gilt" and "treble gilt" may be placed upon buttons gilt to a specified degree.

§ 7 declares what quality is required to constitute a "gilt" or "plated" button.

The Act also contains provisions with respect to procedure, &c.

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## GUN-BARRELS.

By *Royal Charter*, 1637, "The Master, Wardens and Society of the Mystery of Gunmakers of the City of London" were incorporated, proof marks assigned to them, &c.

53 *Geo.* 3, *c.* 115 (*a*) (1813).

§ 4 incorporates "The Guardians, Trustees and Wardens of the Gun-Barrel Proof House of the Town of Birmingham."

§ 7 appoints Birmingham proof marks (*b*).

18 & 19 *Vict. c. cxlviii.* (1855) (Local), "The Gun-Barrel Proof Act, 1855" (*c*).

§ 9 repeals the former Acts.

§ 12 continues the incorporation of the Birmingham Company, under the name of "The Guardians of the Birmingham Proof House."

Many provisions follow for the regulation of the Birmingham Company.

31 & 32 *Vict. c. cxiii.* (1868) (Local), "The Gun-Barrel Proof Act, 1868."

§ 9 repeals the Act of 1855.

§ 12 continues the incorporation of "the Guardians of the Birmingham Proof House." Many provisions follow for the regulation of the Birmingham Company.

§ 107. The London and Birmingham Companies to receive, prove, mark, and deliver barrels brought to them for proof.

§ 116. Barrels to be proved according to Rules, Regulations, and Scales in Schedule B to Act.

§ 117. Power given to the two companies, with approval of Secretary for War, to repeal or alter Rules, &c., and to make and alter any new Rules, &c.

§§ 121, 122. Penalties for offences with respect to proof marks.

Schedule B provides proof and other marks for the two companies.

(*a*) Repealed by 18 & 19 Vict. c. cxlviii., § 9 (Local).

(*b*) 55 Geo. 3, c. 59 (1815), further regulated the marking of gun-barrels, but was also repealed by 18 & 19 Vict. c. cxlviii., § 9 (Local).

(*c*) Repealed by 31 & 32 Vict. c. cxiii. (Local).

*Rules and Regulations of December* 1887 made by the two companies, with the approval of the Secretary for War, under the authority of the Act of 1868. (See *London Gazette* for January 3rd, 1888, p. 16.)

These repeal the Rules, &c., in Schedule B to the Act, and contain new Rules, Regulations, and Scales for proving and marking gun-barrels, and provide proof marks, view marks, and provisional proof marks for the two companies.

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## CHAIN CABLES AND ANCHORS.

27 & 28 *Vict. c.* 27 (1864); 34 & 35 *Vict. c.* 101 (1871); 35 & 36 *Vict. c.* 30 (1872); and 37 & 38 *Vict. c.* 51 (1874), regulate the testing, proving, and marking of chain cables and anchors, and provide penalties for falsely marking, &c.

By § 4 of the Act of 1874, every contract for the sale of a chain cable implies, in the absence of an express stipulation to the contrary, that the cable has been duly tested and marked.

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## PLAYING CARDS.

25 & 26 *Vict. c.* 22 (1862).

§§ 28—37 provide that playing cards are to be sold in separate packs, enclosed in wrappers to be provided by the Commissioners of Inland Revenue, on which the duty chargeable and the name of the maker are to be marked. Penalties for frauds, &c.

16 & 17 *Vict. c.* 107 (1853).

§§ 114, 115. Imported playing cards are to be sold in separate packs, to be inclosed in proper wrappers to be provided by the Commissioners of Inland Revenue.

§ 116. Penalties for counterfeiting, &c., such wrappers.

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## PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

25 & 26 *Vict. c.* 68 (1862), "Copyright for Works of Art Act."

§ 7. By this section it is forbidden to do any of the following acts:—

1. Fraudulently sign any painting, drawing, photograph, or negative with any name, initials, or monogram.
2. Fraudulently sell, publish, &c., any painting, &c., marked with the name, &c., of a person who did not execute such work.
3. Fraudulently utter any copy or colourable imitation of any painting, &c., whether the subject of subsisting copyright or not, as having been executed by the author of the original.

4. Where the author of any painting, &c., has parted with the possession of the work, and the work is altered by any other person, it is forbidden, during the life of the author, to make, sell, publish, &c., such work or a copy of it so altered as or for the unaltered work of the author.

The section provides penalties for offenders against its provisions, but limits the time during which they can be incurred to within twenty years after the death of the person whose works have been wrongfully dealt with.

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## HOPS.

*54 Geo. 3, c.* 123 (*a*) (1814).

§ 1. Growers of hops are to mark the bags, in letters of specified dimensions, with their names, and the names of the parish and county in which the hops were grown, before putting the hops into the bag. Penalty for putting in the hops before marking the bag.

29 & 30 *Vict. c.* 37 (1866), "The Hop (Prevention of Frauds) Act, 1866."

§ 2. Growers of hops are to mark each bag, in addition to their own name and the names of the parish and county, with the year in which the hops were grown, the progressive number of the bag, and its weight.

Penalties are provided for not marking, falsely marking, wilfully altering marks, &c. (*b*).

§ 18. The vendor is to be deemed to contract that the marks are genuine.

§ 20. The provisions of the Merchandise Marks Act, 1862, §§ 23 and 24, are incorporated.

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## LINEN.

17 *Geo.* 2, *c.* 30 (*c*) (1743).

§ 1. Penalties provided for stamping foreign linens in imitation of British or Irish, and for placing counterfeit stamps on British or Irish linens.

(*a*) This Act is repealed in part. The former Acts, now repealed, were 14 Geo. 3, c. 68, under which the excise officer was to mark each bag of hops with the weight of hops, the name and place of abode of the grower, and the date of the year; 39 & 40 Geo. 3, c. 81, under which the grower was himself to mark his name and place of abode; the excise officer the weight, date, and progressive number of the bag; and 48 Geo. 3, c. 134, under which the owner was in addition to mark the name of the parish and county in which the hops were grown.

(*b*) See *R.* v. *Morgan*, 1 Trade Marks, 313, in which the defendant was convicted at the Wandsworth Police Court, on May 18th, 1878, of selling inferior hops in the bags and as the hops of a well-known grower, under § 6 of the above Act, and fined 10*l.*, the maximum penalty; 44*l.*, the value of the hops; and 10*l.* 10*s.* costs.

(*c*) Repealed as to Scotland by 4 Geo. 4, c. 40, § 1.

18 *Geo.* 2, *c.* 24 (*a*) (1744).

§ 1. Linens to be stamped must be sworn to be of the manufacture of [Scotland or] Ireland.

§ 2 (*b*). No bounty to be paid on British or Irish linens exported, but on such as are marked at both ends of every piece with the name and place of abode of the maker, the year of manufacture, the number of the piece in rotation, the name and place of abode of the exporter or seller for exportation; and unless the ends are also marked with the month and year when, and the name of the port at which, the linens are entered for exportation. The marks to be stamped with lamp black and burnt oil.

Penalties for falsely stamping, &c.

4 *Geo.* 4, *c.* 40 (1823) (Scotland).

§ 3. Every manufacturer or weaver of linen and dealer in linen in Scotland may weave his name, or fix any mark or seal, in any piece of linen of his make, to denote the length, breadth, or quality of the linen, or the maker's name. Penalties for counterfeiting.

5 & 6 *Will.* 4, *c.* 27 (1835) (Ireland).

§ 4. Across each end of every piece of linen offered for sale in open fair or market in Ireland there are to be woven two coarse threads or cords at a distance of one-fourth of an inch, and close to such threads or cords on each end are to be written the christian name, surname, and place of residence of the weaver or manufacturer, and on the outside fold of every piece its length and breadth.

§ 14. The Lord Lieutenant to appoint a committee of twelve in each county, to superintend the brown linen trade.

§ 19. The committee in each county to prescribe the form and device of the seal or stamp to be used by the county sealmaster of brown linen.

§ 21. The sealmaster shall affix to each piece of brown linen brought for the purpose, and which shall be in accordance with the Act, an impression of the seal, in black, red, or blue; and shall also mark with the same ingredients on the back of each piece its length, breadth, name of sealmaster, and the parish and county where he resides, or the name of the market town to which he is appointed.

Regulations for sales, penalties for frauds, &c.

(*a*) Repealed as to Scotland by 4 Geo. 4, c. 40, § 1.

(*b*) Repealed as to bounty by 6 Geo. 4, c. 105.

## PUBLIC STORES.

38 & 39 *Vict. c.* 25 (*a*) (1875), "The Public Stores Act, 1875."

§ 4. The marks described in the First Schedule to the Act are appropriated to denote Her Majesty's property. Penalty for unauthorised use of such marks.

§ 5. Penalty provided for obliteration of marks.

§ 6. Penalty for unlawful possession of public stores (*b*).

(*a*) This Act repealed the following Acts, by which the Public Stores had previously been regulated:—9 Will. 3, c. 41 (1697); this Act provided penalties for forging the King's marks, or having in possession goods so marked; 9 Geo. 1, c. 8 (1722); this Act modified the penalties contained in the former Act; 17 Geo. 2, c. 40, § 10 (1743); this provided for the trial of offences against these Acts before any judge, justice, or justices at assizes, or justices of the peace at general quarter sessions; 39 & 40 Geo. 3, c. 89 (1800); this Act provided penalties for selling or having in possession goods marked with the marks specified, or defacing, &c., such marks; 54 Geo. 3, c. 60 (1814); this extended the provisions of the former Acts to cordage wrought with worsted threads; 54 Geo. 3, c. 159, § 10 (1814); this provided a penalty for sweeping for lost anchors, cables, &c., belonging to the King's service; 55 Geo. 3, c. 127 (1815); this extended the previous Act to include all public stores; 30 & 31 Vict. c. 128 (1867), "The War Department Stores Act, 1867"; and 32 & 33 Vict. c. 12 (1869), "The Naval Stores Act, 1869." The following Acts have also from time to time regulated Naval Stores:—25 & 26 Vict. c. 64, "The Naval and Victualling Stores Act, 1862"; 27 & 28 Vict. c. 91, "The Naval and Victualling Stores Act, 1864"; 30 & 31 Vict. c. 119, "The Naval Stores Act, 1867"; all of which Acts were previously repealed.

(*b*) It has been repeatedly decided that on an indictment under 9 & 10 Will. 3, c. 41, for being unlawfully in possession of marked stores, the prisoner cannot be convicted unless he is in possession with knowledge of the marks. See *R.* v. ——, Foster, Cr. Cas. 439; *R.* v. *Banks*, 1 Esp. 144; *R.* v. *Willmett*, 3 Cox, 281; *R.* v. *Cohen*, 8 Cox, 41; *R.* v. *Sleep*, 8 Cox, 472. In *R.* v. *Banks*, it was, indeed, held by Lord Kenyon, C. J., that it was sufficient for the prosecution to prove the finding of the marked goods in the prisoner's possession, the prisoner being allowed to obtain acquittal by proving his ignorance; but it is now for the prosecution to prove the knowledge in the affirmative. See *R.* v. *Willmett*, 3 Cox, 281; *R.* v. *Cohen*, 8 Cox, 41; *R.* v. *Sleep*, *ib.* 472. Thus, in *R.* v. *O'Brien*, 15 L. T. N. S. 419, it was held that for a conviction of persons in charge of closed and fastened cases, containing marked goods, to be obtained, it must be proved that they knew that the goods in the cases were marked. Such knowledge may, however, be presumed by the jury from the circumstances attending the possession: *R.* v. *Sleep*, 8 Cox, 472. Although a specified certificate was required by 9 & 10 Will. 3, c. 41, to justify possession of marked goods, it was held that another form of certificate might be accepted (*R.* v. *Willmett*, 3 Cox, 281), or even the certificate be dispensed with altogether (*R.* v. ——, Foster, Cr. Cas. 439; *R.* v. *Banks*, 1 Esp. 144), there being no proof of knowledge.

Possession by a railway company for purpose of transfer, on behalf of the prisoner, is such a possession by the prisoner as to justify a conviction: *R.* v. *Sunley*, 8 Cox, 179. And see *R.* v. *Sleep*, 8 Cox, 472, as to the words "receive or have" in 9 & 10 Will. 3, c. 41; and *R.* v. *Cole*, 8 East, P. C. 767, as to the necessity for the marked articles to be found in the defendant's possession. In *R.* v. *Willmett*, 3 Cox, 281, it was held that a man could not be held criminally responsible for the act of his servants, who had, without his knowledge, improperly taken marked goods into his warehouse.

As to the exception in favour of contractors and contractors' servants, see *R.* v. *Silversides*, 3 Q. B. 406; and *R.* v. *Fitzgerald*, 43 C. C. C. Sess. Pap. 369.

## First Schedule.

*Marks appropriated for use in or on Her Majesty's Stores.*

| STORES. | MARKS. |
|---|---|
| Hempen cordage and wire rope. | White, black, or coloured worsted threads laid up with the yarns and the wire respectively. |
| Canvas, fearnought, hammocks, and seamen's bags. | A blue line in a serpentine form. |
| Buntin. | A double tape in the warp. |
| Candles. | Blue or red cotton threads in each wick or wicks of red cotton. |
| Timber or metal.<br>Any stores not before enumerated, whether similar to the above or not. | The name of Her Majesty, her predecessors, her heirs or successors, or of any public department or any branch thereof, or the broad arrow, or a crown, or Her Majesty's arms, whether such broad arrow, crown, or arms be alone or be in combination with any such name as aforesaid, or with any letters denoting any such name. |

# APPENDIX I.

## UNITED STATES STATUTE LAW.

### ACT OF CONGRESS OF 1870 (*a*).

§ 77 (*b*). *And be it further enacted, that any person or firm domiciled in the United States, and any corporation created by the authority of the United States, or of any State or Territory thereof, and any person, firm, or corporation resident of or located in any foreign country which, by treaty or convention, affords similar privileges to citizens of the United States, and who are entitled to the exclusive use* (*c*) *of any lawful trade mark, or who intend to adopt and use any trade mark* (*d*), *for exclusive use within the United States, may obtain protection for such lawful trade mark* (*e*) *by complying with the following requirements* (*f*), *to wit:*—

First—*By causing to be recorded in the Patent Office* (*g*), *the names of the parties and their residences and place of business* (*h*), *who desire the protection of the trade mark.*

Second—*The class of merchandise* (*i*) *and the particular description of goods* (*k*) *comprised in such class, by which the trade mark has been or is intended to be appropriated.*

Third—*A description of the trade mark itself* (*l*) *with facsimiles thereof* (*m*) *and the mode in which it has been or is intended to be applied and used* (*n*).

Fourth—*The length of time, if any, during which the trade mark has been used* (*o*).

Fifth—*The payment of a fee of twenty-five dollars, in the same manner and for the same purpose as the fee required for patents* (*p*).

Sixth—*The compliance with such regulations as may be prescribed by the Commissioner of Patents* (*q*).

Seventh—*The filing of a declaration* (*r*), *under the oath of the person or of some member of the firm or officer of the corporation, to the effect that the party claiming protection for the trade mark has a right to the use of the same, and that no other person, firm, or corporation, has the right to such use either in the identical form, or having such near resemblance thereto as might be calculated to deceive* (*s*), *and that the description and facsimiles presented for record are true copies of the trade mark sought to be protected.*

(*a*) Although this Act is no longer in force, the Act of 1881 having been substituted for it, it is thought advisable to print the earlier Act, in order that the effect of the decisions upon it may not be misapprehended. In *Leidersdorf* v. *Flint* (1), 8 Biss. 327, the validity of the Act of 1870 was questioned by the United States

Circuit Court, on the ground that the constitution of the United States did not authorise legislation by Congress on the subject of trade marks, except such as had been actually used in commerce with foreign nations, or with the Indian tribes; and in *U. S.* v. *Steffens*, 100 U. S. 82, the Act was formally declared by the Supreme Court to be on this ground unconstitutional and invalid. But this does not entitle persons registered under the invalid Act to recover back the fees paid by them (*Woodman* v. *U. S.*, 15 Ct. of Cl. 541), though they will be credited with such fees when applying for registration under the new Act. See Act of 1881, § 6, *infra*. Nor does the invalidity of the Act justify the disregard of injunctions granted under the general jurisdiction of the Court: *U. S.* v. *Roche*, 1 McCrary, 385. And it has been held that registration of a mark under the invalid Act, even without re-registration under the Act of 1881, is sufficient to prevent registration of a similar mark under the new Act of 1881: *Ex parte Lyon, Dupuy & Co.*, 28 U. S. Pat. Gaz. 191. Since the passing of the Act of 1870, it has been considered in the U. S. Patent Office that, while, on the one hand, the benefits of registration as trade marks were to be reserved for trade marks, and for trade marks only (*e. g.*, in *In re Parker*, 13 U. S. Pat. Gaz. 323, registration as a trade mark was refused to that which could at most amount to a design), so, on the other hand, it was only by registering them as trade marks, and not by patenting them as designs (*Ex parte King*, U. S. Pat. Comm. Decis. 1870, 109; *In re Whyte*, *ib.* 1871, 304) or registering them as labels (*In re Godillot*, 6 U. S. Pat. Gaz. 641; *In re Simpson & Sons*, 10 *ib.* 333; *Ex parte Davids & Co.*, 16 *ib.* 94; *Ex parte Schumacher & Ettlinger* (1), 19 *ib.* 791) that statutory protection could be obtained for trade marks. Descriptive words, not registrable as trade marks, were properly allowed to be registered as labels: *Ex parte Waeferling*, 16 *ib.* 764; *Ex parte Brigham*, 20 *ib.* 891; *Ex parte Lutz*, 33 *ib.* 1389. And see *In re Park*, 12 *ib.* 2, in which it was sought to register as part of a label a device for which the applicant had previously sought registration as a trade mark. In *U. S.* v. *Marble*, 22 *ib.* 1366, however, the Supreme Court of Columbia held that the Commissioner of Patents had no authority to refuse registration to a label merely on the ground that it might have been registered as a trade mark; but in the later case of *Ex parte Schumacher & Ettlinger* (2), 22 *ib.* 1291, the Commissioner again refused registration as labels to what he considered to be trade marks; and in *Ex parte Moodie*, 28 *ib.* 1271, and *Ex parte Wiesel*, 36 *ib.* 689, the Commissioner repeated this decision, and his course was, in the former case, upheld on appeal by the Supreme Court of Columbia in *Moodie* v. *Butterworth*, 28 *ib.* 1271. The Federal Courts have also held that a trade mark must be registered as such, and not copyrighted as a label: *Schumacher & Ettlinger* v. *Wogram*, 35 Fed. Rep. 210. It is for the Commissioner to decide whether what is presented to him is a trade mark or a label: *Moodie* v. *Butterworth*, 28 U. S. Pat. Gaz. 1271.

(*b*) See Act of 1881, §§ 1, 2.

(*c*) In *McElwee* v. *Blackwell*, 15 U. S. Pat. Gaz. 658, it was held that, although where registration had been wrongfully granted to one, it might subsequently be properly granted to another who was really entitled to the exclusive use, yet it would not be granted to another who was not entitled to the exclusive use, even though he might be entitled to use the mark to some extent. And see *Wright* v. *Simpson*, 15 *ib.* 968; also *Sorg* v. *Welsh*, 16 *ib.* 910, as to admissions of right in another; and *Yale Cigar Manufacturing Co.* v. *Yale*, 30 *ib.* 1183.

(*d*) Under these words a new trade mark might be registered prior to any actual use: *In re Rothschild*, 7 U. S. Pat. Gaz. 220. And see *Hoosier Drill Co.* v. *Ingels*, 14 *ib.* 785. This is not the case under the Act of 1881. See §§ 1 and 2, and *Ex parte Strasburger & Co.*, 20 *ib.* 155.

(*e*) As to what is a lawful trade mark, see *infra*, § 79. Registration cannot make a lawful trade mark out of that which does not contain the necessary elements: *Moorman* v. *Hoge*, 2 Sawy. 78; *Schumacher & Ettlinger* v. *Schwenke* (2), 36 U. S. Pat. Gaz. 457; but by § 7 of the Act of 1881 registration is *primâ facie* evidence of ownership. It has been doubted whether the use of a registered trade mark can be restrained: *Decker* v. *Decker*, 52 How. Pr. 218; but in *Glen Cove Manufacturing Co.* v. *Ludeman*, 23 Bl. C. C. 46, an injunction was granted in such a case. See also *Schumacher & Ettlinger* v. *Schwenke* (2), 36 U. S. Pat. Gaz. 457. Separate registration must be obtained for each mark which differs from another by the addition of a symbol; *e.g.*, "X," "XX," "XXX," were held to require separate registration: *In re English*, U. S. Pat. Comm. Decis. 1870, 142. And see *In re Eagle Pencil Co.*, 10 U. S. Pat. Gaz. 981.

(*f*) Absolute compliance with these requirements is necessary on the part of

applicants: *In re Hankinson*, 8 U. S. Pat. Gaz. 89. But it is not necessary that the very words of the Act should be cited, so long as the spirit of it is satisfied: *In re Vidvard & Sheehan*, 8 *ib.* 143.

(*g*) In *Lucroix* v. *Escobal*, 37 La. Ann. 533, it was held that a French citizen, who had not deposited his mark in the U. S. Patent Office, as required by the Convention of 1869 between the United States and France, was not entitled to maintain an action for infringement. But see *Société, &c., de la Bénédictine* v. *Micalovitch*, 36 Alb. L. J. 364.

(*h*) The registration of the name, &c., of a firm has been held to be sufficient, without giving the particulars as to each of the partners: *Smith* v. *Reynolds* (2), 10 Bl. C. C. 100.

(*i*) This requirement has been interpreted to exclude from registration the marks of persons other than manufacturers or merchants, *e.g.*, a carpet cleaner: *In re Hankinson*, 8 U. S. Pat. Gaz. 89.

(*k*) It has been held that a description of the class and goods as "paints" is sufficient (*Smith* v. *Reynolds* (2), 10 Bl. C. C. 100); and so with "alcoholic spirits" (*In re Boehm & Co.*, 8 U. S. Pat. Gaz. 319); but that "fancy goods" is insufficient, as being too general a term: *In re Lisner*, 13 *ib.* 455. Different persons may register the same trade mark for different descriptions of goods even in the same class: *Sorg* v. *Welsh*, 16 *ib.* 910. In *Smith* v. *Reynolds* (2), 10 Bl. C. C. 100; and S. C. (3), 13 *ib.* 458, it was held that a firm who had registered a trade mark for "paints" were not entitled to restrain the use of the mark on white lead by another firm who had used the mark on that variety of paint before the plaintiffs had used or registered their mark; and in the former case it was held that the registration being bad as to white lead was bad *in toto*, though but for that it might have been good.

(*l*) The trade mark must be sufficiently described for it to be possible to clearly distinguish between the essential and non-essential elements: *In re Volta Belt Co.*, 8 U. S. Pat. Gaz. 144.

(*m*) The facsimile limits the verbal description of the mark: *Duke* v. *Green*, 16 U. S. Pat. Gaz. 1094.

(*n*) The previous user of the applicants or their derivative title must be stated: *Ex parte Consolidated Fruit Jar Co.*, 16 U. S. Pat. Gaz. 679. Only one example of the mode of use will be admitted: *In re Kimball*, 11 *ib.* 1109. And see *Smith* v. *Reynolds* (2), 10 Bl. C. C. 100.

(*o*) See *Ex parte Consolidated Fruit Jar Co.*, 16 U. S. Pat. Gaz. 679.

(*p*) A fee paid can only be recovered when it was paid by actual mistake, *e.g.*, a payment in excess, or one not required by law. When, therefore, an application has failed because the proposed mark was not registrable, the fee paid cannot be recovered, although a renewed application for the registration of an essentially different mark has proved successful: *In re Block & Co.*, 14 U. S. Pat. Gaz. 235. See note (*a*), *supra*, as to crediting fees paid under this invalid Act.

(*q*) See § 81, *infra*, and note thereto.

(*r*) As to the necessity for the filing of this declaration, and for the production of sufficient evidence of it on a trial for infringement, see *Smith* v. *Reynolds* (1), 10 Bl. C. C. 85, where an injunction was refused on the ground of a deficiency of such evidence.

(*s*) A declaration that no other person, firm, or corporation has a right to the use of the same, or substantially the same, mark, is a sufficient compliance with this requirement: *In re Vidvard & Sheehan*, 8 U. S. Pat. Gaz. 143.

§ 78 (*a*). *And be it further enacted, that such trade mark shall remain in force for thirty years from the date of such registration, except in cases where such trade mark is claimed for and applied to articles not manufactured in this country, and in which it receives protection under the laws of any foreign country for a shorter period, in which case it shall cease to have any force in this country by virtue of this Act, at the same time that it becomes of no effect elsewhere, and during the period that it remains in force it shall entitle the person, firm, or corporation registering the same to the exclusive use thereof, so far as regards the description of goods to which it is appropriated in the statement filed under oath as aforesaid, and no other person shall lawfully use the same trade mark, or substantially the*

*same, or so nearly resembling it as to be calculated to deceive, upon substantially the same description of goods (b). Provided that six months prior to the expiration of the said term of thirty years, application may be made for a renewal of such registration, under regulations to be prescribed by the Commissioner of Patents, and the fee for such renewal shall be the same as for the original registration, certificate of such renewal shall be issued in the same manner as for the original registration, and such trade mark shall remain in force for a further term of thirty years: And provided further, that nothing in this section shall be construed by any Court as abridging or in any manner affecting unfavourably the claim of any person, firm, corporation, or company to any trade mark after the expiration of the term for which such trade mark was registered.*

(*a*) See Act of 1881, §§ 5, 7, 11.
(*b*) See *Sternberger* v. *Thalheimer*, 3 U. S. Pat. Gaz. 120, where the same mark was registered in two names; and *McElwee* v. *Blackwell*, 15 *ib.* 658.

§ 79 (*a*). *And be it further enacted, that any person or corporation who shall reproduce, copy, counterfeit, or imitate any such recorded trade mark, and affix the same to goods of substantially the same description, properties, and qualities as those referred to in the registration (b), shall be liable to an action on the case for damages for such unlawful use of such trade mark at the suit of the owner thereof in any Court of competent jurisdiction in the United States, and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of his trade mark, and to recover compensation therefor in any Court having jurisdiction over the person guilty of such wrongful use (c). The Commissioner of Patents (d) shall not receive and record any proposed trade mark which is not and cannot become a lawful trade mark (e), or which is merely the name of a person, firm, or corporation only (f), unaccompanied by a mark sufficient to distinguish it from the same name where used by other persons, or which is identical with a trade mark appropriated to the same class of merchandise and belonging to a different owner and already registered or received for registration, or which so nearly resembles such last-mentioned trade mark as to be likely to deceive the public (g): Provided that this section shall not prevent the registry of any lawful trade mark rightfully used at the time of the passage of this Act (h).*

(*a*) See Act of 1881, §§ 7, 3.
(*b*) See *Osgood* v. *Rockwood*, 11 Bl. C. C. 310, where it was held that persons who had registered a trade mark for prints made according to a patented process were not entitled under this Act to an injunction against a person who had used the mark on prints not made in accordance with the patent.
(*c*) It seems that the U. S. Circuit Courts had jurisdiction under this Act in cases of infringement of trade mark, even when both parties were citizens of the same State: *Duwel* v. *Bohmer*, 14 U. S. Pat. Gaz. 270; but see *Leidersdorf* v. *Flint* (1), 8 Biss. 327, and §§ 7, 11 of the Act of 1881.
(*d*) As to the validity of the decisions of the acting commissioner, see *Simpson* v. *Wright* (2), 15 U. S. Pat. Gaz. 293.
(*e*) The question what may be registered as being a "lawful trade mark" has been considered in many cases. The device of a crown is a good trade mark: *Smith* v. *Reynolds* (2), 10 Bl. C. C. 100. The arms of one of the United States cannot, however, constitute of themselves a good trade mark: *Ex parte Davids & Co.*, 16 U. S. Pat. Gaz. 94; and it has been held that the same is the case with the Freemasons' square and compass: *In re Tolle*, 2 *ib.* 415; and the word "Masonic": *Ex parte Smith* (3), 16 *ib.* 764; though in *In re Thomas*, 14 *ib.* 821, the Freemasons' symbols were allowed to be registered in combination. In *Ex parte King* (2), 46 *ib.* 119, the

decision in *In re Thomas*, 14 *ib.* 821, was followed, and the design of the badge adopted by the Grand Army of the Republic was allowed to be registered as a trade mark for writing paper by a person who had no connection with that society, and it was said that, that society not having used their badge as a mark on writing paper, they would be infringing the applicant's rights if they were to begin to do so. A word which has become common, *e.g.*, "Calhoun" plough cannot be registered: *In re Hall & Co.*, 13 *ib.* 229. Registration has been refused to the following words and expressions on the ground of descriptiveness: "Beeswax oil," *In re Hauthaway* (1), U. S. Pat. Com. Decis. 1871, 97; S. C. (2), *ib.* 284; "Razor Steel," *In re Roberts* (4), *ib.* 100; "Invisible" face powder, *Ex parte Palmer*, *ib.* 289; "A Richardson's Patent Union Leather Splitting Machine," *In re Richardson*, 3 U. S. Pat. Gaz. 120; "Für Familien Gebrauch," and "Lawrence Feiner Familien Flannel," *In re Lawrence*, 10 *ib.* 163; "Croup Tincture," *In re Roach*, 10 *ib.* 333; "Crack-proof," india-rubber, *In re Goodyear Rubber Co.*, 11 *ib.* 1062; "Evaporated" articles of food, *Ex parte Alden*, 15 *ib.* 389; "Standard A." cigars, *Ex parte Cohn* (1), 16 *ib.* 680; "Druggists' Sundries" cigars, *Ex parte Cohn* (2), 16 *ib.* 680; "Safety" powder, *Ex parte Safety Powder Co.*, 16 *ib.* 136; "Medicated Prunes," *Ex parte Smith* (2) 16 *ib.* 679; "Swing" scythe-sockets, *Ex parte Thompson Derby & Co.*, 16 *ib.* 13[illegible] "Granulated Dirt-killer" soap, *Ex parte Waeferling*, 16 *ib.* 764; and "Satin Polish boots and shoes, *Ex parte Brigham*, 20 *ib.* 891. And the same has been the case with respect to the figure of a fish for fishing lines: *In re Pratt & Farmer*, 10 *ib.* 866; and the representation of a twig with three leaves and a plum for prunes, *Ex parte Smith* (2), 16 *ib.* 679; and see *Popham* v. *Wilcox*, 66 N. Y. 69. On the other hand, "The Blanchard Churn," *In re Porter Blanchard's Sons*, U. S. Pat. Comm. Decis. 1871, 97; "Beaverine" boots and shoes, *In re Francis & Mallon*, *ib.* 283; and "Dr. Lobenthal's Essentia Antiphthisica," *In re Rohland*, 10 U. S. Pat. Gaz. 980, have been admitted to registration as being non-descriptive. In a series of cases registration has been refused on the ground that the term claimed, if properly applicable to the goods with respect to which it was used, was descriptive, but if not, was deceptive, *e.g.*, "American Sardines," *In re American Sardine Co.*, 3 *ib.* 495; "Egg Macaroni," *In re Dole Bros.*, 12 *ib.* 939; "Cachemire Milano," *In re Warburg & Co.*, 13 *ib.* 44; "French Paints," *Ex parte Marsching & Co.*, 15 *ib.* 294; "London" animal foods, *Ex parte Knapp*, 16 *ib.* 318; but see *In re Green*, 8 *ib.* 729, where registration was granted to "German Sirup." On the latter ground of deceptiveness, the word "patent" cannot be registered as part of a mark for an article made under an expired patent: *In re Richardson*, 3 *ib.* 120. A geographical name is not usually registrable: *Armistead* v. *Blackwell*, 1 *ib.* 603, "Durham" tobacco; *In re Tolle*, 2 *ib.* 415, "Cherry Street Mills," and "Market Street Mills"; *Ex parte Knapp*, 16 *ib.* 318, "London" animal foods; *Ex parte Marsching & Co.*, 15 *ib.* 294, "French Paints"; *Ex parte Farnum & Co.*, 18 *ib.* 412, "Lancaster" goods. But such a name may be registered when arbitrarily selected: *In re Cornwall* (2), 12 *ib.* 312, "Dublin" soap. Similarly, numerals may be registered when arbitrarily selected: *Kinney* v. *Allen*, 1 Hughes, 106; *Ex parte Dawes & Fanning*, 1 U. S. Pat. Gaz. 27; *American Solid Leather Button Co.* v. *Anthony*, 15 R. I. 338; but not otherwise: *In re Eagle Pencil Co.*, 10 U. S. Pat. Gaz. 981. It has been held that a peculiarity in the form of a barrel is not registrable as a trade mark; *Moorman* v. *Hoge*, 2 Sawy. 78; nor a representation of such barrel when applied to the goods contained in it: *Ex parte Halliday Bros.*, 16 U. S. Pat. Gaz. 500; nor is a specialty in the hoops of the barrel registrable: *In re Kane & Co.*, 9 *ib.* 105. But see *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392. A special collar-box has been refused registration: *Harrington* v. *Libby*, 14 Bl. C. C. 128; and so have a sampler-pattern: *In re Parker*, 13 U. S. Pat. Gaz. 323; and a strip of tobacco intended to be wrapped round the mouthpiece of cigarettes, on the ground that it was intended to serve purposes of convenience rather than of identification: *In re Gordon*, 12 *ib.* 517; and the use of a tin tag or ticket on the goods, irrespective of shape and design, is no trade mark; *Lorillard* v. *Pride*, 28 Fed. Rep. 434; though a tin tag of special shape, size and colour may be: *Lorillard* v. *Wight*, 15 Fed. Rep. 383. There is no trade mark in the shape of a plug of tobacco: *Liggett & Myers Tobacco Co.* v. *Hynes*, 20 Fed. Rep. 883; or of a box: *Sawyer* v. *Horn*, 4 Hughes, 239; *Ball* v. *Siegel*, 116 Ill. 137; or of sticks of chewing gum: *Adams* v. *Heisel*, 31 Fed. Rep. 279; or of the frame of a sewing machine originally made under a patent: *Wilcox & Gibbs' Sewing Machine Co.* v. *Gibbons' Frame*, 21 Bl. C. C. 431; *Brill* v. *Singer Manufacturing Co.*, 41 Ohio St. 127; nor in a manner of arranging in boxes cakes of soap wrapped in differently coloured paper wrappers: *Davis* v. *Davis*, 27 Fed. Rep. 490; nor in a

*nom de plume*: *Clemens* v. *Belford*, 11 Biss. 459. But registration has been granted to a peculiarly shaped stick intended to be so placed in a roll of carpet as to show an octagonal ring at each end: *Lowell Manufacturing Co.* v. *Larned*, Dig. 428. Registration cannot be granted to minor and non-essential features in a compound mark: *Ex parte Coats*, 16 U. S. Pat. Gaz. 544. Occasionally a mark has been allowed to be registered in alternative forms, *e.g.*, "The Star Shirt," the same words with the figure of a star, and "The * Shirt": *Morrison* v. *Case*, 9 Bl. C. C. 548; the figure of a lion, the word "Lion," or both: *In re Weaver*, 10 U. S. Pat. Gaz. 1; and see *In re Park*, 12 *ib.* 2; *In re Thomas*, 14 *ib.* 821; *Ex parte Peper*, 16 *ib.* 678. A bad trade mark does not become a good one by the addition of unobjectionable elements: *In re Blakeslee & Co.*, U. S. Pat. Comm. Decis. 1871, 284, "Cundurango Ointment, C. O."; *In re Dick & Co.*, 9 U. S. Pat. Gaz. 538, "D. D. & Co. Tasteless" drugs; *In re Rader & Co.*, 13 *ib.* 596, "Ironstone" in an oval border; but it appears to be possible for two marks, which separately are not good trade marks, to form one in combination: *Ex parte Davids & Co.*, 16 *ib.* 94. A trade mark cannot be registered for the purpose of being used by all the members of an association on goods of any quality, nor can a mark which is intended to be used in furtherance of a scheme for the restraint of trade: *Ex parte Cigar Makers' Association*, 16 *ib.* 958; *Ex parte Kuppenheimer*, 60 *ib.* 439; and in *Schneider* v. *Williams*, 44 N. J. Eq. 391; *Cigar Makers' Protective Union* v. *Conhaim*, 40 Minn. 243; 12 Am. St. Rep. 726; *McVey* v. *Brendel*, 144 Penn. 235; 27 Am. St. Rep. 625; *Weener* v. *Brayton*, 152 Mass. 101; *State* v. *Bishop*, 128 Missouri, 373; 49 Am. St. Rep. 569, the Court refused to protect such a mark at the instance of a member of the association. However, in *Strasser* v. *Mooneli*s, 108 N. Y. 611; *People* v. *Fisher*, 57 N. Y. Sup. Ct. 552; *Allen* v. *Macarthy*, 37 Minn. 347; *Blocte* v. *Simon*, 19 Abb. N. C. 88; *Cohn* v. *People*, 149 Ill. 486; 41 Am. St. Rep. 304; *Carson* v. *Ury*, 49 U. S. Pat. Gaz. 411; *Gravel Roofers Exchange* v. *Turnbull*, 64 *ib.* 441, a different view was taken of the propriety of such a mark. It seems that the decision of a competent Court as to the validity of a mark is binding upon the Patent Office: *In re India Rubber Comb Co.*, 8 *ib.* 905. If an application is refused on the ground that the proposed mark is not a registrable trade mark, a renewed application for the registration of a mark not open to objection must be treated as a new application, and it cannot be treated as an amendment of the original application, nor can the fee originally paid be returned: *In re Block & Co.*, 14 *ib.* 235.

(*f*) Thus in *In re Rowe & Post*, 9 U. S. Pat. Gaz. 496, the name "The New York Cutlery Co." was refused registration as a new mark. As to the registration of names as old marks, see note (*h*), *infra*. See also *In re Porter Blanchard's Sons*, U. S. Pat. Comm. Decis. 1871, 97; *In re Roberts* (1), *ib.* 113; S. C. (2), *ib.* 100; S. C. (3), *ib.* 101; *In re India Rubber Comb Co.*, 8 U. S. Pat. Gaz. 905; *In re Consolidated Fruit Jar Co.*, 14 *ib.* 269; *Ex parte Davids & Co.*, 16 *ib.* 94. The prohibition does not extend to the registration of the name of a person other than the applicant, and such names may be registered, at all events with their owner's consent, if living: *Ex parte Sullivan & Burke*, 16 *ib.* 765; *Ex parte Pace, Talbott & Co.*, 16 *ib.* 909.

(*g*) Thus in *In re The American Lubricating Oil Co.*, 9 U. S. Pat. Gaz. 687, registration was refused to the word "Star" as a trade mark on oil, the device of a star having already been registered for the same article; so in *In re Coggin, Kidder & Co.*, 11 *ib.* 1109, to a device in which the principal feature was the name "Haxall," which had long been the trade mark of another firm; so in *In re Bush & Co.*, 10 *ib.* 164, to a combination mark consisting of the applicants' own registered trade mark and two other devices appropriated by other firms; so in *Ex parte Caire*, 15 *ib.* 248, to the words "Black Swan," the word "Swan" being already registered; so in *Ex parte Smith* (1), 16 *ib.* 679, to "A. S. California Family * Soap," "California" and "*" being already separately on the register; and see *Ex parte Weisert Bros.*, 16 *ib.* 680. On the other hand, in *In re Imbs*, 10 *ib.* 463, registration was granted, notwithstanding that two other marks contained somewhat similar features; and in *In re Cornwall* (1), 12 *ib.* 138, a device of a star and crescent was registered, although there was a star already on the register.

(*h*) Under this proviso registration was granted to a name used as a trade mark before 1870, *e.g.*, "The India Rubber Comb Co. of New York," *In re India Rubber Comb Co.*, 8 U. S. Pat. Gaz. 905; "The Rubber Clothing Co.," *In re Rubber Clothing Co.*, 10 *ib.* 111. See *In re Dole Bros.*, 12 *ib.* 939; *In re Consolidated Fruit Jar Co.*, 14 *ib.* 269; *Ex parte Consolidated Fruit Jar Co.*, 16 *ib.* 679. This saving proviso is, however, omitted from the Act of 1881, so that the prohibition as to names, &c., is universal. See Act of 1881, § 3, and *Ex parte Fairchild*, 21 U. S. Pat. Gaz. 789, in

which case registration was refused to a name which had been used as a trade mark for twenty years, and had been registered under the Act of 1870.

§ 80 (*a*). *And be it further enacted, that the time of the receipt of any trade mark at the Patent Office for registration shall be noted and recorded, and copies of the trade mark and of the date of the receipt thereof, and of the statement filed therewith under the seal of the Patent Office, certified by the Commissioner, shall be evidence in any suit in which such trade mark shall be brought in controversy.*

(*a*) See Act of 1881, §§ 3, 4.

§ 81 (*a*). *And be it further enacted, that the Commissioner of Patents is authorised to make rules and regulations* (*b*) *and to prescribe forms for the transfer of the right to use such trade marks, conforming as nearly as practicable to the requirements of the law respecting the transfer and transmission of copyrights.*

(*a*) See Act of 1881, § 12.

(*b*) It was formerly decided that the authority given to the Commissioner by § 81 to make regulations, empowered him to declare an interference in a trade mark case, for the purpose of deciding a question of title to the trade mark, on the analogy of the practice in patent cases: *Lautz Bros. & Co.* v. *Schultz & Co.*, 9 U. S. Pat. Gaz. 791; *Duke* v. *Green*, 16 *ib.* 1094. And though it was thought in *Swift* v. *Peters*, 11 *ib.* 1110, that the question whether a registered proprietor of a mark was entitled to the exclusive use of it as against an ex-partner, was a question for a Court of law, and not for the Office, it was held in *Hoosier Drill Co.* v. *Ingels*, 14 *ib.* 785, that, in investigating the title to the mark, all matters relating to the ownership should be gone into; and in *Hanford* v. *Westcott*, 16 *ib.* 1181, the U. S. Circuit Court decided that a decision of the Examiner of Interferences, unappealed, was conclusive as to the right to a mark. And see *Josselyn* v. *Sweezey & Dart*, 15 *ib.* 702, as to re-opening the evidence taken on an interference, and *Simpson* v. *Wright* (1), 15 *ib.* 248, and S. C. (2), 15 *ib.* 293, as to re-hearing an interference. After the case of *U. S.* v. *Steffens*, 100 U. S. 82, it was held that the Patent Office has no longer any authority to decide questions of disputed titles to trade marks, or to declare interferences in such cases (*Braun & Co.* v. *Blackwell*, 19 U. S. Pat. Gaz. 481; but see *Ex parte Strasburger & Co.*, 20 *ib.* 155, and *Jacoby & Co.* v. *Lopes & Co.*, 23 *ib.* 342); and in *Yale Cigar Manufacturing Co.* v. *Yale*, 30 *ib.* 1183, it was decided that a declaration of interference is authorized by § 3 of the Act of 1881. In such cases the only duty of the Office is to decide whether the opponent has or has not a better title than the applicant, not to decide any further question: *ib.* If, on an interference between an applicant and a registered proprietor with respect to the same mark, the right to registration is adjudged to the applicant, notwithstanding the opposition of the registered proprietor, the result is, while strictly giving the applicant merely the right to register, practically to displace the registered proprietor, though his mark is not removed from the register: *ib.*

§ 82 (*a*). *And be it further enacted, that any person who shall procure the registry of any trade mark, or of himself as the owner thereof, or an entry respecting a trade mark, in the Patent Office under this Act, by making any false or fraudulent representations or declarations verbally or in writing, or by any fraudulent means, shall be liable to pay damages in consequence of any such registry or entry to the person injured thereby, to be recovered in an action on the case in any Court of competent jurisdiction within the United States.*

(*a*) See Act of 1881, § 9.

§ 83 (*a*). *And be it further enacted, that nothing in this Act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade mark might have had if this Act had not been passed* (*b*).

(*a*) See Act of 1881, § 10.
(*b*) See *Osgood* v. *Rockwood*, 11 Bl. C. C. 310; *U. S.* v. *Roche*, 1 McCrary, 385.

§ 84 (*a*). *And be it further enacted, that no action shall be maintained under the provisions of this Act by any person claiming the exclusive right to any trade mark which is used or claimed in any unlawful business, or upon any article which is injurious in itself, or upon any trade mark which has been fraudulently obtained, or which has been formed and used with the design of deceiving the public in the purchase or use of any article of merchandise* (*b*).

(*a*) See Act of 1881, § 8.
(*b*) It seems that this Act provided no means for removing from the register a mark which was wrongly registered—*e. g.*, a mark which did not contain any of the essential particulars. See *Armistead* v. *Blackwell*, 1 U. S. Pat. Gaz. 603; *McElwee* v. *Blackwell*, 15 *ib.* 658; *Wright* v. *Simpson*, 15 *ib.* 968; *Yale Cigar Manufacturing Co.* v. *Yale*, 30 *ib.* 1183.

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## ACT OF CONGRESS OF 1875.*

BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled:—

§ 1. That every person who shall, with intent to defraud, deal in or sell, or keep or offer for sale, or cause or procure the sale of, any goods of substantially the same descriptive properties as those referred to in the registration of any trade mark, pursuant to the statutes of the United States, to which, or to the package in which the same are put up, is fraudulently affixed said trade mark, or any colourable imitation thereof, calculated to deceive the public, knowing the same to be counterfeit, or not the genuine goods referred to in said registration, shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or imprisonment not more than two years, or both such fine and imprisonment.

§ 2. That every person who fraudulently affixes, or causes or procures to be fraudulently affixed, any trade mark registered pursuant to the statutes of the United States, or any colourable imitation thereof, calculated to deceive the public, to any goods of substantially the same descriptive properties as those referred to in said registration, or to the package in which they are put up, knowing the same to be counterfeit, or not the genuine goods referred to in said registration, shall, on conviction thereof, be punished as prescribed in the first section of this Act (*a*).

(*a*) See the New York case of *People* v. *Fisher*, 57 N. Y. Sup. Ct. 552.

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* So far as this Act was dependent on the Registration Act of 1870, it fell to the ground when that Act was declared invalid in *U. S.* v. *Steffens*, 100 U. S. 82.

§ 3. That every person who fraudulently fills, or causes or procures to be fraudulently filled, any package to which is affixed any trade mark, registered pursuant to the statutes of the United States, or any colourable imitation thereof, calculated to deceive the public, with any goods of substantially the same descriptive properties as those referred to in said registration, knowing the same to be counterfeit, or not the genuine goods referred to in said registration, shall, on conviction thereof, be punished as prescribed in the first section of this Act.

§ 4. That any person or persons who shall, with intent to defraud any person or persons, knowingly and wilfully cast, engrave, or manufacture, or have in his, her, or their possession, or buy, sell, offer for sale, or deal in, any die or dies, plate or plates, brand or brands, engraving or engravings, on wood, stone, metal, or other substance, moulds, or any false representation, likeness, copy, or colourable imitation of any die, plate, brand, engraving or mould of any private label, brand, stamp, wrapper, engraving on paper or other substance, or trade mark, registered pursuant to the statutes of the United States, shall, upon conviction thereof, be punished as prescribed in the first section of this Act.

§ 5. That any person or persons who shall with intent to defraud any person or persons, knowingly and wilfully make, forge or counterfeit, or have in his, her, or their possession, or buy, sell, offer for sale, or deal in, any representation, likeness, similitude, copy, or colourable imitation of any private label, brand, stamp, wrapper, engraving, mould, or trade mark, registered pursuant to the statutes of the United States, shall, upon conviction thereof, be punished as prescribed in the first section of this Act.

§ 6. That any person who shall with intent to injure or defraud the owner of any trade mark, or any other person lawfully entitled to use or protect the same, buy, sell, offer for sale, deal in, or have in his possession any used or empty box, envelope, wrapper, case, bottle, or other package, to which is affixed, so that the same may be obliterated without substantial injury to such box or other thing aforesaid, any trade mark, registered pursuant to the statutes of the United States, not so defaced, erased, obliterated, and destroyed as to prevent its fraudulent use, shall, on conviction thereof, be punished as prescribed in the first section of this Act.

§ 7. That if the owner of any trade mark, registered pursuant to the statutes of the United States, or his agent, make oath, in writing, that he has reason to believe, and does believe, that any counterfeit dies, plates, brands, engravings on wood, stone, metal, or other substance, or moulds, of his said registered trade mark, are in the possession of any person with intent to use the same for the purpose of deception and fraud, or make such oaths that any counterfeits or colourable imitations of his said trade mark, label, brand, stamp, wrapper, engraving on paper or other substance, or empty box, envelope, wrapper, case, bottle, or other package, to which is affixed said registered trade mark not so defaced, erased, obliterated, and destroyed as to prevent its fraudulent use, are in the possession of any person with intent to use the same for purpose of deception and fraud, then the several judges of the circuit and district courts of the United States, and the commissioners of the circuit courts, may, within their

respective jurisdictions, proceed under the law relating to search-warrants, and may issue a search-warrant authorising and directing the marshal of the United States for the proper district to search for and seize all said counterfeit dies, plates, brands, engravings on wood, stone, metal, or other substance, moulds, and said counterfeit trade marks, colourable imitations thereof, labels, brands, stamps, wrappers, engravings on paper, or other substance, and said empty boxes, envelopes, wrappers, cases, bottles, or other packages that can be found; and upon satisfactory proof being made that said counterfeit dies, plates, brands, engravings on wood, stone, metal, or other substance, moulds, counterfeit trade marks, colourable imitations thereof, labels, brands, stamps, wrappers, engravings on paper or other substance, empty boxes, envelopes, wrappers, cases, bottles, or other packages, are to be used by the holder or owner for the purpose of deception and fraud, that any of said judges shall have full power to order all said counterfeit dies, plates, brands, engravings on wood, stone, metal, or other substance, moulds, counterfeit trade marks, colourable imitations thereof, labels, brands, stamps, wrappers, engravings on paper or other substance, empty boxes, envelopes, wrappers, cases, bottles, or other packages, to be publicly destroyed.

§ 8. That any person who shall with intent to defraud any person or persons, knowingly and wilfully aid or abet in the violation of any of the provisions of this Act, shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or imprisonment not more than one year, or both such fine and imprisonment.

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## ACT OF CONGRESS OF 1881.

### An Act to authorise the Registration of Trade Marks and protect the same.

*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,*

§ 1 (*a*). That owners of trade marks used in commerce with foreign nations or with the Indian tribes, provided such owners shall be domiciled in the United States or located in any foreign country or tribe which, by treaty, convention, or law, affords similar privileges to citizens of the United States (*b*) may obtain registration (*c*) of such trade marks by complying with the following requirements:

1st. By causing to be recorded in the Patent Office a statement specifying name, domicile, location, and citizenship of the party applying; the class of merchandise and the particular description of goods comprised in such class to which the particular trade mark has been appropriated (*d*); a description of the trade mark itself, facsimiles thereof (*e*), and a statement of the mode in which the same is applied and affixed to goods and the length of time during which the trade mark has been used (*f*).

2nd. By paying into the Treasury of the United States the sum of

twenty-five dollars, and complying with such regulations as may be prescribed by the Commissioner of Patents.

(*a*) See Act of 1870, § 77.

(*b*) In *Ex parte Portland Cement Fabrik Germania H. Manske & Co.*, 64 U. S. Pat. Gaz. 858, registration of the word "Germania" was allowed to a German citizen, though not allowable by the law of Germany, it appearing that registration had been granted in Germany to citizens of the U. S. of marks not registrable in the case of German citizens.

(*c*) Registration is a mere record of a claim, and affords merely *primâ facie* evidence of ownership. See § 7, *infra*, and *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183; *Brower* v. *Boulton*, 53 Fed. Rep. 389; 58 *ib.* 888; 20 U. S. App. 166; and it seems that registration will not of itself debar the proprietor from using another somewhat different device as a common law trade mark in domestic markets; but it may be evidence of what is claimed: *Kohler Manufacturing Co.* v. *Beeshore*, 53 Fed. Rep. 262; 59 *ib.* 573; *Richter* v. *Reynolds*, 59 *ib.* 577. A certificate of registration will not be granted to an assignee of the applicant even though the assignment has been previously recorded under § 12: *Ex parte Bassett*, 55 U. S. Pat. Gaz. 997. Under this section one of two joint owners cannot obtain registration independently of the other: *Ex parte Langdon*, 61 U. S. Pat. Gaz. 286.

(*d*) Where a trade mark has been used on several specified articles of the same class, one registration will cover all: *Ex parte Silvers*, 67 U. S. Pat. Gaz. 811.

(*e*) See *Adams* v. *Heisel*, 31 Fed. Rep. 279.

(*f*) This implies that a trade mark to be registrable must be attached to a vendible article; consequently registration was denied to a trade mark adopted on bill heads and circulars by a land jobbing company: *Ex parte Roy & Nourse*, 54 U. S. Pat. Gaz. 1267. The dates of adoption set forth in rival applications are not conclusive, but the question of priority must be tried by evidence in the usual way: *Stewart* v. *Einstein* v. *Sawhill*, 61 U. S. Pat. Gaz. 287. Where the prescribed use is proved after but not before the filing of the application, registration may be granted upon a supplemental application: *Stewart* v. *Einstein* v. *Sawhill* (2), 64 U. S. Pat. Gaz. 1333. In *Lacroix* v. *Escobal*, 37 La. Ann. 533, it was held that a French citizen who had not deposited his mark at the U. S. Patent Office, as required by the Convention of 1869 between the U. S. and France, was not entitled to maintain an action for infringement. But in *Société, &c. de la Bénédictine* v. *Micalovitch*, 36 Alb. L. J. 364, it was held that compliance with the terms of that Convention was not essential where the trade mark of a French company had been registered under this Act of Congress.

In California an exclusive right to the use of a trade mark or name cannot now be acquired without registration as required by the State Code: *Whittier* v. *Dietz*, 66 Cal. 78.

§ 2 (*a*). That the application prescribed in the foregoing section must, in order to create any right whatever in favour of the party filing it, be accompanied by a written declaration verified by the person, or by a member of a firm, or by an officer of a corporation applying, to the effect that such party has at the time a right to the use of the trade mark sought to be registered, and that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that such trade mark is used in commerce with foreign nations or Indian tribes, as above indicated (*b*), and that the description and facsimiles presented for registry truly represent the trade mark sought to be registered (*c*).

(*a*) See Act of 1870, § 77.

(*b*) This Act only recognises trade marks actually in use, and not trade marks which it is only intended to use in the future; and the user must be user in commerce with foreign nations or the Indian tribes, and the declaration on oath that there has been such user is strictly insisted on: *Ex parte Strasburger & Co.*, 20 U. S. Pat. Gaz. 155.

(*c*) A word and a picture which are true alternatives and invariably express the same idea may be covered by one registration, but not a word and a picture capable of such a variety of modifications that two of such modifications might appear substantially different things to the ordinary observer: *Ex parte Roth Grocery Co.*, 62 U. S. Pat. Gaz. 315. Thus the word "Rosebud" and the representation of a rosebud have been allowed registration in one application (*Ex parte Kinney*, 72 *ib.* 1346), but not the word "crescent" and the representation of a crescent, inasmuch as the picture of a crescent might be the alternative of the word "Luna": *Ex parte Lazarus Schwarz & Lipper*, 64 *ib.* 1396.

§ 3 (*a*). That the time of the receipt of any such application shall be noted and recorded. But no alleged trade mark shall be registered unless the same appear to be lawfully used as such (*b*) by the applicant in foreign commerce or commerce with Indian tribes, as above mentioned, or is within the provision of a treaty, convention, or declaration with a foreign power; nor which is merely the name of the applicant (*c*), nor which is identical with a registered or known trade mark (*d*) owned by another and appropriated to the same class of merchandise, or which so nearly resembles some other person's lawful trade mark as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers (*e*). In an application for registration the Commissioner of Patents shall decide the presumptive lawfulness of claim to the alleged trade mark (*f*); and in any dispute between an applicant and a previous registrant, or between applicants, he shall follow, so far as the same may be applicable, the practice of courts of equity of the United States in analogous cases (*g*).

(*a*) See Act of 1870, §§ 80, 79.

(*b*) The right to trade marks and remedies for their protection exist independently of the Act, and the omission in § 3 to exclude descriptive words does not impliedly validate a trade mark consisting of such words: *Harris Drug Co.* v. *Stucky*, 46 Fed. Rep. 624. As to what may be lawfully used as a trade mark, see the cases cited in note (*e*) to § 79 of the Act of 1870, *ante*. Under the present Act it has been decided that "Albany Beef" was no trade mark for canned sturgeon, being descriptive (*Ex parte Ams*, 23 U. S. Pat. Gaz. 344); that, on the same ground "Timekeeper" could not be registered as an essential part of a trade mark for watches (*Ex parte Strasburger & Co.*, 20 *ib.* 155); nor "Cristalline" as a trade mark for artificial brilliants (*Ex parte Kipling*, 24 *ib.* 899); nor "Famous" as a trade mark for stoves (*Ex parte Brand Stove Co., Ld.*, 62 *ib.* 588); nor "Splendid" as a trade mark for flour (*Ex parte Stokes*, 64 *ib.* 437); but that "Invigorator" was not descriptive, but a good trade mark for spring bed-bottoms: *Ex parte Heyman*, 18 *ib.* 922. As a general rule geographical names will not be admitted to registration. In *Ex parte Headley*, 72 *ib.* 1654, geographical names were declared to be divisible into three classes: 1. Well-known names in common use; 2. Names in their primary sense not geographical; 3. Words primarily geographical though not well-known; and it was held that Class 2 alone was capable of registration, and accordingly registration was refused to "Cloverdale." So, also, registration has been refused to "Raleigh" (*Ex parte Oliver*, 18 *ib.* 92); to "Cromarty" (*Ex parte Procter*, 51 *ib.* 1785), and to "Trenton": *Ex parte American Saw Co.*, 58 *ib.* 521. On the other hand it has been granted to "Dover" (*Ex parte Dover Stamping Co.*, 51 U. S. Pat. Gaz. 1784); to "Florentine" (*Ex parte Mississippi Glass Co.*, 64 *ib.* 713); to "Germania" (*Ex parte Portland Cement Fabrik Germania H. Manske & Co.*, 64 *ib.* 858), and to "Waverley," when used in an arbitrary and fanciful sense (*Ex parte Indiana Bicycle Co.*, 72 *ib.* 1654); but it seems difficult to reconcile some of these decisions with the principles laid down in *Ex parte Headley*, 72 *ib.* 1654. Registration has been granted to a distinctive band or ribbon, intended to be attached to cigar-boxes, as a trade mark for cigars, it serving no mechanical purpose (*Ex parte Straiton & Storm*, 18 *ib.* 923); but a mark which appears upon its face to be purely decorative in its character will not be registered: *Ex parte Peyser*, 62 *ib.* 588. And see *Hoeb* v. *Bishop*, 49 *ib.* 1845. Whether a device should be registered as a trade

mark or a label, see *Ex parte Palmer*, 58 *ib.* 383, and *Ex parte National U. S. Stamp Delivery Co.*, 60 *ib.* 893, and cases collected at p. 634. There is no trade mark in the colour of an article or of the packets containing it. Thus registration was refused to a red bag intended to contain flower seeds offered for sale: *Ex parte Landreth*, 31 *ib.* 1441. See *Fleischmann* v. *Starkey*, 25 Fed. Rep. 127. A trade mark of an inherently deceptive character cannot be registered: *Ex parte Bloch & Co.*, 40 U. S. Pat. Gaz. 443; *Ex parte Chichester Chemical Co.*, 52 *ib.* 1061; *Ex parte Zwack & Co.*, 76 *ib.* 1855, with which compare *Société, &c. de la Bénédictine* v. *Micalovitch*, 36 Alb. L. J. 364; nor a trade mark which is not distinctive (*Ex parte Kuppenheimer*, 60 U. S. Pat. Gaz. 439); nor one which is either deceptive or descriptive: *Ex parte Grove*, 67 *ib.* 1447 ("Bromo Quinine"); (with which, however, compare *Keasbey* v. *Brooklyn*, 142 N.Y. 467); *Ex parte Wolf*, 80 U. S. Pat. Gaz. 1271 ("Gyrator" sieves). That case also shows that a word formed by a combination of known words is not registrable if descriptive.

(*c*) This prohibition being so general, registration has been refused to a name which had been used for twenty years as a trade mark, and had been registered as such under the Act of 1870: *Ex parte Fairchild*, 21 U. S. Pat. Gaz. 789. And in *Ex parte Adriance, Platt & Co.*, 20 *ib.* 1820, registration was refused to a name as part of a trade mark which also included a device. But a name has been allowed to be registered as part of an old combination trade mark: *Ex parte Frieberg & Workum*, 20 *ib.* 1164. The prohibition applies equally to the name of a corporation: *Ex parte Creedmoor Cartridge Co.*, 56 *ib.* 1333. Whether initials can be registered when the full name cannot, *quære*: *Burt* v. *Smith*, 71 Fed. Rep. 161.

(*d*) These words have been held to prohibit the registration under this Act of a mark identical with or only colourably differing from a mark registered under the invalid Act of 1870, and not re-registered under this Act: *Ex parte Lyon, Dupuy & Co.*, 28 U. S. Pat. Gaz. 191. And the fact that the new applicant uses the mark in foreign or Indian commerce, and that it does not appear whether the registered mark was so used, makes no difference: *ib.* So, also, *Yale Cigar Manufacturing Co.* v. *Yale*, 30 *ib.* 1183. What the applicant has to show is: (1) that he has a right to use the mark, and that no one else has; (2) that it is not too similar to the registered or known mark of another; (3) that the applicant uses it in foreign or Indian commerce: *Ex parte Lyon, Dupuy & Co.*, 28 *ib.* 191.

(*e*) In *Ex parte Strasburger & Co.*, 20 U. S. Pat. Gaz. 155, registration as part of a trade mark was refused to the word "Railway," that having already been registered by another manufacturer. Wherever a person has registered a trade mark for an article, and has announced his intention to use it on a similar article, an applicant to register a similar mark for such similar article must prove that the registrant has not used his mark thereon. The registration covers all merchandise of substantially the same descriptive properties: *Ex parte Kyle & Co.*, 57 *ib.* 274. Where a mark sought to be registered under the Act of 1881 has been anticipated by a mark registered under the Act of 1870, the proper course is to give notice of the application to the registrant to enable him to make an application under the Act of 1881 with a view to an interference: *Ex parte American Lead Pencil Co.*, 61 *ib.* 151. In *Ex parte Coon*, 58 *ib.* 946, the device of a shield with the words "shield brand" was held anticipated by two devices of a shield in combination with an eagle; in *Ex parte Corning & Co.*, 65 *ib.* 751, the words "Monarch Distilling Co." by "M. V. Monarch"; and in *Lewn* v. *Ohio Coffee & Spice Co.*, 73 *ib.* 1136, "Capitol" by "Capital," notwithstanding differences in the details of the marks. On the other hand, it has been held that "Royal Vellum" as applied to paper was not anticipated by "Royal Irish Linen" (*Ex parte Hurd & Co.*, 59 *ib.* 1763); nor "Magico" by "Magic" (*Ex parte American Chemical Co.*, 62 *ib.* 588); nor "Electric Light" as applied to flour by "Electric"; but the words "Electric Light" accompanied by a representation of an electric lamp were held to be interfered with by the words without the symbol: *Kirby* v. *McLaughlin* v. *Johnson*, 72 *ib.* 1785.

(*f*) The Court cannot grant registration; that is for the commissioner alone: *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183. In determining the right of an applicant to registration, the decision of the commissioner goes to the questions—(1) Whether there has been any actual user of the prescribed character; (2) Whether the applicant has a right to the use of the trade mark at all? The commissioner must decide whether the mark is inherently capable of registration; whether it is anticipated; whether the applicant is the true owner; and whether the trade mark is lawfully used in actual commerce with foreign nations or with

the Indian tribes; and the refusal of the commissioner to register being an act done in the performance of a discretionary duty cannot be reviewed by mandamus: *South Carolina* v. *Seymour*, 66 *ib.* 1167, reversing 65 *ib.* 1221. In that case the commissioner had held that the State of South Carolina had no authorized trade in liquor, in respect of which registration was sought, beyond its own limits: *Ex parte South Carolina*, 64 *ib.* 1395. The question was finally taken to the Supreme Court of the U. S., but the appeal was dismissed for want of jurisdiction: *South Carolina* v. *Seymour*, 153 U. S. 353.

(*g*) Under this section the commissioner has power to declare an interference (*Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183); and it makes no difference that the parties are partners, nor that one is a company and the other a member of it: *ib.* If the better title is with the applicant, he will be registered, notwithstanding that the same mark is on the register in the name of another person with an inferior title: *ib.* As to interferences, see § 81 of Act of 1870, *supra*.

§ 4 (*a*). That certificates of registry of trade marks shall be issued in the name of the United States of America, under the seal of the Department of the Interior, and shall be signed by the Commissioner of Patents; and a record thereof, together with printed copies of the specifications, shall be kept in books for that purpose. Copies of trade marks and of statements and declarations filed therewith and certificates of registry so signed and sealed shall be evidence in any suit in which such trade marks shall be brought in controversy.

(*a*) See Act of 1870, § 80.

§ 5 (*a*). That a certificate of registry shall remain in force for thirty years from its date, except in cases where the trade mark is claimed for and applied to articles not manufactured in this country, and in which it receives protection under the laws of a foreign country for a shorter period, in which case it shall cease to have any force in this country by virtue of this Act at the time that such trade mark ceases to be exclusive property elsewhere. At any time during the six months prior to the expiration of the term of thirty years such registration may be renewed on the same terms and for a like period.

(*a*) See Act of 1870, § 78.

§ 6. That applicants for registration under this Act shall be credited for any fee or part of a fee heretofore paid into the Treasury of the United States with intent to procure protection for the same trade mark.

§ 7 (*a*). That registration of a trade mark shall be *primâ facie* evidence of ownership (*b*). Any person who shall reproduce, counterfeit, copy, or colourably imitate any trade mark registered under this Act, and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trade mark at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of such trade mark used in foreign commerce or commerce with Indian tribes, as aforesaid, and to recover compensation therefor in any Court having jurisdiction over the person guilty of such wrongful act; and Courts of the United States shall have original and appellate jurisdiction in such cases without regard to the amount in controversy (*c*).

(*a*) See Act of 1870, §§ 78, 79.

(*b*) The use of a trade mark which, though registered, is a colourable imitation of another, may consequently be restrained: *Glen Cove Manufacturing Co.* v. *Ludeman*, 23 Bl. C. C. 46; *Schumacher & Ettlinger* v. *Schwenke* (2), 36 U. S. Pat. Gaz. 457; determining the doubt suggested in *Decker* v. *Decker*, 52 How. Pr. 218. The registration of a mark does not deprive the public of the right to use a somewhat similar mark, which was of common right before the registration, *e.g.*, where "La Normandi" had been registered, but "La Normanda" was already in common use, no injunction was granted to restrain the use of the latter: *Stachelberg* v. *Ponce*, 128 U. S. 86. See also *Kohler Manufacturing Co.* v. *Breshore*, 53 Fed. Rep. 262; 59 *ib.* 577; *Richter* v. *Reynolds*, 59 *ib.* 577. As between applicant and registrant the burden of proof is on the applicant to overcome the *primâ facie* evidence of ownership caused by the registration. The question is substantially the same as who would be entitled to an injunction: *Manitowoc Manufacturing Co.* v. *Dickerman*, 57 U. S. Pat. Gaz. 1720.

(*c*) See § 11, *infra*.

§ 8 (*a*). That no action or suit shall be maintained under the provisions of this Act in any case when the trade mark is used in any unlawful business or upon any article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise, or under any certificate of registry fraudulently obtained.

(*a*) See Act of 1870, § 84.

§ 9 (*a*). That any person who shall procure the registry of a trade mark, or of himself as the owner of a trade mark, or an entry respecting a trade mark, in the office of the Commissioner of Patents, by a false or fraudulent representation or declaration, orally or in writing, or by any fraudulent means, shall be liable to pay any damages sustained in consequence thereof to the injured party to be recovered in an action on the case.

(*a*) See Act of 1870, § 82.

§ 10 (*a*). That nothing in this Act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade mark might have had if the provisions of this Act had not been passed.

(*a*) See Act of 1870, § 83.

§ 11 (*a*). That nothing in this Act shall be construed as unfavourably affecting a claim to a trade mark after the term of registration shall have expired; nor to give cognizance to any Court of the United States in an action or suit between citizens of the same State (*b*), unless the trade mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe (*c*).

(*a*) See Act of 1870, § 78.

(*b*) The Federal Courts have now no jurisdiction to try a trade mark action between citizens of the same state, unless the pleadings allege that the plaintiff uses the trade mark on goods intended for foreign or Indian commerce: *Ryder* v. *Holt*, 128 U. S. 525; *Luylies* v. *Hollender* (1), 22 Bl. C. C. 413; *Schumacher & Ettlinger* v. *Schwenke* (1), 26 Fed. Rep. 818. The Federal Court is not limited in its jurisdiction to cases in which the defendant's profits have exceeded 500 dollars: *Symonds* v. *Greene*, 28 Fed. Rep. 834.

(*c*) Since under this Act the Federal Court cannot try a trade mark case between citizens of the same state unless the goods are intended for foreign or Indian commerce, there is no jurisdiction in such a case in respect of past wrongful acts: *Schumacher & Ettlinger* v. *Schwenke* (2), 36 U. S. Pat. Gaz. 457.

§ 12 (*a*). That the Commissioner of Patents is authorized to make rules and regulations and prescribe forms for the transfer of the right to use trade marks and for recording such transfers in his office.

(*a*) See Act of 1870, § 81. A contract enabling different parties to use the same trade mark in different forms is not a transfer within this section, and does not require recording in the Patent Office. *Waukesha Hygeia Mineral Springs Co.* v. *Hygeia Sparkling Distilled Water Co.*, 24 U. S. App. 162.

§ 13. That citizens and residents of this country wishing the protection of trade marks in any foreign country the laws of which require registration here as a condition precedent to getting such protection there, may register their trade marks for that purpose as is above allowed to foreigners, and have certificate thereof from the Patent Office.

Approved, March 3, 1881.

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## ACT OF CONGRESS OF 1882.

AN ACT RELATING TO THE REGISTRATION OF TRADE MARKS.

BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled, That nothing contained in the law entitled "An Act to authorize the registration of trade marks and protect the same," approved March third, eighteen hundred and eighty-one, shall prevent the registry of any lawful trade mark rightfully used by the applicant in foreign commerce or commerce with Indian tribes at the time of the passage of said Act.

Approved, August 5, 1882.

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## RULES GOVERNING THE REGISTRATION OF TRADE MARKS UNDER THE ACT APPROVED MARCH 3, 1881.

UNITED STATES PATENT OFFICE,
*Washington, D. C., November* 1, 1898.

The following Rules, designed to be in strict accordance with the provisions of the Act approved March 3, 1881, for the registration of trade marks, are published for gratuitous distribution.

Applicants for registration and their attorneys are advised that their business will be facilitated by the observance of the forms.

C. H. DUELL,
*Commissioner of Patents.*

## CORRESPONDENCE.

1. All business with the office should be transacted in writing. Unless by the consent of all parties, the action of the office will be based exclusively on the written record. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.

2. Applicants and attorneys will be required to conduct their business with the office with decorum and courtesy. Papers presented in violation of this requirement will be returned. But all such papers will first be submitted to the Commissioner, and only returned by his direct order.

3. All letters should be addressed to "The Commissioner of Patents"; and all remittances by postal order, check, or draft should be to his order.

4. A separate letter should in every case be written in relation to each distinct subject of inquiry or application. A complaint against the examiner of trade marks, assignments for record, fees, and orders for copies or abstracts must be sent to the office in separate letters.

5. Letters relating to pending applications should refer to the name of the applicant and date of filing. Letters relating to registered trade marks should refer to the name of registrant, number or date of certificate, and the class of merchandise to which the trade mark is applied.

6. The personal attendance of applicants at the Patent Office is unnecessary. Their business can be transacted by correspondence.

7. When an attorney shall have filed his power of attorney duly executed, the correspondence will be held with him.

8. A double correspondence with an applicant and his attorney, or with two attorneys, cannot generally be allowed.

9. The office cannot undertake to respond to inquiries propounded with a view to ascertain whether certain trade marks have been registered, or, if so, to whom, or for what goods; nor can it give advice as to the nature and extent of the protection afforded by the law, or act as its expounder, except as questions may arise upon applications regularly filed. A copy of these Rules with this paragraph marked is intended to be a courteous answer to all such inquiries.

10. Express charges, freight, postage, and all other charges on matter sent to the Patent Office must be prepaid in full; otherwise it will not be received.

## ATTORNEYS.

11. An applicant may prosecute his own case, but he is advised, unless familiar with such matters, to employ a competent attorney. The office cannot aid in the selection of any attorney. An applicant may be represented by any person who is registered under the provisions of Rule 17 of the Rules of Practice of the Patent Office to prosecute applications for patents.

12. Before any attorney, original or associate, will be allowed to inspect papers or take action of any kind, his power of attorney must be filed. But general powers given by a principal to an associate cannot be considered. In each application the written authorization

must be filed. A power of attorney purporting to have been given to a firm or co-partnership will not be recognized, either in favor of the firm or of any of its members, unless all its members shall be named in such power of attorney.

13. No power of attorney, either original or associate, will be recognized unless it has revenue stamps to the value of 25 cents affixed thereto and canceled as provided for by the "Act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898.

14. Substitution or association can be made by an attorney upon the written authorization of his principal; but such authorization will not empower the second attorney to appoint a third.

15. Powers of attorney may be revoked at any stage in the proceedings of a case upon application to and approval by the Commissioner; and when so revoked the office will communicate directly with the applicant, or such other attorney as he may appoint. An attorney will be promptly notified by the docket clerk of the revocation of his power of attorney.

16. For gross misconduct the Commissioner may refuse to recognize any person as an attorney, either generally or in any particular case; but the reasons for such refusal will be duly recorded and be subject to the approval of the Secretary of the Interior.

## WHO MAY REGISTER A TRADE MARK.

17. A trade mark may be registered by any person, firm, or corporation domiciled in the United States or located in any foreign country which, by treaty, convention, or law, affords similar privileges to citizens of the United States (*a*), and who is entitled to the exclusive use of any trade mark and uses the same in commerce with foreign nations or with Indian tribes.

Also, by any citizen or resident of this country wishing the protection of his trade mark in any foreign country the laws of which require registration in the United States as a condition precedent upon the payment of the fee required by law and other due proceedings had.

(*a*) The United States acceded to the International Convention in 1887. See also the treaty with the United Kingdom, p. 663, *infra*.

18. Owners of trade marks for which protection has been sought by registering them in the Patent Office under the Act of July 8, 1870 (declared unconstitutional by the Supreme Court of the United States, 16 O. G., 999), may register the same for the same goods, without fee. With each application of this character a specific reference to the date and number of the former certificate is required (*a*).

(*a*) See *Jacoby & Co.* v. *Lopes & Co.*, 23 U. S. Pat. Gaz. 342.

19. Applicants whose cases were filed under the Act of 1870, either prior to or since the decision of the Supreme Court declaring it unconstitutional, which are now pending before the office, must prepare their applications in conformity with the present law and rules. On the

receipt of such an application, referring to the date of the one formerly filed, all fees paid thereon will be duly applied. Those who have paid only $10 as a first fee are advised that the law does not provide for a division of the legal fee of $25, and that the remainder of the entire fee is required before the application can be examined.

20. No trade mark will be registered unless it shall be made to appear that the same is used as such by the applicant in commerce between the United States and some foreign nation or Indian tribe, or is within the provisions of a treaty, convention, or declaration with a foreign power, or which is merely the name of the applicant, or which is identical with a known or registered trade mark owned by another and appropriated to the same class of merchandise, or which so nearly resembles some other person's lawful trade mark as to be likely to cause confusion in the mind of the public or to deceive purchasers, or which is merely descriptive in its nature.

### The Application.

21. An application for the registration of a trade mark must be made to the Commissioner of Patents and must be signed by the owner of the trade mark.

22. A complete application comprises:

(a) A brief letter of advice requesting registration, signed by the applicant. (See Form 1, *infra*.)

(b) A statement or specification which, in addition to the requirements of § 1 of the statute, must also discriminate between the essential and non-essential features of the trade mark, and if the applicant be a corporation it must set forth under the laws of what state or nation incorporated. (See Forms 2, 4, and 6, *infra*.)

(c) A declaration or oath complying with § 2 of the statute on p. 643. (See Forms 3, 5, and 7, *infra*.)

(d) A facsimile or drawing of the mark. (See Rules 27 and 28.)

(e) A fee of twenty-five dollars.

23. The letter of advice, the statement, and the declaration must be in the English language and written on one side of the paper only.

24. Pending applications are preserved in secrecy, and no information will be given without authority of the applicant respecting the filing of an application for the registration of a trade mark by any person, or the subject matter thereof, unless it shall, in the opinion of the Commissioner, be necessary to the proper conduct of business before the office.

### Declaration or Oath.

25. The declaration or oath may be made before any person within the United States authorized by law to administer oaths, or, when the applicant resides in a foreign country, before any minister, chargé d'affaires, consul, or commercial agent holding commission under the government of the United States, or before any notary public of the foreign country in which the applicant may be, who is authorized by the laws of said country to administer oaths, the oath being attested in all cases, in this and other countries, by the proper official seal of

the officer before whom the oath or affirmation is made. When the person before whom the oath or affirmation is made is not provided with a seal, his official character shall be established by competent evidence, as by a certificate from a clerk of a court of record or other proper officer having a seal.

26. The declaration cannot be amended. If that filed with the application is faulty or defective, a substitute declaration must be filed.

### Facsimile or Drawing.

27. If for any reason a drawing does not constitute a satisfactory facsimile of the trade mark, two copies of the trade mark as actually used must be deposited in addition to the required drawing, to be preserved in the office for reference.

28.—(1) The drawing must be made upon pure white paper of a thickness corresponding to three-sheet Bristol board. The surface of the paper must be calendered and smooth. India ink alone must be used, to secure perfectly black and solid lines.

(2) The size of a sheet on which a drawing is made must be exactly ten by fifteen inches. One inch from its edges a single marginal line is to be drawn, leaving the "sight" precisely eight by thirteen inches. Within this margin all work and signatures must be included. One of the shorter sides of the sheet is regarded as its top, and, measuring downwardly from the marginal line, a space of not less than 1½ inches is to be left blank for the heading of title, name, number, and date.

(3) All drawings must be made with the pen only. Every line and letter, signatures included, must be absolutely black. This direction applies to all lines, however fine, and to shading. All lines must be clean, sharp, and solid, and they must not be too fine or crowded. Surface shading, when used, should be open.

(4) The signature of the proprietor of the trade mark must be placed at the lower right-hand corner of the sheet, and the signatures of the witnesses at the lower left-hand corner, all within the marginal line, but in no instance should they encroach upon the drawing.

(5) When the view is longer than the width of the sheet, the sheet should be turned on its side, and the heading will be placed at the right and the signatures at the left, occupying the same space and position as in an upright view, and being horizontal when the sheet is held in an upright position.

(6) Drawings should be rolled for transmission to the office—not folded.

An agent's or attorney's stamp, or advertisement, or written address will not be permitted upon the face of a drawing, within or without the marginal line (*a*).

(*a*) It was held under the former rules that the drawing must not contain foreign matter: *Ex parte Hudson*, 55 U. S. Pat. Gaz. 1401.

29. The office, at the request of applicants, will furnish the drawings at cost.

### Examination of Applications.

30. All applications for registration are considered in the first instance by the trade mark examiner. Whenever on examination of an appli-

cation registration is refused for any reason whatever, the applicant will be notified thereof. The reasons for such rejection will be stated, and such information and references will be given as may be useful in aiding the applicant to judge of the propriety of prosecuting his application.

31. The examination of an application and the action thereon will be directed throughout to the merits; but in each letter the examiner shall state or refer to all his objections.

### AMENDMENTS.

32. The statement may be amended to correct informalities or to avoid objections made by the office, or for other reasons arising in the course of examination; but no amendments will be admitted unless warranted by something in the statement or facsimile as originally filed.

33. In every amendment the exact word or words to be stricken out or inserted in the statement must be specified, and the precise point indicated where the erasure or insertion is to be made. (See Form 8, *infra*.) All such amendments must be on sheets of paper separate from the papers previously filed, and written on but one side of the paper.

Erasures, additions, insertions, or mutilations of the papers and records must not be made by the applicant.

34. When an amendatory clause is amended, it must be wholly rewritten, so that no interlineation or erasure shall appear in the clause as finally amended, when the application is passed to issue. If the number or nature of the amendment shall render it otherwise difficult to consider the case, or to arrange the papers for printing or copying, the examiner may require the entire statement to be rewritten.

35. Amendments will not be permitted after the notice of allowance of an application, and the examiner will exercise jurisdiction over such an application only by special authority from the Commissioner.

Amendments not affecting the merits may be made after the allowance of an application, if the case has not been printed, on the recommendation of the examiner, approved by the Commissioner, without withdrawing the case from issue.

36. After the completion of the application the office will not return the papers for any purpose whatever. If the applicant has not preserved copies of the papers which he wishes to amend, the office will furnish them on the usual terms.

### INTERFERENCES.

37. In case of conflicting applications for registration, or in any dispute as to the right to use which may arise between an applicant and a prior registrant, the office will declare an interference, in order that the parties may have an opportunity to prove priority of use and the proceedings on such interference will follow, as nearly as practicable, the practice in interferences upon applications for patents (*a*).

(*a*) After *U. S.* v. *Steffens*, 100 U. S. 82, it was held that the U. S. Patent Office had no authority to decide disputed questions of title to trade marks, or to

declare interferences: *Braun & Co.* v. *Blackwell*, 19 U. S. Pat. Gaz, 481. But see *Ex parte Strasburger & Co.*, 20 *ib.* 155, and *Jacoby & Co.* v. *Lopes & Co.*, 23 *ib.* 342. And it is now decided that there is such authority: *Yale Cigar Manufacturing Co.* v. *Yale*, 30 *ib.* 1183. And see notes to § 81 of the Act of 1870, and to § 3 of the Act of 1881, *supra*.

### Appeals or Petitions.

38. From an adverse decision of the examiner of trade marks upon an applicant's right to register a trade mark, or upon any interlocutory matter, or from a decision of the examiner of interferences, the case will be reviewed by the Commissioner, on petition or appeal, without fee.

### Issue, Date, and Duration of Certificate.

39. When the requirements of the law and the rules have been complied with, and the office has adjudged a trade mark lawfully registrable, a certificate will be issued by the Commissioner, under seal of the Interior Department, to the effect that applicant has complied with the law, and that he is entitled to the protection of his trade mark in such case made and provided. Attached to the certificate will be a facsimile of the trade mark and a printed copy of the statement and declaration.

40. Before a trade mark certificate will be delivered, the applicant must furnish a revenue stamp to the value of ten cents, to be affixed thereto and canceled as required by the "Act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898.

41. The weekly issue closes on Thursday, and the certificates of registration of that issue bear date as of the third Tuesday thereafter.

42. A certificate of registry shall remain in force for thirty years from its date, except in cases where the trade mark is claimed for and applied to articles not manufactured in this country, and in which it receives protection under the laws of a foreign country for a shorter period, in which case it shall cease to have any force in this country by virtue of this Act at the time that such trade mark ceases to be exclusive property elsewhere.

At any time during the six months prior to the expiration of the term of thirty years such registration may be renewed on the same terms and for a like period.

### Assignments.

43. The right to the use of any trade mark is assignable by an instrument in writing, and provision is made for recording such instrument in the Patent Office. But no such instrument or conveyance will be recorded unless it is in the English language, and unless an application for the registration of a trade mark shall have first been filed in the Patent Office, and such instrument must identify the application by serial number and date of filing, or, where the mark has been registered, by its certificate number and the date thereof. No particular form of instrument is prescribed.

## Copies and Publications.

44. After a trade mark has been registered printed copies of the statement and declaration in each case, with a facsimile of the trade mark, can be furnished by the office upon the payment of the fee.

45. An order for a copy of an assignment must give the liber and page of the record, as well as the name of the proprietor; otherwise an extra charge will be made for the time consumed in making any search for such assignment.

46. The Official Gazette of the Patent Office will contain a list of all trade marks registered, with the name and address of the registrant in each case, an illustration of the trade mark, a brief statement of its essential features, and the particular description of goods to which it is applied.

## Fees.

| | |
|---|---|
| 47. On filing an application for registration of a trade mark | $25.00 |
| For abstracts of title: | |
| For the certificate of search - - - - - | 1.00 |
| For each brief from the digests of assignments - | .20 |
| For copies of matter in any foreign language, for every 100 words or fraction thereof - - - - - | .10 |
| For translation, for every 100 words or fraction thereof - | .50 |
| For recording every assignment, agreement, power of attorney, or other paper, of 300 words or less - - | 1.00 |
| For recording every assignment, agreement, power of attorney, or other paper of more than 300 words and less than 1,000 words - - - - - - | 2.00 |
| For recording every assignment, agreement, power of attorney, or other paper of more than 1,000 words - | 3.00 |
| For assistance to attorneys and others in the examination of records, one hour or less - - - - - | .50 |
| Each additional hour or fraction thereof - - | .50 |
| For single printed copy of statement, declaration, and facsimile - - - - - - - - - - | .05 |
| If certified, for the certificate, additional . - | .25 |

48. The person ordering any such certificate as specified in Rule 46 must furnish a revenue stamp to the value of ten cents to be affixed to the certificate and canceled as provided for by the "Act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898.

49. Money required for office fees may be paid to the Commissioner, or to the Treasurer, or any of the assistant treasurers of the United States, or to any of the depositaries, national banks, or receivers of public money designated by the Secretary of the Treasury for that purpose, who shall give the depositor a receipt or certificate of deposit therefor, which shall be transmitted to the Patent Office. When this cannot be done without inconvenience, the money may be remitted by mail, and in every such case the letter should state the exact amount inclosed. All money orders should be made payable to the "Commissioner of Patents."

50. All money sent by mail, either to or from the Patent Office, will be at the risk of the sender. All payments to the office must be made

in specie, Treasury notes, national-bank notes, certificates of deposit, post-office money orders, postal notes, or certified checks.

### Repayment of Money.

51. Money paid by actual mistake, such as a payment in excess, or when not required by law, or by neglect or misinformation on the part of the office, will be refunded; but a mere change of purpose after the payment of money, as when a party desires to withdraw his application for the registration of a trade mark, will not entitle a party to demand such a return.

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## FORMS.

The following forms illustrate the manner of preparing papers for applications for registration of trade marks. Applicants will find their business facilitated by following them closely:

### (1) *Letter of Advice.*

*To the Commissioner of Patents:*

The undersigned presents herewith a facsimile of his lawful trade mark, and requests that the same, together with the accompanying statement and declaration, may be registered in the United States Patent Office in accordance with the law in such cases made and provided.

Dated , 18 . A. B.

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### (2) *Statement by an Individual.*

*To all whom it may concern:*

Be it known that I, A. B., a citizen [*or subject, as the case may be*] of the , residing at , , and doing business at No. , Street, in said city, have adopted for my use a trade mark for molasses, of which the following is a full, clear, and exact description. My trade mark consists of the word "Dove" and the representation of a dove. These have generally been arranged as shown in the accompanying facsimile, in which the dove is represented as flying, and above it are arranged, on a curved line, the words "The Dove Brand" in plain block letters. The position of the dove may be changed and different styles of letters used, and the words "The" and "Brand" may be omitted, without altering the character of the trade mark, the essential features of which are the word "Dove" and the representation of a dove. This trade mark has been continuously used in my business since , 18 . The class of merchandise to which this trade mark is appropriated is groceries, and the particular description of goods comprised in said class upon which I use the said trade mark is molasses. It is usually displayed on heads of barrels or packages, and on cans containing the goods, by placing thereon a printed label on which the described trade mark is shown.

A. B.

Witnesses:
C. D.
E. F.

## (3) *Declaration for an Individual.*

STATE OF , COUNTY OF , *ss:*

A. B., being duly sworn, deposes and says that he is the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that he has at this time a right to the use of the trade mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used by him in commerce between the United States and foreign nations or Indian tribes, and particularly with [*here name one or more foreign nations or Indian tribes, or both, as the case may be*]; and that the description and facsimiles presented for record truly represent the trade mark sought to be registered.

A. B.

Sworn and subscribed before me, a , this day of , 18 .

(L. S.)

G. H.

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## (4) *Statement by a Firm.*

*To all whom it may concern:*

Be it known that we, C. D. & Co., a firm domiciled in , county of , State of , and doing business at No. , street, in the said city, have adopted for our use a trade mark for molasses, of which the following is a full, clear, and exact description. Our trade mark consists of the word "Dove" and the representation of a dove. These have generally been arranged as shown in the accompanying facsimile, in which the dove is represented as flying, and above it are arranged, on a curved line, the words "The Dove Brand" in plain block letters. The position of the dove may be changed and different styles of letters used, and the words "The" and "Brand" may be omitted, without altering the character of the trade mark, the essential features of which are the word "Dove" and the representation of a dove. This trade mark has been continuously used in our business since , 18 . The class of merchandise to which this trade mark is appropriated is groceries, and the particular description of goods comprised in said class upon which we use the said trade mark is molasses. It is usually displayed on heads of barrels or packages, and on cans containing the goods, by placing thereon a printed label on which the described trade mark is shown.

C. D. & Co.

By C. D.,
*A member of the firm.*

Witnesses:
E. F.
G. H.

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## (5) *Declaration for a Firm.*

STATE OF , COUNTY OF , ss:

C. D., being duly sworn, deposes and says that he is a member of the firm of C. D. & Co., the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that the said firm at this time has a right to the use of the trade mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the trade mark is used by the said firm in commerce between the United States and foreign nations or Indian tribes, and particularly with [*here name one or more foreign nations or Indian tribes, or both, as the case may be*]; and that the description and facsimiles presented for record truly represent the trade mark sought to be registered.

C. D.

Sworn and subscribed before me, a , this day of , 18 .

(L. S.)

E. F.

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## (6) *Statement by a Corporation.*

*To all whom it may concern:*

Be it known that The E. & F. Company, a corporation duly organized under the laws of the State of , and located in the city of , county of , in said State, and doing business in said city of , has adopted for its use a trade mark for molasses, of which the following is a full, clear and exact description. The trade mark consists of the word "Dove" and the representation of a dove. These have generally been arranged as shown in the accompanying facsimile, in which the dove is represented as flying, and above it are arranged on a curved line the words "The Dove Brand" in plain block letters. The position of the dove may be changed and different styles of letters used, and the words "The" and "Brand" may be omitted, without altering the character of the trade mark, the essential features of which are the word "Dove" and the representation of a dove. This trade mark has been continuously used in the business of the said corporation since , 18 . The class of merchandise to which this trade mark is appropriated is groceries, and the particular description of goods comprised in said class upon which the said trade mark is used is molasses. It is usually displayed on heads of barrels or packages, and on cans containing the goods, by placing thereon a printed label on which the described trade mark is shown.

THE E. & F. COMPANY,
By G. H., *Secretary.*

Witnesses:
I. J.
K. L.

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## (7) *Declaration for a Corporation.*

STATE OF , COUNTY OF , *ss:*

G. H., being duly sworn, deposes and says that he is secretary (*or other officer*) of the corporation The E. & F. Company, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that the said corporation at this time has a right to the use of the trade mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the trade mark is used by the said corporation in commerce between the United States and foreign nations or Indian tribes, and particularly with [*here name one or more foreign nations or Indian tribes, or both, as the case may be*], and that the description and facsimiles presented for record truly represent the trade mark sought to be registered.

G. H., *Secretary* (or other officer).*

Sworn and subscribed before me, a , this day of , 18 .

(L. S.) I. J.

* If the corporation have a seal, it may be used to authenticate the signature of the officer.

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## (8) *Amendment.*

*To the Commissioner of Patents:*

In the matter of my application for the registration of trade mark for molasses, No. , filed , 18 , I hereby amend my statement as follows:

Page , line , cancel the words "The Dove Brand," and insert in place thereof the following: "*Dove*" *and the representation of a dove.*

Same page, line , erase the words "about ten years" and insert *since* , 18 .

A. B.,
By J. K.,
*His Attorney.*

Dated , 18 .

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## Classification of Registered Trade Marks.

1. Agricultural implements. (See Titles 41, 73.)
2. Baking powder and yeast.
3. Beverages. (See Title 42.)
4. Blacking and leather dressing. (See Title 12.)
5. Boots, shoes, and lasts. (See Title 57.)
6. Brooms and brushes.
7. Buttons. (See Title 22.)
8. Canned goods. (See Titles 16, 26.)
9. Carpets, &c.
10. Cement, plaster, and bricks.
11. Cigars and cigarettes. (See Title 71.)
12. Cleaning and polishing preparations. (See Title 4.)
13. Coffee and tea.
14. Confectionery.
15. Corsets. (See Title 75.)
16. Cured meats. (See Titles 8, 26, 37.)
17. Cutlery and edge tools. (See Titles 68, 73.)
18. Dairy products.
19. Dentistry.
20. Drugs and Chemicals. (See Titles 44, 53, 72.)
21. Dry goods. (See Titles 22, 69.)
22. Fancy goods. (See Titles 7, 21, 30, 47.)
23. Fertilizers.
24. Fire-arms, ammunition, and explosives.
25. Flour.
26. Food and relishes. (See Titles 8, 16.)
27. Fuel.
28. Games and toys. (See Title 46.)
29. Glassware. (See Titles 32, 55.)
30. Gloves. (See Title 22.)
31. Head-wear.
32. Household articles. (See Titles 29, 35, 55.)
33. Inks. (See Title 65.)
34. Iron, steel, and manufactures. (See Titles 41, 73.)
35. Jewelry and plated ware. (See Titles 32, 70.)
36. Lamps, lanterns, &c. (See Title 29.)
37. Lard and tallow. (See Title 16.)
38. Laundry articles. (See Titles 61, 64.)
39. Leather and saddlery.
40. Locks and hardware. (See Titles 72, 73.)
41. Machines. (See Titles 1, 34, 73.)
42. Malt liquors. (See Title 3.)
43. Matches.
44. Medical compounds. (See Titles 20, 53, 72.)
45. Miscellaneous.
46. Musical instruments. (See Title 28.)
47. Needles and pins. (See Title 22.)
48. Oils and lubricants. (See Title 51.)
49. Optics and measuring instruments. (See Title 73.)
50. Packing. (Machinery.)

51. Paints and painters' supplies. (See Title 48.)
52. Paper and envelopes. (See Title 65.)
53. Poisons for animals. (See Titles 20, 44.)
54. Publications.
55. Receptacles. (See Titles 29, 32.)
56. Rope, cord, and twine. (See Title 59.)
57. Rubber goods. (See Titles 5, 69.)
58. Sewing-machines and attachments. (See Titles 41, 73.)
59. Sewing silk, cotton, and thread. (See Title 56.)
60. Shirts, collars, and cuffs. (See Title 75.)
61. Soap. (See Titles, 38, 72.)
62. Spices, mustard, and salt. (See Title 26.)
63. Spirituous liquors. (See Titles 42, 77.)
64. Starch, corn-starch, and products. (See Titles 26, 38.)
65. Stationery miscellany. (See Titles 33, 52.)
66. Stoves and heaters.
67. Sugar, sirup, and molasses.
68. Surgical instruments and appliances. (See Title 17.)
69. Tailoring and clothing. (See Titles 21, 57.)
70. Time-keeping instruments. (See Title 35.)
71. Tobacco and snuff. (See Title 11.)
72. Toilet articles and preparations. (See Titles 20, 61.)
73. Tools and devices.
74. Umbrellas, parasols, and canes.
75. Underwear and furnishings. (See Titles 15, 60.)
76. Vehicles.
77. Wines. (See Titles 3, 42, 63.)

# CIRCULAR AS TO MERCHANDISE MARKS (CUSTOMS).

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
*Washington, D. C., August* 3, 1897.

*To Officers of the Customs and others:*

The attention of officers of the customs and others is invited to the following provision of § 11 of the Act of July 24, 1897:—

"§ 11. That no article of imported merchandise which shall copy or simulate the name or trade mark of any domestic manufacture or manufacturer, or which shall bear a name or mark which is calculated to induce the public to believe that the article is manufactured in the United States, shall be admitted to entry at any custom house of the United States. And in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer who has adopted trade marks may require his name and residence, and a description of his trade marks, to be recorded in books which shall be kept for that purpose in the department of the Treasury, under such regulations as the Secretary of the Treasury shall prescribe, and may furnish to the department facsimiles of such trade marks; and thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of the customs."

Applications for the recording of names or trade marks in this department will state the name and residence of the domestic manufacturer, and furnish a description of the mark and the names of the ports to which the facsimiles should be sent. No such name or trade mark will be received unless accompanied by the proper proof of ownership and proof that the owner is a domestic manufacturer, which must consist of the affidavit of the owner or one of the owners, certified by a notary public, or other officer entitled to administer oaths, and having a seal.

On the receipt by a customs officer of any such facsimiles, with information from the department that they have been recorded therein, he will properly record and file them, and will exercise care to prevent the entry at the custom house of any article of foreign manufacture copying or simulating such mark.

No fees are charged for recording trade marks in the department and custom houses.

A sufficient number of facsimiles should be forwarded to enable the department to send one copy to each port named in the application, with ten additional copies for the files of the department.

Especial attention is invited to the provision in said section prohibiting the entry of articles "which shall bear a name or mark which is calculated to induce the public to believe that the article is manufactured in the United States," and collectors and other officers of the customs are instructed to use due diligence to prevent violations of this provision.

W. B. HOWELL,
*Assistant Secretary.*

# APPENDIX K.

## TREATY WITH THE UNITED STATES, 1877 (*a*).

### Declaration between Great Britain and the United States for the Protection of Trade Marks.

The Government of Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and the Government of the United States of America, with a view to the reciprocal protection of the marks of manufacture and trade in the two countries, have agreed as follows:—

The subjects or citizens of each of the contracting parties shall have, in the dominions and possessions of the other, the same rights as belong to native subjects or citizens, or as are now granted or may hereafter be granted to the subjects and citizens of the most favoured nation, in everything relating to property in trade marks and trade labels.

It is understood that any person who desires to obtain the aforesaid protection must fulfil the formalities required by the laws of the respective countries.

In witness whereof the Undersigned have signed the present Declaration, and have affixed thereto the seal of their arms.

Done at London, the 24th day of October, 1877.

(L.S.) Derby.
(L.S.) Edwards Pierrepont.

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(*a*) The importance of this Treaty has not yet disappeared. See opinion of the Attorney-General of the United States (47 U. S. Pat. Gaz. 397) as to the necessity for legislation, not yet passed, for giving effect to the International Convention of 1883.

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