A

DIGEST

OF THE

LAW OF TRADEMARKS

AS PRESENTED IN THE

REPORTED ADJUDICATIONS

OF THE

COURTS OF THE UNITED STATES, GREAT BRITAIN, IRELAND, CANADA, AND FRANCE, FROM THE EARLIEST PERIOD TO THE PRESENT TIME;

TOGETHER WITH

AN APPENDIX

CONTAINING

THE UNITED STATES STATUTES AND THE TREATIES OF THE UNITED STATES CONCERNING TRADEMARKS, AND THE RULES AND FORMS OF THE UNITED STATES PATENT OFFICE FOR THEIR REGISTRATION.

BY

CHARLES E. CODDINGTON,

COUNSELOR AT LAW.

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THIS WORK IS INSCRIBED,

AS

A MARK OF THE AUTHOR'S PERSONAL REGARD.

PREFACE.

ALTHOUGH the first reported trademark case came before the courts two hundred and eighty-seven years ago, nine-tenths of the decisions upon this topic have been made within the last thirty years, and more than one-half of them since the year 1865. During the past ten years nearly all of the treaties and statutes for the protection of this peculiar kind of property have been entered into and enacted.

The number of these reported cases has increased yearly, and the records of the Patent Office show a weekly increase in the registration of trade names and symbols. These facts indicate that this branch of the law, although of recent growth, is attracting much attention, and has attained no inconsiderable importance. The benefits accruing to the manufacturer and trader, as well as to the general public, from the protection of trademarks, and the fact

that they are often of greater value than patents—the enjoyment of their exclusive use being without limit as to time and perhaps place—would easily account for the prominent position which this subject now occupies before the public and in the courts. The decisions have been conflicting and no digest of all the authorities has ever been published, although the judges in their reported opinions have expressed not only their regret that such a work had not been prepared, but also their dissatisfaction with the manner in which these cases have been treated in general digests. These considerations have prompted the present publication, and have encouraged the author in the belief that it might be of some assistance to the profession.

Up to the present time there are reported one hundred and seventy cases as having been adjudicated in the courts of Great Britain, Ireland and Canada, one hundred and seventy-eight in the courts of the United States, and about an equal number in the courts of France—all decisions in the same suit, whether below or on appeal, being counted as a single case. The following table has reference to the English and American decisions only, and exhibits the comparatively recent growth of the law in England and the United

States, and perhaps may suggest other reflections.

The first case, mentioned in the books, was determined in 1590, the second in 1742, and prior to 1805 only six cases are reported. After 1805 the number of decisions reported during each decade is as follows:

1805 to 1815, inclusive,		.	.	3
1815 " 1825,	"	.	.	5
1825 " 1835,	"	.	.	6
1835 " 1845,	"	.	.	13
1845 " 1855,	"	.	.	46
1855 " 1865,	"	.	.	104
1865 " 1875,	"	.	.	108

Since 1875 the increase has been, proportionately, much greater, although in many of the States of the Union no trademark cases have ever been reported.

A digest of all the reported, and a few of the unreported, adjudications in the courts of the United States, Great Britain, Ireland and Canada, and of the principal decisions in the courts of France, the treaties between the United States and foreign countries, and the statutes of the United States concerning trademarks; and the rules and forms of the United States Patent Office for their registration, are contained in this volume. Although

labels, advertisements, business signs, names of establishments of trade, of partnerships, hotels, newspapers, publications, &c., are pronounced by some of the courts and jurists not to be trademarks in a strict and technical sense, yet the principles relative to those subjects and trademarks proper, are so nearly analogous, and the cases in which they have been applied are so often correlatively cited that it has been thonght proper to inc' .de the decisions in which those subjects are considered.

An endeavor has been made to present the different points decided in the English and American cases united under appropriate heads and titles; to combine the analytical and alphabetical methods of arrangement; to state controlling facts as well as principles, and to follow as nearly as possible the language of the opinions.

The digest of the French decisions is exclusively the work of FRANCIS FORBES, Esquire, of the New York Bar, by whom the reports of those decisions were obtained in Paris; and through his learning and industry, the author is enabled to present to the profession in this country a valuable contribution from a source almost inaccessible.

The author also returns his thanks to JOHN SHERWOOD, WILLIAM D. HENNEN (author of the

Louisiana Digest) and HENRY G. ATWATER, Esquires, of the New York Bar, for valuable suggestions.

In the hope that the work may supply a deficiency, which has already been seriously felt, the author submits the result of his labors to the generous consideration of the profession.

C. E. C.

NEW YORK, *November* 15, 1877.

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EXPLANATION OF ABBREVIATIONS.

Abb. Ct. App. Dec..Abbott's Court of Appeals Decisions, N. Y.
Abb. Pr.....Abbott's Practice Reports, N. Y.
Abb. Pr. N. S.....Abbott's Practice Reports, New Series, N. Y.
Allen .....Allen's Reports, Mass.
Am. Law Reg., Am. L. R., or A. L. Reg. ....American Law Register.
Am. L. T. R.....American Law Times Reports.
Am. L. T. R. N. S..American Law Times Reports, New Series.
Ann. de la Pro.....Annales de la Propriété Industrielle, Artistique et Littéraire, Paris.
Atk.....Atkyns' Reports, Chancery, Eng.
Barb. .....Barbour's Reports, Supreme Court, N. Y.
Barn. & Ad., B. & Ad. .... Barnewall & Adolphus' Reports, King's Bench, Eng.
Barn. & C., B. & C. .....Barnewall & Creswell's Reports, King's Bench, Eng.
Beav.....Beavan's Reports, Rolls Court, Eng.
Blatch., or Bl. C. C. .....Blatchford's Reports, U. S. 2d Circuit.
Bosw. .....Bosworth's Reports, Superior Court, N. Y. City.
Brews.....Brewster's Equity Reports, Penna.
Bush .....Bush's Reports, Kentucky.
C. de..... .Cour de.
C. de Cass.....Cour de Cassation.
Cal. .....California Reports.
Chitty's Gen. Pr.....Chitty's General Practice.

Cin ....Cincinnati Superior Court Reporter, Superior Ct., Cin., O.
Com. B.....Common Bench Reports. Eng.
Com. B. N. S.....Common Bench Reports, New Series, Eng.
Conn .....Connecticut Reports.
Cox C. C.....Cox Criminal Cases, Eng.
Cro. Jac.....Croke (James), K. B. and C. P.
Cush.. .....Cushing's Reports, Mass.
Daly .....Daly's Reports, Common Pleas, N. Y. City.
Deady .....Deady's Reports, U. S. District of Oregon.
Dears. & B., or Dears. & B. C. C. ..Dearsley's & Bell's Crown Cases, Eng.
De G. J. & S .....De Gex, Jones & Smith's Reports, Chancery, Eng.
De G. M. & G.....De Gex, Macnaghten & Gordon's Reports, Chancery, Eng.
Dill.....Dillon's Reports, U. S., 8th Circuit.
Doug .....Douglas' Reports, King's Bench.
Dowl. & Ry.....Dowling & Ryland's Reports, King's Bench.
Dr. & Sm.....Drewry & Smale's Reports, Chancery, Eng.
Duer.....Duer's Reports, Superior Court, N. Y. City.
Eden Inj. Am. Ed...Eden on Injunctions, American Edition.
E. D. Smith, or E. D. S. ...E. D. Smith's Reports, Common Pleas, N. Y. City.
El. & E.....Ellis and Ellis' Reports, Queen's Bench, Eng.
Eng. L. R. Ch. Div..English Law Reports, Chancery Division.
Eng. L. & Eq.....English Law & Equity Reports.
G. T.....General Term.
Ga.....Georgia Reports.
Giff.....Giffard's Reports, Chancery, Eng.
Gray.....Gray's Reports, Mass.
Hare.....Hare's Reports, Chancery, Eng.
Hem. & M., or H. & M. ....Hemming's & Miller's Chancery Reports, Eng.
Hilt. .....Hilton's Reports, Common Pleas, N. Y. City.
H. of L. Cas.....House of Lords Cases.
Holmes .....U. S. Circuit.
Hopk. Ch.....Hopkins' Chancery Reports, N. Y.
How. App. Cas.....Howard's Appeal Cases, N. Y.
How. Pr.....Howard's Practice Reports, N. Y.

Huard M. de Fab....Répertoire de Législation de Doctrine et de Jurisprudence en matière de Marques de Fabrique, etc. Par Adrien Huard, Paris, 1865.
Hun.....Hun's Supreme Court Reports, N. Y.
H. V. Johns.....H. V. Johnson's Reports, Chancery, Eng.
I. Jurist, N. S.....Irish Jurist, New Series.
Ill.....Illinois Reports.
Irish Ch., or Ir. Ch. } .... Irish Chancery Reports.
Irish Eq., or Ir. Eq. } .....Irish Reports, Equity Series.
J. & H.....Johnson's & Hemming's Chancery Reports, Eng.
J. & S.....Jones & Spencer's N. Y. Superior Court Reports.
Jur.....Jurist, Eng.
Jur. N. S.....Jurist, New Series, N. S.
K. & J., or Kay & J. } .....Kay & Johnson's Reports, Chancery, Eng.
Keen .....Keen's Reports, Rolls Court, Eng.
Keyes.....Keyes' Reports, N. Y. Court of Appeals.
L. Ch.....Lord Chancellor.
L. J.....Law Journal, Eng.
L. JJ.....Lords Justices.
L. J. N. S. Ch.....Law Journal, New Series, Chancery, Eng.
L. J. N. S. C. P.....Law Journal, New Series, Com. Pleas, Eng.
L. J. N. S. Exch....Law Journal, New Series, Exchequer, Eng.
L. J. N. S. H. L....Law Journal, New Series, House of Lords, Eng.
L. J. N. S. M. C....Law Journal, New Series, Magistrates' Cases, Eng.
L. J. N. S. Q. B....Law Journal, New Series, Queen's Bench, Eng.
L. R. Ch.....Law Reports, Chancery Appeal Cases, Eng.
L. R. E. & I. App...Law Reports, English and Irish Appeals.
L. R. Eq.....Law Reports, Equity Cases, Eng.
L. T. R.....Law Times Reports, Eng.
L. T. R. N. S.....Law Times Reports, New Series, Eng.
La. An.....Louisiana Annual Reports.
Lans.....Lansing's Reports, N. Y. Supreme Court.

Leg. Gaz.....Legal Gazette Reports, Penna.
Leg. Int.....Legal Intelligencer, Phila. Pa.
M. R..... Master of the Rolls.
McLean .....McLean's Reports, U. S., 7th Circuit.
Mac. & G., or M. & Gord. .....Macnaghten & Gordon's Reports, Common Pleas, Eng.
Man & G., or M. & G. .....Manning & Granger's Reports, Common Pleas, Eng.
Man. G. & S.....Manning, Granger & Scott's Reports, Common Bench, Eng.
Mass.....Massachusetts Reports.
Md.....Maryland Reports.
Mer..... .....Merivale's Reports, Chancery, Eng.
Mich. N. P.....Michigan Nisi Prius Cases.
Mo .....Missouri Reports.
Mo. L. Rep., or Mo. Law R. ...Monthly Law Reporter, all courts, American.
Myl. & C., or M. & C. .....Mylne & Craig's Reports, Chancery, Eng.
N. C..... .....North Carolina Reports.
N. Y.....New York Court of Appeals Reports.
N. R.....New Reports, Eng.
Nev. & M., or N. & M. ...Nevile & Manning's Reports, King's Bench.
N. Y. Leg. Obs.....New York Legal Observer.
N. Y. Sup. Ct.....New York Supreme Court Reports.
N. Y. Super. Ct.....New York Superior Court Reports.
Off. Gaz.....Official Gazette, U. S. Patent Office.
Paige.....Paige's Chancery Reports, N. Y.
Pa. St. R.....Pennsylvania State Reports.
Penn. L. J.....Pennsylvania Law Journal.
Phila.....Philadelphia Reports, Common Pleas.
Pick.....Pickering's Reports, Massachusetts.
Poph.....Popham's Reports, King's Bench.
Post..... . .....Post's Reports, Missouri.
R. I.....Rhode Island Reports.
Robt.....Robertson's Reports, Superior Court, N. Y. City.
Rolle .....Rolle's Reports, Eng.
S. C.....Same Case.
S. T... .....Special Term.

Sandf.....Sandford's Reports, Superior Court, N. Y. City.
Sandf. Ch.....Sandford's Chancery Reports, N. Y.
Sawy .....Sawyer's Reports, U. S., 9th Circuit.
Sc. Jur.....Scottish Jurist, Scotland.
Sc. L. R.....Scottish Law Reporter, Scotland.
Sim.....Simon's Chancery Reports, Eng.
St. or Sto .....Story's Reports, U. S., 1st Circuit.
Swans ..... .Swanston's Reports, Chancery, Eng.
T. & C.....Thompson & Cook's N. Y. Supreme Court Reports.
Trans. App.....Transcript Appeals, N. Y.
Trib. Civ.....Tribunal Civil.
Trib. de Com.....Tribunal de Commerce.
V. C.....Vice Chancellor.
V. & B.....Vesey & Beame's Reports, Chancery, Eng.
Ves. Jun.....Vesey Jun. Reports.
W. N.....Weekly Notes, Eng.
W. R.....Weekly Reporter, England.
Wall.....Wallace's Reports, U. S. Supreme Court.
Wall Jr.....Wallace Jr.'s Reports, U. S., 3d Circuit.
West. L. J.....Western Law Journal.
Wilson.....Wilson's Indiana Superior Court Reports.
Woodb. & M.....Woodbury and Minot's Reports, U. S., 1st Circuit.

TABLE

OF

CASES AFFIRMED, REVERSED, CITED, CRITICISED, &c.

(NOTE.—The cases included in this table are those only cited in the opinions—not those in the briefs of counsel. The words "after," and "before" indicate the report where the same case has come before the court on some interlocutory or other question *after* or *before* the final determination.)

Abbott *v.* Bakers and Confectioners' Tea Association, W. N. 1871, p. 207; S. C., *affirmed*, W. N. 1872, p. 31; *cited*, 20 W. R. 720; 26 L. T. R. (N. S.) 757.

Ainsworth *v.* Walmsley, L. R. 1 Eq. 518; S. C., 12 Jurist (N. S.) 205; S. C., 14 L. T. R. (N. S.) 220; S. C., 35 L. J. R. (N. S.) Ch. 352; S. C., 14 W. R. 363; *cited*, 35 Cal. 70; 45 Scottish Jurist, 206; 4 Am. Law Times R. (N. S.) 177.

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American Grocer Publishing Association *v.* The Grocer Publishing Company, 51 How. Pr. 402; *cited*, Id. 220.

Amos *v.* King, 2 Gray, 379.

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Amoskeag Manufacturing Company *v.* Garner, 4 Am. Law T. R. (N. S.) 176.

Amoskeag Manufacturing Company *v.* Spear, 2 Sandf. 599; *cited*, 17 Barb. 609; 3 Duer, 627; 2 Abb. Pr. 322; 3 Blatchf. 448; 4 Abb. Pr. 88; 13 How. Pr. 343; 24 Barb. 164; 4 Abb. Pr. 147; 13 How. Pr. 388.; 4 Abb. Pr. 161; 2 Bosw. 7; 18 How. Pr. 67; 7 Bosw. 228; 5 Phila. 465; 28 How. Pr. 123; 28 How. Pr. 207; 4 Robt. 618; 5 Am. Law Reg. (N. S.) 594; 47 Barb. 463; 2 Abb. Pr. (N. S.) 462; 1 Abb. Ct. of App. Dec. 270; 5 Abb. Pr. (N. S.) 218; 3 Trans. App. 160; 3 Keyes, 596; 35 How. Pr. 115; 49 Barb. 591; 57 Barb. 534; 36 How. Pr. 35; 2 Daly, 315; 35 Cal. 64; 35 Conn. 414; 5 Abb. Pr. (N. S.) 220; 44 Missouri, 176; 6 Abb. Pr. (N. S.) 270; 55 Barb. 167; 3 Daly, 54; 2 Brews. 318; 7 Phila. 255; 2 Brews. 325; 54 Ill. 465; 1 Dillon, 332; 1 Wilson, 63; 45 N. Y. 297; 10 Abb. Pr. (N. S.) 364; 18 Wallace, 323; 6 Lans. 160; 13 Abb. Pr. (N. S.) 309; 48 N. Y. 377; 45 Cal. 481; 15 Abb. Pr. (N. S.) 4; 1 T. & C. 629; 46 How. Pr. 159; 3 T. & C. 552; 58 N. Y. 233; 49 How. Pr. 7; 4 Am. L. T. R. (N. S.) 181.

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Banks *v.* Gibson, 35 L. J. R. (N. S.) Ch. 502; S. C., 34 Beav. 566; S. C., 13 W. R. 1012; *cited*, 45 N. Y. 302; 10 Abb. Pr. (N. S.) 369; 26 L. T. R. (N. S.) 391; 20 W. R. 508; 2 Cin. 320.

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Blackwell *v.* Armistead, 5 Am. Law Times R. 85.

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Blanchard *v.* Hill, 2 Atk. 484; *cited*, 4 McLean, 517; 2 Sandf. 605; 24 L. J. R. (N. S.) Ch. 634; 1 K. & J. 514; 3 Jurist (N. S.) 930; 3 K. & J. 427; 3 K. & J. 420; 7 Bosw. 225; 1 N. R. 544; 9 Jurist (N. S.) 484; 8 L. T. R. (N. S.) 228; 32 L. J. R. (N. S.) Ch. 550; 11 W. R. 526; 29 Cal. 295; 2 Brews. 327; 61 N. Y. 231.

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Booth *v.* Jarrett, 52 How. Pr. 169.

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Brook *v.* Evans, 2 L. T. R. (N. S.) 740; *affirmed*, 20 L. J. R. (N. S.) 616.

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12 Mo. L. R. 224; 18 How. Pr. 09; 7 Bosw. 220; 9 Bosw. 199; 2 Abb. Pr. (N. S.) 462; 1 Abb. Ct. of App. Dec. 270; 5 Abb. Pr. (N. S.) 217; 3 Trans. App. 169; 3 Keyes, 596; 35 How. Pr. 113; 49 Barb. 597; 57 Barb. 535; 35 Cal. 75; 5 Abb. Pr. (N. S.) 220; 55 Barb. 167; 6 Abb. Pr. (N. S.) 270; 3 Daly, 54; 2 Brews. 325; 1 Wilson, 63; 13 Wallace, 325; 24 La. An. 99; 51 N. Y. 104; 1 Holmes, 195.

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Burgess *v.* Burgess, 3 De G. M. & G. 896; S. C., 17 Jurist, 292; S. C., 22 L. J. R. (N. S.) Ch. 675; S. C., 17 Eng. L. & Eq. 257; *cited*, 18 Jurist, 10; 23 Eng. L. & Eq. 57; 23 Eng. L. & Eq. 283; 23 L. J. R. (N. S.) Ch. 255; 18 How. Pr. 67; 28 How. Pr. 207; 35 How. Pr. 113; 57 Barb. 534; *criticised*, 37 L. J. R. (N. S.) Ch. 848; *cited*, 5 Abb. Pr. (N. S.) 220; 3 Daly, 54; 1 Hun, 373; 3 T. & C. 551; 62 N. Y. 433.

Burgess *v.* Hately, 26 Beav. 249.

Burgess *v.* Hills, 26 Beav. 249; S. C., 28 L. J. R. (N. S.) Ch. 356; *cited*, 33 Beav. 579.

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Burnett *v.* Phalon, 9 Bosw. 193; *cited*, 5 Phila. 466; 49 Barb. 592; 4 Abb. Pr. (N. S.) 8; 35 How. Pr. 78; 35 Cal. 75; 44 Missouri, 177; 55 Barb. 167; 6 Abb. Pr. (N. S.) 279; 1 Dillon, 332; *affirmed*, 1 Abb. Ct. of App. Dec. 267.

Burnett *v.* Phalon, 1 Abb. Ct. of App. Dec. 267; S. C., 5 Abb. Pr. (N. S.) 212; S. C., 3 Transcript Ap. 167; S. C., 3 Keyes, 594; *affirming*, S. C., 9 Bosw. 193; *cited*, 13 Abb. Pr. (N. S.) 399; 48 N. Y. 376; 13 Abb. Pr. (N. S.) 391; S. C., *before* 12 Abb. Pr. 186; S. C., 21 How. Pr. 100; S. C., *before* 11 Abb. Pr. 157; S. C., 19 How. Pr. 530.

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Bury *v.* Bedford, 9 Jurist (N. S.) 956; S. C., 32 L. J. R. (N. S.) Ch. 741; S. C., 11 W. R. 973; S. C., 8 L. T. R. (N. S.) 847; (S. C., *before* 1 New, 5); *cited*, 1 H. & M. 284; *reversed*, 10 L. T. R. (N. S.) 470; S. C., 33 L. J. R. (N. S.) Ch. 465; S. C., 10 Jurist, (N. S.) 503; S. C., 4 New R. 180; S. C., 12 W. R. 726; *reversal cited* 111 Mass. 242; *cited*, 61 N. Y. 231.

Byass *v.* Sullivan, 21 How. Pr. 50.

Byron, Lord *v.* Johnston, 2 Mer. 29; *cited*, 12 Jurist, 149; 17 L. J. R. (N. S.) Ch. 144.

Canal Company *v.* Clark. See Delaware and Hudson Canal Co. *v.* Clark, *infra*.

Candee *v.* Deere, 54 Ill. 439; *cited*, 1 Dillon, 382; 3 T. & C. 554; 5 Daly, 287.

Canham *v.* Jones, 2 V. & B. 218; *cited*, 4 McLean, 518; 2 Sand. 611; 2 R. I. 570; 9 Hare, 258; 2 Abb. Pr. 326; 4 E. D. Smith, 392; 4 Abb. Pr. 147; 13 How. Pr. 388; 4 Now, 478; 5 Phila. 465; 5 Am. Law. Reg. (N. S.) 591; 54 Ill. 466; 6 Hun, 108.

Carmichael *v.* Latimer, *unreported*.

Cartier *v.* Carlile, 31 Beav. 292; S. C., 8 Jurist (N. S.) 163; *cited*, 37 Conn. 295.

Cartier *v.* May, (unreported), July 12, 1861, Reg. Lib. 1861, A; *cited*, Ludlow and Jenkyns on Trademarks, 42; Lloyd on Trademarks, 55, 77.

Carver *v.* Pinto Lite, 20 W. R. 134; S. C., 41 L. J. R. (N. S.) Ch. 92; S. C., L. R. 7 Ch. 90, S. C., 25 L. T. R. (N. S.) 732.

Caswell *v.* Davis, 4 Abb. Pr. (N. S.) 6; S. C., 35 How. Pr. 76; *cited*, 15 Abb. Pr. (N. S.) 4; 1 T. & C. 629; 46 How. Pr. 150; *affirmed*, 58 N. Y. 223; *affirmation cited*, 59 N. Y. 335.

Chappell *v.* Davidson, 8 De G. M. & G. 1; *affirming* S. C., 2 K. & J. 123.

Chappell *v.* Sheard, 2 K. & J. 117; (*See* 8 De G. M. & G. 1).

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Stewart *v.* Smithson, 1 Hilt. 119; *cited*, 12 Abb. Pr. 241; 36 How. Pr. 39; 2 Daly, 317.

Stokes *v.* Landgraff, 17 Barb. 608; *cited*, 12 Mo. L. R. 224; 18 How. Pr. 67; 7 Bosw. 220; 9 Bosw. 100; 5 Phila. 465; 5 Am. Law Reg. (N. S.) 504; 47 Barb. 463; 1 Abb. Ct. of App. Dec. 270; 5 Abb. Pr. (N. S.) 217; 3 Trans. App. 169; 3 Keyes, 506; 49 Barb. 501; 57 Barb. 534; 35 Cal. 64; 44 Missouri, 170; 2 Brews. 317; 7 Phila. 255; 2 Mich. N. P. 324; 54 Ill. 465; 6 Lans. 160; 13 Abb. Pr. (N. S.) 401; 24 La. An. 99; 45 Cal. 481; 59 N. Y. 385.

Stone *v.* Carlan, 13 Mo. L. R. 360; *cited*, 7 Cush. 333; 7 Bosw. 230; 6 Robt. 538; 4 Abb. Pr. 415; 36 How. Pr. 16.

Stonebreaker *v.* Stonebreaker, 33 Md. 252; *cited*, 2 Brews. 332; 1 Hun, 374; 3 T. & C. 552.

Swift *v.* Dey, 4 Robt. 611.

Sykes *v.* Sykes, 3 B. & C. 541; S. C., 5 Dowl. & Ryl. 292; *cited*, 19 Pick. 210; 2 Sand. Ch. 595; 4 McLean, 518; 13 Ir. Eq. 486; 18 Jurist, 9; 23 Eng. L. & Eq. 54; 11 Hare, 84; 24 L. J. R. (N. S.) Ch. 634; 1 K. & J. 515; 2 K. & J. 128; 3 K. & J. 431; 28 L. J. R. (N. S.) Ch. 61; 7 Bosw. 225; L. R. 1 Eq. 302; 50 Barb. 242; 2 Brews. 325; 18 W. R. 943; 2 Brews. 340; L. R. 7 Ch. 630; 41 L. J. R. (N. S.) Ch. 622; 27 L. T. R. (N. S.) 227; 1 Hun, 372; 3 T. & C. 550; 22 W. R. 766; 62 N. Y. 433; 45 L. J. R. (N. S.) Ch. 498; 34 L. T. R. (N. S.) 805.

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Taylor v. Carpenter, 3 Story, 458; *cited*, 2 Sand. Ch. 596; 4 Phila. 141; 7 Bosw. 230; 29 Cal. 296; 49 Barb. 596; 44 Missouri, 175.

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Taylor v. Gillies, 59 N. Y. 331; *affirming* S. C., 5 Daly, 285.

Taylor v. Taylor, 23 Eng. L. & Eq. 281; S. C., 23 L. J. R. (N S.) Ch. 255; *cited*, 49 Barb. 596; 3 T. & C. 552.

Thomson v. Winchester, 19 Pick. 214; *cited*, 7 Bosw. 229; 5 Am. Law Reg. (N. S.) 591; 54 Ill. 466.

Tonge v. Ward, 21 L. T. R. (N. S.) 480.

Town v. Stetson, 5 Abb. Pr. (N. S.) 218; *affirmed*, 3 Daly, 53.

Tucker v. Turpin, 2 J. & H. 139; S. C., 30 L. J. R. (N. S.) Ch. 495; S. C., 7 Jurist N. S. 673; S. C., 4 L. T. R. (N. S.) 637; *cited*, 11 W. R. 746; 11 W. R. 933; 32 L. J. R. (N. S.) Ch. 727; 8 L. T. R. (N. S.) 831.

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Upmann v. Elkan, 40 L. J. R. (N. S.) Ch. 475; S. C., L. R. 12 Eq. 140; S. C., 19 W. R. 867; S. C., *affirmed*, 20 W. R. 131; S. C., 25 L. T. R. (N. S.) 813; S. C., L. R. 7 Ch. 130; S. C., 41 L. J. R. (N. S.) Ch. 246.

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280; 9 L. T. R. (N. S.) 550; 10 Jurist (N. S.) 81; 2 Brews. 833.

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Welch *v.* Knott, 4 K. & J. 747; *cited*, 33 L. J. R. (N. S.) Ch. 200; 12 W. R. 280; 9 L. T. R. (N. S.) 550; 10 Jurist (N. S.) 81.

Weston *v.* Ketchum, 39 Superior Ct. R. 54; see S. C., 51 How. Pr. 455.

The Wheeler and Wilson Manufacturing Company *v.* Shakespear, 39 L. J. R. (N. S.) Ch. 36; *disapproved*, 45 Scottish Jurist, 206.

Wilder *v.* Wilder, *cited*, 2 Sawyer, 89.

Williams *v.* Johnson, 2 Bosw. 1; *cited*, 7 Bosw. 229; 25 How. Pr. 366; 2 Abb. Pr. (N. S.) 462; 1 Abb. Ct. of App. Dec. 270; 5 Abb. Pr. (N. S.) 217; 3 Trans. App. 169; 3 Keyes, 596; 49 Barb. 595; 35 Cal. 75; 2 Brews. 329; 24 La. An. 99; 45 Cal. 481; 14 Abb. Pr. (N. S.) 212; 58 N. Y. 230; 49 How. Pr. 10.

Williams *v.* Osborne, 13 L. T. R. N. S. 498.

Williams *v.* Spence, 25 How. Pr. 366; *cited*, 49 Barb. 595; 49 How. Pr. 10.

Winsor *v.* Clyde, 9 Phila. 513.

Wolfe *v.* Barnett, 24 La. An. 97.

Wolfe *v.* Burke, 7 Lans. 151; *cited*, 1 Hun, 375; 3 T. & C. 553 *reversed*, 56 N. Y. 115.

Wolfe *v.* Goulard, 18 How. Pr. 64; *cited*, 12 Abb. Pr. 240; 5 Phila. 466; 28 How. Pr. 207; 47 Barb. 463; 1 Abb. Ct. of App. Dec. 270; 5 Abb. Pr. (N. S.) 217; 3 Trans. App. 169; 3 Keyes, 596; 35 How. Pr. 113; 57 Barb. 531; 4 Abb. Pr. (N. S.) 8; 35 How. Pr. 79; 35 Cal. 75; 5 Abb. Pr. (N. S.) 220; 3 Daly, 54; 13 Abb. Pr. (N. S.) 390; 5 Am. L. T. R. 91; 15 Abb. Pr. (N. S.) 2; 1 T. & C. 628; 46 How. Pr. 158; 49 How. Pr. 8.

Woods *v.* Sands, *unreported.*

Woodward *v.* Lazar, 21 Cal. 448; *cited*, 12 Abb. Pr. (N. S.) 98.

Woolam *v.* Ratcliff, 1 H. & M. 259; *cited*, 22 W. R. 456; 30 L. T. R. (N. S.) 296.

Wotherspoon *v.* Currie, 18 W. R. 562; S. C., 22 L. T. R. (N. S.) 260; *cited*, 2 Brews. 338; S. C., *reversed*, 23 L. T. R. (N. S.) 443; S. C., 18 W. R. 942; *reversal cited*, 54 Ill. 464; S. C., *affirmed*, L. R. 5 E. & I. App. 508; S. C., 42 L. J. Ch. (N. S.) 130; S. C., 27 L. T. R. (N. S.) 393; *affirmation cited*, 27 L. T. R. (N. S.) 55; 41 L. J. R. (N. S.) Ch. 756; L. R. 14 Eq. 553; 51 N. Y. 197; 15 Abb. Pr. (N. S.) 4; 1 T. & C. 629; 46 How Pr.

150; L. R. 17 Eq. 37; 45 Scottish Jurist, 206; L. R. 18 Eq. 151; 22 W. R. 455; 30 L. T. R. (N. S.) 296; 75 Pa. St. 470; 24 W. R. 1028; 34 L. T. R. (N. S.) 865.

Wotherspoon *v.* Gray, 36 Scottish Jurist, 24.

Young *v.* Macrae, 9 Jurist (N. S.) 322; *cited*, 1 H. & M. 454; 2 N. R. 572; 15 Irish Ch. 81; 12 W. R. 306.

DIGEST

OF

TRADEMARK DECISIONS.*

GENERAL PRINCIPLES AND DEFINITIONS.

§ 1. The ground on which the court protects trademarks is, that it will not permit a party to sell his own goods as the goods of another. A party will not therefore be allowed to use names, marks, letters or other *indiciæ* by which he may pass off his own goods to purchasers as the manufacture of another person. 1842, *Rolls Court*, Perry *v.* Truefitt, 6 *Beavan*, 66.

§ 2. What is proper to be done in trademark cases, must, more or less, depend upon the circumstances which attend them. The court must deal with each case according to the nature of its peculiar circumstances. The principle in these cases is, that no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud. 1843, *Rolls Court*, Croft *v.* Day, 7 *Beavan*, 84.

* The French decisions are collated at p. 375 *et seq.*

§ 3. A man is not to sell the goods or manufactures of B under the show or pretense that they are the goods or manufactures of A, who by superior skill or industry has established the reputation of his articles in the market. The law will permit no person to practice a deception of that kind, or to use the means which contribute to effect it. He has no right and he will not be allowed, to use the names, letters, marks or other symbols by which he may palm off upon buyers as the manufactures of another, the article he is selling, and thereby attract to himself the patronage that without such deceptive use of such names, &c., would have enured to the benefit of that other person who first got up, or was alone accustomed to use such names, marks, letters or symbols. 1845, Vice Chancellor SANDFORD, N. Y., Coats *v.* Holbrook, 2 *Sandf. Ch.* 586; S. C., 3 *N. Y. Leg. Obs.* 404.

§ 4. The right to a trademark does not partake of the nature and character of a patent or copyright. 1846, SPENCER, Senator, *N. Y. Court of Errors*, Taylor *v.* Carpenter, 2 *Sandf. Ch.* 603; S. C., 11 *Paige*, 292.

§ 5. The scope or design of a bill in chancery to restrain the violation of a trademark is not to secure the complainants against a fair, honest and legitimate competition in their business. Its object is to prevent the commission of a fraud, not only on them, and to the prejudice of their rights, but on the public, by the sale of an article with an imitation of their trademark thereon in such a manner as to deceive purchasers, and through the false representations thus held out, to deprive the owners thereof of the profits of their skill and enterprise. 1846, LOTT, Senator, in Taylor *v.* Carpenter, *ibid.*

§ 6. The assurance to the manufacturer or vendor that he can secure the exclusive benefit of his trade-mark, is always to be found among the highest incentives to ingenuity, laborious exertion, and honorable and faithful conduct, and is one of the greatest securities to the public against imposition. SPENCER, Senator, *ibid.*

§ 7. In suits to restrain the use of trademarks alleged to be simulated the question is not whether the complainant was the original inventor or proprietor of the article made by him, and upon which he now puts his trademark, or whether the article made and sold by the defendants under the complainant's trademark is an article of the same quality or value. But the court proceeds upon the ground that the complainant has a valuable interest in the good will of his trade or business, and that having appropriated to himself a particular label, or sign, or trademark, indicating to those who wish to give him their patronage that the article is manufactured or sold by him, or by his authority, or that he carries on business at a particular place, he is entitled to protection against a defendant who attempts to pirate upon the good will of the complainant's friends or customers, or the patrons of his trade or business, by sailing under his flag without his authority or consent. 1848, *N. Y. Court of Appeals*, Partridge *v.* Menck, 2 *Barb. Ch.* 101; S. C., 2 *Sandf. Ch.* 622; 1 *How. App. Cases*, 558.

§ 8. In commercial dealings the utmost good faith should be observed, and no one is permitted to go into the market with the deception of labels assimilated to those of another, so as to profit by the ingenuity, good faith or established reputation of

the latter. 1840, *U. S. Circuit Court, Indiana*, Coffeen *v.* Brunton, 4 *McLean*, 516.

§ 9. If the article sold by the defendant is not only different from the complainant's article, but greatly inferior to it, the effect must be to destroy, in the market, the value of the plaintiff's article. And this is an injury for which a court of law can not give adequate compensation. However valuable the plaintiff's invention may be, yet if it be discredited by a worthless article it would be impossible, in any reasonable time, to restore the public confidence in the genuine article. In this consists the injury; and the fraud arises from the false representations that the article is the same. 1840, Coffeen *v.* Brunton, *ibid.*

§ 10. Every manufacturer and every merchant for whom goods are manufactured has an unquestionable right to distinguish the goods that he manufactures or sells by a peculiar mark or device, in order that they may be known as his in the market for which he intends them, and that he may thus secure the profits that their superior repute, as his, may be the means of gaining. His trademark is an assurance to the public of the quality of his goods and a pledge of his own integrity in their manufacture and sale. To protect him therefore in the exclusive use of the mark that he appropriates, is not only the evident duty of a court as an act of justice, but the interests of the public, as well as of the individual, require that the necessary protection shall be given. It is a mistake to suppose that this necessary protection can operate as an injurious restraint upon the freedom of trade. Its direct tendency is to produce and encourage a competition, by which the interests of the public are

sure to be promoted ; a competition that stimulates effort and leads to excellence, from the certainty of an adequate reward. When we consider the nature of the wrong that is committed, when the right of property in a trademark is invaded, the necessity for the interposition of a court of equity becomes more apparent. He who affixes to his own goods an imitation of the original trademark, by which those of another are distinguished and known, seeks, by deceiving the public, to intercept and divert to his own use the profits to which the superior skill and enterprise of the other had given him a prior and exclusive title. He *endeavors*, by a false representation, to effect a dishonorable purpose. He commits a fraud upon the public and upon the true owner of the trademark. The purchaser has imposed upon him an article that he never meant to buy, and the owner is robbed of the fruits of the reputation that he has successfully labored to earn. In such a case there is a fraud coupled with a damage, and a court of equity, in refusing to restrain the wrong-doer by an injunction, would violate the principles upon which a large portion of its jurisdiction is founded, and abjure the exercise of its most important functions, the suppression of fraud and the prevention of a mischief that otherwise might prove to be irreparable. 1849, *N. Y. Superior Ct. S. T.*, DUER, Ch. J., Amoskeag Manufacturing Co. *v.* Spear, 2 *Sandf. Superior Ct.* 599.

§ 11. In all cases where a trademark is imitated the essence of the wrong consists in the sale of the goods of one manufacturer or vender of those of another ; and it is only when this false representation is directly or indirectly made, and only to the extent in which it is made, that the party who ap-

peals to the justice of the court can have a title to relief. 1840, Amoskeag Manufacturing Co. *v.* Spear, *ibid.*

§ 12. The credit and reputation which a man acquires by his care or skill in the manufacture of a particular article is a species of property which the law recognizes and protects; and where, as a means of extending his reputation and guiding purchasers, he affixes some mark or symbol to designate that the article is of his manufacture, he is injured by the sale of an article manufactured by another with his peculiar symbol or trademark affixed to it. If the article is inferior to his own, he is injured in reputation; and even if it be of a similar quality and kind its sale goes so far to diminish the sale of his own article and thus works a pecuniary damage. 1854, *N. Y. Common Pleas, G. T.*, Lemoine *v.* Ganton, 2 *E. D. Smith*, 343.

§ 13. The law of trademarks is of recent origin, and may be comprehended in the proposition that the dealer has a property in his trademark. The ownership is allowed to him that he may have the exclusive benefit of the reputation which his skill has given to articles made by him, and that no other person may be able to sell to the public, as his, that which is not his. 1857, *N. Y. Supreme Ct. G. T.*, Clark *v.* Clark, 25 *Barb.* 76.

§ 14. A person who has appropriated to himself a particular label, sign, or trademark, indicating that a certain article is made or sold by him or his authority, and with which label or trademark the article has become identified, is entitled to the protection of a court of equity, which will enjoin any one who attempts to pirate upon the good will of his friends or customers by using such label, sign,

or trademark without his authority. 1860, *Phil. Ct. of Com. Pleas, Pa.*, Colladay *v.* Baird, 4 *Phila.* 139.

§ 15. The property which a manufacturer acquires in a trademark by the adoption of the use of it is of a very peculiar nature. It must be now conceded that some property exists in the use of a trademark, which, at present, is sufficient to support an action or to maintain an injunction. It is true that property in a good will is of a very evanescent character, but it is frequently one of great value. It is clear, from a variety of decided cases, that a manufacturer who has originally stamped his goods with a particular brand has a property in his mark at law and can sustain an action for damages for the use of it by another. It is also clear that courts of equity will restrain the use of it by another person. 1863, Master of the Rolls, Hall *v.* Barrows, 8 *L. T. N. S.* 227; S. C., 11 *Weekly R.* 525; S. C., 9 *Jurist N. S.* 483; S. C., 32 *Law J.* (*N. S.*), *Ch.* 548; S. C., 1 *New R.* 543; S. C. on appeal, 9 *L. T. N. S.* 531, 12 *Weekly R.* 322, 10 *Jurist N. S.* 55, 33 *Law J.* (*N. S.*), *Ch.* 204.

§ 16. There was no evidence that the mark, which consisted of the initials of a firm, surrounded by a crown, was ever current or accepted in the market as a representation of the persons who manufactured, or of the place of manufacture, or otherwise than as a brand of quality; there was nothing to show that the iron marked with the initials ever had a reputation in the market because it was believed to be the actual manufacture of those who used the mark. *Held*, that said mark was a trademark, properly so-called, *i. e.*, a brand which has reputation and currency in the market as a well-known sign of quality, and would be protected by

injunction. 1864, Lord Ch. WESTBURY, Hall *v.* Barrows, 10 *Jurist N. S.* 55; S. C., 12 *Weekly R.* 322; S. C., 9 *Law Times R. N. S.* 501; S. C., 33 *Law J. R.* (*N. S.*) *Ch.* 204.

§ 17. The principles applicable to trademark cases are shortly and clearly laid down by Lord KINGSDOWN in the case of the American Cloth Company where he says, "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, '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.'" The same rule would apply to tradesmen not being manufacturers. 1865, Vice Ch. KINDERSLEY, Glenny *v.* Smith, 2 *Dr. and Sm.* 476; S. C., 11 *Jurist N. S.* 964; S. C., 13 *L. T. R. N. S.* 11; S. C., 6 *New R.* 303.

§ 18. The right of property in a trademark is not limited, in its enjoyment, by territorial bounds, but may be asserted and maintained wherever the common law affords remedies for wrongs, subject only to such statutory regulations as may properly be made concerning the use and enjoyment of other property. 1865, *Supreme Ct. of California*, Derringer *v.* Plate, 29 *Cal.* 292.

§ 19. A manufacturer has no right to the exclusive use of a particular colored paper or kind of paper, for covering or enclosing his goods in any particular form. 1867, *N. Y. Supreme Court S. T.*, Faber *v.* Faber, 49 *Barb.* 357; S. C., 3 *Abb. Pr. N. S.* 115.

§ 20. The object or purpose of the law in protecting trademarks as property is twofold: First, to

secure to him who has been instrumental in bringing into market a superior article of merchandise, the fruit of his industry and skill; second, to protect the community from imposition, and furnish some guaranty that an article purchased as the manufacture of one who has appropriated to his own use a certain name, symbol or device as a trademark is genuine. Consequently, the violation of property in trademarks works a twofold injury; the appropriator suffers, in failing to receive that remuneration for his labors to which he is justly entitled, and the public in being deceived and induced to purchase articles made by one man, under the belief that they are the production of another. 1868, *Supreme Ct. of Conn.*, Boardman *v.* Meriden Britania Co., 35 *Conn.* 402.

§ 21. A trademark is property, and the proprietor thereof should be fully protected in its enjoyment and in all the benefits and advantages which it confers. 1868, *N. Y. Ct. of Com. Pleas, G. T.*, Curtis *v.* Bryan, 2 *Daly*, 312; S. C., 36 *How. Pr.* 33.

§ 22. A trademark is a name, symbol, figure, letter, form or device, adopted and used by a manufacturer or merchant to designate the goods he manufactures or sells and to distinguish them from the goods of another. 1869, *Phila. Ct. of Com. Pleas*, Ferguson *v.* Davol Mills, 7 *Phila.* 253; S. C., 2 *Brewster*, 314.

§ 23. The right to the use of a trademark is not an abstract right to which title can be acquired. It is only when such use is attached to or connected with some particular thing to which it is affixed as a designation of individual right in particular property, that the law will interpose to restrain its use by another. *Ibid.* And see §§ 120, 127, 148, 149, 152.

§ 24. A trademark must be so clear and well defined as to give notice to others, and must not be deviated from at the suggestion of whim or caprice. It must be attached to the article manufactured, in such a way as to be reasonably durable and visible. The mere declaration of a person, however long and however extensively published, that he claims property in a word, as his trademark, can not even tend to make it his property. It is the *actual use* of the trademark, affixed to the merchandise of the manufacturer, and this alone, which can impart to it the element of property. So, where a manufacturer of plows, at Moline, Illinois, claimed as a trademark the words "Moline Plow," which he used in his circulars, price-lists, and advertisements, but did not place them upon the articles manufactured, it was *held*, this requisite, being absent, he had no such exclusive right to their use as would prevent other manufacturers of plows at that place from employing them in the same mode. 1870, *Supreme Ct. of Illinois*, Candee *v.* Deere, 54 *Illinois*, 439.

§ 25. The name and address of the manufacturer, combined, may constitute a trademark which will entitle him who adopts it to protection in its exclusive use, but neither the name nor the address, singly, will be sufficient for protection—both must be used. *Ibid.*

§ 26. There are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trademark or trade-name, which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would

be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trademark, and the exclusive use of it be entitled to legal protection. 1871, *U. S. Supreme Ct.*, Delaware & Hudson Canal Company *v.* Clark, 13 *Wall.* 311.

§ 27. The leading principle of the law of trademark is, that the honest, skillful, and industrious manufacturer or enterprising merchant who has produced or brought into the market an article of use or consumption, that has found favor with the public, and who, by affixing to it some name, mark, device or symbol, which serves to distinguish it *as his*, and to distinguish it from all others, has furnished his individual guaranty and assurance of the quality and integrity of the manufacture, shall receive the first reward of his honesty, skill, industry or enterprise; and shall in no manner and to no extent be deprived of the same by another, who, to that end, appropriates and applies to his productions the *same*, *or a colorable imitation of the same name*, *mark*, *device or symbol*, so that the public are, *or may be*, deceived or misled into the purchase *of the productions of the one*, supposing them to be those of the *other*. 1872, *Supreme Ct. of Louisiana*, Wolfe *v.* Barnett, 24 *La. An.* 97.

§ 28. In order to protect a trademark, it is not necessary that the plaintiff should be either the discoverer or first manufacturer of the article for which he claims the mark. 1872 *Supreme Ct. of Louisiana*, Wolfe *v.* Barnett, *ibid.*

§ 29. The principle upon which the jurisdiction of a court of equity in trademark cases is founded, is, the preventing a party from fraudulently avail-

ing himself of the trademark of another which has already obtained currency and value in the market, by whatever means he may devise for the purpose, provided the means are devised in order to give him a colorable title to the use of the mark, and provided it be shown from the manner in which he has employed those means, that his object was, from the beginning, to invade the property of its owner. Lord WESTBURY, *House of Lords*, 1872, Wotherspoon *v.* Currie, 27 *Law Times, N. S.* 393; S. C., *Law R.*, 5 *Eng. & Ir. Ap.* 508; S. C., 42 *Law Jour.* (*N. S.*) *Ch.* 130.

§ 30. Property in the terms, names and devices of trade and business has become as well established as property in any other matter or thing. It is based upon and controlled by the same general principles to which all property is subjected, and has no laws special to itself. The litigation which springs from it is rather for the decision of facts, than for the establishment of peculiar or unknown principles. In a word, it is personal property, and has all the incidents thereof. It is acquired by certain exclusive appropriation, continued use, descent or purchase, and may be relinquished by gift, sale, or abandonment. Its fraudulent appropriation, though no less reprehensible in morals than the felonious taking of other personal property, has not yet become the subject of investigation and punishment by courts having jurisdiction of crime. It is this, perhaps, which has made equity eager to arrest the spoliator *flagrante delicto* by its swiftest and sternest authority. 1872, *Ct. of Com. Pleas, Phil. Pa.* Winsor *v.* Clyde; Stetson *v.* Winsor, 9 *Phila.* 513.

§ 31. A trademark is properly defined by UPTON

as the name, symbol, figure, letter, form or device adopted and used by a manufacturer or merchant, in order to designate the goods that he manufactures or sells, and distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry, or enterprise. It may be any sign, mark, symbol, word, or words which others have not an equal right to employ for the same purpose. 1872, EARL, C., *Commission of Appeals, N. Y.*, Newman *v.* Alvord, 51 *N. Y.* 189.

§ 32. Property in the use of a trademark has very little analogy to that which exists in copy rights or patents for inventions. In all cases where rights to the exclusive use of a trademark are invaded, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as of those of another. It is only when this false representation is directly or indirectly made, that a party who appeals to a court of equity can have relief. Words or devices may be adopted as trademarks, which are not original inventions of the one who adopts and uses them. Words in common use may be adopted, if, at the time of adoption, they were not used to designate the same or similar articles of production. A generic name, or a name merely descriptive of an article of trade, or its qualities, or ingredients, cannot be adopted as a trademark, so as to give a right to the exclusive use of it. The office of a trademark is to point distinctly to the origin or ownership of the article to which it is affixed. Marks which only indicate the names or qualities of products, cannot become the subjects

of exclusive use, for, from the nature of the case, any other producer may employ, with equal truth and the same right, the same marks for like products. Geographical names, which point out only the place of production, cannot be appropriated exclusively, so as to prevent others from using them and selling articles produced in the districts they describe under these appellations. 1872, *U. S. Circuit Ct. Me.*, SHEPLEY, J., in Osgood *v.* Allen, 1 *Holmes*, 185; S. C., 6 *Am. L. T.* 20.

§ 33. A label, at common law, is not a trademark, although a manufacturer is entitled to the exclusive use of one adopted by him to distinguish his goods. 1873, *Supreme Ct. of Cal.*, Burke *v.* Cassin, 45 *Cal.* 467.

§ 34. A party who, while he has avoided liability for the infringement of another's trademark, yet has adopted a course calculated to secure a portion of the good will of the other's business, will not be regarded with favor by a court of equity. 1874, *N. Y. Court of App.*, Wolfe *v.* Burke, 56 *N. Y.* 115.

§ 35. Every manufacturer has the unquestionable right to distinguish the goods that he manufactures and sells by a peculiar mark or device, so that they may be known as his in the market, and he may thus secure the profits which their superior reputation, as his, may be the means of gaining. If, therefore, the inventor, or manufacturer adopts a label, symbol or trademark, to distinguish the article he thus manufactures and sells, no other person has the right to adopt his label or trademark, or one so like his as to induce the public to suppose the article to which it is affixed is the manufacture of the inventor. This rule is

grounded upon a two-fold reason: 1. That the public may be protected from being imposed upon by a spurious or inferior article; and, 2. That the inventor may have the exclusive benefit of the reputation which his skill has given to the article made by him. When one, therefore, adopts a symbol or device, and affixes it to the goods he thus manufactures and puts upon the market, the law will throw its protection around the trademark thus affixed, as his property and a thing of value. 1875, *Supreme Ct. of North Carolina*, Blackwell *v.* Wright, 73 *N. C.* 310.

§ 36. The interference of courts of equity, instead of being founded upon the theory of protection to the owner of trademarks, is now supported mainly to prevent frauds upon the public. If the use of any words, numerals, or symbols, is adopted for the purpose of defrauding the public, the courts will interfere to protect the public from such fraudulent intent, even though the person asking the intervention of the court may not have the exclusive right to the use of these words, numerals or symbols. This doctrine is fully supported by the latest English cases of Lee *v.* Haley, 5 *Chy. App. Cas.* (*Law R.*) 155, and Wotherspoon *v.* Currie in the *House of Lords*, 5 *Eng. & I. App.* (*Law R.*) 508, and also in the case of Newman *v.* Alvord, 51 *New York*, 189. 1877, *N. Y. Supreme Ct. S. T.*, VAN BRUNT, J., Kinney *v.* Basch, unreported.

See also TRADEMARK.

§ 44. A invented a medicine to which he gave the name of "Chlorodyne," a name invented by himself as a fancy title, and not previously known in the medical professsion. B advertised for sale a medicine which he called "Chlorodyne" and sold as B's Chlorodyne. A filed a bill against B, but did not press it to a hearing, and obtained an order dismissing it with costs. B subsequently advertised his medicine as "Original Chlorodyne," asserting that he was the first inventor. Upon motion for injunction in a second bill filed by A to restrain B from the use of the term Original Chlorodyne, *held*, that although A by dismissing his former suit, had abandoned all right to the exclusive use of the term Chlorodyne, he would have been entitled to restrain B from selling his medicine as Original Chlorodyne if he had adduced evidence that any one had been misled by the title into buying B's instead of A's medicine. 1864, *Vice Ch.* Wood's *Ct.*, Browne *v.* Freeman, 12 *Weekly R.* 305; and see S. C., 4 *New*, 476.

§ 45. The use of some word, letter or character of a trademark, by different parties, will not work an abandonment by him in whom its right of use and title is vested. 1871, *Indianapolis Superior Ct. S. T.*, Sohl *v.* Geisendorf, 1 *Wilson* (*Ind.*) 60.

See also ACQUIESCENCE; LACHES; LIMITATION; LICENSE.

ABATEMENT.

§ 50. In a trademark case the administratrix of the defendant after issue and before trial moved that the action be continued against herself as administratrix, but as she failed to show that the defendant had acquired any rights in the litigation, or that any prejudice would result to the defendant's estate by not continuing the action, or that any benefit would result from having the motion granted, *Held*, that no case was shown calling for the exercise of any discretionary power on the part of the court to grant the motion. 1876, *N. Y. Superior Ct. G. T.*, Republic of Peru *v.* Reeves, 40 *N. Y. Superior Ct.* (8 *J. & S.*) 316.

ACCOUNT.

See DAMAGES.

ACQUIESCENCE.

§ 55. When trademarks are used under a protest by their owner it cannot be considered that there was acquiescence on the owner's part. 1837, Lord Ch. COTTENHAM, Motley *v.* Downman, 3 *Myl. & Cr.* 1; S. C., 6 *Law Jour.* (*N. S.*) *Ch.* 308.

§ 56. Where the plaintiffs were manufacturers in England of "Taylor's Persian Thread," and the defendants, in America, imitated their names, trademarks, envelopes and labels, and placed them

on thread of a different manufacture, it was held that it was a fraudulent infringement by the defendants of the right of the plaintiff, for which equity would grant relief, whether other persons had or had not done the same, unless done with the consent or acquiescence of the plaintiff. 1844, *U. S. Circuit Ct. Mass.*, Taylor *v.* Carpenter, 3 *Story*, 458.

§ 57. A suit at law is not barred unless an acquiescence for a period equal to the time fixed by the statute of limitations be shown, or the marks were dedicated to the public, as is prescribed in respect to patents or inventions. 1846, *U. S. Circuit Ct. Mass.*, Taylor *v.* Carpenter, 2 *Woodb. & M.* 1.

§ 58. There is something very abhorrent in allowing such a defense to a wrong which consists in counterfeiting others' marks or stamps, defrauding others of what had been gained by their industry and skill, and robbing them of the fruits of their good name, merely because they have shown forbearance and kindness. WOODBURY, J., *ibid.*

§ 59. The consent of a manufacturer to the use or imitation of his trademark by another may, perhaps, be justly inferred from his knowledge and silence; but such a consent, whether express or implied, when purely gratuitous, may certainly be withdrawn; and when implied it lasts no longer than the silence from which it springs. It is, in reality, no more than a revocable license. The existence of the fact may be a proper subject of inquiry on taking an account of profits, if such an account should be decreed; but even the admission of the fact would furnish no reason for refusing an injunction. 1849, *N. Y. Superior Ct. S. T.*, DUER,

Ch. J., Amoskeag Manufacturing Co. *v.* Spear, 2 *Sandf.* 599.

§ 60. Where an injunction is granted to restrain the use of a trademark, and the defendant disobeys and the plaintiff moves for a committal, acquiescence, if set up as a defense against the motion to acquit, must be shown to be such as to amount almost to a license to use the mark, and entitling the defendant himself to a right in the use of the mark. 1853, *Lords Justices on Appeal*, Rodgers *v.* Nowill, 22 *L. J.* (*N. S.*) *Ch.* 404; reversing S. C., 17 *Eng. L. & Eq.* 83; S. C., 17 *Jurist*, 109.

§ 61. The court refused to grant an injunction at the suit of Flavel, to restrain Harrison from making and selling a stove by the name of "Flavel's Patent Kitchener," on the ground, first, that Flavel had falsely assumed to describe the article as being patented, and, secondly, that he had known of the use of the name by Harrison four months before he applied for an injunction. But the court not deciding whether Flavel had or had not a legal remedy, retained the bill, giving him liberty to bring an action. 1853, *Vice Ch. Wood's Ct.*, Flavel *v.* Harrison, 10 *Hare*, 467; S. C., 19 *Eng. Law & Eq.* 15; S. C., 17 *Jurist*, 368.

§ 62. In order to prove acquiescence by a firm in the piratical use of their trademark, knowledge of such use must be proved; and that is not accomplished by the proof of publication of advertisements, which would have been an invasion of the rights of the firm, if those advertisements have been issued not steadily or uniformly, but interchangeably with other advertisements in some respects similar, but not infringing the rights of the firm. 1863,

Lord Ch. BRADY, Kinahan *v.* Bolton, 15 *Irish Ch.* 75.

§ 63. A person may undoubtedly consent to the employment of his name for a hotel, but if such consent be purely gratuitous, or unless there is some valid agreement binding upon the party who gives the consent, it may be withdrawn at the pleasure of such party. 1864, *N. Y. Supreme Ct. G. T.*, McCardel *v.* Peck, 28 *How. Pr.* 120.

§ 64. It is no defense that a fraud has been multiplied. Acquiescence cannot be inferred and it is revocable if it could be. 1866, *N. Y. Supreme Ct. S. T.*, Gillott *v.* Esterbrook, 47 *Barb.* 455.

§ 65. The issuing of a "caution" to the public by the owner of a trademark will not be construed as an irrevocable acquiescence in its use by others. 1867, *N. Y. Supreme Ct. G. T.*, Gillott *v.* Esterbrook, 47 *Barb.* 455. See § 73, *infra.*

§ 66. Injunction granted to restrain the use of the plaintiff's trademark by the defendants, though the scienter was not proved, but an account of profits refused on the ground of delay by the plaintiffs in commencing the suit. 1865, *Vice Ch. Wood's Ct.*, Harrison *v.* Taylor, 11 *Jurist* (*N. S.*) 408; S. C., 12 *Law Times* (*N. S.*) 330; approved and followed in Amoskeag Manufacturing Co. *v.* Garner, *infra*, § 77.

§ 67. In a suit to enjoin defendant from selling "Charter Oak" stoves, bearing a certain trademark, the fact that parties in other localities manufactured "Charter Oak" stoves, and sent them into market to compete with plaintiff's manufactures, in no way aids the defense, unless it appears that the plaintiff assented to or acquiesced in such in-

fringements upon his rights. 1869, *Supreme Ct. of Mo.*, Filley *v.* Fassett, 44 *Mo.* 168.

§ 68. A delay of nine years in applying for an injunction to restrain the violation of a trademark, is, if the plaintiff had knowledge of the violation, good cause for refusing an application therefor. 1869, *N. Y. Supreme Ct. S. T.*, Amoskeag Manufacturing Co. *v.* Garner, 55 *Barb.* 151; S. C., 6 *Abb. Pr.* (*N. S.*) 265.

§ 69. When a trader believes that he has good ground for complaining of a colorable imitation of the style of his business, he is justified in waiting until he can collect a sufficient number of cases to show that the alleged attempts has succeeded, before he files his bill; inasmuch as it would not be safe for him to come into the court of chancery until he could establish actual cases of deception. 1869, before Lord Justice GIFFARD on appeal, Lee *v.* Haley, 18 *Weekly R.* 242; S. C., *L. R.* 5 *Ch.* 155; S. C., 22 *Law Times N. S.* 251; S. C., 39 *Law Journal Ch.* 284. Affirming, S. C., 18 *Weekly R.* 181; 21 *Law Times* (*N. S.*) 546.

§ 70. The plaintiffs, who for many years past had been mining coal, claimed an exclusive right to use the name "Lackawanna coal" as a special, particular and distinctive name or trademark for coal, and filed a bill to enjoin the defendant from using those words to designate coal sold by him, which was not mined by the plaintiffs. *Held*, that whatever rights the plaintiff might once have had, that they had lost such rights by their acts of acquiescence in the use of those words by the defendant to designate coal sold by him which had not been mined by the plaintiffs, and that such acts of acquiescence were equivalent to a license to the de-

fendant to use those words to designate the coal sold by him, and that plaintiffs were equitably estopped from enjoining the defendant from using said words for such purpose. 1870, *U. S. Circuit Ct. N. Y.*, Delaware & Hudson Canal Company *v.* Clark, 7 *Blatchf.* 112; and see S. C., on appeal, 13 *Wall.* 311.

§ 71. *Semble.* Where a trader acquiesces in a particular infringement of his trademark for a considerable period during his life, his representatives will be unable to restrain it after his death. 1870, Vice Ch. BACON, Hovenden *v.* Lloyd, 18 *Weekly R.* 1132.

§ 72. An injunction, although the facts in support of it are sufficient, will not be granted unless the application is made speedily. An introductory application refused by reason of a delay of twenty months. 1871, *Vice Ch. Bacon's Ct.*, Isaacson *v.* Thompson, 20 *Weekly R.* 196.

§ 73. The use of a trademark by others for a period of twenty years, where the plaintiffs had no knowledge of such practice, and did not authorize or acquiesce in the same, does not preclude the owner from enforcing his sole right. 1872, *N. Y. Com. of App.*, Gillott *v.* Esterbrook, 48 *N. Y.* 374; affirming S. C., 47 *Barb.* 445.

§ 74. The unlawful use of a trademark for ten years by the defendant does not give him a title to the mark. 1872, *Supreme Ct. of Louisiana*, Wolfe *v.* Burnett, 24 *La. An.* 97.

§ 75. The court will not refuse to grant an injunction to restrain the infringement of a trademark on the mere ground that a great number of years have elapsed since it was first infringed by the defendant. But when many years have elapsed

before the plaintiff takes steps to restrain the infringement, the court will require clearer proof than it would otherwise have done that the trademark was adopted originally with fraudulent intent, and will require the plaintiff to prove that he has been actually injured by the infringement. 1874, *Chancery Ct. of Appeal, L. J. J.*, Rodgers *v.* Rodgers, 31 *L. T. R.* (*N. S.*) 285; S. C., 22 *W. R.* 887.

§ 76. Though one discover or invent an article and give it a peculiar and distinctive name, if he permit another with his acquiescence to appropriate it with that name and to put it forth to the public as his own, that other will become the proprietor of the name, if he meets the other conditions prescribed by the law in such cases. 1874, *N. Y. Ct. of App.*, Caswell *v.* Davis, 58 *N. Y.* 223.

§ 77. Where the plaintiff had delayed commencing suit an injunction was issued to restrain the use of plaintiff's trademark, but without damages or account of profits and without costs. 1876, *N. Y. Supreme Ct. S. T.*, Amoskeag Manufacturing Co. *v.* Garner, 4 *Am. Law Times* (*N. S.*) 176.

See also ABANDONMENT, §§ 44–46; LACHES, §§ 505–507; LICENSE, §§ 520–522; LIMITATION, §§ 525–527.

ACQUISITION OF TRADEMARKS.

§ 85. *By operation of law.*—A right to use a trademark is in the nature of a personal chattel and will go to the representatives of its owner on his decease. 1846, case cited by the vice chancellor in Hine *v.* Lart, 10 *Jurist*, 106.

§ 86. The venders of an article of trade or man-

ufacture, are entitled to be protected in the use of a trademark, although they do not manufacture the goods to which it is applied. 1846, LOTT, Senator, *N. Y. Ct. of Errors*, Taylor *v.* Carpenter, 11 *Paige*, 202; S. C., 2 *Sandf. Ch.* 603.

§ 87. *By purchase.*—The plaintiffs agreed with A, the proprietor of a hotel, to pay him a certain sum for the privilege of using the name of A, and of his hotel, on certain coaches of the plaintiff's, used for the conveyance of passengers to and from the hotel of A, and on certain badges worn by the drivers of those coaches, plaintiffs giving security to A for the good conduct of himself and servants in the conveyance of such passengers. *Held*, that the plaintiffs had an exclusive right as against third parties in the use of the name of A's hotel on his coaches and badges; that he was entitled to an injunction to restrain the use by any other party on coaches or badges of the name of A's hotel, or of any device or sign which might induce a stranger to believe that the defendants were connected with the hotel of A. The name "Irving House" when used as above, protected. 1850, *N. Y. Superior Ct. S. T.*, Stone *v.* Carlan, 13 *Monthly L. R.* 360.

§ 88. *By purchase.*—Marsh made an oral agreement with S, the lessee of the Revere House, by which he agreed to keep good coaches, horses, and to employ good drivers, on the arrival of certain trains at the Boston and Worcester Railroad station, to convey passengers arriving at the station who might wish to go to the Revere House; and in consideration of which, S agreed to employ M to convey all the passengers from the Revere House to the station, and authorized him to put on his

coaches, and on the caps of his drivers, as a badge, the words "Revere House." A similar agreement, previously existing between S and B, had been terminated by mutual consent; but B still continued to carry the words "Revere House" as a badge on his coaches and on the caps of his drivers, although requested not to do so by S; and his drivers constantly called "Revere House" at the station, and diverted passengers from his coaches into B's. An action on the case was brought by M against B for using said badge and diverting passengers, and it was *held*, that M, by his agreement with S, had an exclusive right to use the words "Revere House," for the purpose of indicating that he had the patronage of that house for the transportation of passengers; that if B used those words for the purpose of holding himself out as having the patronage and confidence of the lessee of the Revere House, and in that way to induce passengers to go in his coaches rather than in M's, this would be a fraud on the plaintiff and a violation of plaintiff's rights, for which the action would lie, without proof of actual, specific damages. *Held*, further, that M would be entitled to recover such damages as the jury, upon the whole evidence, should be satisfied that he had sustained, and that the damages would not be confined to the loss of such passengers as he could prove were actually diverted from his coaches to the defendant's; but that the jury would be justified in making such inferences, as to the loss of passengers and injury sustained, as they might think were warranted by the whole evidence in the case. 1851, *Supreme Judl. Ct. of Mass.*, Marsh *v.* Billings, 7 *Cush.* 322.

§ 89. *By adoption.*—Certain music publishers

having adapted original words to an old American air which was re-arranged for them, gave to the song so composed the name of "Minnie," and procured it to be sung by Madame Anna Thillon, a popular singer, at M. Julian's concerts in London; and when it had by that means become a favorite song, they published it with a title page, containing a picture of the singer who had brought the song into notice, and the words "Minnie, sung by Madame Anna Thillon and Miss Dolby, at Julian's concerts, written by George Linley," &c. *Held*, that the publishers had by these means obtained a right of property in that name and description of their song which a court of equity would restrain any person from infringing. 1853, *Vice Ch. Wood's Ct.*, Chappell *v.* Sheard, 2 *Kay & J.* 117.

§ 90. *Ownership confined to place where used.*—The employment of particular words or insignia, as a trademark, must be confined to the place where they are used, and the exportation of the articles barring the trademark to other places cannot interfere with the right acquired by others previously using the same words, &c., in such places. 1860, *N. Y. Superior Ct. G. T.*, Corwin *v.* Daly, 7 *Bosw.* 222.

§ 91. *By use.—Length of time required.*—It has sometimes been supposed that a manufacturer can only acquire such a property in a trademark as will enable him to sue for an injunction against the piracy of it by others, by his having enjoyed so long and continued a use of it as is sufficient to give it reputation in the market where such goods are sold. But I entertain great doubt as to the correctness of that view of the law. The interference of a court of equity cannot, it appears to me, depend upon the length of time the manufacturer has used

it. If the brand or mark be an old one formerly used, but since discontinued, the former proprietor undoubtedly cannot retain such a property in it or prevent others from using it. But, provided it has been originally adopted by a manufacturer and has been continuously and still is used by him to denote his own goods, when brought into the market and offered for sale there, I apprehend, although the mark may not have been adopted a week, and may not have acquired any reputation in the market, his neighbors cannot use that mark. Were it otherwise, and were the question to depend entirely on the time the mark had been used, or the reputation of it had been acquired, a very difficult, if not an insoluble inquiry would have to be opened in every case, namely, whether the mark had acquired in the market a distinctive character, denoting the goods of the person who first used it? The adoption of it by another is proof that he considers at that time it is likely to become beneficial. If the manufacturer who first used it were not protected from the earliest moment, it is obvious that malicious and pertinacious rivals might prevent him from ever acquiring any distinctive mark or brand to denote his goods in the market by adopting his mark, however varied, immediately after its adoption or change by the person who had originally used it. That evil would not be obviated by his putting his name in full; for if the name of the manufacturer was a common one it would be difficult for him to point out to the public what goods were or were not manufactured by him. These observations, in my opinion, apply to brands and marks generally. 1863, *Master of the Rolls*, Hall *v.* Barrows, 8 *L. T.* (*N. S.*) 227; S. C., 11 *Weekly R.* 525; S. C., 9 *Jurist*

(*N. S.*) 483; S. C., 32 *Law J.* (*N. S.*) *Ch.* 548; 1 *New*, 543; S. C., on appeal, 9 *L. T.* (*N. S.*) 561; 12 *W. R.* 322; 10 *Jurist* (*N. S.*) 55; 33 *Law J.* (*N. S.*) *Ch.* 204.

§ 92. *By license.*—A party will be restrained by injunction from the continued use of a trademark belonging to another, which he has used under an agreement and with the consent of the owner and for the benefit of both, after the owner shall withdraw his interest from the business and claim the use of his trademark exclusively, unless the party claiming to use it shall show clearly by the agreement that the owner intended to and had forever parted with his right to the use of such trademark. 1864, *N. Y. Supreme Ct. G. T.*, McCardel *v.* Peck, 28 *How. Pr.* 120.

§ 93. *By use.—Six weeks use sufficient.*—The use of the trademark "Anatolia" for the period of about six weeks, during which it had become known in the market, *held*, sufficient to confer an exclusive right thereto. The elements of the right of property in a trademark may be represented as being the fact of the article being in the market as a vendible article with the stamp or trademark upon it at the time when the defendants imitate it. 1864, before Lord Ch. WESTBURY, on appeal, McAndrew *v.* Bassett, 10 *Jurist* (*N. S.*) 550; S. C., 33 *Law J.* (*N. S.*) *Ch.* 561; S. C., 12 *Weekly R.* 777; S. C., 10 *Law Times* (*N. S.*) 442; affirming S. C., 10 *Jurist* (*N. S.*) 492; S. C., 10 *Law T.* (*N. S.*) 65.

§ 94. *Essential qualities.*—The essential qualities for constituting property in a trademark probably would be found to be no other than these: First, that the mark has been applied by the plaintiffs properly; that is to say, that they have not

copied any other person's mark, and that the mark does not involve any false representation ; secondly, that the article so marked is actually a vendible article in the market ; and thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description. 1864, Lord Chancellor WESTBURY, McAndrews *v.* Bassett, 10 *Jurist N. S.* 550 ; S. C., 33 *Law J.* (*N. S.*) *Ch.* 561 ; S. C., 12 *Weekly R.* 777 ; S. C., 10 *Law Times* (*N. S.*) 442.

§ 95. *Adoption and use.*—Any name, symbol, letter, figure or device adopted by the persons manufacturing or selling goods and used and put upon such goods to distinguish them from those manufactured or sold by others, and employed so often and for such a length of time as to raise the presumption that the public would know that it was used to indicate ownership of the goods in the person manufacturing or selling them, constitutes his trademark. His right to the trademark accrues to him from its adoption and use for the purpose of designating the particular goods he manufactures or sells, and although it has no value except when so employed, and, indeed, has no separate existence, but is appurtenant to the goods designated, yet the trademark is property, and the owner's right of property in it is complete as that which he possesses in the goods to which he attaches it, and the law protects him in the enjoyment of the one as fully as of the other. In order that the claimant of the trademark may primarily acquire the right of property in it, it must have been originally adopted and used by him—that is, the assumed name or designation must not be one that was then in actual use by others, and such adoption and use

confer upon him the right of property in the trademark. 1865, *Supreme Ct. of Cal.*, Derringer *v.* Plate, 29 *Cal.* 292.

§ 96. *Not dependent on statutory law.*—The right of property in a trademark does not in any manner depend for its inceptive existence or support upon statutory law, although its exercise may be limited or controlled by statute. 1865, Derringer *v.* Plate, *ibid.*

§ 97. *Operation of law.*—The trademark of a defunct corporation does not descend to the stockholders at the time of its dissolution. 1866, *Superior Ct. of Chicago*, Sherwood *v.* Andrews, 5 *Am. Law Reg.* (*N. S.*) 588.

§ 98. *By prior appropriation.*—It is well settled by the determination of the courts of this country, and the English and French law is the same, that a person may, by priority of appropriation of names, letters, figures, or symbols of any kind, to distinguish his manufacture, acquire a property therein as a trademark, for the invasion of which an action will lie, and in the exclusive use of which he may have protection by injunction. 1868, *N. Y. Com. Pleas, G. T.*, Curtis *v.* Bryan, 2 *Daly*, 312; S. C., 36 *How. Pr.* 33.

§ 99. *It would seem* that where a public administrator sells at public auction the right, title and interest which a decedent had in his lifetime in a newspaper, including the good-will thereof, the purchaser would not acquire such a right of property in the name or title, as would prevent the same name being assumed afterwards, by another person. 1868, *N. Y. Superior Ct. S. T.*, Stephens *v.* De Conto, 4 *Abb. Pr.* (*N. S.*) 47; S. C., 7 *Robt.* 343.

§ 100. Bill in equity to restrain the use on the

labels on razor straps sold by defendant, of the words "Genuine Razor Strap." Charles Emerson, Sr., was the original inventor and maker of razor straps which bore a label stating they were made by "Charles Emerson, Emerson Place." He employed and taught his business to five of his nephews, of whom B. Badger, the father of defendant, was the eldest, and the plaintiff, the third. Said Badger, in his uncle's lifetime, left his employment and continued, with his permission, but on his own account, to manufacture and sell such straps, and to use the same label thereon, and was succeeded in business by his son, the defendant. The uncle died without issue; his nephews were among his heirs at law, and his business and trademark were not disposed of by himself, by will or otherwise, or by his administrator. The plaintiff, after his uncle's decease, continued the business at the same place, and used a label precisely similar to that formerly used by the uncle. The label used by the defendant did not represent his razor straps to be made by the plaintiff or by any person of the name of Charles Emerson, but stated, with exact truth, the relation of the defendant to the original inventor and owner. *Held*, that the plaintiff, though bearing the same name as the original Charles Emerson, had no greater right than the defendant to hold himself out as such, or to use the label of his uncle. That the plaintiff had failed to prove either any infringement of his own rights, or any wrongful act of the defendant. 1869, *Supreme Judl. Ct. of Mass.*, Emerson *v.* Badger, 101 *Mass.* 82.

§ 101. *Adoption and use.*—By the adoption and use of a name and device, adapted to point out the true source and origin of the manufactured article,

the manufacturer acquires a property therein which the courts will protect. 1869, *Supreme Ct. of Missouri*, Filley *v.* Fassett, 44 *Mo.* 168.

§ 102. *Appropriation and use.*—Every person who uses a trademark, be it the label on a bottle, or the name or title of a periodical or magazine, by his appropriation and user of the name acquires a property in that name, and has a right to restrain any other person from using the same name in such a manner as would lead, or be calculated to lead, the public to believe that they are purchasing one thing when, in truth, they are purchasing another. 1869, *Vice Ch. Malin's Ct.*, Bradbury *v.* Beeton, 39 *Law Journal R. Ch.* (*N. S.*) 57.

§ 103. In 1844, Solomon Lloyd invented a composition for shaving, and called it "Lloyd's Euxesis." In 1874, his son, A. S. Lloyd, joined his father in business, at a weekly salary. In 1854, Solomon Lloyd died intestate, and no letters of administration were taken out. From 1854 to 1867, A. S. Lloyd and his wife, the defendant, carried on the manufacture of Lloyd's Euxesis. The widow of S. Lloyd made a claim on this account upon A. S. Lloyd, which he satisfied by making her a weekly allowance during the rest of her life. In June, 1867, defendant separated from her husband, instituted proceedings for a divorce, and obtained a decree *nisi* for dissolution of their marriage. On September 13, 1868, before decree became absolute, A. S. Lloyd died. After separating from her husband, defendant continued to manufacture and sell Lloyd's Euxesis on her own account, and plaintiff had dealt with her. A. S. Lloyd's estate, proving insolvent, was administered in the court of chancery, and the good will of the business and such

right as he had to the trademark "Lloyd's Euxesis" was sold to the plaintiff under a decree of the court. The secret of making the Euxesis was communicated to plaintiff by a person in A. S. Lloyd's employ. *Held*, that A. S. Lloyd not having had any title to the trademark, defendant could not be restrained. If A. S. Lloyd had had a title, defendant could be enjoined, even if she was his wife. 1870, *Vice Ch. Bacon's Ct.*, Hovenden *v.* Lloyd, 18 *Weekly R.* 1132.

§ 104. It is the *actual use* of a trademark, affixed to the merchandise of the manufacturer, and this alone, which can impart to it the element of property. See § 24. 1870, *Supreme Ct. of Illinois*, Candee *v.* Deere, 54 *Ill.* 439

See, also, ASSIGNMENT; PARTNERSHIP.

ACTION (CAUSE OF).

As to what constitutes a good cause of action,—see CAUSE OF ACTION; IMITATION; NAME; WORDS; PUBLICATIONS; PARTNERSHIP; &c.

ADMINISTRATORS AND EXECUTORS.

See §§ 50, 71, 85, 99, 601, 791, 904.

ADOPTION.

See ACQUISITION.

ADVERTISEMENTS.

When the publication of advertisements will be enjoined. See PUBLICATIONS.

AGENT.

See §§ 224, 472, 768, 873.

ALIENATION.

See ASSIGNMENT.

ALIENS.

§ 110. In an action for the violation of a trade-mark, it makes no difference that the complainants are aliens; in the courts of the United States alien friends are entitled to the same protection in their rights as citizens. 1844, *U. S. Circuit Ct. Mass.*, Taylor *v.* Carpenter, 3 *Story*, 458.

§ 111. The alienage of the person whose trade-marks are simulated, nor the fact that he resides abroad, does not alter his right to be protected in their exclusive use in this country. 1845, Vice Ch. SANDFORD, Coats *v* Holbrook, 2 *Sandf. Ch.* 586; S. C., 3 *N. Y. Leg. Obs.* 404.

§ 112. The fact that complainant, in a suit in equity to restrain the fraudulent use of a

trademark, is a subject of a foreign government, does not affect the rights of the parties. The honor of our country and the character of its jurisprudence, forbid that justice or equity should ever be administered on such narrow, prescriptive, and inequitable principles as to recognize a different rule of right and justice between any class of suitors. 1846, *N. Y. Ct. of Errors*, Taylor *v.* Carpenter, 11 *Paige*, 292; S. C., 2 *Sandf. Ch.* 603.

§ 113. An alien friend may bring an action in the courts of the United States for damages sustained by reason of the piratical use of his trademarks. He can bring in our courts any action for the violation of his trademarks which a citizen can. 1846, *U. S. Circuit Ct. Mass.*, Taylor *v.* Carpenter, 2 *Woodb. & M.* 1.

§ 114. Aliens have the same rights as citizens in respect to the protection of their trademarks. 1849, *U. S. Circ. Ct. Ind.*, Coffeen *v.* Brunton, 4 *McLean*, 516.

§ 115. A foreign manufacturer has a remedy, by suit in England, for an injunction and an account of profits, against a manufacturer in England, who has committed a fraud upon him by using his trademark for the purpose of inducing the public to believe that the goods so marked were manufactured by the foreigner. This relief is founded upon the damage caused to the plaintiff by the defendant's fraud, and exists, although the plaintiff resides and carries on his business in another country, and has no establishment in England, and does not even sell his goods in that country. 1857, Vice Ch. WOOD, Collins Co. *v.* Brown, 3 *Kay and J.* 423; S. C., 3 *Jurist N. S.* 929, Collins Co. *v.* Cowen, 3 *Kay and J.* 428; S. C., 3 *Jurist N. S.* 929; Collins Co. *v.*

Reeves, 1859, Vice Ch. STUART, 28 *Law Jour. R. Ch.* 56.

APPROPRIATION.

See ACQUISITION.

ASSIGNMENT.

§ 120. An injunction was granted where the defendant, having sold a medicine to the plaintiff, set up another under a similar description, and in his advertisement adopted verses which had been attached to the original medicine. 1811, *Rolls Court*, Sedon *v.* Senate, *Eden on Injunctions*, 1*st Am. Ed.* 226.

§ 121. T. took out letters patent, which expired in 1844, for the manufacture of solid headed pins and carried on the business under the firm name of T. & Co. until 1838. In such business T used parti-colored labels, in pink and green, in which the pins were described as "patent pins," "exclusively manufactured by T. & Co."; and had engraved plates and blocks for striking off such labels. In 1838 T. assigned the letters patent, together with his business and good will, and the right to use the plates, labels &c., and the name of "T. & Co." to S. In 1839 S. became bankrupt. His assignees carried on the trade until 1841, when they agreed to assign the business, patent, plates, labels, &c., and the right to use the name of "T. & Co." to E, the

plaintiff, who ever since carried on the business accordingly and used the said labels. In 1853 E. discovered that V., the defendant, was using labels in palpable imitation of the plaintiff's. *Held*, that E. was entitled to restrain such palpable imitation by V., but that E. had no exclusive right to the use of the name of T. That V. was not to be precluded altogether from representing that his pins were manufactured according to T's patent (now expired), but he was not to do so in a manner liable to mislead. 1853, *Vice Ch. Wood's Ct.*, Edelston *v.* Vick, 11 *Hare*, 78; S. C., 18 *Jurist*, 7; S. C., 23 *Eng. Law and Eq.* 51.

§ 122. The assignee of the whole right in a trademark and of the property in the goods to which it is attached is entitled to whatever privilege the law accorded to his assignor in the possession and use thereof, and may maintain an action in his own name for any wrongful use, by others, of such trademark. 1856, Walton *v.* Crowley. 3 *Blatchf. C. C.* 440 (*U. S. Circuit Ct. N. Y.*).

§ 123. Where plaintiff claimed the right to the use of a trademark as assignee by purchase, it was *held*, that he could not enjoin the sale of goods to which the trademark had been attached by its original owner prior to the purchase thereof. 1856, *N. Y. Supreme Ct. S. T.*, Samuel *v.* Berger, 24 *Barb.* 163; S. C., 13 *How. Pr.* 342; S. C., 4 *Abb. Pr.* 88.

§ 124. Where the lease of a bakery with the tools, fixtures, etc., and also the good will of the business of baking, then or previously carried on at such place, had been sold and assigned with a covenant, by the vendor, not to carry on the business in the same city himself, it was held that the

purchaser did not acquire the right to use the name of the assignor in the conduct of the business at the same place, nor to designate or describe the bakery (by signs thereon or otherwise) by the name of his vendor. 1860, *N. Y. Superior Ct. G. T.*, Howe *v.* Searing, 19 *How. Pr.* 14; S. C., 10 *Abb. Pr.* 264; S. C., 6 *Bosw.* 354.

§ 125. Where the plaintiff sold to the defendant's assignor his lease of the premises, No. 432 Broadway, New York, known by the name of "Howe's Bakery," and stock in trade, with the good will of the business of baking, now or heretofore carried on by him in the city of New York: *Held*, that the plaintiff was entitled to an injunction, to restrain the defendant from designating such bakery establishment as "Howe's Bakery," and from otherwise using the name of "Howe" in the business, so as to induce the public to believe that the business carried on at 432 Broadway was conducted by Howe. *Ibid.*

§ 126. It is doubtful if the right of using a mere trademark, by itself, can be transferred like a copyright, so as to make wares, not yet in existence, the subject of them, and the injury to an assignee of it, greater or less by the use of it by others. The imitation of a trademark is entirely a personal injury; it is merely passing off the wares of the imitator as being those of the party injured. How can the relinquishment by the assignor of his trademark prevent the rest of the world from using that trademark to distinguish their wares? On the other hand, although a name has been used by any one as a trademark, and is susceptible of being used as such, its previous employment by him does not prevent any one else from employing it to des-

ignate their wares. It is wholly immaterial how much or how long a word has been employed as a trademark. The employer of it can neither give any special right to another, nor abandon it to the *community so as forever to take away the right of* employing it to designate his wares. If he can, the first use of a trademark gives a common law perpetual copyright in it. *Obiter*, ROBERTSON, J., 1860, *N. Y. Superior Ct., G. T.*, Corwin *v.* Daly, 7 *Bosw.* 222.

§ 127. If a name, impressed upon a vendible commodity, passes current in the market as a representation that the commodity has been manufactured by a particular person, this court would not transfer to another person the right to use the name simply and without addition; but if it sold the business carried on by the owner of the name, it might give to the purchaser the right to represent himself as the successor in the business of the first maker, and in that manner to use the name. Where a name, once affixed to a manufactured article, continues to be used after the death of the manufacturer, the name in time becomes a mere trademark or sign of quality, and ceases to denote or be current as indicating that any particular person was the maker, and can, therefore, be sold with the business, and will be protected in a court of equity. 1863, Before Lord Ch. WESTBURY, on appeal, Hall *v.* Barrows, 33 *Law J. (N. S.) Ch.* 204; S. C., 9 *Law T. (N. S.)* 561; S. C., 12 *Weekly R.* 322; S. C., 10 *Jurist (N. S.)* 55; reversing S. C., 9 *Jurist (N. S.)* 483, 11 *Weekly R.* 525, 8 *L. T. (N. S.)* 227, 32 *Law J. (N. S.) Ch.* 548.

§ 128. A corporation trademark, granted by the Cutler's Company, under the various acts of Par-

liament regulating the company, to a non-freeman, is assignable; but whether such a mark granted to a freeman is assignable, *quære*. 1864, *Ch. Cl. of Appeal*, Bury *v.* Bedford, 10 *Jurist* (*N. S.*) 503; S. C., 33 *Law J.* (*N. S.*) *Ch.* 465; S. C., 12 *Weekly R.* 726; S. C., 10 *L. T.* (*N. S.*) 470; S. C., 4 *New R.* 180; reversing S. C., 11 *Weekly R.* 973; S. C., 8 *Law T.* (*N. S.*) 847; S. C., 32 *Law J. Ch.* (*N. S.*) 741; S. C., 9 *Jurist* (*N. S.*) 956; S. C., 1 *New R.* 5.

§ 129. If a personal trademark be in any respect less assignable than one referring to locality only, or to a mere device, the distinction must be limited to cases where the mark is so clearly personal as to import that the goods bearing it are manufactured by a particular person; and, *semble*, even in that case, the objection is rather to the right of using the mark than to its assignable quality. 1864, Bury *v.* Bedford, *ibid.*

§ 130. J. B., being a non-freeman of the Cutler's Company, acquired by grant from that company a corporate trademark, consisting of the figure of a lion and the letters J. B. O. S.; he also acquired by purchase from William Ash, the right to the exclusive use of the trademark "Wm. Ash & Co." He subsequently entered into partnership, and by the articles then executed, it was agreed that the corporate trademark, used with such other mark as might be agreed upon, should be a partnership asset. It was also agreed that at the expiration of the partnership, the several partners should have the free use and enjoyment of the corporate trademark for the remainder of their lives, either alone or in partnership with any other persons. The firm, after carrying on business, in the course of which both the corporate trademark and the mark

"Wm. Ash & Co." were used, fell into difficulties, and the partners assigned all their estate and effects, both joint and separate, to trustees, upon the usual trusts for creditors. By the deed the trustees were empowered to sell the trade, &c., as a going concern. They accordingly afterwards sold the concern to H. B., and assigned to him the partnership property, and the corporate trademark and the other marks of the firm, so far as they lawfully could. Shortly afterwards, J. B. entered into an arrangement with B. & Co., by which he authorized them to use the corporate mark, and he also used the corporate mark and the mark "Wm. Ash & Co.," himself. Thereupon H. B. filed a bill to restrain him from so doing, and the lords justices, on appeal from the decision of the master of the rolls, *Held*, that the plaintiff was entitled to the exclusive use of both trademarks, and granted an injunction accordingly. *Ibid.*

§ 131. Although a trader may have a property in a trademark, giving him a right to exclude all others from using it, if his goods derive their increased value from the personal skill or ability of the adopter of the trademark, he cannot give any other person the right to affix his name or mark upon their goods, for the effect thereof would be to give them the right to practice a fraud upon the public. 1865, *House of Lords*, Leather Cloth Co. (limited) *v.* The American Leather Cloth Co. (limited), 35 *Law J.* (*N. S.*) *Ch.* 53; S. C., 11 *House of Lords Cas.* 523; S. C., 13 *Weekly R.* 873; S. C., 11 *Jurist* (*N. S.*) 513; S. C., 12 *L. T. R.* (*N. S.*) 742; S. C., 6 *N. R.* 209; affirming S. C., 33 *L. J.* (*N. S.*) *Ch.* 199; 12 *Weekly R.* 289; 10 *Jurist* (*N. S.*) 81; S. C., 9 *L. T. R.* (*N. S.*) 558; and reversing

S. C., 1 *H. & M.* 271 ; S. C., 32 *Law J.* (*N. S.*) *Ch.* 721 ; S. C., 11 *Weekly R.* 931 ; S. C., 8 *L. T.* (*N. S.*) 829.

§ 132. *Semble*, per Lord CRANWORTH. — The right to a trademark is a right closely resembling, though not exactly the same as, copyright. The right which a manufacturer has in his trademark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it was affixed was manufactured. The right to a trademark may, in general, treating it as property, or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser. Difficulties, however, may arise where the trademark consists merely of the name of the manufacturer. When he dies, those who succeed him, though they may not bear the same name, yet ordinarily continue to use the original name as a trademark, and they would be protected against any infringement of the exclusive right to that mark. They would be so protected, because, according to the usages of trade, they would be understood as meaning no more by the use of their predecessor's name than that they were carrying on the manufacture formerly carried on by him. Nor would the case be necessarily different if, instead of passing into other hands by devolution of law, the manufactory were sold and assigned to a purchaser. The question in every such case must be, whether the purchaser, in continuing the use of the original trademark 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 trademark. In such a case there is nothing to make it improper for the purchaser to use the old trademark, as the mark would, in such a case, indicate only that the goods so marked were made at the manufactory which he had purchased. *Ibid.*

§ 133. *Semble*, per Lord KINGSDOWN.—A trader may mark his own manufacture either by his name or by using any symbol or emblem; and if such symbol or emblem comes by use to be recognized in trade as the mark of the goods of such trader, no other trader has a right to stamp it upon his goods of a similar description, and as the usage of trade does not confine the name of a firm to the original partners only, but extends it to subsequent partners and transferees, the use of the trademark by the new partners or successors of the original adopters is no fraud upon the public, but only a statement that the goods are the goods of the firm whose trademark they bear. If, however, the trademark contains statements materially affecting the value of the goods, such statements must be judged as if made in separate labels or advertisements; the test being whether they are material misstatements and calculated to deceive the public. *Ibid.*

§ 134. Where a trademark contained an emblem, with such a collection of words as amounted to an advertisement of the character and quality of the goods, and contained statements, which, though true as regarded the original adopter of the trademark, were calculated to deceive the public when used by his assignee, the assignee was held not to be entitled to protection in the use of such trademark. *Ibid.*

§ 135. A general assignment in insolvency held inoperative in regard to conveying a right to a trademark, where such trademark was not inventoried by the trustee or appraisers, and had never been claimed by creditors of the insolvent, or the trustee, nor disposed of in any manner under the assignment. 1865, *Supreme Court of Conn.*, Bradley *v.* Norton, 3 *Conn.* 157.

§ 136. Inasmuch as the court protects the owner of a trademark, he is entitled to authorize another, when he hands over his business to him, to place that mark on his goods. That is a right which being protected by the court of chancery, may be disposed of for value, may be bought and sold, and is, therefore, in that sense of the word, property. 1866, Wood, V. C., in Ainsworth *v.* Walmsley, *Law R.* 1 *Eq.* 518; S. C., 12 *Jurist, N. S.* 205; S. C., 14 *Weekly R.* 363; S. C., 14 *Law Times, N. S.* 220; S. C., 35 *Law Journal* (*N. S.*) *Ch.* 352.

§ 137. All who use trademarks, indicating that the articles were originally manufactured or owned by others, are practicing an imposition on the public. Every assignee and purchaser, who uses the trademark of the original proprietor, without indicating that he is the assignee or purchaser, is in this position; and thus an article which, by reason of the skill and integrity of the original proprietor, has justly acquired a reputation which insures the sale of the article at a large profit, is, by aid of the courts, permitted to be adulterated and sold, by some dishonest assignee of the trademark, as made by the original owner. Thus the public, which the courts are so zealous to protect against the frauds and impositions of one class, are handed over to the tender mercies of a more dangerous class, with the

license and exclusive indorsement of a court of equity; and the confiding public pay an extra price for a mixture of chalk, lime and lead, labeled "A. B. Pure White Lead" or for a mixture of Indian meal, turmeric and mustard, labeled "C. D. Pure Mustard." By what process the assignees and legal representatives of a manufacturer or trader are inoculated so as to have the skill and integrity of the original owners of the trademark assigned to them, is not disclosed. As there is no American case, so far as I am advised, which sanctions this doctrine, . . . and until it can be shown that skill and integrity can be transferred bodily from man to man, or descend, like goods and chattels, to personal representatives, I shall, most emphatically, repudiate the authority of cases not in harmony with equitable principles. . . . I do not deny that the right to use the trademark of the original proprietor passes with the good will, by operation of law, to the executor and to the assignee of a bankrupt, and that it may pass to an assignee by express agreement between the parties. But I insist that, in such cases, in order to receive the aid of a court of equity, the parties must add to the original trademark words indicating the authority for and right to use as executor, assignee or successor of the original proprietor, as the case may be. In other words, assignees of trademarks have no special privilege of sailing under false colors, and if they will persist in doing so, prudence would dictate that they give courts of equity a wide berth. 1866, WILSON, C. J., *Superior Ct. of Chicago*, Sherwood *v.* Andrews, 5 *Am. Law Reg.* (*N. S.*) 588.

§ 138. The purchaser of a trademark is not pre-

cluded from enjoining against its piracy by reason of his being only the assignee, nor by his use of it without designating himself as assignee. 1867, *Superior Ct. Penn.*, Fulton *v.* Sellers, 4 *Brews.* 42.

§ 139. A suit was instituted between B and H as to the proprietorship of a newspaper, in which it was ultimate y decided that they were entitled in equal moieties. During the progress of the suit B assigned his share in the newspaper and the right of publication and in the profits thereof to W. The assignment contained a recital of the proceedings in the suit, and a power of sale. Afterwards B mortgaged the same share to his partner H to secure sums due to H in respect to that share. W registered his assignment at Stationers' Hall under the provisions of the copyright act, and subsequently sold the mortgaged share to the plaintiff under his power of sale. Both W and the plaintiff permitted the newspaper to be carried on by B and H jointly. On a bill filed by the plaintiff for a declaration that he was entitled to a moiety of the newspaper, *Held*, first, that there is nothing analogous to copyright in the name of a newspaper, and therefore the registration of the assignment at Stationers' Hall was futile, but that the proprietor has a right to prevent any other person from adopting the name, and that this right is a chattel capable of assignment. Secondly, that as W and the plaintiff knew of the suit between B and H, and also permitted them to carry on the newspaper as partners, the plaintiff could only takes B's share, subject to the equities subsisting between the partners. The decree of STUART, V. C., varied. 1868, before the Lords Justices, Kelly *v.* Hutton, *L. R.* 3

Ch. 703; S. C., 19 *L. T. R.* (*N. S.*) 228; S. C., 16 *W. R.* 1182; S. C., *below*, 17 *L. T. R.* (*N. S.*) 592; and see S. C., 20 *L. T. R.* (*N. S.*) 201.

§ 140. There is a right of property in a trademark which is capable of being transferred to another by assignment. 1869, *N. Y. Common Pleas, S. T.*, Lockwood *v.* Bostwick, 2 *Daly*, 521.

§ 141. Where the wood-cuts of a trademark are sold, such transfer does not carry the property in the trademark itself, unless the circumstances indicate that such was the intention. 1869, *N. Y. Com. Pleas, S. T.*, Lockwood *v.* Bostwick, *ibid.*

§ 142. In substance there is no distinction between the sale of a business and good will by a trader himself, and a sale by his assignees in bankruptcy. Therefore, on a sale of a business by a trader's assignees in bankruptcy, the trader has no right, upon setting up a fresh business after his discharge, to use the trademarks of his old business, or in any other way to represent himself as carrying on the identical business which was sold, although he has a right to set up again in business of the same kind next door to his old place of business. In such a case, it is no objection to the purchaser coming for the assistance of a court of chancery, that he has continued to use the name of the old business which he found there. 1869, *Vice Ch.* JAMES, Hudson *v.* Osborne, 39 *Law J.* (*N. S.*) *Ch.* 79; S. C., 21 *Law T. R.* (*N. S.*) 386.

§ 143. The property in a trademark will pass by assignment, or by operation of law, to any one who takes at the same time the right to manufacture or sell the particular merchandise to which said trademark has been attached; there is no property in it as a mere abstract right. 1870, *Ct. of Com. Pleas*,

Phil. Pa., Dixon Crucible Co. *v.* Guggenheim, 2 *Brewster*, 321; S. C., 7 *Phila.* 408.

§ 144. The plaintiff and the defendant, Reuben P. Hall, were in partnership, under the name of R. P. Hall & Co., in the business of making and selling a preparation called "Hall's Vegetable Sicilian Hair Renewer." Defendant sold to the plaintiff all his interest in the firm, in the secret of said preparation, the right to make and vend the same, and the exclusive right to use his name therefor in the future sales thereof, and he also covenanted not to use or allow his name to be used in the preparation of any similar articles, or to engage in the manufacture thereof, and that he would allow the plaintiff the exclusive use of his name in the manufacture and sale of said preparation. *Held*, that defendant would be enjoined from making or selling any preparation as and for those of the plaintiff, and from using the name of Hall, or R. P. Hall, or Reuben P. Hall, either singly or in connection with others, but that defendant would not be enjoined from making preparations for the hair, provided he did not use the name of Hall therefor. 1870, *Ct. of Common Pleas, Philadelphia, Pa.*, Gillis *v.* Hall, 2 *Brewster*, 342 (*Penn.*).

§ 145. A trademark may be devised and adopted by the party himself, or he may acquire it by purchase from his predecessor. The mode by purchase is as effectual as any other, and courts will go as far to protect such trademark as if the party devised and adopted it. A party purchasing part of a trademark, and adopting the balance, will be protected in his title to the former, as well as the latter. 1871, *Indianopolis Superior Ct., S. T.*, Sohl *v.* Geisendorf, 1 *Wilson*, 60 (*Ind.*).

§ 146. Where a business is sold, the entire good will and right to use the trademarks pass to the purchaser without any express mention of them being made in the deed of assignment, and the court will restrain any attempt on the part of the vendor to retain either for his own benefit or use. 1871, V. C. *Malin's Ct.*, Shipwright *v.* Clements, 19 *W. R.* 599.

§ 147. Where the plaintiffs are the purchasers of a mineral spring and all the interest of the original proprietors, who invented and used a trademark for the waters flowing from such spring, they are entitled to relief by injunction against sellers of mineral water attempting to appropriate such trademark, as descriptive of the waters sold by them. 1871, *N. Y. Ct. of App.*, Congress & Empire Spring Company *v.* High Rock Congress Spring Company, 45 *N. Y.* 291; S. C., 10 *Abb. Pr.* (*N. S.*) 348; reversing S. C., 57 *Barb.* 526.

§ 148. A property in a trademark may be obtained by transfer from him who has made the primary acquisition; though it is essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trademark has been attached. FOLGER J., *ibid.*

§ 149. Property in trademark may pass, by operation of law, to any one who at the same time takes the right either to manufacture or sell the merchandise to which the trademark has been attached. FOLGER, J., 1871, Congress & Empire Spring Company *v.* High Rock Congress Spring Company, *N. Y. Ct. of App.*, 45 *N. Y.* 291; S. C., 10 *Abb. Pr.* (*N. S.*) 348; reversing S. C., 57 *Barb.* 526.

§ 150. There is a wide distinction between a cov-

enant not to engage in trade and a covenant to restrain the use of a trademark. The former may be void, as being against the policy of the law, while the latter, not being obnoxious to any such objection, will be enforced. A name has for certain purposes a commercial value. If the proprietor estimates the value and sells it to another person, to the extent and for the purposes for which he sold it, he has no right to use it. 1871, *Ct. of Com. Pleas, Phil. Pa.*, Gillis *v.* Hall; Ayer *v.* Hall, 3 *Brews.* 509; S. C., 1 *Leg. Gaz. R.* 124; S. C., 8 *Phil.* 231.

§ 151. Property in trademarks may be assigned. 1872, *Ct. of Com. Pleas, Phila. Pa.*, Winsor *v.* Clyde, 9 *Phil.* 513. See § 30.

§ 152. The inventor of a sauce gave it the name of the Licensed Victualers' Relish, and designed a trademark for labels on the bottles containing it, and employed his son to sell it. He permitted his son to describe himself in his circulars and invoices as the sole proprietor of the sauce. The son became bankrupt, and his trustees sold his interest in the sauce and its trademark to the plaintiffs, who now sought to restrain the inventor from infringing the trademark. It appeared that the plaintiffs did not know the defendant's recipe, but made a sauce which their witnesses deposed to be indistinguishable from the defendant's. *Held*, that a trademark could not exist in gross, and that, as the plaintiffs did not know the recipe for the original article, they could not have a right to affix the trademark to a sham article for the purpose of imposing on the public. 1874, *Jessel, M. R.*, Cotton *v.* Gillard, 44 *L. J.* (*N. S.*) *Ch.* 90.

§ 153. The plaintiff had established, and acquired

a valuable reputation for a hotel in Chicago, under the name of "Wood's Hotel." He carried on business at said hotel for a number of years, and then sold his interest therein to one Cummings, agreed not to open another hotel during the remainder of the leased term, and also assigned the use of his name to said Cummings. The premises were burned during Cummings' management. After said burning, the defendant opened a hotel in Chicago, under the name of "Wood's Hotel," and announced it to be the reopening of "Wood's Hotel." In the meantime, Wood, the plaintiff, had purchased back from Cummings, the right to the use of the name "Wood's Hotel," and had opened another hotel under that name in a different place. Plaintiff filed a bill to enjoin defendant from using the name "Wood's Hotel." The defendant claimed that plaintiff acquired no title to said trademark from Cummings, as it was not assignable. *Held*, that the defendant should be enjoined—that said trademark was capable of assignment—or at least that it could be assigned for the purpose of being used on the premises where it had previously been used. That whatever value there was in said trademark was the plaintiff's property. 1875, *Circuit Ct., Cook Co., Ill.*, Woods *v.* Sands, unreported.

§ 154. *Query*,—If a trademark, the reputation of which depends on the excellence of the manufacture, or the skill and honesty of the manufacturers, can be legally assigned. 1876, *Supreme Ct.* of *R. I.*, Carmichael *v.* Latimer, unreported.

See PARTNERSHIP. Also §§ 87, 88, 92, 164.

ASSOCIATION.

See ORIGIN AND OWNERSHIP, and §§ 261, 694, 759, 713, 1010.

ATTACHMENT.

See CONTEMPT.

AUCTIONEER.

See VENDOR.

BANKRUPTCY.

See §§ 121, 135, 142, 152.

BARRELS.

Peculiar shape of, not a valid trademark.
See §§ 983, 985, 986.

BOOKS.

See PUBLICATIONS.

BOTTLES.

Peculiar shape of, not a valid trademark.
See § 985.

BOXING.

§ 159. **A selection of boxes, signs, colors, labels, the phraseology of cautions, and style of lettering, may all be designed to aid in the perpetration of a fraud, and may be the most conclusive evidence of the intent to mislead the public and to commit a fraud upon the plaintiff in relation to some device of his connected with a trademark; yet, merely because they are such evidence, or because they have been used with such intent, it does not follow that their use can be legally enjoined and restrained. The manner of boxing, the phraseology and other incidents are open to the public.** 1867, *N. Y. Supreme Ct., S. T.*, Gillott *v.* Esterbrook, 47 *Barb.* 455; 1868, *Supreme Ct. of Cal.*, Falkinburgh *v.* Lucy, 35 *Cal.* 52. See also § 19.

BUILDINGS (NAMES OF).

§ 160. **The principle upon which trademarks are protected is not confined to articles of personal property which a man may manufacture, but may be applied to a hotel. Hence where plaintiff opened a hotel in New York city, under the name**

of Irving House, which soon became generally and equally known as the Irving House and Irving Hotel, and was kept by him while thus designated, and the defendant subsequently setting up a hotel called Irving Hotel, in the same city, the latter was restrained from the use of that name by injunction. 1851, *N. Y. Superior Ct.*, Howard *v.* Henriques, 3 *Sandf. Superior Ct.* 725.

§ 161. The name established for a hotel is a trademark, in which the proprietor has a valuable interest, which a court of equity will protect by injunction. 1863, *Supreme Ct. of Cal.*, Woodward *v.* Lazar, 21 *Cal.* 448.

§ 162. A person may have a right, interest or property in a particular name, which he has given to a particular house, and for which house, under the name given to it, a reputation and good will may have been acquired; but a tenant, by giving a particular name to a building which he applies to some particular use, as a sign of the business done at that place, does not thereby make the name a fixture to the building and transfer it irrevocably to the landlord. Accordingly, where the plaintiff, the lessee of a lot of land, erected upon it a building, which he occupied as a hotel, and to which he gave the name of "What Cheer House," and before the expiration of the lease purchased an adjoining lot, upon which he erected a larger building, and for a time occupied both buildings as the "What Cheer House," the principal sign being removed from the first and placed upon the second building, and in November, 1860, surrendered the leased premises, with the buildings, to the owner of the land, but continued to carry on the "What Cheer House" in the adjoining building aforesaid,

and in January, 1861, the defendant purchased the first-mentioned lot and building, and opened there a hotel under the name of the "Original What Cheer House," the word "original" being in smaller letters than the residue of the title and disposed so as to deceive the public: *Held*, that the plaintiff was entitled to protection in the exclusive use of the name as proprietor of the new house. *Ibid.*

§ 163. Where the plaintiff had consented to the use of his name as a trademark by the defendant for a hotel, and the plate and other articles in the hotel, and had afterwards withdrawn such consent, and it appeared that the plate and other articles, marked with the name, would become valueless if their use was enjoined, and that no serious injury from such use would accrue to the plaintiff, it was *held* that only the use of the name, McCardel House, upon the building itself, as a business sign, would be prohibited. 1864, *N. Y. Supreme Ct., G. T.*, McCardel *v.* Peck, 28 *How. Pr.* 120.

§ 164. An agreement by the proprietor of a hotel with, and license to, another, permitting the latter to place the name of a hotel upon his coaches, such arrangement to continue so long only as the parties were mutually "satisfied," held to be a valid contract, and would continue until terminated by a notice from either party. Continuing the use of such name, by the licensee, after the license has ceased, or is terminated, may be restrained. The proprietor of a hotel, and his licensee, may each claim the protection of the court for any violation of his individual rights, and the pendency of a suit by such licensee, for the injury he has sustained, is no bar to an action by the hotel proprietor. 1866.

N. Y. Superior Ct., S. T., Deiz *v.* Lamb, 6 *Robt.* 537.

§ 165. In 1868 the plaintiff built a theater which he called "Booth's Theater." From February, 1869, to January 30, 1873, he managed said theater and obtained for it a great reputation under said name. Plaintiff re-leased said theater under the designation of "Booth's Theater" to J. B., on January 30, 1873, and on April 7, 1874, J. B. assigned said lease to defendants. Plaintiff had mortgaged the premises under said designation, and in the foreclosure suit of the mortgage the receiver in the suit had accepted defendants as tenants of the premises. Since April 7, 1874, defendants had carried on the theatrical business at said theater, designating the same as "Booth's Theater," but representing themselves as the lessees and managers. Plaintiff, claiming that by the use of the name "Booth's Theater" the public would be misled into believing that he was still its manager, and would be deceived into going there, supposing he still acted there, and that he would be injured thereby, brought an action to restrain the defendants from the use of the name "Booth's Theater," and applied for an injunction *pendente lite*. *Held*, that the motion should be denied. The plaintiff by his acts has affixed his name to the theater, so that his grantees and their successors have the right to call the building "Booth's Theater," the name which he had given it. The use of the name indicates nothing more than that the theater was built by the plaintiff. 1876, *N. Y. Com. Pleas, S. T.*, Booth *v.* Jarrett, 52 *How. Pr.* 169.

See also §§ 124, 125, 147, 149, 153, 511.

BUSINESS SIGNS.

Infringement and imitation of business signs. See SIGNS; BUILDINGS; PARTNERSHIP.

CAUSE OF ACTION.

§ 170. An action upon the case was brought in the Common Pleas by a clothier, that, whereas he had gained great reputation for his making of his cloath, by reason whereof he had great utterance to his great benefit and profit, and that he used to let his mark to his cloath whereby it should be known to be his cloath; and another clothier perceiving it used the same mark to his ill-made cloath on purpose to deceive him, and it was resolved that the action did well lie. 1590, case cited in Southern *v.* How, *Popham R.* 143. And Doderidge cited a case to be adjudged 33 Eliz., in the common bench: A clothier of Gloucestershire sold very good cloth, so that in London if they saw any cloth of his mark they would buy it without searching thereof; and another, who made ill-cloth, put his mark upon it without his privity; and an action upon the case was brought by him who bought the cloth, for this deceit, and adjudged maintainable. 2 *Cro. Jac.* 471. But see S. C., 2 *Rolle R.* 28, where Lord ROLLE expressly states that *Doderidge did not say* whether the action was brought by the clothier or by the vendee, but adds: *Semble que gist pur le vendee.* See S. C., commented upon in 4 *M. & G.* 386.

§ 171. The plaintiff, for a long time, had been

a manufacturer of steel pens, which were sold in boxes. The ones containing pens of the finest quality were labeled No. 303, and the boxes containing pens of an inferior quality were labeled No. 753. The complaint charged that the defendant was in the practice of removing the labels from the boxes last mentioned and putting on in place thereof labels numbered 303, closely imitating the genuine labels bearing that number. *Held*, that this practice of the defendant defrauded both the public and the plaintiff, and that, if the injured party was obliged to seek redress by action to recover damages, there would be no end to litigation, and certain and adequate relief would be unattainable. Defendant was enjoined. 1854, *N. Y. Superior Ct., G. T.*, Gillott *v.* Kettle, 3 *Duer*, 624.

§ 172. *Selling labels unattached to goods.*—A manufacturer who has adopted a trademark to designate some particular article as made by him, has a right to the assistance of the court to prevent any one from so using the same, or any similar mark, as to induce purchasers to believe, contrary to the fact, that they are buying that particular article to which the mark was originally applied. In a case, however, where the mark consisted of a label in a certain form, and it was shown that in very many instances labels, the same as or similar to it, might be sold for a legitimate purpose, the court, in the absence of any proof of actual fraud, refused to restrain the printing and sale of such labels until the manufacturer, who alleged that they were used for a fraudulent purpose, has established his case by an action at law. 1856, before the Lord Ch., on appeal, Farina *v.* Silverlock, 6 *De G. M. & G.*, 214; S. C., 2 *Jurist N. S.*, 1008; S. C., 26 *Law*

Jour. (*N. S.*) *Ch.* 11 ; reversing S. C., 1 *Kay & J.* 509 ; S. C., 24 *Law Jour.* (*N. S.*) *Ch.* 632 ; and see S. C., 1858, 4 *Kay & J.* 650

§ 173. Where a printer had been in the habit of printing and selling indiscriminately labels containing a copy or colorable imitation of the trademark of the plaintiff, the celebrated manufacturer of eau de cologne, and the plaintiff had filed his bill for an injunction to restrain such printing and selling, which was granted by WOOD, V. C., the Lord Chancellor dissolved the injunction, with liberty to the plaintiff to bring an action, on the ground that it appeared by the evidence that there was a legitimate object for which these labels might be applied by retail dealers, viz : to replace soiled labels affixed to bottles containing the genuine eau de cologne of the plaintiff. *Ibid.*

§ 174. The defendant sold soda water of his own manufacture in bottles which he had bought at second hand and which were stamped with the plaintiff's name and address. The defendant stated, in his affidavit, that it was the custom of the trade, on selling bottles of soda water, to take in return for the bottles sold an equal number of similar bottles, without regard to the name moulded therein, and that he believed the bottles mentioned in the plaintiff's affidavit as having been sold by him were bottles originally manufactured for the use of the plaintiffs and sold by them to the public. The preliminary injunction restraining the defendant was dissolved, the court being of opinion that defendant was not shown to have used the bottles, either with an intention or so as in fact to mislead the public. 1857, *Vice Ch. Wood's Ct.*, Welch *v.* Knott, 4 *Kay & Johns.* 747.

§ 175. But the user of such bottles so as in fact to mislead the public, although unintentionally, would be restrained. *Obiter*. *Ibid.*

§ 176. Whether or not the onus was thrown upon defendant of informing the public that it was not plaintiff's soda water he was selling. *Quaere*. *Ibid.*

§ 177. The bill was filed by an American trading company, incorporated by the law of the State of Connecticut, for an injunction to restrain the defendant, a manufacturer at Birmingham, from continuing the fraudulent use, as alleged, of the trademarks of the plaintiffs, and for an account of the profits made by him from such use. The defendant, by his answer, admitted the user of the trademarks complained of, but by way of rebuttal of the charge of fraud, stated that in so using the said trademarks he had only followed a custom prevalent at Birmingham for manufacturers of goods of the kind sold by the plaintiff, to affix on the goods ordered by merchants a particular trademark, relying on the respectability of the merchant, when known to them, for the fact that those merchants had authority to act as agents of, or by way of license from, the person entitled to the exclusive use of the trademarks; and further, that he had been informed that the plaintiffs themselves had ordered goods to be manufactured at Birmingham, with their own trademark upon them, for the purpose of sale in foreign countries. The court, upon motion for decree, ordered that an interim injunction, which the defendant had previously submitted to, should be continued for a year, with liberty to the plaintiffs to bring an action within that time to try their right at law; and in case of their not proceed-

ing at law and to trial within that time, then that their bill should thereupon stand dismissed with costs. 1859, Vice Ch. KINDERSLEY, Collins Co. *v.* Reeves, 28 *Law Jour. Ch.* 56.

§ 178. Without a patent from the government no one has an exclusive right to manufacture and sell pills as a useful invention. Therefore an injunction will not be granted to restrain an innocent defendant from manufacturing, advertising or selling by any name, designation or trademark resembling plaintiff's, pills precisely like those manufactured and sold by the plaintiff, or pills composed of the same elementary constituents. 1860, *N. Y. Supreme Ct., S. T.*, Comstock *v.* White, 18 *How. Pr.* 421.

§ 179. A having infringed B's trademark on a blistering ointment manufactured by A, it was agreed between them that all claims in respect of such invasion, not only with respect to A, but to include all parties who might have purchased the ointment from him, should be settled and discharged by the payment of a sum of money; and B undertook to execute a release of all claims and demands in respect of the above infringement. Before the agreement A had sold large quantities of the ointment to different persons, who, after the agreement, sold it with B's trademark; and suits were commenced against them by B, for injunctions. A thereupon sued B for a specific performance of the agreement to execute a release, and to restrain B from proceeding in the several suits. *Held*, that the agreement was confined to sales by A, and all other persons to whom he had sold the ointment, prior to the agreement; and did not authorize a sale by them after the agreement. Petition

denied. 1862, *Rolls Court*, Oldham *v.* Jones, 13 *Irish Ch.* 393.

§ 180. Spurious champagne, having a counterfeit brand, was deposited with wharfingers, who, having notice of the fraud and that an injunction was about to be applied for, refused to deliver it over to the holder of the dock warrants. The court, upon bill filed, restrained an action for damages for the non-delivery, commenced by the holder of the warrants against the wharfingers. 1864, *Rolls Ct.*, Hunt *v.* Maniere, 34 *Beavan*, 157; S. C., 11 *L. T. R.* (*N. S.*) 469.

§ 181. Where a defendant sold articles similar to, though not manufactured by, the plaintiff in boxes bearing the plaintiff's labels; the court, on motion for an injunction, restrained the defendant, from so selling or exposing for sale such articles. 1865, *V. Ch. Stuart's Ct.*, Barnett *v.* Leuchars, 13 *L. T. R.* (*N. S.*) 495.

§ 182. The danger of judicial proceedings is not an injury justifying an injunction. A person charged with an infringement of a trademark and against whom an action is threatened and about to be commenced, cannot maintain an action to restrain the commencement of such threatened action, and the fact that an injunction against him would be a serious injury to his business furnishes no justification therefor. It is no ground for equitable interference that the decision may result in determining the law in a way which will or may have the effect of preventing suits between other parties. 1874, *N. Y. Ct. of App.*, Wolfe *v.* Burke, 56 *N. Y.* 115; reversing S. C., 7 *Lans.* 151.

§ 183. The plaintiff was a gun maker, who manufactured rifles, purchasing some of the different

parts from various makers, and putting them together so as to form a complete rifle, which, after having been viewed and approved by him, was stamped with his name and trademark on the lockplate as a guarantee that it had been examined and approved by him. He also fitted to the rifles levers manufactured by himself, for which he had taken out a patent, and these levers were also marked with his name. The plaintiff's rifles so marked with his name had a great reputation. The plaintiff supplied rifles so marked and guaranteed by him to the government, and when they became unsuitable for government purposes they were taken to pieces and some of the parts mutilated and sold as old stores. The defendant bought some of these old stores as old iron in market overt, including levers and lockplates with the plaintiff's name and trademark upon them, and fitted them to old rifle barrels, which had been cut down to the size of carbine barrels, and were not suited to the action which formed part of the rifles, as passed and guaranteed by the plaintiff. At this time the plaintiff's patent for the lever had expired. The court granted an injunction to restrain the defendant from making up said lockplates and levers into firearms and allowing plaintiff's trademark to remain on the lockplates and levers so as to induce the public to believe that the firearms were manufactured by the plaintiff. 1874, *Vice Ch. Bacon's Ct.*, Richards *v.* Williamson, 30 *L. T.* (*N. S.*) 746; 22 *W. R.* 765.

§ 184. The plaintiff, a cigar merchant in London, registered a label at Stationers' Hall, which he requested G, the manufacturer at Havana who supplied him with cigars of a particular description,

to affix to each box consigned to him. G accordingly affixed the label, with his own name as manufacturer, to all boxes so consigned. The plaintiff subsequently discovered that G was supplying cigars of the same description, and with the same label, to the defendants, who were G's agents, and brought an action to restrain the alleged infringement of his trademark. On a motion for an injunction against the defendants, *held*, that, there being no evidence of any contract that G should supply the plaintiff exclusively with that description of cigars, the court could not on an interlocutory application restrain the defendants from using the label. 1876, *Jessel, M. R.*, Hirsch *v.* Jonas, 45 *L. J.* (*N. S.*) *Ch.* 364; S. C., *Eng. L. R.* 3 *Ch. Div.* 584.

See also §§ 821, 826.

CIRCULARS.

See PUBLICATIONS (ADVERTISEMENTS).

CITY—NAME OF.

When a valid trademark.

See NAME (GEOGRAPHICAL NAME).

COACHES.

Names of, when protected.

See VEHICLES.

COLORABLE INFRINGEMENT.

What constitutes a colorable infringement. See IMITATION.

COMMON USE.

See WORDS; ACQUIESCENCE.

CONTEMPT.

§ 190. Where an injunction is granted to restrain the use of a trademark, and the defendant disobeys, and the plaintiff moves for a commital, acquiescence, if set up as a defense against the motion to commit, must be shown to be such as to amount almost to a license to use the mark, and entitling the defendant himself to a right in the use of the mark. 1853, *Ch. Cl. of Appeal*, Rodgers *v.* Nowill, 22 *Law Journal R.* (*N. S.*) *Ch.* 404; reversing S. C., 17 *Jurist*, 109, and S. C., 17 *Eng. L. & Eq.* 83.

§ 191. When there had been a breach of the injunction, the Vice Chancellor (WOOD) refused to commit in respect of such breach on account of the plaintiff's delay in coming to the court, but ordered the defendant to pay the costs of the motion. July 12, 1861, Cartier *v.* May (unreported), *Reg. Lib.* 1861, *A.* 1738; cited in *Ludlow & Jenkyns on Trademarks*, 42; and see Rodgers *v.* Nowill, 8 *D. M. & G.* 614.

§ 192. The defendant had, by a series of ingenious substitutions, managed to evade the letter of

the injunction, while evidently breaking it in spirit, and the court accordingly was obliged to dismiss the motion to commit him. At the same time the terms of the injunction were so amended by the express and absolute prohibition of the use of certain words in the plaintiff's labels, as to afford him substantially the security which he desired and to which he was fairly entitled. July 12, 1861, before Vice Ch. WOOD, Cartier *v.* May, cited in *Lloyd on Trademarks*, 55, 77.

§ 193. In Cartier *v.* May (V. C. WOOD, July 12, 1861), where a perpetual injunction was obtained in the year 1859, for the breach or the alleged breach of which a motion for committal was afterwards made, but was refused, and his Honor observed, whe• a motion was made before him on the date above, to vary the terms of the injunction, "that since it had been granted there had been on the part of the defendants a series of ingenious devices to secure the misrepresentation without coming within the terms of the injunction;" so that in the end his Honor was obliged to make an order absolutely restraining the use of the words "Cross Cotton," which were used by the plaintiff on his labels. Cited in *Lloyd on Trademarks*, 42.

§ 194. Where an injunction order is definite and peremptory the defendant must obey it, or at once procure an alteration or dissolution of it. If he fails to do either, an attachment for contempt will issue against him. 1864, *N. Y. Supreme Ct. G. T.*, McCardel *v.* Peck, 28 *How. Pr.* 120.

§ 195. For the purpose of sustaining a motion to punish for a contempt in violating an injunction as to trademarks, it should appear clearly that the ordinary mass of customers, paying that attention

which such persons usually do in purchasing, would be easily deceived by the label used by the defendant. So held on a motion to punish the defendant for contempt, on the ground that he had violated an injunction against him *pendente lite* where he had changed his trademark after the injunction was served and continued his business with the new label, the plaintiff believing the use of the new label was an infringement on his mark. 1865, *N. Y. Superior Court, G. T.*, Swift *v.* Dey, 4 *Robertson*, 611.

See also § 611.

COPYRIGHT.

§ 200. The right to a trademark does not partake of the nature and character of a patent or copyright. 1846, *N. Y. Ct. of Errors*, SPENCER, Senator, Taylor *v.* Carpenter, 2 *Sandf. Ch.* 603; S. C., 11 *Paige*, 292. But see §§ 32, 132.

§ 201. In a suit founded on the copyright act, where both parties are residents in New York and the plaintiff fails to make out a title to sue under his copyright, the question whether the court will interfere to prevent the use of the title of the work in fraud of the plaintiff upon principles relating to the good will of trades, cannot be entertained, as the court has no jurisdiction of such a question. A copyright is given for the contents of a work, not for its mere title. There need be no novelty or originality in the title. The title or name is an appendage to the work, and if the latter fails to be

protected the title goes with it. 1850, *U. S. Circuit Ct., N. Y.*, Jollie *v.* Jaques, 1 *Blatch. C. C.* 618.

§ 202. The fact that a trademark label is copyrighted, but the date of entry is not given, as required by the act of Congress, is of no importance in a suit in a State court for damages for imitation of a trademark. 1872, *Supreme Ct. of La.*, Wolfe *v.* Barnett, 24 *La. Ann. R.* 97.

§ 203. If there is no piracy of a copyrighted publication there can be no remedy under the copyright act for the use of a title which could not be copyrighted independently of the book. *Obiter.* 1872, *U. S. Circuit Ct., Me.*, Osgood *v.* Allen, 1 *Holmes*, 185; S. C., 6 *Am. Law T. R.* (*N. S.*) 20.

COSTS.

§ 208. As a general rule the costs of the cause should follow the general result of the cause, but an exception will be made where a party has established his object by means of an unnecessary degree of litigation. Thus, the plaintiffs, having filed a bill to restrain the defendants from using certain trademarks and for an account of the profits made by the sale of goods so marked, obtained an *ex parte* injunction. On the same day the plaintiffs received a letter from the defendants' solicitor, in which the defendants stated, through their solicitor, that they had never used the marks since they were aware that they were private property; and that they did not intend to use them again; and they offered to compensate the plaintiffs for any injury they might have sustained. The plaintiffs,

however, prosecuted the cause to a hearing, and then, by their counsel, abandoned their title to the account, because it was so small as not to be worth taking. The Lord Chancellor, although he made the injunction perpetual, refused the plaintiffs the costs of the suit. 1838, Lord Ch. COTTENHAM, Millington *v.* Fox, 3 *Mylne & Cr.* 338.

§ 209. Where costs of an injunction suit for the violation of a trademark are increased by an allegation in the bill which is untrue. the court will direct such increased costs to be paid by the plaintiff, although he substantially establishes his case. 1846, Vice Ch. BRUCE, Pierce *v.* Franks, 10 *Jurist*, 25.

§ 210. Where the use of another's trademark originated in mistake and not in design, the party may be exempted from damages and costs. *Obiter*. 1849, *N. Y. Superior Ct., S. T.*, Amoskeag Manufacturing Co. *v.* Spear, 2 *Sandf. Sup. Ct.* 599. But see §§ 458, 463, 472, 478.

§ 211. An interim injunction having been granted to restrain the defendant from continuing the publication of a song, containing a colorable imitation of the title-page of the plaintiff's song, and the defendant, instead of submitting, insisted on his right to continue the publication of his song, and brought the matter to a hearing, when the injunction was continued. *Held*, that the defendant must pay the costs of the motion against him to continue the injunction, although it appeared that no application had been made to him by the plaintiff to discontinue his publication previously to the filing of the bill. 1855, *Vice Ch.* WOOD, Chappel *v.* Davidson, 2 *Kay & J.* 123; and see S. C., 8 *De G. M. & G.* 1.

§ 212. In cases where an injunction restraining the use of a trademark is dissolved because the mark is false and fraudulent, and the plaintiff for that reason not entitled to the protection of a court of equity against an infringement by the defendant, the order dissolving the injunction should be without costs, because the defendant certainly has no title to receive them. 1857, *N. Y. Superior Ct., S. T.*, Fetridge *v.* Wells, 4 *Abb. Pr.* 144; S. C., 13 *How. Pr.* 385.

§ 213. The defendant, insisting on an adverse right, after being made aware that the plaintiff had been defrauded through his agency, was ordered to pay the costs of all the proceedings, both at law and in equity. 1858, *V. C.* WOOD'S *Ct.*, Farina *v.* Silverlock, 4 *Kay & J.* 650.

§ 214. A suit was instituted to restrain the user of a trademark, and for an account. No application was made to the defendant before suit, and the defendant said he would have desisted if applied to. At the hearing the account was abandoned, but a perpetual injunction was granted. *Held*, that the defendant must pay the costs. 1858, *Rolls Ct.*, Burgess *v.* Hately, 26 *Beav.* 249.

§ 215. The defendant innocently used the plaintiff's trademarks, and, on being served with the bill, removed the labels, and gave an undertaking not to sell any more, but refused to pay the costs. The suit was continued to a hearing, and the account of profits, which were very trifling, was waived. *Held*, that the defendant must pay the whole costs of the suit. 1858, *Rolls Ct.*, Burgess *v.* Hill, 26 *Beav.* 244; S. C., 28 *L. J. R.* (*N. S.*) *Ch.* 356.

§ 216. Where an offer is made by the defendant

after bill filed to discontinue the use of the plaintiff's trademark, unless it be also accompanied by an offer to pay the costs and expenses up to the time of the offer, or to let the cause be argued only upon the question of costs, the defendant will not be relieved from the payment of the costs of the suit. 1864, *V. C. Wood's Court*, McAndrew *v.* Bassett, 10 *Jurist* (*N. S.*) 492; S. C., 10 *L. T. R.* (*N. S.*) 65; S. C., affirmed on appeal, 10 *Jurist*, (*N. S.*) 550; S. C., 33 *L. J.* (*N. S.*) *Ch.* 561; S. C., 12 *W. R.* 777; S. C., 10 *Law Times* (*N. S.*) 442.

§ 217. The right to an injunction ordinarily carries with it the right to costs; but if the plaintiff asks for the costs, and for something more than he is entitled to, he will lose the costs he might otherwise have received. 1864, *Master of the Rolls*, Moet *v.* Couston, 10 *Law Times* (*N. S.*) 395; S. C., 33 *Beav.* 578.

§ 218. The defendant, an infant, had advertised for sale and sold second-hand iron safes, which he represented as, and were marked as manufactured by the plaintiff. They were, however, spurious and inferior articles. The defendant submitted to an injunction. *Held*, that defendant should pay the costs of the suit. 1865, *Rolls Ct.*, Chubb *v.* Griffiths, 35 *Beav*, 127.

§ 219. B filed a bill against C to restrain an infringement of a trademark, and obtained an interim injunction; before the hearing of the cause C offered to enter into an undertaking to refrain from using the trademark and pay all costs, but declined to publish an apology (insisted upon by B) in the newspapers. The court, at the hearing, while decreeing a perpetual injunction, ordered (in consequence of B's refusing C's offer) each party to

pay his own costs. 1866, *Vice Ch. Stuart's Ct.*, Hudson *v.* Bennett, 14 *Law Times R.* (*N. S.*) 698.

§ 220. If a trader imitates another person's label or trademark, and sails so near the wind as just to avoid an injunction, though the court does not grant the injunction, it will not willingly give him any costs of the proceedings. 1869, *Rolls Court*, Bass *v.* Dawber, 19 *L. T. R.* (*N. S.*) 626.

§ 221. The defendants with perfect *bona fides* had adopted a trademark bearing a general resemblance to the plaintiff's, but differing from it in several particulars so that nobody could be deceived who looked at them attentively. Before and after suit, defendants offered to alter their trademark, so as to make it distinct from the plaintiffs. The offer before suit was not accepted. The court was of opinion that the offer should be adhered to, and dismissed the bill with costs to the defendants. *Ibid.*

§ 222. A defendant whom the court held, on the chief point in issue, to have been guilty of a fraudulent misrepresentation, was, though successful on another point, ordered to pay the whole costs. 1869, *Vice Ch. James' Ct.*, Wheeler & Wilson Manufacturing Company *v.* Shakespear, 39 *L. J. R.* (*N. S.*) *Ch.* 36.

§ 223. A trademark has not, of itself, as distinct from the value of the article of which it is the trademark, any money value which can constitute a money basis on which to compute an extra allowance. 1871, *N. Y. Superior Ct. G. T.*, Coates *v.* Goddard, 34 *N. Y. Superior Ct.* (2 *J. & S.*) 118.

§ 224. Bill by the plaintiff, a merchant, to restrain the defendant, an agent, (who received goods from the continent, and forwarded them to parties in

England for a commission,) from forwarding goods, bearing a forged imitation of the plaintiff's trade-mark. On a first application, the defendant readily gave the names of the persons from whom and to whom the goods were sent, but declined to give an undertaking not to take them out of the dock. *Held*, that under the circumstances the defendant should neither pay nor receive costs. *Semble*, if he had refused to give his principal's name, he would have had to pay costs, and if he had undertaken without suit in the terms prayed, he would have been entitled to his costs. A person to whom the goods were sent, and who was innocent of fraud, was made a party. *Held*, that he was entitled to his costs. The persons by whom the goods were sent were in communication with their agents during the proceedings, and having no property within the jurisdiction, except the goods, were not made parties to the suit. *Held*, that the plaintiff's costs should be charged on the goods, with liberty for the owners to intervene. 1871, *Rolls Ct.*, Allones *v.* Elkan, and Upmann *v.* Elkan, 40 *L. J. R.* (*N. S.*) *Ch.* 475; S. C., *L. R.* 12 *Eq.* 140; S. C., 19 *W. R.* 867; S. C., affirmed, 41 *L. J. R.* (*N. S.*) *Ch.* 246; S. C., *L. R.* 7 *Ch.* 130; S. C., 20 *W. R.* 131; S. C., 25 *L. T. R.* (*N. S.*) 813.

§ 225. The court will give no costs on either side in a case where both plaintiff and defendant are engaged in the manufacture of an article intended to be used to deceive and mislead the public. 1875, *Ch. Ct. of Appeal*, Eastcourt *v.* Estcourt Hop Essence Company (limited), 44 *L. J. R.* (*N. S.*) *Ch.* 223; S. C., *L. R.* (10 *Ch.*) 276; S. C., 32 *L. T. R.* (*N. S.*) 80; S. C., 23 *W. R.* 313; reversing S. C., 31 *L. T. R.* (*N. S.*) 567.

§ 226. Costs refused where plaintiff had delayed commencing suit. 1876, *N. Y. Supreme Ct., Special Term*, Amoskeag Company *v.* Garner, 4 *American Law Times R.* (*N. S.*) 176.

CRIMES.

§ 230. An indictment for false pretenses will be sustained by evidence, that the prisoner had sold to the prosecutor blacking, which he had asserted to be Everett's Premier, and which bore a label nearly, but not precisely, imitating Everett's labels, the said blacking not being Everett's Premier, but a spurious manufacture of his own. 1853, *York Assizes*, Reg. *v.* Dundas, 6 *Cox Crim. Cases*, 380.

§ 231. *Semble*, that if a man in the course of his trade or business, openly carried on, puts a false mark or token upon a spurious article so as to pass it off as a genuine one, and the article is sold and money obtained by means of the false mark or token, he is guilty of a cheat at common law. 1858, *Ct. of Crim. Appeal*, Reg. *v.* Closs, *Dearsley & B.* 460.

§ 232. One B was in the habit of selling baking powders, contained in printed wrappers, entitled "B's Baking Powder," and having his printed signature at the end. The prisoner got printed a quantity of wrappers in imitation of those of B, only leaving out B's signature, and sold spurious powders, done up in said wrappers, as B's powders. *Held*, that the prisoner was not guilty of forging the wrappers or uttering forged wrappers, though he might be indictable for the fraud on a charge of

obtaining money by false pretenses. 1858, *Court of Crim. Appeal*, Reg. *v.* Smith, *Dearsley & B.* 566; S. C., 27 *Law Journal Mag. C.* 225.

See § 962.

DAMAGES.

§ 235. The owner of a trademark is entitled to nominal damages for the violation of his trademark, although it is not shown that he has sustained actual damage, and although the defendant's articles are not inferior in quality to his own. 1833, *Ct. of King's Bench*, Blofield *v.* Payne, 1 *Nev. & Man.* 353; S. C., 4 *Barn. & Ad.* 410; S. C., 3 *L. J. R.* (*N. S.*) 68.

§ 236. Vindictive damages are not to be allowed in an action for the violation of a trademark. 1846, *U. S. Circuit Ct., Mass.*, Taylor *v.* Carpenter, 2 *Woodb. & M.* 1.

§ 237. The proper measure of damages is the profits realized upon the sales of goods to which the spurious marks were attached; and it is of no consequence that such goods were equal in quality to the genuine. 1846, Taylor *v.* Carpenter, *ibid.*

§ 238. Where the use of another's trademark originated in mistake and not in design, the party may be exempted from damages and costs. *Obiter.* 1849, *N. Y. Superior Ct. S. T.*, Amoskeag Manufacturing Company *v.* Spear, 2 *Sand. Superior Ct.* 599. But see §§ 452, 459, 462, 464, 472, 474, 478, 830, 1003.

§ 239. In an action on the case brought against the defendant for holding himself out, by using the name "Revere House" on his coaches, as having

the patronage of that house, for the conveyance of passengers, when the plaintiffs, by agreement with the lessee of the Revere House, had that exclusive right. *Held*, that if the jury found for the plaintiffs, they would be entitled to such damages as the jury, upon the whole evidence, should be satisfied they had sustained; that the damage would not be confined to the loss of such passengers as the plaintiffs could prove had actually been diverted from their coaches to those of the defendants, but that the jury would be justified in making such inferences as to the loss of passengers and injury sustained by the plaintiffs, as they might think were warranted by the whole evidence in the case. 1851, *Supreme Judicial Ct. of Mass.*, Marsh *v.* Billings, 7 *Cush.* 322.

§ 240. In an action to restrain the violation of a trademark, as to the issue on the question of damages, a party is not privileged from answering a question which will reveal the materials with which his compound, which he sought to protect by the trademark, was prepared. 1860, *N. Y. Superior Ct. G. T.*, Burnett *v.* Phalon, 11 *Abb. Pr.* 157; S. C., 19 *How. Pr.*, 530.

§ 241. The expenses of obtaining an injunction cannot be embraced within the range of damages for the infringement of a trademark. 1861, *N. Y. Superior Ct. G. T.*, Burnett *v.* Phalon, 21 *How. Pr.* 100; S. C., 12 *Abb. Pr.* 186.

§ 242. An exception to the exclusion of an offer to prove a loss of damages by reason of the defendant's infringement of a trademark, coupled with the condition that the witness (party plaintiff) would not disclose the ingredients of the manufactured article containing the trademark, cannot be sus-

tained, where the court have previously decided that if the plaintiff claimed damages by reason of a loss of profits, he must, if required, state the ingredients of his compound, although he was not compelled to do so. 1861, Burnett *v.* Phalon, *ibid.*

§ 243. Where a defendant is ordered to account for the profits made by him through a wrongful use of the plaintiff's trademark, he cannot be charged with bad debts as profits; but on the other hand, he cannot charge the plaintiff with the costs of manufacturing the goods in respect of which the bad debts were incurred. 1864, *Vice Ch. Wood's Ct.*, Edelsten *v.* Edelsten, 10 *L. T. R.* (*N. S.*) 780.

§ 244. The bill in the cause had been filed to restrain the infringement of the plaintiffs' trademark, and a decree had been obtained for an injunction. A decree for an account of profits had been offered by the court and refused by the plaintiffs, who elected to take, in lieu thereof, an inquiry as to damages arising from the use by the defendants of their trademark. On such inquiry, the plaintiffs did not prove direct damage, and could not show to what extent their trademark had been used, but claimed damages equal to all the profits made by the defendants on all their sales of cloth. *Held*, that they were not so entitled, and had not given sufficient proof of any damage sustained by them. That on such an inquiry, the onus lies on the plaintiffs of proving some special damage by loss of custom or otherwise, and it will not be intended, in the absence of evidence, that the amount of goods sold by the defendant under the fraudulent trademark, would have been sold by the plaintiffs, but for the defendant's unlawful use of the

plaintiffs' mark. 1865, *Vice Ch. Wood's Ct.*, Leather Cloth Company (limited) *v.* Hirschfield, 13 *L. T. R.* (*N. S.*) 427; S. C., *L. R.* 1 *Eq.* 299.

§ 245. An account of profits refused on the ground of delay by the plaintiffs in commencing the suit. 1865, *Vice Ch. Wood's Ct.*, Harrison *v.* Taylor, 11 *Jurist* (*N. S.*) 408; S. C., 12 *Law Times* (*N. S.*) 339. Approved and followed; see § 251, *infra*.

§ 246. In an action to recover damages for a violation of plaintiff's trademark, the profit actually realized by defendants from the sales of the spurious article under the simulated trademark, is a proper measure of damages, but the recovery of the plaintiff is not limited to the amount of such profits. 1871, *Supreme Ct. of California*, Graham *v.* Plate, 40 *Cal.* 593.

§ 247. Bill in equity for an injunction and relief for infringement of a trademark. The proof showed that the plaintiff had an established trade in the city where the articles with simulated labels were made and sold by the defendants, and that their sales had fell off in that place, in an amount at least equal to sales made by the defendants of their articles. *Held*, that the plaintiff might recover as damages the profits he would have made on the number of bottles which the defendants actually sold of their own manufacture, the court being satisfied that the plaintiff's sales had been reduced to that extent by the infringement. 1871, *U. S. Circuit Ct. Nebraska*, Hostetter *v.* Vowinkle, 1 *Dillon*, 329.

§ 248. Damages ought not to be recovered against a defendant, who, in ignorance of the plaintiff's rights and claims, has used a trademark

belonging to the plaintiff. 1872, *N. Y. Supreme Ct. Circuit*, Weed *v.* Peterson, 12 *Abb. Pr. N. S.* 178.

§ 249. On an assessment of damages, by reason of an infringement of a trademark, the referee found that plaintiffs damages were equal to the profits they could have made from the manufacture and sale of the same number of articles which defendant had sold with the simulated trademark thereon. *Held*, on appeal, that there was no error in said assessment. 1875, *N. Y. Supreme Ct. G. T., First Dept., Dec.* 30, Faber *v.* Hovey, *unreported.*

§ 250. Where, in an action for violating a covenant not to manufacture a certain article, plaintiff merely charges that defendant has diverted plaintiff's patronage to himself, and thereby injured or destroyed the good will of plaintiff's business, without alleging any claim to the profits made by defendant on articles, the exclusive right to manufacture which belonged to plaintiff, or to the profits derived from the use of a trademark, the exclusive right to which was in plaintiff, his measure of damages is not what defendant has gained but what he has lost by the breach, whether defendant's profits have been greater or less than that amount. And in ascertaining plaintiff's losses, defendant's profits may be given in evidence in connection with the diversion of customers from plaintiff to defendant, and the amount of plaintiff's purchases and manufactures and sales, and any reduction in the price of articles sold in consequence of the unlawful competition. 1876, *Supreme Ct. of Missouri*, Peltz *v.* Eichele, 62 *Mo.* 171.

§ 251. Damages, account of profits, and costs refused, where plaintiff had delayed commencing suit. 1876, *N. Y. Supreme Ct., S. T.*, The Amos-

keag Manufacturing Company *v.* Garner, 4 *Am. Law Times R.* (*N. S.*) 176.

See also DISCOVERY.

DECEPTION.

See EVIDENCE; INTENT; and IMITATION.

For cases of deception on the part of the plaintiff, see MISREPRESENTATION.

When evidence of actual deception of purchasers will be required in order to sustain plaintiff's right of action, see §§ 286, 289, 296, 297, 340, 343, 346, 349, 360, 368, 369, 377, 381, 389, 391, 395, 399, 400, 401, 447, 455, 494, 586, 850, 906.

DEFENSES.

I.—Misrepresentation on the part of the plaintiff.

See MISREPRESENTATION.

II.—Laches, license, acquiesence, limitation.

See those titles.

III.—Prior use.

See PRIOR USE.

IV.—Words in common use, generic terms, descriptive names, geographical names, etc., cannot

be protected and their use will not be enjoined, except in certain cases.

See WORDS; NAME.

V.—What are not good defenses.

§ 252. Neither alienage of the person whose trademarks are simulated, nor the fact that he resides abroad, constitute a defense.

See ALIENS.

§ 253. To an action for the infringement of a trademark it is wholly immaterial whether the simulated article is or is not of equal goodness and value with the genuine article.

See QUALITY.

§ 254. It is no excuse or defense that others have used the plaintiff's trademarks; this rather aggravates than excuses the misconduct. Taylor *v.* Carpenter, 3 *Story*, 458; Coats *v.* Holbrook, 2 *Sandf. Ch.* 586; and see ACQUIESENCE.

§ 255. It is no answer that the maker of the spurious goods, or the jobber who sells them to the retailers, informs those who purchase that the article is spurious or an imitation. 1845, Vice Ch. SANDFORD, *N. Y.*, Coats *v.* Holbrook, 2 *Sandf. Ch.* 586; S. C., 3 *N. Y. Leg. Obs.* 404; and see § 360.

§ 256. *Held:* That a defendant could not escape his liability for the infringement of a trademark by cautioning his shopmen to explain to purchasers that his article was not the same as the plaintiff's, because he could not secure that retail dealers purchasing from him would give the same information to their customers. 1855, *Vice Ch. Wood's Ct.*, Chappell *v.* Davidson, 2 *Kay & J.* 123; S. C., *Chancery Ct. of App.*, 8 *De G. M. & G.* 1.

§ 257. As to whether want of an intent to deceive or defraud constitutes a defense, see INTENT.

§ 258. It is no defense that the defendants have not used all the plaintiffs' labels; it is sufficient if there has been a violation of the plaintiffs' rights by the defendant in imitating and using any of the labels with a view to deceive the public. 1844, *Circuit Ct. U. S., Mass. Dist.*, Taylor *v.* Carpenter, 3 *Story*, 458.

See IMITATION; EXCLUSIVE USE; NAME; PUBLICATIONS; INJUNCTION; PARTNERSHIP; etc.

DEFINITIONS.

See GENERAL PRINCIPLES AND DEFINITIONS, §§ 1–37.

DELAY.

When ground for refusing an injunction. See LIMITATION; LACHES; ACQUIESCENCE.

DEMURRER.

See PLEADING.

DESCRIPTIVE NAME.

See WORDS; NAME (DESCRIPTIVE NAME).

DEVICES.

§ 260. The plaintiff had been in the habit of using a lion stamp upon certain cloths of their manufacture, made for the Chinese market, upon others an elephant stamp. These goods were well known in the trade as "the lion chop," and "the elephant chop." It was held that such marks were marks of quality, and that there was such a colorable imitation as to injure the plaintiff's trade by the greater cheapness of the inferior article, as well as by loss of the character of the plaintiff's goods in the market. The injunction granted was not to restrain altogether the use of such marks as the lion or elephant, by any other parties than the plaintiffs, but to restrain the use of them in any manner which might represent the goods so marked to be the plaintiffs. Henderson *v.* Jorp (V. C. Wood, June 22, 1861), cited in *Lloyd on Trademarks*, p. 54.

§ 261. The illustration of a crown, applied as a brand, by stencil plate or die, to cases, casks or vessels, containing paints, or printed on labels or wrappers applied to such vessels, or on business cards, notices or placards, advertising such paints, may be a lawful trademark, for, when used in connection with paints, it may designate, by association in the minds of purchasers of, and dealers in such article, the origin or ownership of such article as being in a particular manufacturer. 1872, *U. S. Circuit Ct. N. Y.*, Smith *v.* Reynolds, 10 *Blatch. C. C.* 100.

§ 262. Plaintiff and defendant were refiners of lard, and packed the same for market in tin vessels.

Plaintiff's device was stamped in the metal in a circular form, and contained the figure of a pig or hog, and the word "trademark," adjoining it, also his name and the name of the article, viz., "prime leaf lard." Defendant's device was stamped in the metal, in a circular form, and contained the figure of a boar surmounting a hemisphere, and the word "trademark," adjoining the same, also his name and the words "prime leaf lard." Plaintiff claimed his device to his exclusive use as a trademark to be placed on packages of refined lard made by him, and sought to enjoin the defendant in the use of his device. It appearing from the evidence:—1. That, although the plaintiff claimed to have used his design for fifteen years, yet, on the witness stand, he could not tell who invented the device for use, on either crude or refined lard. 2. That, since 1845, the figure of a pig or swine had been extensively used on packages of natural or crude lard, by many persons; and, since 1856, on packages of refined lard packed in wooden vessels; and that, from 1860 to 1868, one Brewster, a refiner, used the said device on tin boxes, although not stamped into the metal of the packages; and, for a long time past, *tin packages* had been used by the trade, for packing and shipping refined lard. *Held*, that these facts establish in the plaintiff no exclusive right to the use of the figure or device of a pig or swine, on tin packages of crude or refined lard. There is nothing, either in the device itself, or in the combination in which it is, or has been used by the plaintiff, which gives him any exclusive right to the same. 1874, *N. Y. Superior Ct. G. T.*, Popham *v.* Wilcox, 38 *N. Y. Superior Ct.* 274; and see S. C. *at S. T.*, 14 *Abb. Pr.* (*N. S.*) 206.

§ 263. A device representing an orb rising from the water, protected. See § 698.

§ 264. Where the plaintiff had first adopted and appropriated the device representing rays of light, or sun's rays, as a trademark for cigarettes, he was protected by injunction in its exclusive use. 1877, *N. Y. Supreme Ct., S. T.*, Kinney *v.* Basch, unreported.

See also IMITATION, § 325 to § 409, and §§ 327, 359, 372, 376, 382, 428, 694, 986, 1035.

DISCOVERY.

§ 270. The plaintiff complained that the defendant had sold, under the plaintiff's name, sewing machines which had not been manufactured by him, and he sought a discovery of all the machines sold by the defendant, the price, the profit, the names of the purchasers, and other particulars. The defendant refused to answer, saying that he would thereby disclose the names of his customers and the secrets of his trade. *Held*, that he was bound to answer. 1862, *Rolls Ct.*, Howe *v.* McKernan, 30 *Beav.* 547.

§ 271. Where a decree has been made directing the defendant to account for all goods sold by him with a particular stamp thereon, he is compellable to disclose the names of all persons to whom he has sold any such goods; and if he be unable to give such information precisely, he may then (but not otherwise) be required to disclose the names of all persons to whom he has sold any goods which he will not swear positively were unstamped. 1863,

V. C. Wood's Ct., Leather Cloth Company (limited) *v.* Hirschfeld, 1 *H. & M.* 295; S. C., 11 *W. R.* 933.

§ 272. Although, in considering whether the rule that a defendant who submits to give discovery must give full discovery, is to be applied, the court does not, in general, weigh nicely the materiality of the discovery sought; still, if the discovery is such as might be used for purposes prejudicial to the defendant irrespective of the suit, the court will look narrowly to the question, whether there is a reasonable prospect of its being of material service to the plaintiff at the hearing. 1871, *Ct. of App. in Chan.*, Carver *v.* Pinto Leite, 20 *Weekly R.* 134; S. C., 41 *Law Jour.* (*N. S.*) *Ch.* 92; S. C., *L. R.* 7 *Ch.* 90; S. C., 25 *L. T. R.* (*N. S.*) 722.

§ 273. The defendants, in a suit to restrain the infringement of trademarks, having sealed up certain parts of entries and letters admitted to relate to the matters in question in the cause, were ordered by the Duchy Court of Lancaster to unseal the names of customers, and of places, and the prices, forming parts of such entries, and to unseal the portions of letters and copies of letters which contained the names of the writers and of the persons to whom the letters which were copied were sent, and the places to and from which the letters were sent, and the description of the marks to be placed, or which had been placed, on the goods referred to in such letters. *Held*, on appeal, that the defendants ought not to be compelled to disclose the names of customers, or the names of persons to or from whom letters were sent or received, or any prices inasmuch as such discovery might be used in

a manner prejudicial to the defendants in their trade, and was not likely to assist the plaintiffs in making out their case at the hearing; but that the order of the Vice Chancellor was, in other respects, right. *Ibid.*

§ 274. Plaintiffs, by their bill, alleged that goods bearing counterfeit trademarks, similar to their own trademarks, were being sold in large quantities in V. and elsewhere. They also alleged that the defendants, who were shippers at L., had shipped large quantities of these goods to V. They wrote to the defendants, asking for the names and addresses of the persons who had shipped the goods. On receiving no answer they commenced an action for discovery. *Held*, overruling the demurrer, that the defendants must answer interrogatories within one month. 1876, *Vice Ch. Hall's Ct.*, Orr *v.* Diaper, 46 *L. J.* (*N. S.*) *Ch.* 41.

See also, § 224.

EMBLEM.

See DEVICES, §§ 260–269.

EQUALITY.

Equality of goods upon which simulated mark is placed not a good defense. See QUALITY, § 912, *et seq.*

EVIDENCE.

§ 280. Where the declaration in case, for the violation of a trademark, stated that defendants sold goods, marked with the same name as the plaintiff's, as and for goods manufactured by the plaintiff; and it appeared in evidence that the persons who bought the goods of the defendants knew by whom they were manufactured, but that the defendants used the plaintiff's mark and sold the goods so marked in order that his customers might, and in fact they did, re-sell them as and for goods manufactured by the plaintiff. *Held*, that this evidence supported the declaration. 1824, *Ct. of King's Bench*, Sykes *v.* Sykes, 3 *Barn. & C.* 541; S. C., 5 *Doucl. & Ryl.* 292.

§ 281. In an action on the case for the violation of a trademark it was proved that the plaintiff had informed the defendants that he considered the mark used by them to be an imitation of his own, and required them to desist from using it. The defendants, in their reply, denied that their mark either was or was intended to be an imitation of the plaintiff's, and they continued to use it. *Held*, that this was proper evidence for the jury as to the intention of the defendants in persisting to use the mark, but that it made no difference in point of law in their right to use it. 1842, *Ct. of Com. Pleas*, Crawshay *v.* Thompson, 4 *M. & Y.* 357; S. C., 11 *L. J. R. C. P.* 301.

§ 282. A custom in Europe to violate trademarks is a bad one, and cannot affect the law as it exists in the United States. 1846, *U. S. Circuit Ct. Mass.*, Taylor *v.* Carpenter, 2 *Woodb. & M.* 1.

§ 283. The moment the straightforward and simple mode of indicating ownership by the owner's name is abandoned, the burden is thrown upon the complaining party of showing that the designation used does not mean something relating to the quality of the article or some other attribute. 1860, *N. Y. Superior Ct. G. T.*, Corwin *v.* Daly, 7 *Bosw.* 222.

§ 284. In an action for an account and payment of profits, and for damages on the ground that the defendant had been unlawfully copying and using the plaintiff's trademark or label on bottled porter, the defendant, on being called as a witness, refused to answer the following questions, upon the ground that his answers would tend to convict him of a criminal offense, under the act of April 1, 1850 (*Laws of N. Y.* 1850, 197), to wit: 1. Have you within the last six years, used labels like those set forth in the complaint, on American porter bottled by you? 2. Were there, on any of the bottles, labels like those of the plaintiff, as set forth in the complaint? 3. Have you sold porter, within the last six years, as and for an imitation of Byass London Porter? 4. Did you at any time during the three years ending May 1, 1857, put American porter in bottles and label them with labels like those attached to the complaint in this action? *Held*, that the defendant was privileged from answering the first, second and fourth questions, but was not privileged from answering the third question. *Held*, also, that the same rule of law which excuses a witness from answering questions which may tend to convict him of a crime or misdemeanor, excuses him from producing books or papers which may be used in evidence against him

tending to the same result. 1860, *N. Y. Supreme Ct. S. T.*, Byass *v.* Sullivan, 21 *How. Pr.* 50.

§ 285. Where certain correspondence passed between the parties with a view to a compromise anterior to the filing of the bill, by which terms were offered to the defendants, which, as was alleged them, rendered the suit unnecessary. *Held*, that in the absence of bad faith or anything amounting to a release or binding agreement with respect to the cause of action, the court could not regard such negotiations. 1863, *Before the Lord Ch.* on appeal, Edelsten *v.* Edelsten, 9 *Jurist* (*N. S.*) 479; S. C., 1 *De G. J. & S.* 185; S. C., 11 *Weekly R.* 328; S. C., 7 *Law Times* (*N. S.*) 768; S. C., 1 *N. R.* 309.

§ 286. Where the court is of opinion that the use of a particular mark is likely to deceive, it will not require evidence of actual deception. 1863, *Vice Ch. Wood*, Braham *v.* Bustard, 9 *Law Times* (*N. S.*) 199; S. C., 1 *Hem. & M.* 427; S. C., 11 *W. R.* 1061; S. C., 2 *New R.* 572.

§ 287. In trademark suits, in order to found the jurisdiction of the court of chancery, there must be established, first, the existence of the trademark; next, the fact of an imitation, whether a direct imitation, or one with such variations that the court must regard them as merely colorable; and thirdly, the fact that the imitations were made without license, or anything that the court could regard as aquiescence in their use. 1863, *Lord Ch. Brady*, Kinahan *v.* Bolton, 15 *Irish Ch.* 75.

§ 288. A plaintiff by his bill prayed an injunction to restrain the defendant from falsely representing that the latter was carrying on business in succession to or in connection with him; the bill averred

general acts of misrepresentation ; but one case only was made out in which the defendant had opened a letter addressed to the plaintiff, answered it in his own name and endeavored to obtain the custom which that letter offered to the plaintiff. *Held*, that though this raised a grave suspicion against the defendant, it was not sufficient in a suit framed as was this to entitle the plaintiff to an injunction, and the bill was therefore dismissed ; but, owing to the suspicious conduct of the defendant, without costs. 1864, *V. Ch. Wood's Court*, Edginton *v.* Edginton, 11 *Law Times R.* (*N. S.*) 199.

§ 289. Where there is evidence showing that in point of fact some persons have been actually misled, it is in vain for witnesses to say that in their opinion persons could not be misled. And it is not the question whether the public generally, or even a majority of the public, is likely to be misled ; but whether the unwary, the heedless, the incautious portion of the public would be likely to be misled ; and I think it may be safely said that that is not a very inconsiderable portion of the public. 1865, *V. Ch. Kindersley*, Glenny *v.* Smith, 2 *Dr. & Sm.* 476 ; S. C., 11 *Jurist* (*N. S.*) 964 ; S. C., 13 *L. T. R.* (*N. S.*) 11 ; S. C., 6 *New R.* 363.

§ 290. Where the imitation of the plaintiff's trademark is close, and the manner in which the defendant's article is put up nearly resembles the plaintiff's article and mark, th law must presume it to have been resorted to for the purpose of inducing the public to believe the article is that of the plaintiff's whose trademark is imitated, and for the purpose of supplanting him in the good will of his business. 1868, *N. Y. Com. Pleas, G. T.*, Curtis *v.* Bryan, 2 *Daly*, 312 ; S. C., 36 *How. Pr.* 33.

§ 291. Whenever a trademark is employed to designate a particular manufacture, whether the term used is a popular one, formed of words or symbols common to the world, or one expressly created for the purpose to which it is applied, and the manufacture acquires reputation and becomes valuable as an article of merchandise, an imitator thereof for a kindred or similar manufacture, is presumed to intend wrongfully, and the burden rests upon him to show that there is either no property in the term or symbol, arising from priority of use for the article to which it has been applied, or that the claim of priority is unfounded, or that no deceit or injury can result from the imitation. 1868, *N. Y. Ct. Com. Pleas, S. T.*, Messerole *v.* Tynbergh, 4 *Abb. Pr.* (*N. S.*) 410; S. C., 36 *How. Pr.* 14.

§ 292. Most of the defendants corporators were officers, stockholders and employes of the plaintiff corporation. One after another resigned his office or position, and sold out his stock, and secretly organized and put in operation a rival company, which bought the entire property of a similar corporation in a neighboring town, and located themselves permanently in the same town with the petitioners, established their depots for the sale of their goods in New York and Boston, as near as practicable to the depots of the petitioners, and assumed a name so nearly like that of the petitioners as to induce the belief that the two companies were the same. *Held*, that from these facts the intention of the defendants to benefit themselves at the expense of injuring the petitioners may be legitimately inferred. 1870, *Supreme Ct. of Errors of Conn.*, Holmes *v.* Holmes, Booth & Atwood Manuf. Co., 37 *Conn.* 278.

§ 293. Where a person seeks to establish a trademark, the proof must be clear, leaving the question beyond a reasonable doubt. 1870, *Supreme Ct. of Illinois*, Candee *v.* Deere, 54 *Ill.* 439.

§ 294. Where the plaintiffs had been in the exclusive use of a trademark since 1858, it was held that they were not obliged to show, as against wrong-doers, that they had a written assignment from one of their former partners. 1871, *U. S. Circuit Ct. Nebraska*, Hostetter *v.* Vowinkle, 1 *Dill.* 329.

§ 295. The certificate of the registration of a trademark, issued to the plaintiff from the United States patent office, under the act of Congress of July 8, 1870, is not conclusive evidence that the mark or device claimed as a trademark is, or can become a lawful trademark, or that the claimant was the first to appropriate and use it. 1871, *U. S. Circuit Ct. Cal.*, Moorman *v.* Hoge, 2 *Sawyer*, 78.

§ 296. There is nothing much more difficult than to decide upon the kind of evidence which is proper in trademark cases. The best evidence, of course, would be instances of actual deception. But if none such can be furnished, the opinions of witnesses, formed from a mere inspection of the genuine and the imitation, are of little weight. They may or may not be deceived, but they are wholly unable to do more than express an opinion as to the effect in the community, the force or correctness of which is not increased or strengthened by the peculiar business in which they are engaged. An expert can easily detect a counterfeit bank bill, but his opinion as to whether the public could detect it, is not entitled to any more weight than the opinion of any other person. 1872, *N. Y. Superior*

Ct. Special T., Cook *v.* Starkweather, 13 *Abb. Pr.* (*N. S.*) 392.

§ 297. Evidence of skilled witnesses, that in their opinion the public is likely to be deceived by the similarity of two trademarks, is not of itself sufficient evidence of infringement. 1874, *Vice Ch. Hall's Ct.*, Cope *v.* Evans, *L. R.* 18 *Eq.* 138; S. C., 30 *L. T. R.* (*N. S.*) 292; S. C., 22 *W. R.* 453.

See also §§ 432, 435, 447, 453, 456, 466, 471, 476, 482, 792.

EXCLUSIVE RIGHT.

§ 300. The right which any person may have to the protection of a court of equity, does not depend upon any exclusive right which he may be supposed to have to a particular name or form of words. His right is to be protected against fraud, and fraud may be practiced by means of a name, though the party practicing it may have a perfect right to use that name, provided he does not accompany its use with such other circumstances as to effect a fraud upon others. 1843, *Rolls Ct.*, Croft *v.* Day, 7 *Beav.* 84.

§ 301. The inventor of a medicine has no exclusive right of property in it. Any other individual has a right to make and sell the same medicine. An exclusive right, as the inventor, can only be obtained under the patent law by a compliance with its provisions. 1849, *U. S. Circuit Ct. Ind.*, Coffeen *v.* Brunton, 4 *McLean*, 516.

§ 302. The privilege of a party to the exclusive enjoyment of a trademark, does not rest upon the ground that the plaintiff has a right of property in

the trademark, but the relief of a court of equity is given because the mark is a sign or representation, importing and so understood and acted upon by the public, that the article to which it is attached is the manufacture or production which is generally known in market under that denomination. 1856, Walton *v.* Crowley, 3 *Bl. Circuit Ct. R.* 440 (*U. S. Circuit Ct., N. Y.*).

§ 303. The owner of goods, which he offers for sale in his own right, is entitled to proceed in his own name for the protection of any trademark devised and applied by him to the goods, to distinguish them as being of a particular manufacture, although he is not himself the manufacturer, and although he uses the name of the real manufacturer as part of the trademark. *Ibid.*

§ 304. Although there is no exclusive ownership of the symbols which constitute a trademark apart from the use or application of them, yet the exclusive right to use such mark in connection with a vendible commodity is rightly called property, and the jurisdiction of the court to restrain the infringement of a trademark is founded upon the invasion of such property, and not upon the fraud committed upon the public. The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trademark, as in the case of the violation of any other right 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 as to prejudice the plaintiff's custom, and injure him in his trade or business.

1863, Lord Chancellor WESTBURY, The Leather Cloth Company (limited) *v.* The American Leather Cloth Company (limited), 33 *Law J. R.* (*N. S.*) *Ch.* 199; S. C., 12 *W. R.* 289; S. C., 10 *Jurist* (*N. S.*) 81; S. C., 9 *L. T. R.* (*N. S.*) 558.

§ 305. It is true that in some cases are found *dicta* by eminent judges, that there is no property in a trademark, which must be understood to mean that there can be no right to the exclusive ownership of any symbols or marks universally in the abstract; thus an iron founder, who uses a particular mark for his manufacture in iron, could not restrain the use of the same mark when impressed upon cotton or woolen goods; for a trademark consists in the exclusive right to the use of some name or symbol as applied to a particular manufacture, and such exclusive right is property. Nor is it correct to say, that the right to relief is founded on the fraud of the defendant, for, as appears by Millington *v.* Fox, the plaintiff is entitled to relief even if the defendant can prove that he acted innocently, and without any knowledge of the rights of the plaintiff. Imposition on the public is indeed necessary for the plaintiff's title, but in this way only, that it is the test of the invasion by the defendant of the plaintiff's right of property; for there is no injury, if the mark used by the defendant is not such as may be mistaken, or is likely to be mistaken, by the public for the mark of the plaintiff. But the true ground of the jurisdiction of the court of chancery, is property, and the necessity for interfering to protect it by reason of the inadequacy of the legal remedy. 1863, Lord Chancellor WESTBURY, Hall *v.* Barrows, 12 *Weekly R.* 322; S. C., 9

Law Times N. S. 561; S. C., 33 *Law Jour.* (*N. S.*) *Ch.* 204; S. C., 10 *Jurist N. S.* 55.

§ 306. The court of chancery 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, the court has said that no one shall be at liberty to defraud that man by using that mark and passing off goods of his manufacture as being the goods of the owner of that mark. 1866, V. C. WOOD, in Ainsworth *v.* Walmsley, *Law R.* 1 *Eq.* 518; S. C., 12 *Jurist* (*N. S.*) 205; S. C., 14 *Weekly R.* 363; S. C., 14 *Law Times* (*N. S.*) 220; S. C., 35 *Law Jour.* (*N. S.*) *Chanc.* 352.

§ 307. A trademark to which a trader had originally an exclusive right, may in course of time become *publici juris*, and the exclusive right may be lost. The proper test of this having happened is, that the use of the trademark by other persons has ceased to deceive the public as to the maker of the article. 1872, *Ch. Ct. of Appeal*, Ford *v.* Foster, *Law R.*, 7 *Chancery App. Cas.* 611; S. C., 27 *L. T. R.* (*N. S.*) 219; S. C., 41 *Law Jour.* (*N. S.*) *Ch.* 682; S. C., 20 *Weekly R.* 318; reversing S. C., 20 *W. R.* 311.

§ 308. *It seems*, that it is not necessary that the claimant of a trademark, in an action for its infringe-

ment, should show an exclusive right to it. The right must be exclusive as against the defendant. The principle upon which relief is granted is that the defendant shall not be permitted, by the adoption of a trademark which is untrue and deceptive, to sell his own goods as those of the plaintiff, thus injuring the latter and defrauding the public. 1872, *N. Y. Commission of Appeals*, Newman *v.* Alvord, 51 *N. Y.* 189; affirming S. C., 49 *Barb.* 588; S. C., 35 *How. Pr.* 108.

§ 309. The rule that descriptive terms cannot be exclusively appropriated, has its exceptions, where the intention in the adoption of the descriptive word is not so much to indicate the place of manufacture as to intrench upon the previous use and popularity of another's trademark. 1873, *N. Y. Supreme Ct. G. T.*, Lea *v.* Wolf, 15 *Abb. Pr.* (*N. S.*) 1; S. C., 1 *Thompson and C.* 626; S. C., 46 *How. Pr.* 157; modifying S. C., 13 *Abb. Pr.* (*N.S.*) 389.

§ 310. The interference of courts of equity, instead of being founded upon the theory of protection to the owners of trademarks, is now supported mainly to prevent frauds upon the public. If the use of any words, numerals, or symbols, is adopted for the purpose of defrauding the public, the courts will interfere to protect the public from such fraudulent intent, even though the person asking the intervention of the court may not have the exclusive right to the use of those words, numerals, or symbols. This doctrine is fully supported by the latest English cases of Lee *v.* Haley, 5. *Ch. App. Cas. Law R.* 155, and Wotherspoon *v.* Currie, in the House of Lords, 5 *Eng. & Ir. App. Law R.* 508, and also in the case of Newman *v.* Alvord, 51 *N.*

Y. 189. 1877, *N. Y. Supreme Ct., S. T.*, VAN BRUNT, J., Kinney *v.* Basch, unreported.

And see §§ 326, 345, 586, 590, 657, 670, 726, 783.

For cases concerning the exclusive right to the use of descriptive, geographical and firm names, see those titles.

See also, ORIGINAL OWNERSHIP, and WORDS.

EXECUTORS.

See ADMINISTRATORS.

FALSEHOOD.

See MISREPRESENTATION, §§ 530–579.

FANCY NAME.

See NAME (FANCY NAME), § 680.

FIGURES.

See NUMERALS, §§ 740–749.

FIRM NAME.

See PARTNERSHIP, §§ 780-819.

FOREIGNERS.

See ALIENS, §§ 110–116.

FOREIGN WORDS.

§ 315. Where the plaintiff had been accustomed to manufacture watches for the Turkish market, in which country they had acquired great repute and were known by the marks engraved upon the inside thereof, to wit: in Turkish characters the plaintiff's name and the word "Pesserdede," which signified "Warranted" or "Approved"; and the defendant got Messrs. Parkinson to manufacture watches for him on which there were engraved, in Turkish characters, the words "Ralph Gout" and "Pessendede" on the same part of the watch as the plaintiff and which the defendant consigned to Constantinople. *Held*, that defendant Aleploghe should be restrained by injunction from sending or permitting to go to Turkey or any other place, and from selling and disposing of any watches with the name of the plaintiff thereon in Turkish characters, or the word "Pessendede" thereon in Turkish characters, or any watches in imitation of the plaintiff's watches, and also that Aleploghe and Messrs. Parkinson should be enjoined from manufacturing or vending such watches. 1833, *Vice Ch. Ct.*, Gout *v.* Aleploghe, 6 *Beav.* 69; S. C., *Chitty's Gen'l Pr.* 72.

§ 316. An injunction lies to protect the prior right of one who has first adopted in the United States a word from a foreign language to designate an article of his manufacture, although a similar article was previously produced and known under such designation in the foreign country. 1870, *N. Y. Supreme Ct., S. T.*, Rillet *v.* Carlier, 11 *Abb. Pr.* (*N. S.*) 186; S. C., 61 *Barb.* 425.

§ 317. The plaintiff made a syrup from pomegranates, which he sold under the name of "Grenade Syrup." The defendant sought to justify his subsequently adopting the same name for a rival article, by alleging that the word "Grenade," from the French language, signifying "Pomegranate," was used in France, at and before its adoption by plaintiff here, as the name of a similar syrup sold there. *Held*, that notwithstanding these facts, the plaintiff was entitled to an injunction. *Ibid.*

§ 318. The plaintiffs manufactured and sold to foreign merchants, for export in the east, pieces of Spanish shirtings, impressed with a trademark consisting of a figure of a lion enclosed in an ornamental border, and the words "Spanish Shirtings," inclosed in a scroll, with the figures No. 120, to which were added the words, "exactly twelve yards," in Turkish, Armenian, and Roman, placed one over the other. The bill alleged that the defendants were preparing Spanish shirtings for exportation, with marks almost identical with the plaintiffs' impressed upon them, except that an elephant was substituted for a lion, and five lions for four. *Held*, that though an elephant was used by the defendants, the three sentences in the same order was an infringement of the plaintiffs' rights, and an injunction should, therefore, be granted to restrain the use of the words in the three languages, in the order used by the plaintiffs. Vice Ch. WICKEN'S Ct., Broadhurst *v.* Barlow, *Weekly Notes* 1872, p. 212.

FRAUD.

Fraud by the owner of a trademark.

See MISREPRESENTATION, §§ 530–579.

Fraud by one who infringes upon another's right to a trademark.

See INTENT, §§ 445–489; EXCLUSIVE RIGHT, §§ 301–314.

GENERAL ASSIGNMENT.

See §§ 121, 135, 142.

GENERIC TERM.

See DESCRIPTIVE NAME, § 640, et seq.; WORDS, § 1010, et seq.

GEOGRAPHICAL NAME.

See NAME, § 705, et seq.

HOTELS, NAME OF.

See BUILDINGS, § 160, et seq.

IMITATION.

§ 325. The plaintiffs and the defendant were manufacturers of blacking, and the latter sold his blacking in bottles, which not only resembled the bottles used by the plaintiffs, but were labeled in a similar manner; the only difference betweer the two labels was, that the labels of the plaintiffs described their blacking as "manufactured by Day and Martin," whilst that of the defendant described his blacking as "equal to Day and Martin's." The words, "equal to," were printed in a very small type. An injunction was granted *ex parte* to restrain the defendant from using his said labels or any labels in imitation of those of the plaintiffs. 1831, Before the Vice Ch., Day *v.* Binning, 1 *C. P. Cooper*, 489.

§ 326. The plaintiffs were proprietors of the London Conveyance Company, which ran omnibuses between Paddington and the Bank. The defendant began to run between the same places an omnibus on which were the words "Conveyance Company" and "London Conveyance Company," in such characters and parts of the omnibus as exactly to resemble the same words on the omnibuses of the plaintiffs; a star and garter were in like manner simulated, and the green livery and gold hat bands by which plaintiffs distinguished the coachmen of their omnibuses were also imitated

by the defendant. The plaintiffs served a notice on the defendant, intimating that an injunction would be applied for, and after such notice the defendant obliterated from the back of his omnibus the word "Company," and painted on each side of his omnibus, over the words "Conveyance Company," the word "Original," and between the words "Conveyance" and "Company" the word "for" in very small and almost invisible characters. The Master of the Rolls held that the defendant intended to induce the public to believe that his omnibuses were those of the plaintiffs. That 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 that plaintiffs had a right to call upon the 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 their profits of their business by attracting custom on the false representation that carriages, really the defendant's, belonged to the plaintiffs. The defendant was enjoined from using on his omnibus the words "London Conveyance," or "Original Conveyance for Company," or any other names painted thereon, in such manner as to be a colorable imitation of the words, devices, &c. on plaintiff's omnibuses. 1836, *Rolls Ct.*, Knott *v.* Morgan, 2 *Keen*, 213.

§ 327. The plaintiff, and his father before him, had been for some years past in the habit of marking the bars of iron manufactured by them, with their initial letters, placed in an oval, thus: (WC) The plaintiff's iron so marked was in great estima-

tion in the Turkish market, where the mark in question was generally known as "the comb mark." In the year 1837, the defendants received from a Turkish merchant in London, an order for a quantity of iron to be stamped W, with a little O in an oval, thus: (Wº) and to be shipped by a certain vessel. The order was executed, but the stamp was made W, with a dot in an oval, thus: (W·) The defendants, in execution of other orders, and for the Turkish market, continued to supply iron stamped with the foregoing letters, which were afterwards varied, according to orders, to W, with a large O in an oval, thus: (WO) The plaintiff, in 1837 and 1839, remonstrated with, and complained to the defendants, but they did not discontinue the use of the stamp, but used it only in the execution of foreign orders. Other manufacturers had used somewhat similar marks, having been ordered to do so for the Turkish market. There was no evidence to show that any person had been actually deceived by the mark used by the defendants; but one witness stated that possibly, in Asia Minor, it might be taken for the plaintiff's mark. The jury found for the defendants. 1842, *Ct. Com. Pleas*, Crawshay *v.* Thompson, 4 *M. and G.* 357; S. C., 11 *Law Jour.* (*C. P.*) 301.

§ 328. The plaintiff sold a medicine in bottles containing not more than three-quarters of a pound, covered with wrappers headed "Franks' Specific Solution of Copaiba," which, after eulogizing the medicine at some length, contained "general directions for its use," and concluded with copies of the

several "testimonials" of the most eminent surgeons. The defendant sold a similar medicine, in bulk, that is, by the pound, covered with a plain paper, and at a price less by two-thirds, than the medicine of the plaintiff. The defendant used a label headed "Chemical Solution of Copaiba," and after refering to the curative powers of the balsam of copaiba, it stated that its nauseous properties had been removed by Mr. Franks, to whom was due the merit of originally introducing, under the appellation of "Specific Solution of Copaiba," a preparation of the balsam, which was perfectly miscible with water, &c. It then went on to state the merits of "The Chemical Solution," and proceeded as follows: "Mr. Frank's Specific Solution of Copaiba was extensively adopted and employed by the following members of the profession," whose testimonials are subjoined, "Sir Benjamin Brodie, F. R. S.," (and other names). The directions for use then followed, which were similar to those used by the plaintiff. Four of the testimonials given by said gentlemen to the plaintiff, and included in his wrapper, were subjoined in *totidem verbis*, testifying to the merits of Mr. Franks' preperation. *Held*, that although the defendant had used the plaintiff's name and certificates in such an ingenious manner as, *prima facie*, though not in fact, to appropriate and apply them to his own medicines, and notwithstanding the differences in the mode of selling, the proceeding was wrongful, and calculated to deceive, and the defendant was restrained by injunction. 1847, *Rolls Ct.*, Franks *v.* Weaver, 10 *Beav.* 297.

§ 329. Complainant's matches were put up in small paper boxes, usually of brown paper, made

with a cap or cover, which, when placed on the box, covered about a third of its length; and his trade-marks were a cut representing a straw bee hive, surrounded by flowers and foliage, with the words "A. Golsh's Friction Matches," above the hive. Both the cuts and the words were printed on a label, which was pasted on the front of each box. Under the bee hive was inserted on the label, usually in two panels, the street and number of the manufactory, and between what streets it was situated, and the place, "*New York*," under all. The defendants used two labels upon the brown paper boxes in which they put up their matches. One contained the device of the bee hive and the foliage, over which were printed the words, "Menck & Backes' Friction Matches, late chemist to A. Golsh;" the words "late chemist," being in caps smaller than the rest, and under the bee hive were printed in two panels the number and street in which their manufactories were situated, and under all the place, "New York." The other label contained a better executed bee hive, with flowers and foliage, the same printed words under it, similarly arranged, and over it the words "Menck & Backes' Friction Matches, made by J. Backes, late chemist for A. Golsh," the words "A. Golsh" being much larger and more prominent than those above them. The words and figures on the Golsh label were in black letters on a white ground, while those on the defendant's label were in white letters upon a black ground. When the cover was on the complainant's box, the whole printed part of the label was distinctly visible. When the cover was on the defendant's box, the only printed words visible above

the bee hive, were "Late Chemist for A. Golsh." *Held*, that the difference in appearance between these two labels, was so great, even while the covers remained upon the boxes, that it was hardly possible to suppose a person who had been in the habit of buying and using boxes of matches with the Golsh label, would suppose those with the defendant's label were the same article, from the resemblance between the two articles. 1848, *N. Y. Ct. of Appeals*, Partridge *v.* Menck, 1 *How. App. Cas.* 548; affirming S. C., 2 *Sandf. Ch.* 622, and S. C., 2 *Barb. Ch.* 101.

§ 340. Although the court will hold any imitation colorable which requires a careful inspection to distinguish its marks and appearance from those of the manufacture imitated, it is certainly not bound to interfere when ordinary attention will enable a purchaser to discriminate. It does not suffice to show that persons incapable of reading the labels might be deceived by the resemblance. It must be made to appear that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article, would probably be deceived. In cases of doubt the court should not grant or retain an injunction, until the cause is heard upon the pleadings and proofs, or until the complainant has established his right by an action at law. But if the court sees that the complainant's trademarks are simulated in such a manner as probably to deceive his customers or the patrons of his trade or business, the piracy should be checked at once by injunction. *Ibid.*

§ 341. Plaintiff in his label called his medicine "Chinese Liniment," the defendant called his

"Ohio Liniment;" from the body of the label and from the directions for the use of the medicine, it was clear that the language of the defendant was so assimilated to that of the plaintiff's as to make his article appear to be the same medicine as the plaintiff's, the alteration being only colorable. Defendant also published a handbill asserting that the medicine sold by him contained the qualities and ingredients of the "Chinese Liniment," and some other ingredients which rendered it more efficacious, and which allegations plaintiff averred to be false. An injunction was granted enjoining defendant from using his said label and directions, and from issuing said handbill. 1849, *U. S. Circuit Ct. Ind.*, Coffeen *v.* Brunton, 4 *McLean*, 516.

§ 342. In order to convey a false impression to the mind of the public, as to the true origin and manufacture of goods, it is not necessary that the imitation of an original trademark shall be exact or perfect. It may be limited and partial—it may embrace variations that a comparison with the original would instantly disclose; yet a resemblance may still exist, that was designed to mislead the public, and the effect intended may have been produced; nor can it be doubted that whenever this design is apparent, and this effect has followed, an injunction may rightfully be issued and ought to be issued. 1849, *N. Y. Superior Ct., S. T.*, DUER, Ch. J., Amoskeag Manufacturing Co. *v.* Spear, 2 *Sandf. Superior Ct.* 599.

§ 343. An injunction ought to be granted whenever the design of a person who imitates a trade mark, be his design apparent or proved, is to impose his own goods upon the public as those of the

owner of the mark, and the imitation is such that the success of the design is a probable or even possible consequence. *Ibid.*

§ 344. In an imitation of the original mark upon an article, or goods of the same description, the name of the proprietor may be omitted—another name, that of the imitator himself, may be substituted—but if the peculiar device is copied, and so copied as to manifest a design of misleading the public, the omission or variation ought wholly to be disregarded. *Ibid.*

§ 345. It is not enough that the public may be misled, or has been misled. The resemblance must arise from the imitation, or adoption of those words, marks or signs, which the person who first employed them had a right to appropriate, as indicating the true origin or ownership of the article or fabric to which they are attached; and the resemblance, when it induces error and gives a title to belief, must amount to a false representation, express or implied, designed or accidental, of the same fact. *Ibid.*

§ 346. Plaintiff's label was a paper pasted on the body of a bottle, on the upper part of which was the word "Pain-killer," printed in a scroll, below which were the words, "Manufactured by Perry Davis," and below this an engraving, intended to represent the plaintiff surrounded by an oval circle bounded on either side by a simple wreath, and having in its lower margin the words, "The original inventor, No. 74 High Street, Providence." Below the circle, in small type, were the words, "Copyright secured," and the price of the bottle; and at the bottom of the label the words, "Destroy this

label as soon as the bottle is empty. This will prevent fraud." The defendant's label was similarly fixed to bottles of similar size with those of the plaintiff, though of somewhat different shape; at the upper part were the words, "J. A. Perry's Vegetable Pain-killer," underneath which was represented the bust of a man, and beneath this the words, "Manufactured in Providence, R. I. Price 30 cents. Copyright secured." The devices on the plaintiff's label were on a light ground, those on the defendant's upon a dark ground. *Held*, that defendant's label was likely to deceive the public, and to lead them to suppose they were purchasing an article manufactured by the plaintiff, instead of the defendant. Judgment ordered for plaintiff. (Action on the case.) 1850, *Supreme Ct. of Rhode Island*, Davis *v.* Kendall, 2 *R. I.* 566.

§ 347. The defendant, formerly the shopman of the petitioners, set up an establishment of his own, and used labels corresponding closely as to their shape, size and general appearance, with those used by the petitioners. The defendant's label contained the words, "A. Lea, late of Lundy Foot & Co., Dublin, Snuff Manufacturer, 1 Dame Street, Dublin," and round the label, "To prevent imposition, ask for Lea's genuine Dublin snuff." On the petitioners' label were printed the words, "Lundy Foot & Co., Irish Snuff Manufacturers, Essex Bridge and Carlisle Bridge, Dublin," and round the label, "To prevent imposition, ask for Lundy Foot & Co.'s Irish Snuff." Over the defendant's door were printed the words, "A. Lea, late of Lundy Foot & Co." *Held*, that the case was not so clear as to induce the court to interfere by in-

junction in the first instance, and the petition was ordered to stand over with liberty to the petitioners to bring an action at law. See pictures of the labels in the report. 1850, *Rolls Ct.*, Foot *v.* Lea, 13 *Irish Eq. R.* 484.

§ 348. The plaintiffs, Shrimpton and Hooper, manufactured needles which were packed and enveloped in labels bearing these names, and stating them to be "Invented and made solely by Shrimpton and Hooper, at the Albion Needle Works, Studley." The defendant, Laight, residing at Redditch, authorized, as he said, by one David Shrimpton Turvey, but who was not a needle maker, sold his needles in similar packets, omitting the words "Shrimpton and Hooper," and "Albion Needle Works," and substituting the name "Shrimpton Turvey." *Held*, that defendants' wrappers were a plain colorable imitation of the plaintiffs' trademark, and an injunction was therefore issued. 1854, *Rolls Ct.*, Shrimpton *v.* Laight, 18 *Beav.* 164.

§ 349. In cases of alleged colorable imitation of trademarks, the court has not to consider whether manufacturers could distinguish between the articles, but whether the public would probably be deceived by the alleged spurious imitation. *Ibid.*

§ 350. In an alleged infringement of a right to trademarks, the court in every case must ascertain whether the differences are made *bona fide* in order to distinguish the one article from the other, whether the resemblances and the differences are such as naturally arose from the necessity of the case, or whether, on the other hand, the differences are

simply colorable, and the resemblances 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 of primary importance for the court to consider, because, if the court find that there is no reason for the resemblance, except for the purpose of misleading, it will infer that the resemblance was adopted for the purpose of misleading. 1854, V. C. WOOD'S Court, Taylor *v.* Taylor, 23 *Eng. Law and Eq. R.* 281; S. C., 23 *Law J. R.* (*N. S.*) *Ch.* 255.

§ 351. The plaintiffs were sewing thread manufacturers and winders, at Leicester, and on one end of the reels used for thread sold by them, were labels marked "Taylor's Persian Thread," in a circular form, having an inner circle in which was marked the particular quality of the article wound on the reel. On the other end of the reel was placed another circular label, having in the centre the armorial bearings of the city of Leicester, the words "J. & W. Taylor, six cord," and a number denoting the quantity of yards wound on the reel. The plaintiffs commenced their trade in 1828. The defendant was a thread manufacturer at Manchester. In 1852, his foreman was applied to by certain persons, to use reels for his thread similar to those used by the plaintiffs, but this the defendant then refused to do. Subsequently the defendant used for his thread, reels of the same size and description as the plaintiffs, and placed at one end a circular label, with the words "Taylor's Persian Thread" thereon, and at the other end of the reel a circular label with his own armorial bearings, sur-

rounded by the words, "Sam Taylor." *Injunction granted. Ibid.*

§ 352. The plaintiffs were a corporation by the name of the Merrimack Manufacturing Company, and had long been the manufacturers of prints known as the "Merrimack Prints," and had used trademarks of various devices, but all contained the distinguishing word, "Merrimack." The label last in use by them contained the words, "Merrimack Prints, Fast Colors, Lowell, Mass.," in a floral wreath. The defendants sold prints of their own manufacture, under a label with the words, "English Free Trade, Merrimack Style, Warranted Fast Colors," likewise in a floral wreath. These labels were about the same color and size. The wreath and exterior border were lighter and more open in one than in the other. The most prominent words were "Merrimack Prints," and "Merrimack Style," respectively. The inscriptions occupied in one of them two, and in the other, three lines. In an action brought to restrain the use, by the defendants, of their label, and for an account of profits realized from such use, the answer did not dispute the plaintiffs' right to their trademark, but denied fraud or intention to imitate; and alleged that their object was to advertise that their goods were simply of the Merrimack style, and they alleged that their prints were equal in quality to those of the plaintiffs. On a motion for an injunction *pendente lite*, *Held*, that although there was an evident resemblance between the labels, that the court could not determine, upon comparing them, that the mass of purchasers would be deceived, nor that a fraudulent intention to imitate was so mani-

fest as to warrant an injunction, until the plaintiffs should establish their right upon a trial of the issues. 1855, *New York Common Pleas, G. T.*, Merrimack Manufacturing Company *v.* Garner, 4 *E. D. Smith*, 387; S. C., 2 *Abb. Pr.* 318.

§ 353. A tradesman, to bring his privilege of using a particular mark under the protection of a court of equity, need not prove that it has been copied in every particular. It will be sufficient to show that the devices employed bear such a resemblance to his as to be calculated to mislead the public generally, who are purchasers of the article bearing the device, and to make it pass with them for his article. Hence, where on ordinary observation, the labels used by the two parties would not be apt to be distinguished the one from the other, the size, shape, vignette, coloring and marking, being so nearly identical as to make them easily pass for the same, and the only difference discernible, on considerable scrutiny, being in the name of the warrantor stamped upon them in letters so small as not readily to attract attention, an injunction was granted. 1856, Walton *v.* Crowley, 3 *Blatchf. Circuit Ct.* 440; *U. S. Cir. Ct. N. Y.*

§ 354. A variation must be regarded as immaterial, which requires a close inspection to detect, and which can scarcely be said to diminish the effect of the *fac simile* which the simulated label in all other respects is found to exhibit. 1857, *N. Y. Superior Ct., Special T.*, Fetridge *v.* Wells, 4 *Abb. Pr.* 144; S. C., 13 *How. Pr.* 385.

§ 355. The trademark of the plaintiffs, manufacturers of spool cotton, at Mile End, Glasgow, was a label with four concentric circles thereon;

the inner one in gold, and the next in silver, and the whole bounded by two concentric black lines. In the inner circle, was the number of cotton; in the next, "J. Clark, Jr. & Co., Mile End, Glasgow," at the bottom. In the next circle were the words, "Six cord cabled thread, warr'd 200 yards." In the outer circle were the words, "Sole agent, Wm. Whitewright, New York." The defendant, agent of J. & J. Clark & Co., manufacturers of the same article at Seed Hill, Paisley, some years after the plaintiffs' trademark was well known, adopted one for his cotton to be sold in the United States, consisting of concentric spaces of precisely the same dimensions as those of the plaintiffs, of the same colors, in the same order, with the letters in black or in gold as the plaintiffs'; in the inner circle, the same number and stamp as in the plaintiffs'; in the next circle, the words, "Clark & Co., Seed Hill, Paisley;" "Clark & Co." being at the top, as in plaintiffs'. In the next circle were the words, "Six cord cabled thread, warr'd 200 yards," precisely as in plaintiffs', and in the outer circle, were the words, "Sole Agent, George Clark, New York." The positions of the words and the letters, were exactly alike in both. *Held*, that there was an evident design to imitate the plaintiffs' mark, and that the effect of the imitation must be that all except very cautious purchasers would be deceived, and that the defendant should therefore be enjoined from using his said label, and from any imitation of it with only colorable differences. 1857, *N. Y. Supreme Ct., S. T.*, Clark *v.* Clark, 25 *Barb.* 76.

§ 356. An imitation of a trademark, with partial differences, such as the public would not observe, does the owner of the trademark the same harm as

an entire counterfeit. If the wholesale buyer, who is most conversant with the marks, is not misled, but the small retailer, or the consumer is, the injury is the same in law, and differs only in degree. The right of action must exist for the last as well as the first. If all consumers do not discriminate, in the end, it would be indifferent, even to the wholesale buyers, from which of the two they bought, and thus the extent also, of the injury would be as great as if they also were deceived. *Ibid.*

§ 357. The plaintiff was an incorporated company, and had been engaged in manufacturing white lead, at Brooklyn, for more than twenty years, and had been in the habit, during that period, of marking its kegs "Brooklyn White Lead Company," or "Co.," and the defendant had been engaged in the same business, at the same place, since 1849, and had recently changed his mark, upon his kegs, which was "Brooklyn White Lead, pure 100 lbs.," to "Brooklyn White Lead and Zinc Company." The defendant had no such company. *Held*, that this was an imitation of the plaintiff's trademark, with only a colorable difference. The defendant was therefore restrained by injunction, from using the word "Company," or "Co." 1857, *N. Y. Supreme Ct., G. T.*, Brooklyn White Lead Co. *v.* Masury, 25 *Barb.* 416.

§ 358. To entitle a trademark to the protection of a court of equity, there must be, between the genuine and fictitious marks, such general similarity or resemblance of form, color, symbols, designs, and such identity of words and their arrangement, as to have a direct tendency of misleading buyers who exercise the usual amount of prudence and caution; and there must also be such a distinctive

individuality in the marks employed by the counterfeiter, as to procure for him the benefit of the deception resulting from the general resemblance between the genuine and counterfeit labels or trademarks. 1860, *Ct. of Com. Pleas, Phil., Pa.*, Colladay *v.* Baird, 4 *Phil.* 139.

§ 359. The plaintiff was a manufacture of wire, and adopted as his trademark the emblem or representation of an anchor. The defendant followed the same business and assumed as his trademark the representation of an anchor surmounted by a crown. The latter was *held*, to be a colorable imitation of the former. 1863, *Before the Lord Ch. on appeal*, Edelsten *v.* Edelsten, 9 *Jurist* (*N. S.*) 479; S. C., 1 *De G. J. & S.* 185; S. C., 11 *Weekly R.* 328; S. C., 7 *Law Times* (*N. S.*) 768; S. C., 1 *New R.* 300.

§ 360. It is no answer to a bill to say that all the persons who purchased goods bearing the plaintiff's trademark were aware that the goods were not of the plaintiff's manufacture, nor is it necessary that proof should be given of persons having been actually deceived, or having bought goods with the defendant's mark under the belief that they were manufactured by the plaintiff, provided the court is satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other. *Ibid.*

§ 361. The plaintiff was in the habit of making up his bundles of silk in a particular form, with forty-eight heads of silk in each bundle, tied with five strings in different places, with the silk protected from the knots of the strings by pieces of foolscap paper of a particular form, the heads of silk being themselves tied with silken strings of different colors, to mark the quality of silk; and he used

to place under the centre string of each bundle a label in a particular form, describing the quality of silk, and containing the following particular mark: St. A * * * , which represented St. A * * *, the place where the plaintiff's manufactory was, and which was well known in the trade as the plaintiff's trademark. The defendant manufactured for one Young, for exportation, a quantity of silk in bundles in exact imitation of the plaintiff's, and affixed to them a label exactly like that of the plaintiff's, except that the mark St. A * * * was omitted, in obedience to an order from said Young to supply him with silk made up to match one of the plaintiff's bundles, then sent him, with the exception of the trademark. It was not proved that any one had been in fact deceived by the defendant's bundles. The Vice Chancellor was in doubt as to any fraudulent intent on the part of the defendant, and did not believe that his bundles were calculated to deceive. *Held*, that the plaintiff's bill should be dismissed with costs. 1863, *Vice Ch. Wood's Court*, Woolam *v.* Ratcliff, 1 *Hem. & M.* 259.

§ 362. It is no justification for a defendant to say, "the plaintiff has two ways of identifying his goods, and I have only stolen one of them." Hence, where only one of a plaintiff's trademarks are imitated, that imitation will be enjoined. 1863, *Vice Ch. Wood's Ct.*, Braham *v.* Bustard, 9 *Law Times* (*N. S.*) 199; S. C., 1 *Hem. & M.* 447; S. C., 11 *W. R.* 1061; S. C., 2 *New R.* 572.

§ 363. It is not necessary to maintain a prayer for an injunction, that the whole of a trademark should have been imitated. *Ibid.*

§ 364. The plaintiffs manufactured and sold a

soap which they called "The Excelsior White Soft Soap," and the defendants, six months thereafter commenced to sell a soap under the name of "Bustard & Co.'s Excelsior White Soft Soap." Both plaintiffs and defendants used their respective names on labels attached to their jars and casks, and on handbills and placards, according to the usual custom in such cases. It was held that defendants' article was likely to deceive, and they were enjoined from using the words "Excelsior White Soft Soap" for any soap. *Ibid.*

§ 365. Where the plaintiff's trademark consisted of the letters "L. L." for whiskey, which the plaintiff advertised as "L. L. Whiskey," although those letters on the labels were always preceded by the word "Kinahan's," and the defendant used for his whiskey the letters "L. L." and sometimes "Bolton's L. L.": *Held*, that the defendant was guilty of a plain and distinct piracy. That the use of the mark "L. L.," by the defendant, was calculated to lead the public to believe, either that he had Kinahan's permission to use it, and had thus acquired the right, or that the article which he sold was the same as Kinahan's. That in that way as much injury might be done as in any other, by inducing the belief that the spurious article was genuine, which was the probable consequence of such invasion. Defendant enjoined. 1863, Lord Ch. BRADY, Kinahan *v.* Bolton, 15 *Irish Ch.* 75.

§ 366. A trademark was adopted by the plaintiffs in 1858, and consisted of the figure of an ox, on which was printed the word "Durham," the word "Harrison's," being printed above said figure, and the word "Mustard" below it. At the exhibition of 1862, the plaintiffs exhibited their

mustard and obtained an award of "honorable mention," of which they afterwards added a notice on their labels. In May, 1863, the defendants affixed to their canisters and tins of mustard, labels containing as a trademark, the figure of an ox, in form and attitude like that used by the plaintiffs, but without the word "Durham," and with the name "Taylor," substituted for "Harrison." The defendants' label also contained the words "First Prize and Medal Ox," printed above the figure of the ox, and below it the words, "In any class exhibited 1862." The defendants deposed that they knew nothing of the plaintiffs' trademark, or of his "honorable mention" aforesaid, until 1863, and that they (the defendants) had conceived the idea of their trademark from seeing a prize ox at the cattle show at Islington. The plaintiffs proved that their mustard was asked for as the "Ox Mustard," which the court said was not contradicted by the evidence that persons in the trade relied on the name, and not on the mark. Injunction granted. 1865, before V. C. WOOD, Harrison *v.* Taylor, 11 *Jurist N. S.* 408; S. C., 12 *Law Times* (*N. S.*) 330.

§ 367. Where, in a stamp used by the defendants, the form of the printed words, the words thenselves, and the pictured symbol introduced among them, so much differed from that of the plaintiffs', that any person with reasonable care and observation must see the difference, and could not be misled into taking one for the other: *Held*, that there had been no infringement. *Vigilentibus non dormentibus leges subserviunt.* (See the report for pictures of the labels.) 1865, *House of Lords*, The Leather Cloth Company (Limited) *v.* The American Leather Cloth Company (Limited),

11 *H. of Lords Cases*, 523; S. C., 35 *Law Jour.* (*N. S.*) *Ch.* 53; S. C., 13 *Weekly R.* 873; S. C., 12 *Law Times* (*N. S.*) 742; S. C., 6 *New R.* 209; S. C., 11 *Jurist* (*N. S.*) 513; affirming S. C., 33 *Law Jour.* (*N. S.*) *Ch.* 199; S. C., 12 *Weekly R.* 289; S. C., 10 *Jurist* (*N. S.*) 81; 9 *Law Times R.* (*N. S.*) 558; and reversing S. C., 1 *H. and M.* 271; S. C., 32 *Law Jour. R.* (*N. S.*) *Ch.* 721; S. C., 11 *Weekly R.* 931; S. C., 8 *Law Times R.* (*N. S.*) 829.

§ 368. It is much more easy in any case to recognize a difference, however minute, after it is pointed out, than to discover it by the ordinary inspection bestowed by purchasers. It would hardly be a fair test of a counterfeit that, after its errors or deviations from the original were known, it could be mistaken for it. The proper question should be, not differences but points of resemblance, not the utmost vigilance of purchasers, but ordinary observation. The value of the goods to be sold, and the intelligence of the persons dealing in and consuming them, besides other circumstances, are also to be taken into account in determining the adaptibility of a simulated trademark to deceive purchasers. It is eminently, therefore, a question of fact, to be submitted to the practical experience of a jury, whether, in a particular case, a resemblance was likely to deceive the community. 1865, *N. Y. Superior Ct., S. T.*, Swift *v.* Dey, 4 *Robertson*, 611.

§ 369. To entitle a trader to relief against the illegal use of his trademark, it is not necessary that the imitation thereof should be so close as to deceive persons seeing the two marks side by side; but the degree of resemblance must be such, that ordinary

purchasers proceeding with ordinary caution are likely to be misled. 1866, *Before Ld. Ch. Cranworth on appeal*, Seixo *v.* Provezende, *Law R.* 1 *Ch.* 192; S. C., 12 *Jurist* (*N. S.*) 215; S. C., 14 *Weekly R.* 357; S. C., 14 *Law Times R.* (*N. S.*) 314.

§ 370. The plaintiff, a Portuguese nobleman, was the owner of a vineyard on the south bank of the Duro, called the Quinta do Seixo (the word "Seixo" meaning stony or pebbly). Portuguese noblemen usually marked the casks which contained the produce of their vineyards with a crown or crowns. The plaintiff had, since 1848, stamped the top of his casks with his coronet, the letters "B. S.," and the date of the year; and the side of his casks, at or near the bung, with his coronet, the word "Seixo," and the date of the year. Hence, the plaintiff's wine had acquired in the London market the name of the "Crown Seixo" wine, under which name it had attained considerable celebrity. The defendants since 1854 had been proprietors or farmers of a vineyard adjoining that of the plaintiff, and of some other small vineyards near it, but on the opposite bank of the Duro. In 1862 the defendants adopted as their trademark a brand on the top of their casks of a coronet, the letters "C. B." (the initials of their firm), the words "Seixo de Cima" (meaning Upper Seixo), and the date of the year, and they put the same brand or stamp at or near the bung. The defendants were enjoined. *Ibid.*

§ 371. It is not necessary for a plaintiff, in order to receive the protection of a court of equity, to show that his whole trademark has been pirated or simulated. A false impression can be as well con-

veyed to the mind of the public, and especially to the unwary, by a partial as by a total counterfeit. The design to defraud may be as apparent, and is generally more injurious, in the partial than in the entire imitation. Where the trademark is a conspicuous device, connected with the name of the true proprietor, of course the imitator would desire to avoid the offense of forgery, and would omit on his own article the name of the true proprietor, and substitute his own; but the real device might be copied with the imitator's name, and other words of the original added which may be also true as regards the imitator's article, and yet as effectually mislead the public as any other way. 1866, *N. Y. Supreme Ct.*, *S. T.*, Gillott *v.* Esterbrook, 47 *Barb.* 455.

§ 372. A trader may establish a trademark by the use of a crest, and anything which amounted to an imitation of the crest as a trademark would be restrained by the court. But the use of a different crest by another maker, if not accompanied by other indicia to make it a colorable imitation of the trademark of the plaintiff, will not be restrained. 1866, *V. C. Wood's Ct.*, Beard *v.* Turner, 13. *L. T. R.* (*N. S.*) 747.

§ 373. A trader had produced and sold an ink which he designated "Stephens' Blue Black," and it was shown to the public in a label in white capital letters of large type. The defendant had sold an ink in bottles similar in size to the plaintiff's, designated as "Steel-pen's Blue Black," also in a label in white capital letters of large type. *Held*, that this was a colorable imitation of the plaintiff's trademark, and the defendant was restrained by injunction from

the further use of it. 1867, *Vice Ch. Wood's Ct.*, Stephens *v.* Peel, 16 *L. T. R.* (*N. S.*) 145.

§ 374. The court will not restrain the use of a label on the ground of its general resemblance to the trademark of another manufacturer, if it is different in the points which a customer would look at in order to see whose manufacture he was purchasing. See pictures of the two labels in Blackwell *v.* Crabb, 36 *Law Jour. R.* (*N. S.*) *Ch.* 504, 1867, *Vice Ch. Wood's Ct.*

§ 375. To entitle the owner of a trademark to an injunction to prevent its use by another person, there must be in the copy such a general resemblance of the forms, words and symbols, in the original, as to mislead the public. A sufficient distinctive individuality must be presented, so as to secure for the person himself the benefit of that deception which general resemblance is calculated to produce. The court will not interfere when ordinary attention will enable purchasers to discriminate; and it must also appear that the ordinary mass of purchasers, paying the usual attention in buying the article in question would be deceived. Where the complainant stamped the jars of his manufacture with the words "The Hero" and "The Heroine," and sometimes the "Hero-" ——, and the "ine," defendant lettered the jars of his manufacture as "Hero-" follows: ——, the letters "ine" underneath the "ine," word "Hero" being so faint as to be practically illegible, and proposed to manufacture jars with the name "The Heroine" blown on them, it was

held that the use of the word "Heroine" or "Heroine" by the defendant on his jars would deceive the mass of ordinary purchasers, and he was therefore restrained by injunction from such use. 1868, *Ct. of Com. Pleas, Phil. Pa.*, Rowley *v.* Houghton, 2 *Brewster*, 303; S. C., 7 *Phil. R.* 39.

§ 376. Plaintiffs, who were brewers, and not bottlers of ale, for many years had been in the habit of issuing labels to their customers who bottled ale, and such labels were affixed to bottles in which plaintiffs' ale was sold, as evidence that the ale was genuine. Plaintiffs' label was of an oval shape, with outer and inner ornamental border; the space within the inner border was carved with an ornamental design in net work of a red color, and upon the middle was represented a triangular block of red color in the form of a pyramid, with the words "Trademark," printed in black upon the base of the triangular block, and surrounding and encircling the two upper sides of the triangle or pyramid were printed in black, the words "Bass & Co's. Pale Ale," and below the base of the triangle were printed in black, as a *fac simile* of the signature of plaintiffs' firm, the words "Bass & Co.," and underneath the signature, the words "Bottled by," followed by the name and address of the customers to whom the label was issued. Defendants' label bore a general resemblance in form and design to plaintiffs', but differed in the following particulars: Instead of the triangular block, there was represented in the middle of defendants' label, a Spanish shield reversed, somewhat smaller than plaintiffs' triangle; instead of "Bass & Co.," the

words "East India Pale Ale," in a similar position, and a *fac simile* of defendants' signature, "Dawber & Co.," took the place of plaintiffs' signature. Upon outer border of plaintiffs' were the words, "This label is issued by Bass & Co., Brewers, Burton-upon-Trent." Defendants' label had no inner border, but on the outer border, in considerably larger characters than the corresponding words in plaintiffs', was printed, "This label is issued and printed only by us, Dawber & Company. The Brewery, Lincoln." On the defendants' label were also the words, "Bottled by Dawber & Co., Lincoln." Though the ground of both labels was of a reddish hue, in the labels used by fourteen other firms of brewers, which were produced in court, red was the prevailing color, and all, in shape and size, much the same as plaintiffs'. Defendants undertook to print their crest in black (a lion rampant) on the Spanish shield. The court found perfect *bona fides* on the part of the defendants, and being of opinion that nobody could be deceived, who looked at the labels attentively, notwithstanding their general resemblance, dismissed the bill with costs to defendants. 1869, *Rolls Ct.*, Bass *v.* Dawber, 19 *L. T. R. N. S.* 626.

§ 377. The imitation of the original trademark need not be exact or perfect. It may be limited and partial. Nor is it requisite that the whole should be pirated. Nor is it necessary to show that any one has in fact been deceived, or that the party complained of made the goods. Nor is it necessary to show intentional fraud. If the court sees that complainant's trademarks are simulated in such a manner as probably to deceive customers or patrons of his trade or business, the piracy should be

checked at once by injunction. 1869, *Supreme Ct. of Missouri*, Filley *v.* Fassett, 41 *Missouri*, 168.

§ 378. A party will be restrained by injunction from using a label as a trademark, resembling one used by another in size, form, color, words and symbols, though in many respects different, where it is apparent that the design was to depart from the genuine label sufficiently to constitute a difference when the two were compared, and yet not so much so, that the difference would be detected by an ordinary purchaser unless his attention were particularly called to it, and he had a very perfect recollection of the other label. And in such a case it will be inferred that the design was to deceive and to obtain in the manufacture and sale of an article any benefit or advantage that might be gained by its being purchased for another article of the same description, which was known and distinguished by a particular trademark. 1869, *N. Y. Common Pleas, S. T.*, Lockwood *v.* Bostwick, 2 *Daly*, 521.

§ 379. The defendants were enjoined from using a label bearing the name "Bovina," on the ground that it was an imitation of a label used by the plaintiffs, bearing the name "Boviline," the labels having, also, otherwise, a close resemblance to each other. *Ibid.*

§ 380. The plaintiffs used the words "Stove Polish—Dixon's Prepared Carburet of Iron," as their trademark. The defendants were restrained from using "J. C. Dixon's Stove Polish." 1870, *Ct. of Com. Pleas, Phil. Pa.*, The Dixon Crucible Co. *v.* Guggenheim, 2 *Brewster*, 321; S. C., 7 *Phila.* 408.

§ 381. To justify an injunction against a defendant from the use of a certain brand as an alleged counterfeit or imitation of that of the plaintiff, it

should at least appear that the resemblance between the two brands was sufficiently close to raise the probability of mistake on the part of the public, or design and purpose to mislead and deceive on the part of the defendants. 1870. *Supreme Ct. of Missouri*, McCartney *v.* Garnhart, 45 *Mo.* (4 *Post*) 593.

§ 382. The plaintiffs rectified whiskey, and branded a class of their goods with a device consisting of the representation of two anchors placed near together in an upright position, the upper parts inclining outward, with a rope attachment. Over the device, in circular form, were the initials S. McC. The device and letters were stenciled upon the heads of barrels containing a particular article of whiskey, known in the trade as "double anchor" or "double anchor whiskey." The defendant stenciled upon the heads of his whiskey barrels a device consisting of the representation of two picks faced near together in an upright position, with the handles inclining inward. Between the handles was suspended a pair of balances or scales. The defendant's name was placed over the picks, and the words "Old Bourbon" underneath; the whole inscription reading "J. H. Garnhart's Old Bourbon." He used the whiskey thus put up and branded for his mountain trade, and called it the "pick brand." The resemblance between the two brands was held to be too slight to be likely to mislead, and an injunction was refused. *Ibid.*

§ 383. A similarity between two trademarks used by different manufacturers for their goods, although of such a character as to induce a belief in the mind of the public that they belong to, and designate the goods of the same manufacturer or trader, is not, of itself, sufficient ground for a pro-

hibition of the use of such trademark by him who did not first adopt it. That similarity, to entitle the originator to the protection of the law, must be such as to amount to a false representation, not alone that the two articles bear the same origin, but that the goods to which the simulated mark is attached are the manufacture of him who first appropriated the trademark. In this consists the essence of the wrong done. 1870, *Supreme Court of Illinois*, Candee *v.* Deere, 54 *Ill.* 439.

§ 384. In this case the party alleging a violation of his trademark upon plows manufactured by him at the town of Moline, Illinois, had branded or stenciled on the beams, the words "John Deere," in large, heavy capitals, in black paint, on the segment of a circle, with the words "Moline, Ill.," in a horizontal line underneath, in smaller capitals in like black paint, with a dash or flourish between them. The brand or mark upon the other plows, which constituted the alleged violation, was this: The words "Candee, Swan & Co." in smaller capital letters, on a segment of a circle at least two inches longer than that of "John Deere," and the address "Moline, Ill." in still smaller capital letters, on a horizontal line underneath, and a dash between them. *Held*, that while there was some resemblance between these brands, there was no such similarity as would show that "Candee, Swan & Co." intended thereby to sell their plows as plows manufactured by "John Deere." *Ibid.*

§ 385. It is an infringement of a trademark, even though the imitation and original, when placed side by side, would not mislead, if the similarity is such that a difference would not be noticed when seen at different times or places. 1871, *Indianapolis Su-*

perior Ct., *S. T.*, Sohl *v.* Geisendorf, 1 *Wilson*, 60 (*Ind.*).

§ 386. The imitation of the trademark of another to be unlawful, need not be copied in every particular; it is sufficient to warrant equitable relief that it is likely to mislead and deceive; accordingly, an imitation of a manufacturer's label in every respect like the original, except that "Hostetter" was altered to "Holsteter," and the words "Hostetter & Smith were changed to "Holsteter & Smyte," was *held* to be illegal, and ground for an injunction and for damages. 1871, *U. S. Circuit Ct., Nebraska*, Hostetter *v.* Vowinkle, 1 *Dillon*, 329.

§ 387. In matters of trademarks or labels for medical compounds, mere similarity of size, or square packages or of classification of diseases or symptoms, is insufficient to invoke equitable interference. Compounding medicines is an open trade, and protection by law is only authorized when the peculiar symbols and devices are put upon the public in fraud of individual rights acquired by priority of use and title therein. 1871, *Supreme Ct. of Georgia*, Ellis *v.* Zeilen & Co., 42 *Georgia*, 91.

§ 388. The plaintiffs, owners of the Stark Mills, manufactured seamless bags bearing the word "Stark" over a semi-circular arch with the letter A below. The defendants made and sold similar goods, with the word "Star" over a semi-circular arch, with the letter A below. The court enjoined the defendants, and a jury subsequently gave a verdict in favor of the plaintiffs for damages. 1871, *U. S. Circuit Ct., Penn.*, Gardner *v.* Baily, unreported.

§ 389. An injunction was issued restraining the defendants from using wrappers which were in imi-

tation of those of the plaintiffs, and on appeal the Lord Chancellor said that though no one particular mark was exactly imitated the combination was very similar and likely to deceive; that it was true there was no proof that any one had been deceived, or that the plaintiffs had incurred any loss; but where the similarity was obvious that was not of importance. The appeal was therefore dismissed with costs. 1872, *Ch. Cl. of Appeal*, Abbott *v.* Bakers' and Confectioners' Tea Association, *Weekly Notes*, p. 31; affirming S. C., *Weekly Notes*, 1871, p. 207.

§ 390. In deciding the question of infringement, it is not sufficient to pronounce against its existence to descry dissimilarities; but it occurs whenever the imitation is, upon the whole, such as to deceive the unwary purchaser, notwithstanding certain marked differences not likely to arrest the attention or challenge the scrutiny of an ordinary unskillful inquirer and buyer. One label read "Genuine Durham Smoking Tobacco;" the other, "The Durham Smoking Tobacco;" one had the side view of the Durham bull; the other, that of his head on a medallion. The color of the paper was the same. *Held*, that defendant should be enjoined in the use of his label (the one containing the bull's head), and that an account be taken by a master of the profits made by the defendant from his sales under the simulated trademark aforesaid. 1872, *U. S. Circuit Ct. Va.*, Blackwell *v.* Armistead, 5 *Am. Law Times*, 85.

§ 391. For the purpose of establishing a case of infringement, it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has ac-

quired 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 trademark belongs. Lord CHELMSFORD, *House of Lords*, 1872, Wotherspoon *v.* Currie, 27 *Law Times R.* (*N. S.*) 393; S. C., *L. R.* 5 *Eng. & Ir. Ap.* 508: S. C., 42 *Law Jour. R.* (*N. S.*) *Ch.* 130 (containing pictures of the labels in question).

§ 392. Where the defendant puts up for sale his manufactured article, with labels and wrappers which are a colorable imitation of those used by plaintiff,—*e. g.*, where the color of the paper, the words used, and the general appearance of the labels show an evident design to give a representation of those used by the plaintiff, he will be enjoined from so doing, and the fact that he puts his own name on the wrappers, &c., as the manufacturer of the article, will not prevent it from being an infringement on plaintiff's trademark. 1872, *N. Y. Supreme Ct., S. T.*, Lea *v.* Wolf, 13 *Abb. Pr.* (*N. S.*) 389; S. C. modified in another particular, 15 *Abb. Pr.* (*N. S.*) 1; S. C., 1 *T. & C.* 626; S. C., 46 *How. Pr.* 157.

§ 393. The name of the manufacturer or seller of goods may be used as a trademark, and the adoption of the same name, as a trademark for goods of the same kind, by a person of a different name, is "piracy of a trademark." A slight change in the name, such as cutting off the final letter, or prefixing "Van" or "Von" to it, so long as it is an evident imitation, does not prevent its use from being piracy of a trademark. 1873, *Supreme Ct. of Cal.*, Burke *v.* Cassin, 45 *Cal.* 467.

§ 394. Plaintiff's article was labeled "Wolfe's Aromatic Schiedam Schnapps. A superlative tonic, diuretic, anti-dyspeptic and invigorating cordial." Defendant's article was labeled "Van Wolf's Aromatic Schiedam Schnapps. A superior tonic, anti-dyspeptic and invigorating cordial." Defendant was enjoined from using "Van Wolf" or "Wolfe," and from using his labels, but not from using the words "Aromatic Schiedam Schnapps." *Ibid.*

§ 395. The plaintiffs were in the habit of packing their cigars in small wooden boxes containing fifty or a hundred each, and in order to distinguish them they, since April 23, 1869, used a brand consisting of the words "Flor Fina Prairie Superior Tobac," stamped on the boxes, and a figure of a hunter smoking a cigar by the river side. The boxes were bound with dark-blue paper. In February, 1872, the plaintiffs discovered that the defendants were manufacturing cigars, which they put in boxes bearing a label, showing the half figure of a young girl, and the words "Flor de la Prairie" underneath. The boxes were bound with yellow and red paper, and had the word "Prairie" in various combinations stamped over them, and also the words "Fabrica de Tabacos de Superior de la Vuelta Abago calle de Campobello, Ratœ, Habana," There was no evidence that any person had been misled by the brand, but the plaintiffs produced witnesses for the purpose of showing that the public might be. *Held*, that the court will not grant an injunction to restrain an infringement of a trademark unless, in the first place, it has evidence that the public have been actually deceived, or is, from inspection, satisfied that there is either an intention

to deceive or a probability of deception. 1874, *Vice Ch. Hall's Ct.*, Cope *v.* Evans, *L. R.* 18 *Eq.* 138; S. C., 30 *L. T. R.* (*N. S.*) 292; S. C., 22 *W. R.* 453.

§ 396. A party who, while he has avoided liability for the infringement of another's trademark, yet has adopted a course calculated to secure a portion of the good will of the other's business will not be regarded with favor by a court of equity. 1874, *N. Y. Ct. App.*, Wolfe *v.* Burke, 56 *N. Y.* 115.

§ 397. Before the owner of a trademark can call upon the courts, he must show not only that he has a clear legal right to the trademark, but that there has been a plain violation of it; and where a violation is alleged, the true inquiry is, whether the mark of the defendant is so assimilated to that of the plaintiff as to deceive purchasers. And it will make no difference whether the party designed to mislead the public. But if it appears that the trademark alleged to be imitated, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. An imitation is colorable and will be enjoined, which requires a careful inspection to distinguish its mark and appearance from that of the manufacturer imitated. 1875, *Supreme Ct. of North Carolina*, Blackwell *v.* Wright, 73 *N. C.* 310.

§ 398. Plaintiff's label was as follows: "Genuine Durham Smoking Tobacco, manufactured only by W. T. Blackwell, (successor to J. R. Green &. Co.) Durham N. C.," with a picture of a bull in the centre of the label, over which were the words, "trademark." Defendant's label contained the

words, "The Original Durham Smoking Tobacco, manufactured by W. A. Wright," above which words was the head of a bull. *Held*, on demurrer, that the word "Durham," the name of the town where both parties were doing business, could not be exclusively appropriated, as a trademark, and that the defendant's label was not an imitation of the plaintiff's. Bill dismissed. 1875, *Supreme Ct. of North Carolina*, Blackwell *v.* Wright, 73 *N. C.* 310; but see § 390.

§ 399. If it appears that the trademark, alleged to be an imitation, though in some respects resembling that of the plaintiff, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. *Ibid.*

§ 400. The imitation of a trademark to render a party liable for an infringement need not be a precise copy of the original; if there is a similarity so that the community would be likely to be deceived it is a sufficient infringement of the right of property in the mark, and an injunction is the sole adequate remedy. 1875, *Connecticut Supreme Ct.*, before all the justices, Bradley *v.* Norton, 33 *Conn.* 157.

§ 401. In determining the question of infringement, the criterion is not the certainty of success in misleading the public, but, as was said by DUER, J., in the Amoskeag Manufacturing Company *v.* Spear, its probability or even possibility. 1876, *N. Y. Supreme Ct. S. T.*, The Amoskeag Manufacturing Company *v.* Garner, 4 *Am. Law Times R.* (*N. S.*) 176.

See NAME; WORDS; LABELS; DEVICES; PARTNERSHIP; SIGNS.

IMPOSITION.

See MISREPRESENTATION.

INFANCY.

See § 218.

INFRINGEMENT.

See IMITATION; NAME; WORDS; LETTERS; NUMERALS; LABELS; DEVICES; PUBLICATIONS; PARTNERSHIP; SIGNS; BUILDINGS; &c., &c.

INITIALS.

See LETTERS.

INJUNCTION.

§ 410. A motion was made on behalf of the plaintiff for an injunction to restrain the defendant from making use of the name "Great Mogul" as a stamp upon his cards, to the prejudice of the plaintiff,

upon a suggestion that the plaintiff had the sole right to this stamp, having appropriated it to himself conformable to the charter granted to the Card-makers' Company by King Charles the First. Lord HARDWICKE denied the injunction, and said he knew of no instance of restraining one trader from making use of the same mark with another. 1742, *High Ct. of Ch.*, Blanchard *v.* Hill, 2 *Atkyns*, 484.

§ 411. An injunction was granted to restrain a manufacturer of blacking from using labels in imitation of those employed by the plaintiff. 1816, Day *v.* Day, *Eden on Injunctions*, 1st Am. Ed. 226.

§ 412. A court of equity will restrain by injunction the unauthorized use of a manufacturers' or venders' trademark. 1846, *N. Y. Court of Errors*, Taylor *v.* Carpenter, 11 *Paige* 292; S. C., 2 *Sand. Ch.* 603.

§ 413. An injunction to restrain a defendant from using the particular style or title adopted by the plaintiff will not be granted if the court entertains the slightest doubt of the plaintiff's right to sustain his title at law. Hence, where the plaintiff used the title "The London Manure Company," and the defendants used the title "The London Patent Manure Company," and also published circulars which were clearly fraudulent imitations of the plaintiff's, the court, not being satisfied that there had been so long a user by the plaintiff as would enable him to sustain an action at law, dissolved an injunction restraining the defendants from using said title and publishing said circulars. 1848, *Vice Chancellor's Ct.*, Purser *v.* Brain, 17 *Law J. R. Ch.* (*N. S.*) 141.

§ 414. The rule is fully settled and is recognized

in nearly all the cases, that in suits for the violation of a trademark an injunction is never to be granted in the first instance, if the exclusive title of the plaintiff is denied, unless the grounds upon which it is denied are manifestly frivolous. When the title is disputed the course is to let the motion for an injunction stand over until the plaintiff has established his legal right in an action at law. Under the provisions of the Code of Procedure an action at law cannot be directed to enable the plaintiffs to establish their right, but a preliminary injunction can be dissolved or modified until their legal right is established by a verdict of a jury in the same suit. 1849, *N. Y. Superior Ct., S. T.*, Amoskeag Manufacturing Co. *v.* Spear, 2 *Sandf. Sup. Ct.* 599.

§ 415. The power of granting an injunction to restrain an unauthorized use of trademarks ought to be exercised with great caution, so as not to transgress the limits that a just regard to the rights of individuals and the interests of the public must be admitted to prescribe. It is not to be exercised so as to involve a violation of the principles upon which it is founded; it is not to be exercised so as to create a monopoly, unjust to other manufacturers, and of necessity prejudicial to the public. *Ibid.*

§ 416. In granting injunctions to prevent the infringement of trademarks, the court of chancery exercises its jurisdiction in aid of courts of law; *i. e.*, where an action could be maintained in a court of law. But it does not exercise an independent jurisdiction. Hence, where the legal right of the plaintiff is not clear, an injunction will be refused until he has established his right in an action at law. The cases on this subject reviewed and con-

sidered. 1850, *Rolls Ct.*, Foot *v.* Lea, 13 *Irish Eq.* 484.

§ 417. A party is not entitled to an injunction to protect him against another person who has assumed the same label, as to a medicine or drug claimed to have been invented by the complainant, unless his right be clear. Where rights are contested between the parties, chancery will not interfere and enjoin a party from using labels, or marks to recommend his article, though it may to some extent be substituted for that of the plaintiff. The matter of right must first be determined, and if it be controverted, chancery will leave the parties to their remedy at law; or, at least, to such a proceeding as shall present the whole merits of the controversy, and enable the court to decide it. Accordingly, injunction refused where there was a controversy between the parties, whether both had not been concerned together in getting up the medicine in question. 1851, *U. S. Circuit Ct. Ind.*, Coffeen *v.* Brunton, 5 *McLean*, 256.

§ 418. An injunction ought not to be granted at the commencement of a suit brought to enjoin the use of plaintiff's trademark, unless the legal right of plaintiff and the violation of it by defendants are very clear. 1855, *N. Y. Common Pleas, G. T.*, Merrimack Manufacturing Co. *v.* Garner, 4 *E. D. Smith*, 387; S. C., 2 *Abb. Pr.* 318.

§ 419. The mere affidavit of a defendant, without a formal answer, will not be sufficient to bar the equity of a complaint arising out of the facts of the bill. 1856, Walton *v.* Crowley, 3 *Bl. Cir. Ct.* 440, (*U. S. Cir. Ct. N. Y.*).

§ 420. If the *indicia* or signs used tend to show that the representations employed bear such a re-

semblance to the ones used on the plaintiff's article as to be calculated to mislead the public generally who are purchasers of the article, and to make it pass with them for the one sold by the plaintiff, the party aggrieved will be allowed an injunction, staying the aggression until the merits of the case can be ascertained and determined. *Ibid.*

§ 421. An injunction ought not be granted at the commencement of a suit brought to enjoin the defendant from the use of plaintiff's trademark, unless plaintiff's legal right and the violation of it are very clear. 1857, *N. Y. Superior Ct. S. T.*, Fetridge *v.* Merchant, 4 *Abb. Pr.* 156.

§ 422. The court, in considering the propriety of enjoining a defendant, pending a litigation, who employs devices calculated and intended by him to secure the benefit of the reputation acquired by the plaintiff, will not feel called upon to be zealous to aid him by refined distinctions, so that he may evade the letter and violate the scope and spirit of the adjudged cases. 1857, *N. Y. Superior Ct. S. T.*, Williams *v.* Johnson, 2 *Bosw.* 1.

§ 423. On the trial of the action it was left to the jury to say whether the defendant had sold any labels printed by him, knowing such labels to be copies of the plaintiff's trademark, and knowing that they were to be applied to bottles containing spurious eau de Cologne. The jury found a verdict for the plaintiff, with nominal damages. The bill, having been retained until after the trial at law, came on for further consideration. *Held*, that the defendant should be perpetually enjoined from printing or selling labels similar to those used by plaintiff as his trademark, notwithstanding the possibility that some labels might be purchased

bona fide, and for the purpose of being applied to articles of plaintiff's own manufacture from which his labels had been lost. 1858, *V. C. Wood's Ct.*, Farina *v.* Silverlock, 4 *Kay & J.* 650.

§ 424. Where the right of the plaintiff to the exclusive use of his trademark is expressly denied by the defendant, an injunction is never granted in the first instance, until the plaintiff has established his legal right to it by action. 1859, *N. Y. Supreme Ct.*, *S. T.*, Wolfe *v.* Goulard, 18 *How. Pr.* 64.

§ 425. The principle of all the cases of trademark is, that if persons of ordinary understanding purchasing the article would be placed on their guard, and would be led to inquire whether they were being deceived by the article they were purchasing, that fact is sufficient for the court to refuse its interference. 1865, *N. Y. Superior Ct.*, *G. T.*, Swift *v.* Dey, 4 *Robertson*, 611.

§ 426. A party brought an action for damages for an alleged fraudulent invasion of his trademark labels. The summons contained a conclusion for interdict. The pursuer, at the closing of the record, moved for interim interdict. *Held*, that he was not entitled to that remedy until he had established his right by action. 1866, *Ct. of Session, Scotland*, Green *v.* Shepherd, 38 *Scottish Jurist*, 523.

§ 427. An injunction will be granted where the design of the defendant to defraud the plaintiff is clear, and defendant has used a trademark in all respects similar to plaintiff's except the name of the manufacturer. But the injunction will not be made to include the manner of boxing an article, the phraseology of cautions, and other incidents which are to be considered open to the public. 1866,

N. Y. Supreme Ct., S. T., Gillott *v.* Esterbrook, 47 *Barb.* 455.

§ 428. The complainer sought to have the respondent interdicted from the manufacture at his works of bar iron stamped or branded "Coats," with a star immediately following—thus, Coats *—on the ground that the trade of the complainer in "star iron" was injured by the respondent assuming the said mark. The Lord Ordinary passed the note to try the question between the parties: "but having regard to the complainer's price list, in which the complainer's iron was entered as stamped, not simply with a star, but as "Govan *" the Lord Ordinary did not think that the use on the part of the respondent of the mark "Coats *" was *ex facie* so clear an adoption of a trademark belonging to the complainer as to entitle him to an interim interdict. On appeal, the Lords Justices said that the question whether the mark of a star used by the complainer was such a trademark as could obtain the protection of law, was a delicate one, on which they would at that time give no opinion. But as it was clear that the complainer had used the mark for some time; that it had some signification in the market; that no one else had used it; that the use of it by the respondent was recent, sudden and unexplained; that it was very like a device on the part of the respondent of an unfair kind to make use of a trademark used by a rival, to the injury of that rival; and as no injury could arise to the respondent by granting *interim interdict*, but very considerable injury might result to the complainer by refusal of it, the true equity of the case demanded that protection should be given in the meantime.

1867, *Ct. of Session, Scotl* '. Dixon *v.* Jackson, 3 *Scottish L. R.* 188.

§ 429. Where there was a question as to what was the nature and effect of an arrangement made between the plaintiff and E. H., Jr., and whether it vested in the latter the right to use the trademark, and to transfer such right to others and that question was not entirely free from doubt, an injunction prior to the trial of the cause to restrain his grantees from using the same was not granted; it appearing that they were of sufficient ability to respond to any damages the plaintiff might recover. 1867, *N. Y. Supreme Ct. G. T.*, Howe *v.* Howe Machine Co., 50 *Barb.* 236.

§ 430. In matters of trademark, in order to authorize the interposition of a court of equity, the title to the use and enjoyment must be clear and unquestionable. 1871, *Supreme Ct. of Georgia*, Ellis *v.* Zeilin, 42 *Georgia*, 91.

§ 431. The plaintiffs alleged that they had used their trademark for whiskey with the words "Silver Grove" thereon since 1867, and on May 30, 1871, letters patent were granted to them by the United States. securing to them the use of said trademark. Defendant claimed to have appropriated the words "Silver Brook" as applied to rye whiskey in 1870, and he had obtained a copyright under the laws of the United States for a label containing the words "Silver Brook Pure Rye Whiskey." Defendant swore positively that prior to his own appropriation of the words he had never heard of the words "Silver Grove" in connection with a trademark for whiskey, and he produced affidavits from a number of dealers that they never knew or heard of any "Silver Grove" whiskey ex-

cept that sold by the defendant. Plaintiffs produced no affidavits to show that their whiskey was known in the market and to the trade as "Silver Grove," except the affidavit of their bookkeeper that it was charged as such upon their books. The two trade-marks were dissimilar; each contained the name of the owner with his place of business; that of the plaintiffs was small and perfectly plain, whilst defendant's was much larger, colored and highly ornamented; the only point of similarity was the use of the words "Silver Grove." On a motion to continue a special injunction restraining defendant from the use of the words "Silver Grove" on his whiskey: *Held*, That the injunction should be dissolved. That where a party claims to have recently adopted a trademark, comprised in part of certain words which do not in themselves designate the origin or ownership of the merchandise, and which has not been used long enough to be known in the trade, and another party shortly after, in entire ignorance of the fact, and without any apparent design of imitation, uses the same words as part of his trademark, a court of equity will not interfere in a summary way by injunction, but will remit the parties to a court of law, there to settle the question of the original appropriation of the trademark by the verdict of a jury. Equity will only interfere when a clear case of piracy is made out. Let the plaintiff establish his right at law, and he may then be entitled to the interposition of the equity powers of the court. 1871, *C. of Com. Pleas, Phil.*, *Penn.*, Seltzer *v.* Powell, 8 *Phila.* 296.

§ 432. On an application to restrain the unauthorized use of a firm name, it is not necessary to show that actual damage or loss has accrued to

the plaintiffs. 1871, *N. Y. Superior Ct., S. T.*, Reeves *v.* Denicke, 12 *Abb. Pr.* (*N. S.*) 92.

§ 433. The plaintiff claimed to be exclusively possessed of and entitled to the recipe for making an ointment called "Dr. Johnson's or Singleton's Golden Ointment," or "Singleton's Golden Eye Ointment," known in the trade and to the public by the name of "The Golden Ointment." The defendant had for some time sold a preparation called "Dr. Rooke's Golden Ointment." Suit was brought to restrain the defendant from selling any ointment under the name used by him, on the ground that the plaintiff had an exclusive right to the use of the word "Golden" as applied to ointment. The right to the description "Golden Ointment" was the subject of litigation in 1832, when the plaintiff obtained an injunction. *Held*, by the Vice Chancellor, that, considering the existing state of the authorities, he was not at liberty to grant an interlocutory injunction, but must order the motion to stand over to the hearing of the cause. *Vice Ch. Wickens*, Green *v.* Rooke, *Weekly Notes*, 1872, p. 49.

§ 434. A preliminary injunction is grantable, where, upon appearance of defendant to notice, he contests plaintiff's title, without successfully rebutting the allegation of infringement. 1872, *U. S. Cir. Ct., Va.*, Blackwell *v.* Armistead, 5 *Am. Law Times*, 85.

§ 435. Reasonable apprehension of injury from the proceedings complained of is sufficient ground for an application for interdict, and it is not necessary to prove actual injury sustained. 1873, *Ct. of Session*, Singer Manufacturing Co. *v.* Kimball, 10 *Scottish L. R.* 173; S. C., 45 *Scottish Jurist*, 201.

§ 436. It is always a matter of discretion with the court to issue an injunction or not, upon a case made in a trademark suit. 1875, *U. S. Cir. Ct., Ill.*, Tucker Manufacturing Co. *v.* Boyington, 9 *Off. Gaz.* (*U. S. Patent Office*), 455.

§ 437. In determining whether an injunction should be granted, some regard should be had to the nature and extent of the injury which the plaintiff would suffer if the injunction be withheld, and also to the consequences to the defendants if it be granted. 1876, *N. Y. Supreme Ct., S. T.*, American Grocer Publishing Association *v.* Grocer Publishing Co., 51 *How. Pr.* 402.

§ 438. When the answer and affidavits on behalf of the defendants so thoroughly and completely deny the whole equity of the plaintiffs' case as stated in their complaint and affidavits, and so thoroughly rebut all charges of evil intent and improper design, as to render it impossible for the court to say, upon a mere motion, that defendants have injured the plaintiffs, or that the use of the mark is calculated to mislead the public, an injunction *pendente lite* will not be granted. 1876, *N. Y. Supreme Ct., S. T.*, Decker *v.* Decker, 52 *How. Pr.* 218.

See also NAME; IMITATION.

INTENT.

§ 445. The court will grant a perpetual injunction against the use, by one tradesman, of the trademarks of another, although such marks have been so used in ignorance of their being any per-

son's property, and under the belief that they were mere technical terms. 1838, Lord Ch. COTTENHAM, Millington *v.* Fox, 3 *Mylne & Cr.* 338.

§ 446. *Case* for "wrongfully and fraudulently" stamping bars of iron made by the defendants, with a stamp resembling one used by the plaintiff, which the defendants knew, and intended to be in imitation of the plaintiff's, and which was used by the defendants in order to denote that their iron was made by the plaintiff; and for knowingly, &c., selling the iron so marked as and for the plaintiff's iron. *Held*, that upon this declaration the plaintiff was bound to establish the defendants' intention to deceive. And there being no evidence at the trial, except from the alleged resemblance in the marks used, that the defendants had ever represented the iron sold by them to be iron manufactured by the plaintiff: *Held*, that it was properly left to the jury to say, first, whether there was in fact so close a resemblance in the marks used as would deceive persons of ordinary skill; and, secondly, whether there was any intention on the part of the defendants to deceive purchasers and get possession of the market in the room of the plaintiff. 1842, *Cl. of Com. Pleas*, Crawshay *v.* Thompson, 4 *M. & G.* 357; S. C., 11 *Law Jour. C. P.* 301.

§ 447. It is no answer that the maker of the spurious goods, or the jobber who sells them to the retailers, informs those who purchase that the article is spurious, or an imitation. 1845, Vice Ch. SANDFORD, Coats *v.* Holbrook, 2 *Sandf. Ch.* 586; S. C., 3 *N. Y. Leg. Obs.* 404.

§ 448. Where one intentionally uses or closely imitates another's trademarks on merchandise or manufactures, the law presumes it to have been done

for the fraudulent purposes of inducing the public or those dealing in the article to believe that the goods are those made or sold by the latter, and of supplanting him in the good will of his trade or business. 1846, *N. Y. Ct. of Errors*, Taylor *v.* Carpenter, 11 *Paige*, 292; S. C., 2 *Sandf. Ch.* 603.

§ 449. It would seem that an intentional fraud by the defendant is not necessary to entitle the owner of a trademark to protection, but that where the same mark or label is used, which recommends the article to the public by the established reputation of another, who sells a similar article, and the spurious article cannot be distinguished from the genuine one, an injunction will be granted, although there was no intentional fraud. 1849, *U. S. Circuit Ct.*, *Ind.*, Coffeen *v.* Brunton, 4 *McLean*, 516.

§ 450. The affixing to his own goods by any person of the name or style of another person, firm or company known to be the manufacturers of similar goods, although other particulars contained in the real trademark of those manufactures may be wholly omitted, is, generally speaking, conclusive evidence of a fraudulent intent; but even where no fraud can be justly imputed, where the use of the name or style originated in mistake and not in design, although the party may be exempted from damages and costs, the continuance of the use may be justly restrained, since it involves a violation of a right of property that if persisted in, with a knowledge of the fact, would be fraudulent. 1849, *N. Y. Superior Ct., S. T.*, Amoskeag Manufacturing Co. *v.* Spear, 2 *Sandf. Sup. Ct.* 599.

§ 451. The original fraud in the preparation of counterfeit trademarks does not attach itself to the goods in the hands of owners ignorant of the of-

fense, and fasten upon them the penalties of a wrong of which they are innocent. 1849, *N. Y. Superior Ct., G. T.*, Rudderow *v.* Huntington, 3 *Sandf. Super. Ct.* 252.

§ 452. The inventor of an unpatented medicine has no exclusive right to make and vend the same, but if others make and vend it, they have no right to vend it as the manufacture of the inventor, nor to adopt his label or trademark, nor one so like his as to lead the public to suppose the article to which it is affixed is the manufacture of the inventor; and they are equally liable for the damage whether such trademark be adopted by fraud or mistake. 1850, *Supreme Ct. of Rhode Island*, Davis *v.* Kendall, 2 *R. I.* 566.

§ 453. In trademark cases it is not necessary or usual for the court to rely solely on the statements of the defendant, in order to discover what his purpose or intent may have been. Where there is a strong resemblance in matter, color and arrangement, the court will presume that it is not fortuitous, but that it was intentional, with a view to mislead purchasers. 1853, *Vice Ch. Wood's Ct.*, Edelsten *v.* Vick, 11 *Hare*, 78; S. C., 18 *Jurist*, 7; S. C., 23 *Eng. Law & Eq.* 51.

§ 454. Resemblance is a circumstance of primary importance for the court to consider, because, if the court find that there is no reason for the resemblance, except for the purpose of misleading, it will infer that the resemblance was adopted for the purpose of misleading. 1854, *V. C. Wood's Ct.*, Taylor *v.* Taylor, 23 *Law J.* (*N. S.*) *Chanc.* 255; S. C., 23 *Eng. Law & Eq.* 281.

§ 455. *Held*, that a defendant could not escape his liability by cautioning his shopmen to explain

to purchasers that his article was not the same as the plaintiffs', because he could not secure that retail dealers purchasing from him would give the same information to their customers. 1855, *V. C. Wood's Ct.*, Chappell *v.* Davidson, 2 *Kay & J.* 123; S. C., *Ch. Ct. of Appeal*, 8 *De G. M. & G.* 1.

§ 456. To render a person liable for misrepresentations as to the credit of another, by the use of false signs or trademarks, the sign or mark must be false in fact, so known to the party using it, and have been used with the intention to deceive, and of such a character as would mislead a person using ordinary caution. An injunction may be proper, without any other proof of the knowledge of the falsity or of the intention to deceive, than that which arises from the fact that there is falsity, and that the effect will necessarily be to deceive. 1857, *N. Y. Supreme Ct., S. T.*, Peterson *v.* Humphrey, 4 *Abb. Pr.* 394.

§ 457. In order to establish a case for relief it is not necessary to show a "fraudulent purpose" in the defendant, but it is sufficient if the similarity of title be such as to have led, and to be likely to lead, to mistakes. 1859, Vice Ch. STUART, Clement *v.* Maddick, 5 *Jurist* (*N. S.*) 592; S. C., 1 *Gif.* 98.

§ 458. The defendant was ordered by C to manufacture an article and stamp it with the plaintiff's trademark (*i. e.*, Collins & Co., Hartford). The defendant caused the article to be manufactured, and admitted that he had heard of the plaintiff's company but had had no absolute knowledge of it. *Held*, that the defendant must submit to a perpetual injunction and pay the costs. 1859, *Vice Ch. Kindersley's Ct.*, Collins Co. *v.* Walker, 7 *Weekly R.* 222; and see § 177.

§ 459. *Semble.* A person acting innocently is liable, in a court of equity, to an injunction from using another person's trademark and to an account. 1861, *Queen's Bench*, Dixon *v.* Fawcus, 7 *Jurist* (*N. S.*) 895; S. C., 30 *Law Jour.* (*Q. B.*) 137; S. C., 9 *Weekly R.* 414; S. C., 3 *Law Times* (*N. S.*) 693; S. C., 3 *El. & El.* 537.

§ 460. The right of plaintiffs to maintain an action for a violation of a trademark does not depend in any degree upon the defendants' intention to violate it. It is enough that the defendants have violated the right. 1861, *N. Y. Com. Pleas, G. T.*, Dale *v.* Smithson, 12 *Abb. Pr.* 237.

§ 461. If it be found that there has been a colorable imitation of a trademark, it follows that the person making it intended to imitate the genuine trademark belonging to some individual, though he may not have known his name or anything about the person to whom it belonged. 1862, *Rolls Ct.*, Cartier *v.* Carlile, 31 *Beav.* 292; S. C., 8 *Jurist* (*N. S.*) 183.

§ 462. A defendant will be perpetually enjoined from, and is liable in equity to account for the profits made by, the user of a plaintiff's trademark, though at the time of the user he may have been ignorant of the rights and of the existence of the plaintiff. *Ibid.*

§ 463. The want of any knowledge or intent on the part of the defendant to injure or defraud the plaintiff is material to the question of costs. 1862, *N. Y. Superior Ct., G. T.*, Guilhon *v.* Lindo, 9 *Bosw.* 605.

§ 464. It is settled law that if A has acquired property in a trademark, which is afterwards adopted and used by B in ignorance of A's right, A is

entitled to an injunction, but not to an account of profits or compensation, except in respect of any use by B after he became aware of the prior ownership. 1863, *before the Ld. Ch. on appeal*, Edelsten *v.* Edelsten, 9 *Jurist* (*N. S.*) 479; S. C., 1 *De G. J. & S.* 185; S. C., 11 *Weekly R.* 328; S. C., 1 *New R.* 300; S. C., 7 *Law Times R.* (*N. S.*) 768.

§ 465. At law the proper remedy is by an action on the case, and proof of fraudulent user is of the essence of the action, but to sustain a bill in a court of equity, it is not necessary to prove fraud, or that the credit of the plaintiff was injured by the sale of an inferior article; the injury done to the plaintiff by loss of custom is sufficient to support his title to relief. *Ibid.*

§ 466. It is not necessary to prove in trademark cases that the respondent was aware that the mark used was a trademark. 1863, Lord Ch. BRADY, Kinahan *v.* Bolton, 15 *Irish Ch.* 75.

§ 467. The jurisdiction of the court of chancery in the protection of trademarks rests on property, and fraud in the defendant is not necessary for the exercise of that jurisdiction. The plaintiff is entitled to relief, even if the defendant can prove that he acted innocently and without any knowledge of the right of the defendant. *Obiter.* 1864, Lord Ch. WESTBURY, Hall *v.* Barrows, 9 *L. T. R.* (*N. S.*) 5[illegible]; S. C., 12 *Weekly R.* 322; S. C., 10 *Jurist* (*N. S.*) 55; S. C., 33 *Law J. R.* (*N. S.*) *Ch.* 204.

§ 468. Injunction granted to restrain the use of the plaintiff's trademark by the defendants, though the *scienter* was not proved, but an account of profits refused on the ground of delay by the plaintiff in commencing the suit. The defendants given a month's time to discontinue the mark, but ordered

to pay all the costs. 1865, *V. C. Wood's Ct.*, Harrison *v.* Taylor, 11 *Jurist* (*N. S.*) 408; S. C., 12 *Law T. R.* (*N. S.*) 339.

§ 469. It does not signify, for the purpose of the plaintiff's right to relief, whether the defendant has acted with a fraudulent intention or not; it is enough if, even without any unfair intention, he has done that which is calculated to mislead the public. 1865, *V. C. Kindersley's Ct.*, Glenny *v.* Smith, 2 *Dr. & Sm.* 476; S. C., 11 *Jurist* (*N. S.*) 964; S. C., 13 *L. T. R.* (*N. S.*) 11; S. C., 6 *New R.* 363.

§ 470. The use of the trademark of another manufacturer, whether done *scienter* or not, is an interference with his business which the court of chancery will interpose to prevent, on the ground that the defendant is endeavoring to pass off the goods of his own, or somebody else's manufacture, as the manufacture of the plaintiff. 1866, V. Ch. WOOD, Ainsworth *v.* Walmsley, *Law R.* 1 *Eq.* 518; S. C., 12 *Jurist* (*N. S.*) 205; S. C., 14 *Weekly R.* 363; S. C., 14 *Law Times R.* (*N. S.*) 220; S. C., 35 *Law J. R.* (*N. S.*) *Ch.* 352.

§ 471. It is not necessary to prove intentional fraud. If the imitation is calculated to mislead, the intention to deceive is to be inferred therefrom. 1869, *Supreme Ct. of Missouri*, Filley *v.* Fassett, 44 *Mo.* 168.

§ 472. W's manager, without the personal knowledge of W, affixed tickets with T's name printed thereon to certain goods of inferior quality to T's, and made by another manufacturer. On T's complaining of this W offered to give an undertaking that he would not use such tickets again, and to pay a certain sum, but declined to make a public

admission that he had used the tickets in order to defraud T. *Held*, that notwithstanding W's offer T was entitled to an injunction with costs, and also to an inquiry as to damages at his own risk. 1869, *Rolls Ct.*, Tonge *v.* Ward, 21 *Law Times* (*N. S.*) 480.

§ 473. An infringement of a trademark will be enjoined, although the intent of the infringer may have been entirely innocent. 1870, *Ct. of Com. Pleas, Phil., Pa.*, Dixon Crucible Co. *v.* Guggenheim, 2 *Brew.* 321; S. C., 7 *Phil.* 408.

§ 474. Trademarks are property, and a person using such marks without the sanction and authority of the owner will be restrained by injunction, even where it does not appear there was any fraudulent intent in their use, and will be required to account for the profits derived from the sale of goods so marked. 1870, *Maryland Ct. of App.*, Stonebreaker *v.* Stonebreaker, 33 *Md.* 252.

§ 475. The ground on which courts of equity afford relief in cases of infringement upon the right of property in trademarks is the injury to the party aggrieved and the imposition upon the public. The existence of these consequences does not necessarily depend upon the question whether fraud or an evil intent does or does not exist. The *quo animo* therefore, *would seem* to be an immaterial inquiry. 1870, *Supreme Ct. of Errors, Conn.*, Holmes *v.* Holmes, Booth & Atwood Manufacturing Co., 37 *Conn.* 278.

§ 476. Where the probable and ordinary consequences of a man's acts will be to benefit himself to the injury of another, his intention to produce such a result may be legitimately inferred. *Ibid.*

§ 477. These matters I should say do not depend on intention. A man may issue a label or trade-

mark like another with the most innocent intention possible; yet the law is settled that if in truth the trademark is such that it is calculated to mislead, the user will be prohibited in a court of equity. Vice Ch. MALINS, 1870, Wotherspoon *v.* Currie, 22 *Law Times* (*N. S.*) 260; S. C., 18 *Weekly R.* 562.

§ 478. A permanent injunction will be issued against a defendant, who, in ignorance of the plaintiff's rights and claims, has used a trademark belonging to the plaintiff. And the plaintiff in such a case is entitled to costs, but not to damages. 1872, *N. Y. Supreme Ct. Circuit*, Weed *v.* Peterson, 12 *Abb. Pr.* (*N. S.*) 178.

§ 479. In order to constitute a ground for interference by a court of equity, to protect the manufacturer against the use, by another person, of the particular name of his manufactured article, it is not necessary that there should be a *mala mens* towards the first purchaser of the article thus imitatively designated. The fault of the imitator is, that the first purchaser may be enabled through this unwarranted designation to retail a simulated article at a lower price than would be demanded for the original article, and so the original manufacturer may be injured. Lord Ch. HATHERLY, *House of Lords*, 1872, Wotherspoon *v.* Currie, 27 *Law Times R.* (*N. S.*) 393; S. C., *L. R.* 5 *Eng. & Ir. Appeals*, 508; S. C., 42 *Law Journal R.* (*N. S.*) *Ch.* 130; reversing S. C., 23 *L. Times R.* (*N. S.*) 443; S. C., 18 *W. R.* 942; and affirming S. C., 22 *T. R.* (*N. S.*) 260, and S. C., 18 *W. R.* 562.

§ 480. Where a trademark is not actually copied, fraud is a necessary element in the consideration of every question of this description—that is, the party accused of piracy must be proved to have

done the act complained of with the fraudulent design of passing off his own goods as those of the party entitled to the exclusive use of the trademark. For the purpose of establishing a case of infringement, it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as, not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trademark belongs. Lord CHELMSFORD, *House of Lords*, *Ibid.*

§ 482. In suits to restrain the fraudulent use of of a trader's name, or of a trademark, it is not necessary to give proof of actual deception; it is enough if the acts of the defendant are calculated to deceive. Nor is it necessary to find that there is any intention on the part of the defendant to mislead; that is immaterial. 1872, *V. C. Malin's Ct.*, Hookham *v.* Pottage, 26 *L. T. R.* (*N. S.*) 755; S. C., 20 *W. R.* 720; S. C., *on appeal*, 21 *W. R.* 47; S. C., *L. R.* 8 *Ch.* 91; S. C., 27 *Law T. R.* (*N. S.*) 595.

§ 483. It would seem to be immaterial whether an infringing trademark is adopted by fraud or mistake, for the injury is the same. 1875, *Supreme Ct. of North Carolina*, Blackwell *v.* Wright, 73 *N. C.* 310.

§ 484. Intent is immaterial. 1876, *N. Y. Supreme Ct.*, *S. T.*, The Amoskeag Manufacturing Company *v.* Garner, 4 *Am. Law Times R.* (*N. S.*) 176.

See also §§ 290, 291, 292, 962.

JURISDICTION.

See §§ 201, 490, 633, 791 ; see INJUNCTION.

KNOWLEDGE.

See INTENT.

LABELS.

§ 490. Labels used on vials and bottles to designate certain medicines, and the diseases cured by their use, are not books within the meaning of the copyright act. They are of no value except as labels, for which they are designed. Their publication could, by no possibility, injure the writer or author of the labels. If falsely applied to medicine, with a view to impose upon the public, and injure the inventor of the medicine, chancery will enjoin. But the circuit court of the United States cannot inquire into such a case, when both parties live in the same State. 1848, *U. S. Cir. Ct., Ohio Dist.*, Scoville *v.* Toland, 6 *West. Law Jour.* 84.

§ 491. A manufacturer has no right to the exclusive use of a particular colored paper, or kind of paper, for covering or inclosing his goods in any particular form. 1867, *N. Y. Supreme Ct., S. T.*, Faber *v.* Faber, 49 *Barb.* 357; S. C., 3 *Abb. Pr.* (*N. S.*) 115.

§ 492. In an action to recover damages for an

alleged invasion, by imitation, of the plaintiff's trademark for the sale of a certain washing powder which consisted of a highly colored picture, representing a wash room, with tubs, baskets, clothes lines, etc., also the following legend interblended with it: "Standard Soap Company, Erasive Washing Powder," followed by directions for the use of the "washing powder," and the place of manufacture; the alleged imitation by defendants consisted of a picture and label which were the same as in plaintiff's alleged trademark, only in the use of the words "washing powder," the directions for the use of the powder, and in the use of paper of the same color as that used by plaintiff. *Held*, that this did not constitute an infringement of plaintiff's trademark. 1868, *Supreme Ct. of Cal.*, Falkinburg *v.* Lucy, 35 *Cal.* 52.

§ 493. The plaintiff, for the purpose of distinguishing the spoons of his manufacture from all other Britannia spoons sold in market, and for the purpose of designating different classes of his own goods, adopted different labels of particular size, color and form, with his own name and some term descriptive of the spoons thereon, and certain figures arbitrarily chosen, each class of spoons being indicated by fixed numbers. Said labels constituted the only trademark under which he introduced his goods into market, and under said labels and numbers his goods had become generally known in the market and had obtained a good reputation, and a large demand had grown up for them, and they were generally known by their respective numbers and generally ordered, bought and sold, by the numbers on the labels. *Held*, that the labels thus arranged and used were entitled to protection. The defendant

made spoons similar in character to those made by plaintiff, though differing somewhat in style or pattern, and prepared labels resembling the plaintiff's, and adopted the same numbers for similar kinds of spoons, the labels being so similar that an unwary trader who did not read the name upon them might be deceived. The defendant adopted said labels with the particular numbers for the purpose of aiding the introduction of his spoons into the market. *Held*, that defendant's labels were a violation of the trademark of the plaintiff, although he put his own name on the labels in the place of that of the plaintiff; and it seems that the use of the figures with a cipher prefixed would not vary the result. 1868, *Connecticut Sup. Ct.*, Boardman *v.* Meriden Britannia Co., 35 *Conn.* 402.

§ 494. Where the plaintiff has the right to the exclusive use of a trademark, in a particular article of manufacture, any labels used by defendants which are calculated to deceive the public into the belief that the article they are selling is the article made and sold by the plaintiff, will be restrained by injunction and the plaintiff fully protected. 1868, *N. Y. Com. Pleas, G. T.*, Curtis *v.* Bryan, 2 *Daly*, 312; S. C., 36 *How. Pr.* 33.

§ 495. A label at common law is not a trademark, but when a manufacturer or seller of goods adopts a label to distinguish his goods from those of another, he is entitled to be protected in its use, and others will be enjoined from using the same, or a colorable imitation thereof. 1873, *Supreme Ct. of Cal.*, Burke *v.* Cassin, 45 *Cal.* 467.

§ 496. An imitation of a label used on goods is a false representation that the goods to which it is attached were manufactured or sold by the person

whose label was copied or imitated, and purchasers are deceived and liable to be defrauded. Case of Falkinburgh *v.* Lucy, 35 *Cal.* 52, explained. *Ibid.*

§ 497. Where a person, by a combination of elements and symbols, has produced a wrapper to enclose and designate an article manufactured by him, under which it has gone into use, he cannot be interfered with or despoiled of his lawful business by the adoption of a label by another, similar in color, size, border, ornamentation, symbol, and colored ink, and so closely an imitation, that the careless or unobservant purchaser may be readily misled. Such practices are deceptive, and have their origin in and promote dishonorable competition. In order to justify the intervention of a court of equity, it is sufficient that the imitation is so close, that a crafty vendor may palm off on the buyer the article manufactured by the latter, as that of the former. It is no answer to an application for an injunction, that in certain particulars, the label of the defendant differs from that of the plaintiff, so long as the imitation in other respects is so close, that the general appearance is the same, and purchasers have been and are likely to be deceived. 1874, *N. Y. Superior Ct., S. T.*, Brown *v.* Mercer, 37 *N. Y. Superior Ct.* 265.

§ 498. The plaintiff imported and sold an article known as "Julienne," composed of various vegetables for making julienne soup, which was prepared and put up expressly for him by the firm of Hollier & Co., in Paris. There was evidence that a similar article designated "Julienne" was prepared and put up at other establishments in France and imported to this country. Plaintiff devised a trademark or label for the article sold by him; the

device consisted of the words "conserves alimentaires," under which was the coat of arms of the city of Paris, upon either side the monogram A. C. in a circle, and underneath the words "Paris" and "Julienne," with directions for preparing for use and using. Subsequently, the defendants sold a similar article with a device in all respects like the plaintiff's device, except that the monogram was F. G. In size, type, color and appearance, the two devices were entirely alike. *Held*, that plaintiff's label as a whole was entitled to protection, and that the defendants should be enjoined. That the combination of all the words and symbols which the plaintiff had put upon his label entitled him to be protected against the appropriation and use of such combination by the defendants. 1875, *N. Y. Superior Ct., S. T.*, Godillot *v.* Hazard, 49 *How. Pr.* 5.

See also IMITATION.

LACHES.

§ 505. A plaintiff laid by for two years before filing his bill for an injunction, having seen labels of the defendant exhibited publicly, which he now complained of as being colorable imitations of his labels. *Held*, that such laches disentitled the plaintiff to relief. 1866, *Vice Ch. Wood's Ct.*, Beard *v.* Turner, 13 *L. T.* (*N. S.*) 747.

§ 506. Plaintiff's article was known as "Eastcourt's Hop Supplement." Plaintiff brought suit to restrain defendant from using the words "Estcourt's Hop Essence" for a similar article, but as

he delayed commencing suit from January, 1874, to August, 1874: *Held*, that he was precluded by delay from right to relief. 1875, *Ch. Cl. of Appeal*, Eastcourt *v.* Estcourt Hop Essence Company (Limited), 44 *L. J. R.* (*N. S.*) *Ch.* 223; S. C., *L. R.* 10 *Ch.* 276; S. C., 32 *L. T. R.* (*N. S.*) 80; S. C., 23 *W. R.* 313; reversing S. C., 31 *L. T. R.* (*N. S.*) 567.

See also ACQUIESCENCE; ABANDONMENT; LIMITATIONS.

LETTERS.

§ 510. The plaintiffs had a patent for the manufacture of case-hardened ploughshares, which they were accustomed to mark with the words "Ransome's Patent," and with the letters H. H. to denote that the shares were case-hardened, and also with certain numbers, as No. 6, to denote their size. The defendant marked his ploughs "Ransome & Co., H. H. 6;" he admitted the use of the words "Ransome & Co.," but said it had been done under belief that the patent had expired; but he claimed the right of using the letters and figures H. H. 6. An injunction was granted restraining the defendant from using said words or letters on ploughshares. 1834, *Vice Ch. Ct.*, Ransom *v.* Bentall, 3 *Law Journal R.* (*N. S.*) 161.

§ 511. The boxes of tin plates made at particular works at Carmarthen were for a long series of years branded with the mark "M. C." S, a lessee of those works, who had used that mark while tenant of the works, subsequently removed his

manufactory to other works, at a distance of forty miles, and there used the same mark. The owner of the property, as soon as the lease expired, remonstrated against Mr. S's continuing to use the said mark, which had always been used to designate the tin plates manufactured at the Carmarthen works. The Carmarthen works were, for some years, unoccupied; but afterwards D, and others as copartners, having taken a lease of them, carried them on, and branded their boxes with the mark "M. C.," and styled themselves "The M. C. Tin Plate Company." S then obtained an injunction to restrain D and his partners from using the mark "M. C.," or the designation of "The M. C. Tin Plate Company;" but upon appeal, it not appearing certain to the court that the plaintiffs had acquired a right to prevent other subsequent tenants of the works at Carmarthen from using said mark, which was originally derived from said works, the injunction was dissolved, with liberty to S to bring an action. 1837, before Ld. Ch. COTTENHAM, Motley *v.* Downman, 3 *Myl. & Cr.* 1; S. C., 6 *Law J. R. (N. S.) Ch.* 308.

§ 512. Where plaintiffs used the words "Amoskeag Manufacturing Company, Power Loom, Yds. ——, A C A, Amoskeag Falls, N. H.," and defendant the words "Lowell Premium Ticking, Power Loom, Yds. ——, A C A, Warranted Indigo Blue," the shape and color of the labels being the same, an injunction was granted, restraining the defendant from using his said labels. But that part of the injunction restraining the use of any labels with the letters A C A thereon was stricken out. 1849, *N. Y. Superior Ct., S. T.*, Amoskeag M'f'g Co. *v.* Spear, 2 *Sand. Sup. Ct.* 599.

§ 513. There can be no doubt that two letters may constitute a trademark. The letters "L. L." *held* a trademark. 1863, Lord Ch. BRADY, Kinahan *v.* Bolton, 15 *Irish Ch. R.* 75.

§ 514. A firm originated and adopted a method of preparing whiskey, whereby a peculiar flavor was imparted, and marked the whiskey so prepared with the letters "L. L.," being the initial letters of the words Lord Lieutenant, and sold it in bottles, jars and casks, having the letters "L. L." with a ducal coronet impressed on the corks of the casks, of the bottles and jars, and also having a label affixed on the outside of the casks, bottles and jars, having printed thereon a ducal coronet and "L. L. Whiskey." Evidence was given that in the trade the letters "L. L." were understood to mean a peculiar whiskey sold by the firm of Kinahan & Sons, and not any other whiskey of the same class. It appeared that the newspaper advertisements issued by the petitioners described the whiskey sold by them as "L. L. Whiskey" simply, although on the labels those letters were always preceded by the word "Kinahan's." The Lord Chancellor said that the word "Kinahan" did not seem to have been incorporated with the trademark, but to have been inserted to say that the whiskey was made or prepared by Kinahan, and could not be had elsewhere. The respondent was restrained by injunction from using the letters "L. L." for whiskey sold by him. *Ibid.*

See also IMITATION.

See also §§ 356, 674, 751, 757.

LICENSE.

§ 520. Elias Howe, Jr., in 1846 obtained a patent for a sewing machine, and gave a license to his brother, the plaintiff, to use his patented right or combination, in the manufacture of sewing machines. Before 1857 the plaintiff placed on the machines manufactured by him his own name, "A. B. Howe." In 1857 he substituted the name "Howe" for "A. B. Howe" and subsequently every machine manufactured by him had the word "Howe" on a conspicuous place on it; such word being used to denote the plaintiff as the manufacturer, and not to denote Elias Howe, Jr., as the inventor. *Held*, 1. That the fact that the plaintiff was the licensee of the inventor and could not have manufactured his machines, without using the patented combination of the inventor, and therefore could not have manufactured them without the inventor's license, did not and could not interfere with or impair his right to adopt and appropriate a trademark to mark or distinguish the machines manufactured by him from from those manufactured by other licensees of the inventor. 2. That the circumstance that licensees did use and had to use the patented right or combination of the inventor as his licensees in manufacturing their machines, did not affect the question of the right of either of such licensees to adopt and appropriate a trademark, even as against Elias Howe, Jr., as a manufacturer of sewing machines. 1867, *N. Y. Supreme Ct., G. T.*, Howe *v.* Howe Machine Co., 50 *Barb.* 236.

§ 521. The use of the name of a steamship line while the shippers were agents for a steamship

company, is a mere license and gives no right to its use after the agency is terminated. 1872, *Ct. of Com. Pleas, Phil. Pa.*, Winsor *v.* Clyde; Stetson *v.* Winsor, 9 *Phil.* 513.

See also ACQUIESCENCE.

LIMITATION.

§ 525. An action to recover damages for the infringement of a trademark will lie, although at the time the article was sold by the defendant, the plaintiff employed another mark and had discontinued the use of the one imitated. The wrong and injury to the plaintiff consist in the sale of an article falsely purporting and declared to be of his manufacture, and it makes no difference whether the deceit be effected by counterfeiting his present trademark, or one that he formerly used. Hence, the fact that the plaintiff had discontinued the use of his trademark for three years and had adopted a new mark, would not deprive him of a right of action against the defendant for selling leather which was not manufactured by the plaintiff, but stamped in the same manner in which the plaintiff had formerly designated the leather manufactured by him, thus purporting to be of his manufacture and declared by the defendant at the time of sale to be the genuine Lemoine calfskins. 1854, *N. Y. Com. Pleas, G. T.*, Lemoine *v.* Gauton, 2 *E. D. Smith*, 343.

§ 526. A person who does not assent to the use of his trademark by another, cannot be deprived of his rights by omitting to bring an action for a

period of nine years. 1871, *Ch. Ct. of Appeal*, Lazenby *v.* White, 41 *Law Jour.* (*N. S.*) *Ch.* 354.

See also ACQUIESCENCE.

MARKS.

See DEVICES.

MAGAZINES.

See PUBLICATIONS.

MISREPRESENTATION.

§ 530. The plaintiff had made a new sort of mixed tea, and sold it under the name of "Howqua's mixture;" but as he had made false statements to the public, as to the teas of which his mixture was composed, and as to the mode in which they were procured (by intimating in his labels and advertisements that the mixture was made by Howqua, in Canton, and imported into England by the plaintiff, in the packages in which it was sold; that the tea which gave it its peculiar flavor was very rare and high-priced, even in China, and was grown only in the province of Kyiang Nau; and that it could not be procured in England, at any price); the court refused to restrain the defendant from selling tea under the same name, until the plaintiff

had established his title at law—and the *ex parte* injunction was dissolved, with liberty to the plaintiff to bring such action as he might be advised. 1837, *High Ct. of Chancery*, Pidding *v.* How, 8 *Simons*, 477.

§ 531. If a plaintiff coming for an injunction in a trademark case appears to have been guilty of misrepresentations to the public, the court will not interfere in the first instance. Accordingly, where it appeared that a Mr. *Lealhart* had invented a mixture for the hair, the recipe for making which he sold to the plaintiff, who gave to the composition the name of "Medicated Mexican Balm," and sold it as "Perry's Medicated Mexican Balm," and used a printed show-card in which he represented that the article was an extract of vegetable balsamic productions of Mexico, and that said composition was "*made from an original recipe of the learned J. F. Von Blumenbach*," and recently presented to the proprietor by a very near relation of that illustrious physiologist—and the defendant commenced selling a composition which he designated and sold as "Truefitt's Medicated Mexican Balm," in bottles and with labels closely resembling those used by the plaintiff—an injunction was denied, with liberty to the plaintiff to commence an action at law. 1842, *Rolls Ct.*, Perry *v.* Truefitt, 6 *Beavan*, 66.

§ 532. It is not the office of chancery to intervene by its summary process in controversies between the vendors of a quack medicine. A complainant, whose business is imposition, cannot invoke the aid of equity against the piracy of his trademarks. The only remedy in such a case is at law. *Hence*, protection to the words "Dr. Wistar's

Balsam of Wild Cherry" was refused. 1847, *U. S. Cir. Ct., Pa.*, Fowle *v.* Spear, 7 *Penn. L. J.* 176.

§ 533. If the label contain a misrepresentation by the use therein of the name of a former proprietor it will not alter the case that the complainant purchased the right to use that name. The privilege of deceiving the public, even for their own benefit. is not a legitimate subject of commerce. 1848, *N. Y. Ct. of Appeals*, Partridge *v.* Menck, 1 *How. App. Cas.* 547.

§ 534. The complainant's label contained the words "A. Golsh's Friction Matches," when, in truth, Golsh had no concern or interest in the business, and had left the country. *Held*, that the label contained a misrepresentation on its face, and would not be protected by injunction. That it is no sufficient answer that the complainant obtained from Golsh the secret of the manner in which his matches were prepared, or that he manufactured an article in all respects equal to that offered by Golsh, the former proprietor. Nor does it alter the case that the complainant purchased the right to use the name of A. Golsh. The privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce; and at all events, if the maxim that he who asks equity must come with pure hands, is not altogether obsolete, the complainant has no right to invoke the aid of a court of chancery in favor of such a monopoly. *Ibid.*

§ 535. The wrappers and pamphlets of the plaintiff's article contained extravagant representations as to its universal curative effects, but as the labels and wrappers used by the defendant were similar in form to and copied from those used by the plaintiff, the defendant was restrained from the use of

the simulated labels and wrappers by injunction. 1850, *Rolls Ct.*, Holloway *v.* Holloway, 13 *Beav.* 209.

§ 536. The court refused to grant an injunction at the suit of Flavell, to restrain Harrison from making and selling a stove by the name of "Flavell's Patent Kitchener," on the ground, first, that Flavell had falsely assumed to describe the article as being patented; and, secondly, that he had known of the use of the name by Harrison four months before he had applied for an injunction. But the court, not deciding whether Flavell had or had not a legal remedy, retained the bill, giving him liberty to bring an action. 1853, *Vice Ch. Wood's Ct.*, Flavell *v.* Harrison, 10 *Hare*, 467; S. C., 19 *Eng. L. & Eq.* 15; S. C., 17 *Jurist*, 368.

§ 537. The plaintiffs, who had purchased the patent and the right to use the name of T. & Co., the patentees of solid-headed pins, and also the labels, &c., used by T. & Co. for said pins, continued, after the expiration of the patent, to use labels on their goods, printed from the original blocks formerly belonging to the patentees, on which label the goods were described as patented. The defendants adopted and issued labels closely resembling those of the plaintiffs. And under such circumstances, although the description of the plaintiff's goods on their labels, as being patented, had ceased to be strictly true, and although the labels announced that the pins were "exclusively manufactured by T. & Co.," when in fact they were not manufactured at all by T., who had long since retired, the court granted an injunction restraining the defendants from using labels bearing an inscription appearing to designate the goods

contained therein as being manufactured by the plaintiffs. 1853, *Vice Ch. Wood's Ct.*, Edelston *v.* Vick, 11 *Hare*, 78; S. C., 18 *Jurist*, 7; S. C., 23 *Eng. Law & Eq.* 51.

§ 538. Chancery will not interfere by injunctions in questions of trademarks between the venders of patent medicines, being quack medicines; such questions having too little merit on either side. Hence, protection to the word "Kathairon" was refused. 1855, Heath *v.* Wright, 3 *Wall. Jr. U. S. Cir. Ct., Pa.*

§ 539. It is no defense to an action brought to restrain the defendants' use of the plaintiff's trademark upon an article intrinsically valuable, that the trademark in question is false and fraudulent, used by the plaintiff with intent to deceive, and that the article which is accompanied by it is not what the trademark indicates it to be. Certain trademarks, owned by plaintiff, containing these words, respectively, one of them, "H & M's patent thread, Barnsley," and the other, "G & W's celebrated patent thread, Berwick;" *Held*, that the fact that the threads were not patented, and were not made by the persons whose names they bore, nor by their assignees or successors, nor at the places designated on the trademarks, but that the trademarks were false and fraudulent, constituted no defense, and, therefore, a motion to amend the answer by inserting allegations to that effect, was properly denied. 1856, *N. Y. Com. Pleas, S. T.*, Stewart *v.* Smithson, 1 *Hilt.* 119.

§ 540. A court of equity will not interfere to protect a party in the use of a trademark where the name claimed as such is intended and calculated to deceive the public. It may be true that the de-

fendants, if permitted to use, in their contemplated sales, a trademark apparently the same as the plaintiff's, would commit a fraud upon the plaintiffs and upon the public; but if the plaintiffs are themselves engaged in the execution of a systematic plan for deceiving the public, if they have been, and still are, endeavoring, constantly and daily, to multiply their sales and swell their profits by false representations of the composition, qualities and uses of the liquid compound which they invite the public to buy, they cannot be listened to when they complain that, by the fraudulent rivalry of others, their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character. 1857, *N. Y. Superior Ct., S. T.*, Fetridge *v.* Wells, 4 *Abb. Pr.* 144; S. C., 13 *How. Pr.* 385; See Fetridge *v.* Merchant, 4 *Abb. Pr.* 156.

§ 541. Where it appears in an action to restrain an infringement of plaintiff's trademark, that defendant has deliberately and without any previous connection with the particular business, adopted the emblems and appellations employed by plaintiff, simply to break in upon the trade and profit of the latter, in such cases, notwithstanding that it may appear to the court that the trademark claimed by the plaintiff was intended and calculated to deceive the public, the question should be judged of solely as between the immediate parties, and the public should be left to its own guardianship. 1857, *N. Y. Superior Ct., S. T.*, Fetridge *v.* Merchant, 4 *Abb. Pr.* 156. See Fetridge *v.* Wells, 4 *Abb. Pr.* 144; S. C., 13 *How. Pr.* 385.

§ 542. The legislature having passed an act to

punish and prevent fraud in the use of false stamps and labels, and it being the policy of the law to protect the rights of individuals in respect to their own inventions, labels and devices, it would seem to be implied, since the legislature and the courts are thus sedulous to protect the rights of individuals in respect to their own inventions, labels and devices, that such individuals should not themselves attempt or allow any imposition upon the public by the false and fraudulent use of such labels, devices, names or inventions, for the sale of spurious or simulated articles. Accordingly held, that it was an offense against the spirit of the law, equally injurious to trade and commerce, and equally an imposition upon the public, to palm off spurious goods under the cover of genuine labels and devices; and that contracts to do this were clearly against public policy, and should not be upheld and enforced by the courts. A contract for the sale and purchase of a quantity of empty papers or bags for seeds with the plaintiff's label thereon, to be filled with seeds of good quality by the purchaser, and the seeds thus put up to be offered for sale by the purchaser of such papers in a specified county, and not elsewhere, was therefore held to be void. 1857, *N. Y. Supreme Ct., G. T.*, Bloss *v.* Bloomer, 23 *Barb.* 604.

§ 543. If the pills are an innocent humbug, the defendants have no right to deprive the plaintiffs of the reputation and customers which the plaintiffs' money has been the means of acquiring for the pills and themselves; especially in this case, where the expenditure was in a great measure induced by the defendant. It does not appear that the pills are positively injurious; but it is not for

the defendants to say that the plaintiffs are humbugging the public and are therefore not entitled to any relief against them, when the defendants have been, and still are engaged in the same work. As to the public: if the pills are an innocent humbug, it is doubtful whether it is the duty of the court, on the questions of the property, of right and wrong between the parties, to step outside of the case and abridge the innocent individual liberty, which all persons must be presumed to have in common, of suffering themselves to be humbugged. 1860, *N. Y. Supreme Ct., S. T.*, Comstock *v.* White, 18 *How. Pr.* 421.

§ 544. The courts will not interfere by injunction, to protect a party in the use of trademarks, which are employed to mislead the public, and to deceive them by fraudulent representations contained in the labels and devices which are claimed to constitute wholly or in part such trademarks. The court does not refuse its aid in such a case from any regard to a defendant, who is using the same efforts and misrepresentations to deceive the public. Hence, where the plaintiff's label was calculated to induce the belief that the article in the box on which it was pasted was manufactured in London, and that the sole proprietors of it had their place of business in London, and that the plaintiff was their sole agent for the United States, when in fact the article was made in New York and the plaintiff was not the agent, but the manufacturer and proprietor, and injunction was denied. 1860, *N. Y. Superior Ct., S. T.*, Hobbs *v.* Francis, 19 *How. Pr.* 567.

§ 545. While it is true that a court of equity will not interfere preliminarily by injunction and

protect a person in an ex . . right to a trade-mark or label, manifestly devised and intended to cheat the public in the purchase of the article to which it may be attached, by representing the thing to be of a different substance from that of which it really consists, or by stating untruthfully its origin, properties or qualities; or when the articles to which they are affixed are of very doubtful character and quality; nevertheless, in a case where the plaintiff's title to the trademark has been legally established, and the label is manifestly one not intended to delude the public in the purchase of an article by making any representations or asserting anything in respect to its qualities or properties, which are untrue, and is not used with any fraudulent intent, and the public is not in fact deceived, the plaintiff will be entitled to protection by injunction against the use by defendant of similar labels, although the plaintiff's trademark bears a fictitious name as the name of the manufacturers of the article. Hence, Thomas Nelson Dale was protected by injunction in the exclusive use of the following label: "Courtria Flax; Thomas Nelson & Co. Warranted Fast Colors, et 16 oz." 1861, *N. Y. Com. Pleas, G. T.*, Dale *v.* Smithson, 12 *Abb. Pr.* 237.

§ 546. A trademark describing the articles on which it is impressed as "patented" is a proper one, if the statement was true at the time the mark was adopted, though the patent has been allowed to drop before its expiration. 1863, *V. C. Wood's C.*, Leather Cloth Company (Limited) *v.* Hirschfeld, 1 *Nev. R.* 551. But see Leather Cloth Company (Limited) *v.* American Leather Cloth Company (Limited), *infra*, § 548.

§ 547. Where the plaintiffs advertised their perfume as the extract of the "Night Blooming Cereus, distilled from this rare and beautiful flower, from which it takes its name," and the perfume was an alcoholic compound, not an extract from the flower,—*Held*, that this was a deception, intended to impose upon the public by exciting curiosity to learn the nature of the perfume of the rare and beautiful flower, and that a court of equity would not aid him in carrying it on. 1864, Phalon *v.* Wright, 5 *Philadelphia*, 464 (*Penn.*).

§ 548. Misrepresentations in a trademark, amounting to a fraud upon the public, will disentitle the person making such misrepresentation to protection in a court of equity against a rival trader; and, as a general rule, a misstatement of any material fact calculated to impose upon the public, will be sufficient for the purpose; *e. g.*, a trademark representing an article as protected by a patent, when in fact it is not so protected, or a trademark falsely representing an article as the production of an artist of special skill, or of a place of special adaption. 1865, *House of Lords*, Leather Cloth Company (Limited) *v.* American Leather Cloth Company (Limited), 35 *Law J. R.* (*N. S.*) *Ch.* 53; S. C., 11 *House of Lds. Cases*, 523; 12 *Law T. R.* (*N. S.*) 742; S. C., 6 *New R.* 209; S. C., 13 *Weekly R.* 873; S. C., 11 *Jurist* (*N. S.*) 513; affirming S. C., 33 *Law J. R.* (*N. S.*) *Ch.* 199; S. C., 12 *Weekly R.* 289; S. C., 9 *L. T. R.* (*N. S.*) 558; S. C., 10 *Jurist* (*N. S.*) 81; and reversing S. C., 1 *H. & M.* 271; S. C., 32 *Law J. R.* (*N. S.*) *Ch.* 721; S. C., 11 *Weekly R.* 931; S. C., 8 *Law Times R.* (*N. S.*) 829.

§ 549. The plaintiffs purchased from a firm established in the United States, knowledge of a

secret mode of making crucibles, which had acquired a reputation in America as "Patent Plumbago Crucibles," although the process had never been patented. *Held*, that the plaintiffs could not maintain a bill to restrain others from pirating this designation. That the use of the word "Patent" by the plaintiffs was calculated to mislead and defraud the public with whom they were dealing, and that therefore they would not be protected in its use. 1866, *V. C. Wood*, Morgan *v.* M'Adam, 36 *Law Jour.* (*N. S.*) *Ch.* 228.

§ 550. In such a state of things, the court, whatever may be the conduct of the defendant, does not ask whether or not it shall interfere to restrain a defendant, but it must see in the first instance, before it reaches the defendant's case, whether or not the plaintiff has made such a case as to entitle him to the court's assistance. All that the court has to determine is, has the plaintiff, who comes to seek relief, any ground whatever for asking the court to assist him in protection of that right which he sets up? If the court finds it to be a right founded upon fraud, the court says it cannot assist a person in carrying on a fraud; and when he comes and cannot establish to the satisfaction of the court that he has a case in which he is entitled to relief, he is told that when he has entitled himself by a proper description to protection in regard either to a trademark or any trade designation of that kind, he will be assisted; but until then, the court must disregard altogether any supposed wrong which he may suffer from other persons carrying on the same system of fraud that he carries on, imitating him in the false description of what

they sell, or in the title of the company under which they and he falsely profess to exist. *Ibid.*

§ 551. Defendant procured a label very closely resembling plaintiffs' and commenced to attach it to a perfume manufactured by him, adopting the same name and style of packages, with the intention of counterfeiting plaintiffs' trademark, as well as imitating the article and style of packages used, and with the design of appropriating to himself the market obtained for the plaintiffs' article. The plaintiffs in connection with their label put forth a puff in which it was stated that "The opoponax is a native flower from Mexico, of rare and very rich fragrance, *from which this extract is distilled*," &c. Several perfumers on the part of the defendant made affidavit that plaintiffs' article was not distilled from the flower of opoponax, but was a compound of essential oils, combined with pure spirits, and that there was a resinous gum in the market, of a disagreeable odor, but no flowers of opoponax. Plaintiffs and their claimants swore the perfume was made from said flower. *Held*, that upon this contradictory state of the evidence, the defendant's defense that the plaintiffs are attempting to impose upon and defraud the public was not available and that defendant should be enjoined. 1867, *N. Y. Supreme Ct., G. T.*, Smith *v.* Woodruff, 48 *Barb.* 438.

§ 552. The justice and morality of this defense is not very high, in the present instance; but this rule of law or equity has been recognized in several cases, and must be followed if the case is brought within its application. It is a defense that ought to be suggested by the court in some cases, and probably would be in all cases where the imposition is flag-

rant. For instance, where a quack compounds noxious and dangerous drugs, hurtful to the human constitution, and advertises them as a safe and sure remedy for disease; or when some charlatan avails himself of the prejudice, superstition, or ignorance of some portion of the public, to palm off a worthless article, even when not injurious, the case falls beneath the dignity of a court of justice to lend its aid for the redress of such a party, who has been interfered with by the imitations of another quack or charlatan. But the suggestion comes with a poor grace from one who has, by the imitation, been guilty of the same fraud or imposition upon the public, if such it happens to be. *Per* LEONARD, P. J. *Ibid.*

§ 553. A person who in and by his tradmrak makes representations which deceive the public, cannot appeal to the equitable interposition of a court of equity to restrain the use of such deceptive trademark by another. But a mere false or exaggerated statement in an advertisement of the manufactured article, and not contained in the trademark itself, tending to recommend its use to the public, will not deprive the owner of a right to be protected in the exclusive use of his trademark. Hence, where an advertisement of the plaintiff's article (called "Mrs. Winslow's Soothing Syrup") contained these words: "Mrs. Winslow, an experienced nurse and female physician, presents to the attention of mothers her Soothing Syrup," whereas the truth was, that Mrs. Winslow had been for many years dead, and the defendant denied that Mrs. Winslow had been an experienced nurse and female physician: *Held*, that the statements in said advertisement did not affect the plaintiff's

trademark one way or the other. 1868, *N. Y. Com. Pleas, G. T.*, Curtis *v.* Bryan, 2 *Daly*, 312, and 36 *How. Pr.* 33.

§ 554. A person who has fraudulently imitated the trademark of another, and offered for sale his own goods as those of the owner of the trademark, can not be heard to raise the objection that the latter's goods are injurious to health. The acts of the party conclude him. *Ibid.*

§ 555. The ground on which the jurisdiction of equity in trademark is vested, is the promotion of honesty and fair dealing, because no one has a right to sell his own goods as the goods of another. There is no class of cases to which the maxim "He who comes into equity must come with clean hands" can more properly be applied. A party who attempts to deceive the public by the use of a trademark, which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market, is guilty of the same fraud of which he complains in defend ants who imitate his mark. He can have no claim to the extraordinary interposition of a tribunal constituted to administer equity, for the purpose of securing to him the profits from his fraudulent act. It is not necessary that any one person has been actually deceived or defrauded; it is enough that it is a misrepresentation calculated to have that effect on the unwary and unsuspicious. A trademark on Spanish cigars made in New York, indicated that they were made in Havana. *Held*, that an injunction would not be granted to restrain a counterfeit of the trademark. 1869, *Supreme Ct. of Pa.*, Palmer *v.* Harris, 60 *Pennsylvania*, 156.

§ 556. The use of the word "patent" as part of the description in a label or trademark of goods not protected by a patent, is not such a misrepresentation as to deprive the owner of his right to be protected against an infringement of his label where the goods have, from the usage of many years, acquired the designation, in the trade generally, of patent. 1869, *V. C. James' Court*, Marshall *v.* Ross, *Law R.* 8 *Eq.* 651; S. C., 21 *Law Times R.* (*N. S.*) 260; S. C., 17 *Weekly R.* 1086; S. C., 39 *Law J. R.* (*N. S.*) *Ch.* 225.

§ 557. The plaintiffs instituted a suit to restrain the defendant from using the name "The Pall Mall Guinea Coal Company" in Pall Mall. The defendant, amongst other grounds of defense, set up a case that the plaintiffs habitually served short weight upon their customers, and deceived their customers also in the character of the goods supplied. *Semble*, if these allegations had been supported by the evidence, which was held not to be the case, they would have disentitled the plaintiffs to come to the court of chancery. 1869, *Before Lord Justice Gifford on appeal*, Lee *v.* Haley, 18 *Weekly R.* 242; S. C., *L. R.* 5 *Ch.* 155; S. C., 22 *Law T.* (*N. S.*) 251; S. C., 39 *Law J. R.* (*N. S.*) *Ch.* 284. But see S. C., *Before V. C. Malins*, 18 *Weekly R.* 181, S. C., 21 *Law Times* (*N. S.*) 546.

§ 558. Although where suit is brought for the infringement of a trademark which is itself a falsehood and calculated to deceive and mislead the public as to the true character of the article sold under it, equity will not relieve; yet where there is no intention to deceive and no falsehood is used, an injunction will issue. Where the trademark discloses truly the place of manufacture and sale

of the goods, and substantially the true ownership of them, the fact that the name on the label is not the exact name of the manufacturers, owing to changes in the persons manufacturing after the manufacture was commenced, will not debar the plaintiffs of their injunction. *Held*, that the difference between Jos. Dixon & Co., as printed on the labels and the Jos. Dixon Crucible Company, the name of the manufacturer and vender of the goods, was not of such a character as to destroy the plaintiffs' right to equitable relief. 1870, *Ct. of Com. Pleas., Phil. Pa.*, Dixon Crucible Co. *v.* Guggenheim, 2 *Brewster*, 321, *Penn.*; S. C., 7 *Phila.* 408.

§ 559. A joint stock company took its name from the names of four of its principal stockholders. Subsequently an act of the legislature was passed requiring the names of corporations to begin with the word "The" and end with the word "Company;" but nothing in the act required a change in the names of existing corporations. The retention of a name without such words, thereby indicating a partnership instead of a corporation, after the passage of the act, held not to be such a misrepresentation as to render it inequitable for a court of equity to protect the corporation in the use of its name against infringement by a rival company. After a period of more than fifteen years, the persons whose namesappeared in the corporate name of such joint stock company ceased their connection with the corporation. The retention of the name subsequently, held not to import a representation that the company still had the benefit of the skill and experience of the persons named. 1870, *Supreme Court of Errors of Conn.*, Holmes

v. Holmes, Booth & Atwood Manf. Co., 37 *Connecticut*, 278.

§ 560. Trademark cases will be adjudicated only upon the rights of parties before the court, and as between their conflicting claims, and not with a view to the guardianship of the public upon the merits or demerits of *nostrums*, except in cases where injury to the public health or morals enters into the ingredients of the allegations. 1871, *Supreme Ct. of Ga.*, Ellis *v.* Zeilin, 42 *Ga.* 91.

§ 561. The court of chancery will not interfere by injunction to restrain the imitation of a trademark, if there is false representation in the trademark, or if the trade itself is fraudulent. And, *semble*, such false representation or fraud would be a good defense to an action at law for imitation of the trademark, on the ground that *ex turpi causâ non oritur actio*. But a collateral misrepresentation by the owner of the trademark will not disentitle him to relief, either at law or in equity. 1872, Ford *v.* Foster, *Law R. 7 Ch. Ap. Cas.* 611; S. C., 27 *L. T. R.* (*N. S.*) 219; S. C., 41 *L. J. R.* (*N. S.*) *Ch.* 682; S. C., 20 *W. R.* 318; reversing S. C., (BACON, V. C.,) 20 *W. R.* 311.

§ 562. In a case where the plaintiff, whose trademark was "Ford's Eureka Shirt," had falsely represented in his invoices and in a few advertisements that he was a "patentee" of the shirt: *Held*, that such false representation was not sufficient to prevent him from sustaining an action at law; and that, his right at law being clear, he was entitled to an injunction in chancery. *Ibid.*

§ 563. Where fraud and falsehood on the part of the plaintiff are relied on as a forfeiture of his title to relief in equity for a violation of a trade-

mark, it must result from direct proof, and not mere crimination or argument. 1872, *U. S. Circuit Ct. Va.*, Blackwell *v.* Armistead, 5 *Am. Law Times*, 85.

§ 564. Trademarks intended to deceive and practice a fraud upon the public, will not be protected by a court of equity. G. W. Laird instituted this action against J. B. Wilder & Co. to enjoin them from counterfeiting his trademark. Injunction refused. In this case the design of the bottle, and the label of "Laird's Bloom of Youth or Liquid Pearl," a compound prepared and sold by G. W. Laird, were unwarrantably adopted by J. B. Wilder & Co., to mislead the public by inducing the belief that the compound prepared and sold by them was identical with that of G. W. Laird, and the imitation was so nearly exact as to be well calculated to produce that effect. On the facts the court held, that the plaintiff in putting his compound on the market as he did, with his express as well as implied assurance to the public that it was "free from all mineral and poisonous substances," deliberately engaged in the perpetration of a fraud, which in a court of equity should be rebuked rather than upheld or protected. To a party thus presenting himself, a court of equity, adhering to the maxim that "*he who asks equity must come with pure hands*," will not lend its aid when the object to be effected is to secure to himself the exclusive privilege of deceiving the public in a particular way, although in doing so it might prevent another equally guilty from committing the same wrong. 1872, *Ct. of Appeals*, *Kentucky*, Laird *v.* Wilder, 9 *Bush*, 131.

§ 565. Equity will not protect a trademark which

deceives the public; but that deception need not be of such a character as to work a positive injury to purchasers, nor, on the other hand, will the fact that some erroneous impression may be received by the public, be suffered to destroy the validity of the trademark. If the representation of the trademark does not in fact mislead the public, and may be understood in any reasonable sense as substantially true, the trademark will be entitled to protection. 1872, *Sup. Ct. of Errors*, Meriden Britannia Co. *v.* Parker, 39 *Conn.* 450.

§ 566. As it appeared that the Rogers brothers superintended the petitioners' spoon and fork manufactory, directed as to the style and quality of such goods, and had the general supervision of the manufacturing and sale thereof, it was held that the representation contained in the trademark on the goods manufactured by the Meriden Britannia Company, that the Rogers brothers were the manufacturers, was true in a certain sense, to wit: that the goods were the production of their skill, judgment and experience, and therefore the misrepresentation, if any, was not of such a character as to defeat the petitioners' claim to the exclusive use of the trademark. *Ibid.*

§ 567. *It seems*, that a business which is, to a certain extent, a fraud upon the public, such as the palming off of an alcoholic beverage in common use exclusively as a medicine and as a specific for certain diseases, under a name not generally understood by the community, is not entitled to the aid of a court of equity, and that the name will not be protected as a trademark. CHURCH, Ch. J., 1874, *N. Y. Court of Appeals*, Wolfe *v.* Burke, 56 *N. Y.* 115.

§ 569. Complainants used to distinguish jars, the

designations "*Mason's Patent, Nov. 30th*, 1858," "Mason's Improved," "The Mason Jar of 1858." It appeared that the jars had been protected by a patent that had been adjudged to be invalid. *Held*, that the designations had a tendency to mislead the public, and could not therefore, be protected as trademarks. In respect of the designation "*The Mason Jar of* 1872," the objection held not to be applicable. 1874, *U. S. Circuit Ct., Penn.*, Consolidated Fruit Jar Company *v.* Dorflinger, 2 *Am. Law Times* (*N. S.*) 511

§ 570. S. C., deceased, and plaintiff, G. C., jointly took out letters patent for a filter, which they allowed to drop, but continued to affix to their filters, "G. C.'s improved patent gold medal, self-cleansing, rapid water filter, Boston." Defendant commenced to sell filters of similar shape, inscribed "S. C.'s patent prize medal, self-cleansing, rapid water filter, improved and manufactured by W. P. & Co." *Held*, that plaintiffs had acquired a right to protection of their inscription as a trademark, and that the use of "patent" therein did not avoid such right. 1876, *Ch. Div. Vice Ch.* Bacon, Cheavin *v.* Walker, 35 *Law Times* (*N. S.*) 757; S. C., 46 *Law J. R.* (*N. S.*) *Ch.* 265.

§ 571. The plaintiffs' trademark or label was affixed to bottles containing quantities of brandy less than pints and quarts. Nothing appeared upon the bottles or the trademark to indicate that the bottles contained quarts and pints, and there was nothing in their appearance or form to deceive or impose upon any one. They were transparent, and any one looking at them could see the quantity they contained. It did not appear that the bottles in the trade were ever used as the measure of quan-

tity, or that they were ever sold or bought as actually containing quarts or pints. The plaintiffs were manufacturers and wholesale dealers in the brandy, and the bottles, when imported in this country, were entered at the custom house with a statement of the true quantity contained in them. There was no proof that any purchasers from the plaintiffs purchased upon the faith that the bottles actually contained quarts and pints, or that such purchaser did not understand perfectly their capacity. There was no proof that the plaintiffs ever represented to any one that the bottles contained quarts and pints, or that they ever deceived or imposed upon any one, or that any dealers ever sold the bottles as containing more than by measure they actually contained. It did not appear that the trademark was used or could be used by plaintiffs to impose upon or deceive any one, or that they carried on their business for a dishonest purpose, or in such way as to cheat or defraud any one. It was not questioned that the brandy was genuine and just what it purported to be, and *although in the complaint the bottles were described as quart and pint bottles*, they appeared to be of the ordinary size used in the liquor trade. *Held*, that it might be assumed that the brandy in the bottles was sold by the bottle and not by measure. That as plaintiffs shipped their brandy to different parts of the world the fact that a quart differs in size in various countries showed it to be impracticable to use bottles actually containing measure quarts and pints. That as the brandy was put up in bottles of convenient size, and sold by the bottle in this country, they might be called quart and pint bottles because they were nearest in size to those measures, and the

designation was sufficiently accurate for the purposes of trade, and that no one would be necessarily or actually deceived. That the case was therefore not one where it could be said that plaintiffs came into court with unclean hands and guilty consciences, and must therefore be denied equitable relief; that the case was not one where the trademark was used to deceive or impose upon the public, or where it was used upon a spurious, worthless or deleterious compound, or where the business in which it was used was carried on systematically in a dishonest and fraudulent way; in such cases courts will not lend their aid to protect trademarks. Judgment of court below denying injunction on ground of misrepresentation reversed, and a new trial ordered. 1877, *N. Y. Court of Appeals*, Hennessy *v.* Wheeler, not yet reported; reversing S. C., 51 *How. Pr.* 457.

§ 572. The plaintiffs claimed the exclusive right to the use of the word "Capcine" as used in their trademark "Benson's Capcine Plasters," and filed a bill to restrain the defendants from using the word "Capsicin" for a similar article. "Although the plaintiffs may have omitted the fraudulent and deceptive and untrue language from their circulars before this suit was commenced, yet if they have any property in their trademark which they claim title to, they acquired such property by the use, for a considerable time, of such language in the circulars which accompanied the articles they sold, and in respect to which the trademark is claimed. Such language was to the effect that 'a celebrated chemist had recently discovered a vegetable principle of great value, and, prior to making it generally known, had introduced it into hospitals, and had generously

extended its use to the most successful physicians; that the flattering and astonishing results which characterized its action, at once stamped it as the most remarkable principle ever discovered; that this powerful remedy was named Capcine, and that it was used in plasters prepared by the plaintiffs, and called Benson's 'Capcine Plasters'. A registered trademark is claimed in the word 'Capcine.' Courts of equity refuse to interfere in behalf of persons who claim property in a trademark acquired by advertising their wares under such representations as those above cited, if they are false. It is shown there is no such article as Capcine known in chemistry, or medicine, or otherwise. The authorities are clear that in a case of this description a plaintiff loses his right to claim the assistance of a court of equity. The motion for an injunction is denied." 1877, *U. S. Circuit Ct. N. Y.*, Seabury *v.* Grosvenor, unreported.

See also §§ 152, 225, 824.

NAME.

I. In general, § 580, *et seq.*
II. How far one may be restrained from the use of his own name in business, § 600, *et seq.*
III. Corporate name, § 630, *et seq.*
IV. Descriptive name and words, § 640, *et seq.* (and see WORDS, § 1010, *et seq.*).
V. Fancy name, § 680, *et seq.*
VI. Geographical name, § 705, *et seq.*
VII. Patentee, name of, § 731, *et seq.*
VIII. Partnership name, see PARTNERSHIP, § 780, *et seq.*
IX. Names of buildings, see BUILDINGS, § 160, *et seq.*, SIGNS, § 940, *et seq.*
X. Nom de plume, see § 886.

I. *In general.*

§ 580. The provisional directors of a joint stock company, having, without the authority of the plaintiff, published a prospectus, stating him to be a trustee of the company, were restrained by injunction. 1847, *Rolls Court*, Routh *v.* Webster, 10 *Beav.* 561.

§ 581. A court of equity will protect by injunction the name of an enterprise undertaken for the amusement of the public. The use of the name "Christy's Minstrels" protected. 1856, *New York Supreme Ct. S. T.*, Christy *v.* Murphy, 12 *How. Pr.* 77.

§ 582. It is to protect a party's right of selling his own, that the law of trademarks has been introduced. The right must include the privilege of selling to all, to the incautious, as well as to the cautious. Any false name that is assumed in imitation of a prior true name, is in violation of this right, and the use of it will be restrained by injunction. Hence the use of the word "company" in the mark "Brooklyn White Lead & Zinc Company," by the defendant, who had no such company, in imitation of the trademark of the plaintiff, an incorporated company, was restrained by injunction. 1857, *N. Y. Supreme Ct. G. T.*, Brooklyn White Lead Company *v.* Masury, 25 *Barb.* 416.

§ 583. Whether a manufacturer can acquire an absolute right in a *name* as a *name* merely, and whether the words or name "Aramingo Mills" can be protected as a trademark, doubted. 1860, *Ct. of Com. Pleas, Phil. Pa.*, Colladay *v.* Baird, 4 *Phil.* 139.

§ 584. It would be impossible to lay down any general rule as to when persons in business are entitled to use the names of others in the same business. The court has always purposely avoided doing so, that they might not thereby open a door to fraud. But the general principle is, that the court will always interfere where there has been a fraudulent use of the name. Before the court will interfere to prevent one trader from making fraudulent use of the name of another, it requires to be satisfied not only that the course taken by the defendant is calculated to deceive the public but that representation has been made to him by the plaintiff that it will have that effect. If after such representation the defendant persists in continuing the use of the name in the same manner, then on the plaintiff's 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 defendant's persisting in the same course, and that therefore the plaintiff would be entitled to relief. 1865, *Vice Ch. Wood's Court*, Williams *v.* Osborne, 13 *L. T.* (*N. S.*) 498.

§ 585. The actual physical resemblance of the two marks is not the sole question for the court, for if the plaintiff's goods have, from his trademark, become known in the market by a particular name, the adoption by the defendant of a mark or name which will cause his goods to bear the same name in the market, is as much a violation of the plaintiff's rights as the actual copy of his mark. 1866, *Before Lord Chancellor* CRANWORTH *on appeal*, Seixo *v.* Provezende, *Law R.* 1 *Ch.* 192; S. C., 12 *Jurist* (*N. S.*) 215; S. C., 4 *Weekly R.* 357; S. C., 14 *Law Times* (*N. S.*) 314.

§ 586. Although the defendant may have some title to the use of a mark or name, he will not be justified in adopting it, if the probable effect of his so doing is to lead the public to suppose, that in purchasing his goods they are purchasing those of the plaintiff. *Ibid.*

§ 587. A person may acquire a valid trademarl in his own Christian name, as a designation of his place of business, which will be protected by injunction. *N. Y. Superior Ct., S. T.*, Staudinger *v.* Staudinger, 19 *Leg. Int.* 85.

§ 588. The name of an inventor, or discoverer, or manufacturer, may be employed as a part of a trademark. It may give to other parts of the appellation a distinctive character, or rather, it may make words distinctive that without the name would not be. The words "Dr. J. M. Lindsey's Improved Blood Searcher" were held to be a legitimate trademark, and entitled to protection in a court of equity. 1867, *Sup. Ct., Penn.*, Fulton *v.* Sellers, 4 *Brews.* 42.

§ 589. No right can be absolute in a name as a name merely. It is only when that name is printed or stamped upon a particular article and thus becomes identified with a particular style and quality of goods, that it becomes a trademark. Hence, therefore, the fact that the defendant had suggested the name of "Heroine," to the plaintiff for his jars, was held to be immaterial, when he had not used the name until after the plaintiff had used it and established for it a reputation and value—and the defendant was enjoined from the use of said name on his jars. 1868, *Phil. Com. Pleas, Pa.*, Rowley *v.* Houghton, 2 *Brewster*, 303; S. C., 7 *Phila.* 39.

§ 590. The plaintiffs had carried on for some

years at No. 22 Pall Mall, under the style of "The Guinea Coal Company" a large business, which had a considerable reputation. They were also frequently spoken of as "The Pall Mall Guinea Coal Company." In March, 1869, the defendant, who had been their manager, set up a rival business in Beauford Buildings, Strand, under the name of "The Pall Mall Guinea Coal Company," and at the end of August removed it to No. 46 Pall Mall. On November 24, the plaintiffs finding that many persons had been misled into giving orders to the defendant in the belief that his concern was that of the plaintiffs, filed their bill to restrain him from trading under the above style, or any other colorable imitation of the plaintiffs' business style. The defendant, among other grounds of defense, alleged, that the plaintiffs had no exclusive right to the name "Guinea Coal Company," which was used by various other establishments about London. Vice Chancellor MALINS granted an injunction restraining the defendant from using the name "The Pall Mall Guinea Coal Company" in Pall Mall. On appeal by defendant: *Held*, that although the plaintiffs had no exclusive right to the name, the injunction had been properly granted, on the ground that the defendant had no right to use the name in such a way as to lead persons to believe that his business was that of the plaintiffs, and that therefore there was no objection to confining the injunction to the use of the name in a particular place, inasmuch as its tendency to deceive greatly depended on the place where it was used. 1869, *Before Lord Justice Gifford on appeal*, Lee *v.* Haley, 18 *Weekly R.* 242; S. C., *L. R.* 5 *Ch.* 155: S.C., 22 *Law Times R.* (*N. S.*) 251; S. C., 39

Law J. R. (N. S.) Ch. 284; affirming S. C., 18 *Weekly R.* 181; S. C., 21 *Law Times R.* (*N.S.*) 546.

§ 591. The name and address of the manufacturer combined, may constitute a trademark which will entitle him who adopts it to protection in its exclusive use, but neither the name nor the address singly will be sufficient for protection; both must be used. 1870, *Supreme Ct. of Illinois*, Candee *v.* Deere, 54 *Ill. R.* 439. See §§ 22, 740.

§ 592. A name has for certain purposes a commercial value. If the proprietor estimates that value, and sells it to another person, to the extent and for the purposes for which he sold it, he has no right to use it. 1871. *Ct. of Com. Pleas, Phil. Pa.*, Gillis *v.* Hall, Ayer *v.* Hall, 3 *Brews.* 509; S. C., 8 *Phila.* 231; S. C., 1 *Leg. Gaz.* 124.

§ 593. It is unlawful to put up imitation goods under the name of the real manufacturer, and the excuse that such an act was authorized by a person of the same name as that manufacturer, is absurd. 1872, *Supreme Ct. of Louisiana*, Wolfe *v.* Barnett, 24 *La. An.* 97.

§ 594. Title to property in the name "Keystone Line," acquired by many years' certain, exclusive appropriation and use of it by shippers of merchandise, who did not own the vessels employed by them, will be protected in equity. 1872, *Ct. of Com. Pleas, Phila. Pa.*, Winsor *v.* Clyde, Stetson *v.* Winsor, 9 *Phila.* 513.

See also, §§ 283, 878.

II. *How far one may be restrained from the use of his own name in business.*

§ 600. **Where plaintiff marked his goods "Sykes' Patent," to show that they were his own**

manufacture, and defendant copied the mark on his goods to show that they were plaintiff's manufacture, and sold the goods so marked as and for plaintiff's manufacture; *Held*, that case would lie for the injury, though plaintiff and the defendant were both named "Sykes," and neither of them had in fact a valid patent, and that a verdict for the plaintiff would be sustained where the evidence was, that the persons to whom the defendant sold the goods knew that they were not manufactured by the plaintiff, but that the defendant copied plaintiff's mark, and sold the goods so marked, in order that the purchasers might re-sell them as and for goods manufactured by plaintiff, and which they did. 1824, *King's Bench*, Sykes *v.* Sykes, 3 *Barn. & C.* 541; S. C., 5 *Dowl. & Ryl.* 292.

§ 601. The right which any person may have to the protection of the court, does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practiced against him by means of a name, though the person practicing it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others. A blacking manufactory had long been carried on under the firm name of Day & Martin, at 97 High Holborn. The executors of the survivor continued the business under the same name. A person of the name of Day, having obtained the authority of one Martin to use his name, set up the same trade at 90½ Holborn Hill, and sold blacking as of the manufacture of Day & Martin, 90½ Holborn Hill, in bottles and labels having a general resemblance to

those of the original firm, and in a manner calculated to mislead the public. He was restrained by injunction. 1843, *Rolls Ct.*, Croft *v.* Day, 7 *Beav.* 84.

§ 601*a*. In a suit for an injunction against the use by defendants of a certain name and mark upon their goods, the defendants admitted the use of the name and mark, but said that it was their true name, and that they were entitled so to use it; the plaintiffs, without moving for an injunction, went into evidence in equity. At the hearing of the cause, the court, being of opinion that the evidence did not establish the plaintiff's right to the injunction, but that it showed the defendants to have used the name and mark in question on their goods, in a manner which might lead purchasers to understand falsely, that the goods were manufactured by the plaintiffs, gave the plaintiffs the option either of having the bill dismissed against them without costs, or having the right tried at law. The bill being retained for a year, with liberty to the plaintiffs to bring an action at law, the action was brought and the plaintiffs recovered a verdict. The court then granted the injunction and ordered the defendants to pay the costs at law and in equity, except the costs of the evidence in equity. 1847, *Vice Chancellor's Ct.*, Rodgers *v.* Nowill, 6 *Hare*, 325; and see S. C., 5 *Com. Bench.* (*M. G. & S.*) 109; S. C., 11 *Jurist*, 1037; S. C., 17 *L. J. R. N. S.* (*C. P.*) 52.

§ 602. The plaintiff, Thomas Holloway, sold a medicine as "Holloway's Pills." The defendant, Henry Holloway, commenced selling pills as "H. Holloway's pills," but in boxes, &c., similar to the plaintiff's, and with a view of passing off his pills

as the plaintiff's. The pill boxes and pots were similar in form to, and the labels and wrappers were copied from, those used by the plaintiff. The defendant was restrained by injunction. 1850, *Roll's Court*, Holloway *v.* Holloway, 13 *Beav.* 209.

§ 603. Where a person is selling an article in his own name, fraud must be shown to constitute a case for restraining him from so doing on the ground that the name is one in which another has long been selling a similar article. Therefore, where a father had for many years exclusively sold an article under the title of "Burgess's Essence of Anchovies" the court would not restrain his son from selling a similar article under that name, no fraud being proved. 1853, Burgess *v.* Burgess, 3 *De G. M. & G.* 896; S. C., 17 *Jur.* 292; S. C., 22 *Law Journal R.* (*N. S.*) *Chanc.* 675; S. C., 17 *Eng. L. & Eq.* 257.

§ 604. Where the plaintiff and the defendant have nearly the same names and are engaged in the same business, each has the right to use his own name, and a party will not be restrained by injunction from using his own name, unless he so use it as to mislead. 1857, *N. Y. Supreme Ct., G. T.*, Clark *v.* Clark, 25 *Barb.* 76.

§ 605. Where a firm name, as "J. & P. Coats" in connection with certain symbols, has acquired the properties of a trademark, it is not an infringement for two other individuals bearing the same name, to adopt the style of "J. & T. Coats" to designate goods of the like description, provided they do not use it in connection with the residue of the trademark of the former firm. Coats *v.* Platt, 17 *Leg. Int.* 213; S. C., 7 *Pitts. L. J.* 361.

§ 606. A defendant sold tobacco pipes packed in boxes or cases, upon which were labels or descriptions of a similar character to those of the plaintiff, using the plaintiff's name as being the real manufacturer, the defendant having a person in his employ of that name: *Held*, that such colorable imitation and use of the labels and descriptions could be restrained by injunction. 1865, *before V. C. Wood*, Southorn *v.* Reynolds, 12 *Law T. R.* (*N. S.*) 75.

§ 607. The court will not enjoin a defendant from using his own name in the prosecution of a manufacturing business, because it is similar to that of a rival manufacturer in the same business. Any injury which one manufacturer may suffer by competition of other persons of the same name, from the use of such name merely, is without a remedy. 1867, *N. Y. Supreme Ct., S. T.*, Faber *v.* Faber, 49 *Barb.* 357; S. C., 3 *Abb. Pr. N. S.* 115.

§ 608. A manufacturer has a right to adopt and appropriate his surname as a trademark; and another manufacturer of the same article, though his surname is the same, has no right to use his own surname in such a way as to deceive the public and deprive the former of the benefit of the notoriety and market which his articles have gained. 1867, *N. Y. Supreme Ct., G. T.*, Howe *v.* Howe Sewing Machine Co., 50 *Barb.* 236.

§ 609. The plaintiff's preparations were known to the trade and public generally as "Stonebreaker's medicines." One Dr. Stonebreaker, a brother of the plaintiff, engaged with the defendants in the sale and preparation of medicines known as "Dr. Stonebreaker's Medicines," using on their wrappers and labels the language of the plaintiff

on his wrappers and labels, and printing on the wrappers of some of their medicines the certificates given to the complainant in recommendation of his preparations. The evidence in the case showed that the whole agreement between all of the defendants was but a combination to deceive the public and to enable them to obtain for their medicines the benefit of the celebrity which the plaintiff's preparations and medicines had in the market, at the expense of the plaintiff and in fraud of his rights. *Held*, that although Dr. Stonebreaker had a right to enter into an agreement with anybody to manufacture and sell his own medicines, he had no right to lend or sell his name to perpetrate an injury upon his brother, and a fraud upon the public. The defendants were restrained by injunction from using the name Stonebreaker in titles of preparations and medicines the same as those used by the plaintiff. 1870, *Maryland Court of Appeals*, Stonebreaker *v.* Stonebreaker, 33 *Md.* 252.

§ 610. Plaintiff manufactured an article called "Lazenby's Harvey's Sauce." Defendant employed a person of the name of Charles Lazenby to assist in manufacturing a sauce which he called "Lazenby's Harvey Sauce," and put up with labels resembling the plaintiff's. It was assumed at the hearing that the word "Harvey's Sauce" was not itself a trademark, but a name open to the public. *Held*, that defendant might represent himself as the proprietor and maker of a Harvey Sauce, and to represent himself as the maker of a Harvey Sauce made according to a recipe purchased from a Mr. Charles Lazenby, or to represent that there was a connection by relationship between Charles Lazenby the vendor, and Elizabeth Lazenby, the original

proprietor of it; but that the defendant was not entitled to use his present labels, or to represent his business as being carried on at No. 6 Edwards Street, or to represent that his sauce was the "original sauce" or the "original Lazenby's Sauce" or "Lazenby's Sauce, the original." 1871, *Ct. Ct. of App.*, Lazenby *v.* White, 41 *L. J.* (N. S.) *Ch.* 354.

§ 611. The defendant sold his right to use his own name on a preparation known as "Hall's Vegetable Sicilian Hair Renewer." A decree of the court enjoined the defendant from using the name of "Hall" or "R. P. Hall" upon any such preparation as aforesaid. The defendant commenced the manufacture and sale of an article, which he designated "R. P. Hall's Improved Preparation for the Hair," and added upon the label that the new article was not the original article. Upon a rule to show cause why an attachment should not issue against him for a contempt in disregarding the decree of the court: *Held*, that a name has for certain purposes a commercial value. If the proprietor estimates the value and sells it to another person, to the extent and for the purposes for which he sold it, he has no right to use it. That the use of the name "R. P. Hall" by the defendant was a palpable piracy of plaintiff's trademark, and a clear evasion of the decree. 1871, *Ct. of Common Pleas, Phila. Pa.*, Gillis *v.* Hall; Ayer *v.* Hall, 3 *Brews.* 509; S. C., 1 *Ley. Gaz. R.* 124; S. C., 8 *Phila.* 231.

§ 612. Any person who by fair means has gained the knowledge of a trade secret, may, after the death of the original inventor, make and sell the article under the name of the original inventor, pro-

vided such person does nothing to induce the public to believe that the article sold by him is made by the successor of the original inventor. A member of the family of R. J., the original inventor of a secret preparation, having by fair means become possessed of the original recipe, made and sold the article by the name given to it by the original inventor, under the signature of R. J., his own name being R. J. J. *Held*, that he was not entitled, as against the successor of the original inventor, to sell the article under the siguature of R. J., simply, or to represent that his was the only genuine preparation. 1872, James *v.* James, *Law R.* 13 *Eq.* 421; S. C., 20 *W. R.* 434; S. C., 41 *Law J. R.* (*N. S.*) *Ch.* 353; S. C., 26 *L. T. R.* (*N. S.*) 568.

§ 613. H by agreement sold the use of his name to C, and C manufactured goods marked "H & C." On C's death, which terminated the agreement, C's son continued to manufacture goods with the same mark. H forbade him to use his name under said agreement or in any way, and C's son replied that he had made arrangements with another person named H, to use his name in connection with his own. *Held*, that the plaintiff, having no interest in the business, had no right in any trademark used in it, and could not therefore maintain a bill to restrain the use of the name of Hallett & Cumston as a trademark; nor to restrain the use of his name under the Gen. Sts. of Mass., c. 56, §§ 3, 4, in the absence of a distinct and sufficient allegation that the defendant used the name of H. with intent to represent it to be the name of the plaintiff, and thereby to defraud and injure him. 1872, *Supreme Jud'l Ct. of Mass.*, Hallett *v.* Cumston, 110 *Mass.* 29.

§ 614. Theodore J. and John H. McGowan were

manufacturers of pumps, and partners in business under the name of "McGowan Brothers." John H. sold out all his interest in the business and assets of the firm to Theodore J., including the old patterns, with the name "McGowan Brothers" on them, and Theodore J. was to assume the liabilities and succeed to the business of the firm, and associate with himself others if he chose. After the contract of sale was executed, there was inserted in the notice of dissolution a privilege to Theodore J. of using the old firm name, as to which there had been no previous negotiation. Theodore J., with others, procured a certificate of incorporation, under the name "The McGowan Brothers Pump and Machine Company," and transferred to the said corporation all his rights and interest as purchased from John H. *Held*, that John H., who set up a similar business by himself, was entitled to an injunction to restrain the corporation from the use of "McGowan Brothers" in its name; the use of the old firm name, granted to Theodore, being in the nature of a revocable license. That the old name is not a trade mark to be used by the corporation; and while it has a right to use the old patterns and sell the castings with the name "McGowan Brothers" on them, it cannot hold out by the corporate name, that *all* the articles made by it are in part the product of the skill and labor of John, or that the corporation is in fact the old firm. That a well-founded apprehension of injury is sufficient to warrant an injunction, where the act, if completed, must give a ground of action. 1872, *Superior Ct. of Cincinnati, O.*, McGowan Bros. Pump and Machine Co. *v.* McGowan, 2 *Cin.* 313.

§ 615. The petitioners' spoons and forks were

manufactured under the supervision of the Rogers brothers and were stamped "1847, Rogers Bros. A. 1." The respondent acquired the right from other persons, named Rogers, to stamp the name of Rogers on plated spoons and forks manufactured by respondent for himself and them. He stamped the goods so manufactured "C. Rogers Bros. A. 1." and "C. Rogers & Bros. A. 1." These stamps resembled the petitioners' trademark to such an extent that they were calculated to deceive, and did in fact deceive, unwary purchasers, and the respondent sold large quantities of his own goods thus stamped, upon the reputation of the petitioners' goods, stamped with their trademark. *Held*, that the respondent's trademarks were infringements of the petitioners' trademark, and that the petitioners were entitled to an injunction restraining their further use by the respondent. The court declined, however, to prohibit absolutely the use of the name "Rogers," inasmuch as that name might be used in such a manner as not to constitute an infringement of the petitioners' trademark. The court also declined to prohibit absolutely the sale by the respondent of goods bearing the stamp in question, which were on hand at the time the petition was served, and also goods at that time in process of manufacture and which had been stamped, as such goods might be sold to purchasers who would not be misled by the stamps, and some injustice might be done to the respondent by such absolute prohibition—leaving the petitioners to their remedy at law for any injury that might be actually done by the sale. 1872, *Sup. Ct. of Errors, Conn.*, Meriden Britannia Co. *v.* Parker, 39 *Conn.* 450.

§ 616. A man cannot make a trademark of his

name to the exclusion of a like use of it by another of the same name, the use of it by the latter being fair, and unaccompanied by contrivances to deceive. 1873, *N. Y. Supreme Ct., G. T.*, Wolfe *v.* Burke, 7 *Lans.* 151; S. C., reversed on another point, 56 *N. Y.* 115.

§ 617. "There was lately before me, and before the court of appeal, who affirmed my decision, the Annatto case, Fullwood *v.* Fullwood. In that case the uncle, the plaintiff, had got the original business. The nephew, the defendant, set up the same business, and used a label so like his uncle's that I had great difficulty in saying, even on the label itself, that there was not a case for interference. Upon the whole, I am inclined to think the court would not have interfered upon the label alone, as his name was *Fullwood*, and he did make annatto, as long as he remained at a distance. At all events, the uncle did not ask for the interference of the court on that ground; but nothing would do but that, like the defendant in the *Guinea Coal Company* case, he must remove from the place where he had been carrying on his business, into the same small street in which his uncle carried on his business. Then, there being a combination of the name, a similarity of the labels, and the same place of manufacture, I thought, and in that I was affirmed by the court of appeal, that it was a case for the interference of the court, because I was of opinion that he could not have removed into that street, of all streets in the world, except for the purpose of availing himself of the name and reputation of his uncle." *Malins, V. C.*, Fullwood *v.* Fullwood, cited in *L. R.* 17 *Eq.* 40.

§ 618. Plaintiffs, who were two brothers, carried

on business at West Troy, Albany county, N. Y., as bell founders, under the firm name of "E. A. & G. R. Meneely." This business had been established by Andrew Meneely, the father of the plaintiffs, who had acquired an extended reputation of great value as a manufacturer of bells, and which had by his last will been given to plaintiffs. Defendants, one of whom was a brother of plaintiffs, after the father's death, began the manufacture of bells under the name of "Meneely & Kimberly" at Troy, Rensselaer county, N. Y. The defendants by the use of the name "Meneely" expected and intended to derive a profit and advantage from the good reputation and celebrity in bell founding given to that name by Andrew Meneely. In an action to restrain defendants from the use of the name of "Meneely" in the bell business, *held*, (1) that equity would not interfere to prevent defendant, Meneely, from the use of his own name in such business, no fraud or intention to injure plaintiffs or deceive the public being shown, even though he intended to derive advantage from such name; (2) that there was not such a resemblance in the names of the firms as would of itself tend to deceive the public or indicate a fraudulent purpose; (3) that the location of defendants' business was not of itself evidence of an attempt to deceive the public, or an interference with plaintiffs business. 1874, *N. Y. Supreme Ct., G. T.*, Meneely *v.* Meneely, 1 *Hun*, 367; S. C., 3 *T. & C.* 540; S. C., affirmed, 62 *N. Y.* 427.

§ 619. Andrew Meneely, by his will, after making certain specific legacies, devised all the remainder of his estate, both real and personal, to the plaintiffs, charging them with the support and mainte-

nance of his children during the minority of the youngest of them, and with the payment of certain legacies, and he states that in so doing, he has taken into view "that I leave them . . . . . conveniences for carrying on a successful business, ... and the good will and custom which it is believed is established and connected with it." *Held*, (1) that there is a distinction between appropriating the good will of a business of a deceased father, carried on in a particular locality, and enjoying the benefit of his name and reputation as a man of skill and fair dealing; (2) that there was nothing in the language of the will, which conferred upon the plaintiffs the exclusive use of the name of Meneely in the business of bell founding. *Ibid.*

§ 620. If the defendants were using the name of Meneely with the intention of holding themselves out as the successors of Andrew Meneely, and as the proprietors and managers of the old-established foundry which was being conducted by the plaintiffs, and thus enticing away the plaintiffs' customers; and if with that intention they used the name in such a way as to make it appear to be that of the plaintiffs' firm, or resorted to any artifice to induce the belief that the establishment of the defendants was the same as that of the plaintiffs, and, perhaps, if without any fraudulent intent they had done acts calculated to mislead the public as to the identity of the establishments, and produce injury to the plaintiffs beyond that which resulted from the similarity of name, then the cases referred to sustain the proposition, not that a court of equity would absolutely restrain the defendant Meneely from the use of his own name in any way or form, but simply that the court would enjoin him from

using it in such a way as to deceive the public and injure the plaintiffs. The manner of using the name is all that would be enjoined, not the simple use of it, for every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead. Where the only confusion created is that which results from the similarity of the names the court will not interfere. A person cannot make a trademark of his own name and thus obtain a monopoly of it which will debar all other persons of the same name from using their own names in their own business. *N. Y. Ct. of Appeals, Ibid.*, 62 *N. Y.* 427.

§ 621. Plaintiff sold a cosmetic known as "Gourard's Oriental Cream or Magical Beautifier," and claimed those words as his trademark, and that the defendants infringed his rights by using the words "Creme Orientale" and adding thereto "by Dr. T. F. Gourard's Sons." Plaintiff was known by the name of Dr. J. W. Trust for a number of years, and the defendants, his sons, were known by that name. Three years before the commencement of this action, plaintiff's name was changed to Trust Felix Gourard. The defendants were enjoined. 1875, *N. Y. Supreme Ct. Gen. T.*, Gourard *v.* Trust, 3 *Hun*, 627.

§ 622. Plaintiffs for a long time had been engaged in business in New York City as manufacturers of pianos, under the firm name of Decker Brothers, and their pianos had acquired much celebrity.

Defendants since 1871, had been in the same business, in the same place, under the firm name of Decker & Barnes, and defendant Decker prior to that time had been engaged in the same business under the name of Decker & Co. The defendants caused to be registered and recorded as a trademark, in the patent office, the words: "*The Decker Piano.*" Plaintiffs sought to enjoin defendants from the use of said trademark, claiming it was obtained for the purpose of misleading the public, and that it was an artifice calculated and intended to induce purchasers to believe that defendants were solely entitled to use the name of Decker, and that the pianos manufactured by them were those of the plaintiffs. Defendants claimed that their pianos were known in the trade as Decker pianos, long before the plaintiffs acquired a reputation as the manufacturers of pianos. All the equities in the complaint and plaintiffs' affidavits were denied and rebutted by the answer and affidavits of defendants. Motion for injunction *pendente lite* denied. 1876, *N. Y. Supreme Ct., S. T.*, Decker *v.* Decker, 52 *How. Pr.* 218.

§ 623. The plaintiffs' trademark consists of the words "Prince's Metallic Paint," used in a particular form. The defendants, for their trademark, use the words "Prince Bros. Iron Ore Paint," in an entirely different form. Prince is the name of the defendants; they are brothers, and they manufacture and sell a paint which they call "iron ore paint." The injunction restrains them from using the name "Prince," as applied to the paint manufactured by them, "or upon any label, card, billhead, or any advertisement." The order is altogether too broad. The use of their own name in connection with their business, in any form that

does not infringe the plaintiffs' trademark, cannot be enjoined. But I think that defendants' trademark is no infringement of the plaintiffs'. There is no similitude between the trademarks except the word "Prince," and that is only used to indicate that Prince Bros. are the manufacturers of iron ore paint, and not, I think, to hold out to purchasers that theirs is a Prince metallic paint made by plaintiffs. Motion denied and injunction order dissolved, with ten dollars costs of opposing. 1877, *N. Y. Supreme Ct., S. T.*, Prince Metallic Paint Company *v.* Carbon Metallic Paint Company, unreported.

See also §§ 144, 689, 949.

III. *Corporate name.*

§ 630. The plaintiff, "The London and Provincial Law Assurance Society," was projected in the year 1845, and its deed of settlement was registered in November, 1846. Some time afterwards another insurance company, the defendant in the suit, called "The London and Provincial Joint Stock Life Insurance Company," was projected and completely registered on June 20, 1847. A motion was made by the plaintiff, to restrain the defendant from using the words: "London and Provincial." The Vice Chancellor refused to grant the injunction, on the grounds that it was a fair question whether the plaintiff was likely to suffer any injury, and whether there had been such a length of user by the plaintiff as to entitle it to complain, but gave the plaintiff leave to bring an action at law. 1847, *Vice Chancellor's Ct.*, London and Provincial Law Assurance Society *v.* London and Provincial Joint

Stock Life Insurance Company, 11 *Jurist*, 938; S. C., 17 *Law J. R.* (*N. S.*) *Ch.* 37.

§ 631. The corporate name of a corporation is a trademark from the necessity of the thing, and upon every consideration of private justice and public policy, deserves the same consideration and protection from a court of equity. A corporate name is a necessary element of a corporation's existence, and any act which produces confusion or uncertainty concerning such name, is well calculated to injuriously affect the identity and business of the corporation. 1870, *U. S. Circuit Court*, Newby *v.* Oregon Central R. R. Co., 1 *Deady*, 609.

§ 632. The right to a corporate name does not rest in parol, but is shown by the record and is triable by inspection thereof in any form of proceeding. Therefore, a court of equity will not refuse to enjoin the use of such name because the right to the same has not been established at law. *Ibid.*

§ 633. The jurisdiction to enjoin the use of a corporate name does not depend upon the insolvency of the defendant. *Ibid.*

§ 634. Where the name of a manufacturing corporation designates the origin and ownership of goods manufactured by it, it will be protected in the use of its name to the same extent and upon the same principle that individuals will be protected in the use of trademarks. Where a corporation, with the consent of its principal stockholders, has embodied the names of such stockholders in the corporate name, the right to use the name so adopted will continue during the existence of the corporation. Another corporation subsequently formed, and composed in part of the same persons, will have no right so to use the names of such per-

sons as to mislead those dealing with them into the belief that the two companies are the same. 1870, *Supreme Court of Errors of Connecticut*, Holmes *v.* Holmes, Booth & Atwood Manf. Co., 37 *Conn.* 278

§ 635. In 1853 the plaintiff corporation was organized under the joint stock laws of Connecticut, taking the name "Holmes, Booth & Haydens"—being the names of its principal corporators or promoters. Two of them, Israel Holmes and J. C. Booth, whose names appear in the corporate title, by long experience had acquired considerable skill and reputation in the manufacture of brass, the business for which the corporation was organized. Thus organized, the corporation established and carried on a successful business, and their corporate name acquired a valuable reputation in the public markets of the country. Most of the respondent's corporators were officers, stockholders and employees of the plaintiff corporation. One after another resigned his office or position, and sold out his stock and secretly organized and put in operation a rival company (in 1869) which bought the entire property of a similar corporation in a neighboring town and located themselves permanently in the same town with the petitioners, established their depots for the sale of their goods in New York and Boston as near as practicable to the depots of the petitioners, and organized under the corporate title of "The Holmes, Booth & Atwood Manufacturing Company." The similarity of the names of the two companies resulted in confusion of their correspondence, mistakes in the delivery of orders, goods, &c., and the court below found that "by reason of this similarity, dealers in the market are likely to be confused and misled into the belief that the

companies are the same." *Held*, that the respondents should be restrained by injunction from the use of their said title. *Ibid.*

§ 636. Plaintiff, a manufacturing company, had long applied its corporate name, "The Amoskeag Manufacturing Company," to numerous kinds of cotton goods, but had never made prints. Sometimes its full name appeared upon the labels affixed to its goods, at other times the word "Amoskeag," and again "A. M. Co." or "A. M. C." Defendant used the word "Amoskeag" on prints: *Held*, that plaintiff was entitled to an injunction restraining the defendant from such use of its corporate name. 1876, *N. Y. Supreme Ct. Special Term*, The Amoskeag Manufacturing Company *v.* Garner, 4 *Am. Law Times R.* (*N. S.*) 176. See 56 *Barb.* 151, and 6 *Abb. Pr.* (*N. S.*) 265.

IV. *Descriptive name and words.*

§ 640. The plaintiff's father prepared and sold a medicine called "Dr. Johnson's Yellow Ointment," for which no patent had been obtained. The plaintiff, after his father's death, continued to sell the same. The defendant sold a medicine under the same name and mark, but no evidence was given of the defendant having sold it as if prepared by the plaintiff. *Held*, that no action could be maintained against him by the plaintiff. 1783, *King's Bench*, Singleton *v.* Bolton, 3 *Douglas*, 293.

§ 641. There is no exclusive right in the manufacture and sale of a medicine, and therefore the sale by another person of a medicine under the same title as the plaintiffs' will not be prevented—provided the defendant does not represent his art

cle to be the same as the plaintiffs. 1813, *Before the Vice Chancellor*, Canham *v.* Jones, 2 *V.* & *B.* 218.

§ 642. The bill stated that Isaac Swanson was the owner of the recipe for preparing Velno's Vegetable Syrup, which he bequeathed to the plaintiff, who continued its manufacture and sale. The defendant, a former servant of Swanson, manufactured and sold a spurious composition under the name of Velno's Vegetable Syrup, and stated by him in advertisements and handbills, to be the same medicine in quality and composition as that made by Swanson and the plaintiff. General demurrer to the bill allowed. *Ibid.*

§ 643. Where certain medicines are designated by the name of the inventor, as a generic term, designating their general character, the inventor is not entitled to the exclusive right of compounding or vending them, unless he has a patent therefor; and if another person prepares such medicines of an inferior quality, and sells them, and by this means all medicines of that class are brought into disrepute, such inventor can maintain no action for any loss sustained by him in consequence thereof, unless he sold them, or placed them in the hands of others to sell, as and for the medicines made by the inventor, so that persons purchasing the same supposed and believed they were purchasing the medicines made and prepared by the inventor. Protection of the words "Thomsonian medicines" as a trademark refused. 1837, *Supreme Jud'l Ct. of Mass.*, Thomson *v.* Winchester, 19 *Pick.* 214.

§ 644. There is no exclusive right in the use of marks, symbols or letters, which indicate the appropriate name, mode, or process of manufacture, or the peculiar or relative quality of the fabric manu-

factured, as distinguished from those marks which indicate the true origin or ownership. 1849, *N. Y. Superior Ct., S. T.*, The Amoskeag Mfg. Co. *v.* Spear, 2 *Sandf. Sup'r Ct.* 599.

§ 645. No exclusive right to the use of words, marks, or devices, which do not denote the goods or property or particular place of business of a person, but only the nature, kind, or quality, of the articles in which he deals, can be acquired. There is obviously no good reason why one person should have any better right to use them than another. They may be used by many different persons at the same time, in their brands, marks, or labels on their respective goods, with perfect truth and fairness. They signify nothing, when fairly interpreted, by which any dealer in a similar article could be defrauded. Hence, the court refused to protect the use of the words "Cylinder," "Lake," "New York," and "Galen." 1853, *N. Y. Supreme Ct., S. T.*, Stokes *v.* Landgraff, 17 *Barb.* 608; affi'd at *G. T.*, Sept. 1854.

§ 646. A name may, in some cases, be rightfully used and protected as a trademark. But this is only true where the name is used as indicating the true origin or ownership of the article offered for sale; never where it is used to designate the article itself, and has become by adoption and use its proper appellation. 1857, *N. Y. Superior Ct., S. T.*, Fetridge *v.* Wells, 4 *Abb. Pr.* 144; S. C., 13 *How. Pr.* 385. See Fetridge *v.* Merchant, 4 *Abb. Pr.* 156.

§ 647. When a new preparation or compound is offered for sale, a distinct and specific name must necessarily be given to it. The name thus given to it, no matter when or by whom imposed, becomes by use its proper appellation, and passes as such

into one common language. Hence, all who have an equal right to manufacture and sell the article, have an equal right to designate and sell it by its appropriate name, the name by which alone it is distinguished and known, provided each person is careful to sell the article as prepared and manufactured by himself and not by another. When this caution is used, there is no deception of which a rival manufacturer, not even the manufacturer by whom the distinctive name was first invented or adopted, can justly complain; and so far from there being any imposition upon the public, it is the use of the distinctive name that gives to purchasers the very information which they are entitled to have. In short, an exclusive right to use, on a label or other trademark, the appropriate name of a manufactured article, exists only in those who have an exclusive property in the article itself. This, however, is a species of property unknown to the law, and that can only be given to one by the infringement of the rights of all. *Held*, that the plaintiffs have no exclusive property in the words "Balm of Thousand Flowers." *Ibid.* But see Fetridge *v.* Merchant, 4 *Abb. Pr.* 156.

§ 648. Where a person forms a new word to designate an article made by him, which has never been used before, he may obtain such a right to that name as to entitle him to the sole use of it as against others who attempt to use it for the sale of a similar article; but such an exclusive use can never be successfully claimed of words in common use previously, as applicable to similar articles. Words as used in any language cannot be appropriated by any one to his exclusive use to designate an article sold by him similar to that for which

they were previously used. That is, no person can acquire a right to the exclusive use of words, applied as the name of an article sold by him, if in their ordinary acceptation they designate the same or a similar article. *Held*, that as it was very doubtful whether plaintiff had any right to the exclusive use of the name "Schiedam Schnapps" for gin, and his right being denied by the defendant, that a preliminary injunction restraining the use of those words by defendant should be dissolved. 1859, *N. Y. Supreme Court, S. T.*, Wolfe *v.* Goulard, 18 *How. Pr.* 64. But see §§ 661, 664, 1029.

§ 649. No dealer in any commodity can be protected by injunction in the exclusive use simply of a name by which to designate it, which does not express the origin, ownership, or place of manufacture or sale of the article, but merely its quality, kind, texture, composition, utility, destined use or class of consumers, or some other attribute which it has in common with other similar commodities. Hence, the term "Club House," as a designation for gin, was not protected, it being established that such name had been long in use as designating a superior kind of gin used in such establishments. 1860, *N. Y. Superior Court, G. T.*, Corwin *v.* Daly, 7 *Bosw.* 222.

§ 650. The court will restrain the use by a third party of an arbitrary fancy name, which a plaintiff has invented and applied to a particular class of goods as sold by him and which has thus become identified with the plaintiff's goods. But where the plaintiff invents or discovers a product to which he gives a name, not as a fanciful but as a descriptive name, and it becomes identified with the plaintiff's goods, so that, by the use of the

name alone, his goods would be referred to, not because they are the plaintiff's, but because he alone as patentee can make and sell them, the defendant will not be enjoined from using the name fixed upon by the patentee, for similar goods, manufactured in such a way as not to infringe the patent. Hence, the use of the words "Paraffine Oil" was not enjoined. 1862, *Vice. Ch. Wood's Ct.*, Young *v.* Macrae, 9 *Jurist* (*N. S.*) 322.

§ 651. A word which is the *name* of the article, or indicates its quality, is not capable of an exclusive use as a trademark. Every one has the right to manufacture the same article and to call it by its name or descriptive character. In doing so, there is no violation of propriety or of truth, nothing which intrudes upon the distinctive province of others. Were it otherwise, monopolies might be created which would be destructive of the freedom of trade. Hence, any one has the right to make an extract from the flower known as "The Night Blooming Cereus," and to call it what it is, by the name of the flower, and his use of those words will not be enjoined. 1864, *Ct. of Com. Pleas, Phil. Pa.*, Phalon *v.* Wright, 5 *Phil.* 464.

§ 652. Words that do not denote the goods or property or particular place of business of the plaintiff, but only the nature, kind or quality of the article in which he deals, are never the subjects of trademarks. Hence, no title can be acquired to the words "Old London Dock Gin." But where the name of the manufacturer is appended to such title and a style of bottle and label used which have a general resemblance of form, symbols and accompaniments to those of the plaintiff, and are therefore calculated to deceive the public, the plain-

tiff will be protected by injunction. 1865, *N. Y. Com. Pleas, S. T.*, Binninger *v.* Wattles, 28 *How. Pr.* 206.

§ 653. A trademark, which is merely descriptive of the kind of articles or goods to which it is applied, is not a trademark in a legal sense, and is not entitled to protection as such. Hence, where the name of "Holbrook" and "Holbrooks," as applied to school apparatus, had become generic, and descriptive merely of the class of articles manufactured to elucidate astronomy, geography and geometry in schools, protection to said names was refused. 1866, *Superior Ct. of Chicago*, Sherwood *v.* Andrews, 5 *Am. Law Reg.* (*N. S.*) 588.

§ 654. In 1847, Baron Von Liebig discovered and published a process for making an extract of meat. The extract was made extensively at the Royal Pharmacy, Munich, and sold there, with the permission of the baron, as Liebig's extract of meat, from 1861 to 1864. It became generally known in Germany and other countries, and the term Liebig's extract of meat became used as a term of art in scientific treatises. In 1864, Baron Liebig gave the Fray Bentos Company the right of using his name in connection with the extract of beef manufactured by them. In 1864, the plaintiff's company bought the business and property of the Fray Bentos Company, and by a deed poll, dated April 12, 1866, the baron granted to the plaintiff's company the exclusive right and privilege to use his name in connection with the extract manufactured by them. The defendants, who had previously sold extract manufactured by the Fray Bentos Company, in 1866, began to sell as "Liebig's extract of meat" an extract manufactured by a Mr. Tooth, in Australia, after Liebig's process. On a suit being instituted

by the plaintiff's company to restrain the defendants from so using the name Liebig's extract of meat, the court *held*, that the term having been used as a term of art to designate a well known process before 1861, the defendants were fully justified in using it, and the bill was dismissed with costs. 1867, *Vice Ch. Wood's Ct.*, Liebig's Extract of Meat Company (limited) *v.* Hanbury, 17 *Law Times R.* (*N. S.*) 298.

§ 655. A manufacturer cannot acquire a special property in an ordinary term or expression, the use of which as an entirety is essential to the correct and truthful designation of a particular article or compound. Thus, a dealer in salt fish can not maintain an exclusive claim to the use of the term "dessicated cod-fish" as a trademark. It is a sequence of the right of each party to dessicate cod-fish that he may sell the article thus produced, under the designation which is strictly appropriate to the altered or modified condition of the principal ingredient. A dealer may distinguish his "dessicated cod-fish" as the "Bismarck" or the "Von Buest," or by the prefix of any other proper name or common word not previously applied in that connection, and not essential to the truthful designation of the article produced, and he will be protected in its exclusive use. But he can no more acquire a special property in the word "dessicated," as applicable to an article which has undergone that process, than he can to the words "dried," "preserved" or "pickled," as applied to that which has, in fact, been thus treated. It appearing that no attempt had been made to deceive the public or to palm off the defendant's dessicated cod-fish as that of the plaintiffs' manufacture, the temporary in-

junction was dissolved. 1868, *N. Y. Com. Pleas, S. T.*, Town *v.* Stetson, 5 *Abb. Pr.* (N. S.) 218; S. C., affirmed, 3 *Daly*, 53.

§ 656. Although, by the long continued use of certain letters, figures, words, marks or symbols, which do not, of themselves, and were not designed to indicate the origin or ownership of the goods to which they are attached, but only to designate the nature, kind or quality of the different varieties of the article, and because so marked, the goods have become known as those of the manufacturer who first used them, such fact cannot alter the original meaning of the words or symbols, or the intent with which they were first used, as denoting the name of the thing, or its general or relative quality, or take from others the right to employ them in the same sense. So where a manufacturer of plows placed upon them, for the purpose of designating the size, shape, and quality of the different plows upon which they were respectively branded, the letters and figures in their combinations as follows: "A No. 1, A X No. 1, No. 1, X No. 1, No. 3, and B No. 1," it was *held*, he had no exclusive right to their use for such purpose, but they could be used by any other manufacturer of plows, in the same combinations, to indicate like varieties of the same article. 1870, *Supreme Ct. of Illinois*, Candee *v.* Deere, 54 *Ill.* 439.

§ 657. The defendants resisted an application for an injunction to restrain an alleged violation of a trademark on the ground (among others) that the plaintiff's trademark was composed of letters, words and characters denoting the quality of the article to which they were affixed. RAND, J.: "I find some authorities that hold there can be no

exclusive right to a trademark, which only denotes the quality of the article manufactured. I believe, however, the weight of authority is the other way. The later, and it seems to me, the better authorities, establish the proposition that a trademark may be composed in part, if not entirely, of words, letters and characters, that denote the quality of the article. If a trademark is once established, I hold, whatever its design, it will, to some extent, necessarily indicate to the public the quality of the article. But if I am mistaken in this, still I am of opinion that the plaintiff's trademark does designate much more than the simple quality, or quantity of the flour in the barrel, and therefore is entitled to protection from infringement." 1871, *Indianapolis Superior Ct. S. T.*, Sohl *v.* Geisendorf, 1 *Wilson*, 60 (*Ind.*).

§ 658. No one has a right to appropriate a sign or symbol which from the nature of the fact it is meant to signify, others may employ with equal truth for the same purpose. Names having a definite and established meaning in the language, and which do not indicate origin or ownership, or something equivaleut, can not be appropriated by one so as to exclude a similar use by others. No property can be acquired in words or marks which do not denote the goods or property, or particular place of business of a person. No person by prior use can acquire an exclusive right to the words "Mammoth Wardrobe" as a sign or designation where a large amount of clothing is kept. 1871, *Michigan Circuit Ct.*, Gray *v.* Koch, 2 *Mich. N. P.* 119.

§ 659. The owner of a peculiar product of nature, like natural mineral water, who has applied to it a

conventional name, by which it has become generally known, and under which it has been extensively sold by him as a useful article, is entitled to be protected in the exclusive use of such name as his trademark in the sale of the article. 1871, *N. Y. Court of Appeals*, Congress & Empire Spring Company *v.* High Rock Congress Spring Company, 45 *N. Y.* 291; S. C., 10 *Abb. Pr.* (*N. S.*) 348; reversing S. C., 57 *Barb.* 526.

§ 660. A generic name or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, cannot be employed as a trademark. 1871, *U. S. Supreme Ct.*, Delaware & Hudson Canal Company *v.* Clark, 13 *Wall.* 311.

§ 661. A word, figure, &c., in common use, which indicates the name, nature, kind, quality, or character of the article, cannot be appropriated as a trademark. The word "Schnapps," which has long been in use to designate gin manufactured at Schiedam, cannot be appropriated as a trademark for gin, in the United States, even if its former use had been confined to Europe. 1873, *Supreme Ct. of Cal.*, Burke *v.* Cassin, 45 *Cal.* 467. See §§ 648, 664, 1029.

§ 622. The word "Schiedam" cannot be adopted as a trademark, because it has long been used to denote quality or kind. *Ibid.*

§ 663. The word "aromatic," when employed to express one of the qualities of liquor, cannot be protected as a trademark. *Ibid.*

§ 664. The employment in a trademark of a term, which is the true generic designation of the merchandise, cannot give any exclusive right to employ it. Hence the word "schnapps," intending abroad alcoholic drink in general, and in common use here,

Holland gin, may not be exclusively appropriated for trademark purposes. 1873, *N. Y. Supreme Ct. G. T.*, Wolfe *v.* Burke, 7 *Lans.* 151; S. C., reversed on another point, 56 *N. Y.* 115.

§ 665. Protection afforded to trademarks rests upon the principle of preventing a fraudulent appropriation of a name by which only the product or manufacture of another is designated, and of shielding the public against deception by such means. The appropriate and distinctive name given to a new commodity becomes, by use, its proper appellation, and passes as such into our language, and, excepting rights secured by patent, may be used in manufacturing and selling the article by any one. (Per GILBERT, J.) *Ibid.*

§ 666. A was the manufacturer of certain stout known as "Nourishing London Stout," and had adopted and registered a circular trademark or label with such words inscribed upon it. B carried on the trade or business of wine and ale merchants and had, subsequently to the registration of the plaintiff's label, adopted an oval trademark or label with the words "Nourishing Stout" inscribed upon it. *Held*, that an injunction could not be granted to restrain B from using the label with the inscription "Nourishing Stout," the word "nourishing" being merely descriptive of the quality of the manufacture. 1873, *Vice Ch. Malins*, Raggett *v.* Findlater, 43 *L. J. R.* (*N. S.*) *Ch.* 64; S. C., *L. R.* 17 *Eq.* 29; S. C., 29 *L. T. R.* (*N. S.*) 448; S. C., 22 *W. R.* 53.

§ 667. There is no principle more firmly settled in the law of trademarks, than that words and phrases which have been in common use, and which indicate the character, kind, quality, and composition of the

thing, may not be appropriated by any one to his exclusive use. In the exclusive use of them the law will not protect, nor does it matter that the form of words or phrases adopted also indicates the origin and maker of the article. The combination of words must express only the latter. It is the result of all the decisions, that known words and phrases indicative of quality and composition are the common property of all mankind. They may not be appropriated by one to mark an article of his manufacture, when they may be used truthfully by another to inform the public of the ingredients which make up an article made by him. Even when the sole purpose of the one who first uses them is to form of them a trademark for himself, expressive only of origin with himself, if they do in fact show forth the quality and composition of the article sold by him, he may not be protected in the exclusive use of them. Still less, then, when joined to the fact that they do thus show forth the quality and composition, there is a purpose that they should do so. 1874, *N. Y. Ct. of Appeals*, Caswell *v.* Davis, 58 *N. Y.* 223; overruling S. C., 35 *How. Pr.* 76; 4 *Abb. Pr.* (*N. S.*) 6.

§ 668. It is a right which everyone has, and from the exercise of which he may not be debarred, to make an article of the same ingredients, of the same composition, and of as good quality as that made by another, when that other has no exclusive privilege of manufacture conferred by law. Having this right to make, he has also the right to indicate the ingredients, the composition and quality of that which he has made, by any words or phrases apt therefor. Hence, when he adopts usual phrases which do no more than this, he but takes from a

stock common to all mankind, and does not infringe upon any exclusive right of another, who has, before that, used the same or like words or phrases. Nor can the first user avoid this result by coupling with his purpose to indicate quality and characteristics, a purpose also to indicate origin. Though he have that purpose also, and the form of words used by him have also that effect, inasmuch as he cannot be given the exclusive use, without impairing the right of another, the exclusive use will be denied. The general rule is against appropriating mere words as a trademark. An exception is of those indicating origin or ownership, having no reference to quality or use. Words are but symbols. When they are used to signify a fact, or when, with what purpose soever used, they do signify a fact which others may, by the use of them, express with equal truth, others have an equal right to them for that purpose. *Ibid.*

§ 669. Nor is the question whether the name used as a trademark will convey an exact notion of how to compound an article, so that one reading it may be able to make a like article. If the necessary effect is to inform the reader or hearer of the general characteristics and composition of the thing, it is a name which may be used, with equal truth, by any one who has made and offers for sale a thing compounded of the same ingredients, and who desires to express to the public the same facts. Nor does the coupling together, in a new combination, of words, which before that had been used apart, and had entered into the common or scientific vocabulary, give a right to the exclusive use of such combination, where it is indicative, not of

origin, maker, use and ownership alone, but also of quality and other characteristics. *Ibid.*

§ 670. Plaintiffs prepared a medicine, the principal ingredients of which were iron, phosphorus and elixir of calisaya bark, to which they gave the name of "Ferro-Phosphorated Elixir of Calisaya Bark," and so labeled the bottles containing it. *Held*, that as it appeared from the testimony in the case, that the phrase claimed by the plaintiffs was formed of words in use before the adoption thereof by them; that they were then and are indicative, not of origin, use and ownership alone, but also of characteristics, quality and composition; that the said phrase could not be protected as a trademark, and that the defendant would not be enjoined from their use upon labels, devices, &c., which were calculated to deceive the public, and to induce the belief that the article which he sold was the same as that made and sold by the plaintiffs *Ibid.*

§ 672. The defendant used labels, devices, &c., calculated to deceive the public, and to induce a a belief that the elixir which he sold was the same as that made and sold by the plaintiffs. The plaintiffs sought to have the defendant enjoined from using certain words on such labels which they claimed constituted their trademark. *Held*, that although the courts would be desirous of restraining and punishing the designed interference with the business of the plaintiffs, as the words did not constitute a trademark, the injunction should be denied. 1874, *N. Y. Court of Appeals*, Caswell *v.* Davis, 58 *N. Y.* 223.

§ 673. An exclusive right cannot be acquired to the use of the words "gold medal" as a trademark upon the wrappers of a manufactured article. The

words so used do not indicate ownership or origin, but quality, and that, in some competitive exhibition, a gold medal had been awarded to the article for its excellence, and so they cannot be appropriated as a trademark. 1874, *N. Y. Court of Appeals*, Taylor *v.* Gillies, 59 *N. Y.* 331; affi'g S.C., 5 *Daly*, 285.

§ 674. The applicants, who were iron masters, had for some time prior to the passing of the Trademarks Registration Act, 1875 (38 & 39 *Vict.* c. 91, and 39 & 40 *Vict.* c. 33), been in the habit of using as trademarks the initials of their original firm, the name of their works, or an abbreviation of it, and combinations of them, and also these marks coupled *with symbols or words denoting the particular* quality of the iron. The registrar of trademarks was willing to register as trademarks the initials, and the name of the works and abbreviation and their combinations, but refused to register the marks which contained the symbols or words denoting quality. On motion before MALINS, V. C., that the registrar might be directed to register the whole of the marks claimed: *Held*, that the symbols and words denoting quality, though by themselves not trademarks, yet were trademarks in combination with the initials and the name of the works, and abbreviations and their combinations, and were entitled to registration. On appeal by the registrar of trademarks, the court of appeal were of opinion that the proper form of registration would be "B. B. H., used either alone or in combination with a crown, horse-shoe, or crown and horse-shoe, or with any other mark, device or word signifying the quality of the iron," and such order was made by agreement. 1877, *Ch. Ct. of Appeal*, *In re* Barrow's Application, 25 *W. R.* 564; S. C.,

below, 36 *L. T. R.* (*N. S.*) 291 ; S. C., 25 *W. R.* 407 ; S. C., 46 *L. J. R.* (*N. S.*) *Ch.* 450.

§ 675. The court at special term found that plaintiffs, in 1842, had originated a medicine for the cure of diseases of the throat, &c., for which they then devised and commenced to use as a trademark, to designate the origin, ownership and particular manufacture of the article, in connection with the name "Ayer," the words "Cherry Pectoral," which combination, "Cherry Pectoral," was original and not previously used. That the word "Pectoral," though known as an adjective, was then of rare and infrequent use as a substantive. That said words "Cherry" and "Pectoral," suggested, partially, the origin and use of the article. That the extract of wild cherry was one of the ingredients thereof. That said article became well-known to the public under its name and title of "Ayer's Cherry Pectoral," and "Cherry Pectoral;" was commonly known among dealers as "Cherry Pectoral;" and that, by association with the name of Ayer, and long-continued and uninterrupted use, the title "Cherry Pectoral" became established as plaintiffs' trademark. That it was generally understood by purchasers that the title "Cherry Pectoral," referred to and meant "Ayer's Cherry Pectoral," and none other. Said article was a liquid of a deep saffron color, put up in oblong, flat, clear glass bottles, containing about six ounces, upon which bottles were stamped the words, "Ayer's Cherry Pectoral." The bottles were enclosed in a paper wrapper of a deep orange color, bearing the printed words, "Ayer's Cherry Pectoral for the various affections of the lungs and throat, such as colds, . . . Prepared and sold

by J. C. Ayer, Lowell, Massachusetts. Price One Dollar." In 1869, defendant commenced to make and sell a medicine for coughs, &c., which he called "Cherry Pectoral Troches;" said article was in the form of lozenges, put up in small paper boxes of a salmon color, with a figure of a red lion, holding a scroll in his mouth, with the words "Cherry Pectoral Troches" thereon, and also the words "Cherry Pectoral Troches for coughs . . . &c." Soon thereafter, defendant commenced to sell and manufacture a preparation of the same color, taste, smell and appearance as plaintiffs' article, and put up in oblong, flat, clear glass bottles, containing about five and a half ounces, of a somewhat smaller size, but of the same shape and having the same general appearance as plaintiffs' article, and having on the outer wrapper of white paper with red print, in large lettering, the words "Cherry Pectoral," and underneath the same in smaller lettering, the words, "Rushton's, F. V.," and on an inside wrapper the words "Cherry Pectoral," and, after some printed words of description and recommendation, the words, "For sale, wholesale and retail, by Rushton & Co., 11 Barclay Street, New York." Soon thereafter, defendant changed the color of his article to a lighter shade, and somewhat changed the taste and smell thereof. The articles made by defendant, as aforesaid, contained the extract of wild cherry. Defendant extensively advertised the words "Cherry Pectoral," for sale at 11 Barclay street, without the name of any person, and had conspicuously placed in front of his premises, a sign, "Depot of the Cherry Pectoral Company," and inside his premises a placard, "Ayer's Cherry Pectoral, One Dollar.

Rushton's Cherry Pectoral, Fifty Cents. Which will you have?" Defendant instructed his clerks to answer to purchasers who called for Ayer's Cherry Pectoral, that his Cherry Pectoral was not Ayer's, and that all persons inquiring for Cherry Pectoral, should be asked which they wanted—"Rushton's" or "Ayer's," and told that Rushton's was much better. The court also found that the said articles put up by defendant were well calculated to deceive and mislead purchasers, and to induce them to believe that they were the plaintiffs' article; and that defendant, well-knowing that said words and name, "Cherry Pectoral," were plaintiffs' trademark, and had by long use become known as designating plaintiffs' article, and known to the public as their trademark, with the wrongful intent to induce purchasers to believe that his article was the plaintiffs', and with the wrongful intention of securing to himself the benefit of plaintiffs' trademark, had imitated their trademark so closely as to mislead and deceive purchasers. Defendant was enjoined from using the words "Cherry Pectoral," and from imitating, &c. On appeal, the court at general term held that the said findings as to intent, &c., and as to imitation were not sustained by the findings describing defendant's acts and the respective articles. That defendant had been careful to distinguish his article from plaintiffs', and had taken precaution to prevent purchasers from being misled. That although he had taken advantage of the celebrity of plaintiff's name, and had hoped to gain advantage from the popularity plaintiff's article had acquired, by calling his medicine "Cherry Pectoral," and thus inducing persons to try his com-

pound, if they could be persuaded that one "Cherry Pectoral" was as good as another; and had proposed to build up a business upon and avail himself of the fame which years of sale and great expenditure of money had acquired for plaintiff's preparation; still there was clear proof that he did not intend to incur any penalty for imitation, or for attempts to impose his compound on the public as the plaintiff's article, and that he had kept within the letter of the law if he were at liberty to call his preparation "Cherry Pectoral." That the word "Cherry" described one of the ingredients of the compound, the word "Pectoral" described its use and application; that both words were common property, and that the two words made a descriptive term, to which no one could acquire an exclusive use. Judgment granting injunction reversed. 1877, *N. Y. Ct. of Com. Pleas, G. T.*, Ayer *v.* Rushton, unreported.*

See also WORDS; and PARTNERSHIP, Name of.

V. *Fancy name.*

§ 680. A and B filed their bill, alleging a right to a trademark in the word "Ethiopian" upon black cotton stockings, acquired by A, and a former partner, deceased, praying an injunction and an account of profits. Defendants denied plaintiffs' right to the mark as a trademark, stating that other parties used the word prior to A and his partner, but admitted that they (defendants) had copied the mark from plaintiffs' stockings, and denied any fraudulent intent in so doing. The evidence as to plaintiffs' right to the mark as a trade-

* This case is now in the Court of Appeals for review.

mark was very unsatisfactory ; but held, that defendants, having made so complete a copy of plaintiffs' mark, the difference being only nominal, must be taken to have done so with an intent to gain an advantage to which they were not entitled—and that the motion to dissolve the injunction should be denied. 1846, *Vice Chancellor's Ct.*, Hine *v.* Lart, 10 *Jurist*, 106

§ 681. The plaintiff having first applied the name "Pain Killer" to a medical compound made and sold by himself, it was held that the application of the same name to a similar compound sold by defendant, bottled and labeled in a somewhat similar way, was an infringement of the plaintiff's trademark. 1850, *Supreme Ct. of Rhode Island*, Davis *v.* Kendall, 2 *R. I.* 566.

§ 682. The distinction between a "fancy" name and a descriptive name—considered. 1857, *N. Y. Superior Ct. S. T.*, Fetridge *v.* Merchant, 4 *Abb. Pr.* 156.

§ 683. Whether a mere name of an article or a designation of a place of manufacture, can or cannot become the subject of protection, as a trademark, or whether the words "Genuine" or "Yankee" can or cannot in any possible combination be used as a trademark, the court will restrain the use thereof in peculiar devices and labels in imitation of trademarks used by a manufacturer to distinguish his goods and when such use tends to deceive the public. 1857, *N. Y. Superior Ct., G. T.*, Williams *v.* Johnson, 2 *Bosw.* 1. See § 685.

§ 684. There is no legal restriction upon a manufacturer's choice of a name for his trademark, any more than of his choice of a symbol, so that his name be so far peculiar, as applied to manufacture

goods, as to be capable of distinguishing, when known in the market, one manufacturer's goods of a certain description from those of another. "Roger Williams," though the name of a famous person, is, applied to cotton cloth, a fancy name, and the name "Roger Williams, Long Cloth," is capable of being appropriated by a manufacturer to cotton cloth of his manufacture, to distinguish it from cloth of the same general description manufactured by others; and if, to the knowledge of the public, it be so appropriated by the plaintiff, a person who stamps the name of "Roger Williams" on his cloth of similar description, with the design and effect of fraudulently passing it upon the market as and for cloth manufactured by the plaintiff, to the lessening of the gains and credit as a manufacturer of the latter, is liable to him for the injury caused thereby. 1860, *Supreme Ct. of R. I.*, Barrows *v.* Knight, 6 *R. I.* 434.

§ 685. Where the plaintiff has the right to the exclusive use of a trademark, in a particular article of manufacture, any labels, devices or handbills used by the defendants which are calculated to deceive the public into the belief that the article they are selling is the article made and sold by the plaintiff, will be restrained by injunction, and the plaintiff fully protected. *So held*, where it appeared that the appellation "Yankee Soap" was known to indicate the plaintiff's soap, and that the defendant's labels were in imitation of the plaintiff's, and calculated to deceive. 1863, *N. Y. Superior Ct.*, *S. T.*, Williams *v.* Spence, 25 *How. Pr.* 366.

§ 686. Where A introduces into the market an article which, though previously known to exist,

is new as an article of commerce, and has acquired a reputation therefrom in the market by a name not merely descriptive of the article, B will not be permitted to sell a similar article under the same name; and this although the peculiarity of the name in question has long been in common use as applied to goods of a different kind. *Held*, that where the plaintiffs sold only one quality of soap, and that by the name of "The Excelsior White Soft Soap," the word "Excelsior" was not a mark of quality or description, and that said word is one in which an exclusive right of user as a trademark may be obtained. 1863, *Vice Ch. Wood's Ct.*, Braham *v.* Bustard, 9 *Law Times Rep.* (*N. S.*) 199; S. C., 1 *Hem. & M.* 447; S. C., 11 *W. R.* 1061; S. C., 2 *New R.* 572.

§ 687. The judge, before whom the action was tried, found as facts that the plaintiffs, in November, 1856, compounded from cocoanut oil and other ingredients, a mixture to be used as a hair wash, for which they devised as a trademark the name or word "Cocoaine;" that they published the same very extensively, with notice that they had adopted the said name or title as their trademark; and that the defendant, in November, 1868, commenced the preparation and sale of a similar compound, in bottles and with labels under the name and title of "Cocoïne;" and further, that the defendants, well knowing that the name, word or title of "Cocoaine" was, and for a considerable time had been, the trademark of the plaintiffs, with the wrongful intent of inducing the public to believe that the compound sold by themselves under the name, word or title of "Cocoïne," was that of the plaintiffs, and with the wrongful intention of securing to

themselves the benefit of the skill, labor and expense of the plaintiffs, have so closely imitated and used the aforesaid trademark of the plaintiffs as to deceive the public, and to injure and damage the plaintiffs; that the word, name, title or device "Cocoïne" is a spurious and unlawful imitation by the defendants of the word, name, title or device "Cocoaine," the aforesaid trademark of the plaintiffs. *It was held* that the plaintiffs were entitled to a judgment enjoining the defendants from manufacturing, using, selling or in any manner disposing of a compound or preparation with the name, word or title of "Cocoïne" printed or stamped upon the bottles, labels, wrappers, covers or packages thereof. 1867, *N. Y. Court of Appeals*, Burnett *v.* Phalon, 3 *Trans. App.* 167; S. C., 3 *Keyes*, 594; S. C., 5 *Abb. Pr.* (*N. S.*) 212; S. C., 1 *Abb. Ct. of App. Dec.* 267; affi'g S. C., 9 *Bosw.* 193; affi'g S. C., 12 *Mo. Law R.* 220.

§ 688. The title and trademark of the plaintiff's article was "Perry Davis' Vegetable Pain Killer," and had been introduced in the market under that name as far back as 1842. About five years ago the defendant commenced to manufacture and sell an article similar to the plaintiff's, which he called "The Great Home Remedy, Kennedy's Pain Killer." Plaintiff filed a bill to restrain the use of the words "Pain Killer" by defendant. There was an obvious difference in the appearance of the labels and bottles when seen together. Defendant contended that his label was not an infringement of the plaintiff's, and that, as the words Pain Killer was descriptive of the article, that plaintiff had no exclusive right thereto. The evidence showed that the name Pain Killer was first invented by Perry

Davis, that since 1841 it was understood by the public and the trade that Perry Davis was the inventor of "Pain Killer," that "Pain Killer" meant the medicine of the plaintiff, that whenever "Pain Killer" was asked for, the plaintiff's medicine was understood as meant, and supplied without further inquiry, that his medicine was asked for and supplied without further designation, that the defendant's article could not be sold in considerable quantities unless the name Pain Killer was conspicuously placed thereon, and that it was only since the defendant's article had been introduced that persons who asked for "Pain Killer" gave the name of the maker. There was proof that defendant's article was obscurely known in the trade, but that plaintiff's article had previously obtained a great reputation. *Held*, that the words "Pain Killer" fell within the class of trademarks usually called fancy names or trademarks, which are arbitrarily selected by an inventor or manufacturer to catch the eye or ear of the public, and to distinguish his article from others of the like nature. That it was true that the term Pain Killer was suggestive of the use of the medicine, but that it was not an adjective or used adjectively; that it was a quaint combination of words never probably used together before, forming a name by which the inventor desired his medicine to be known, and calculated, as he rightly judged, from its quaintness to fix itself in the memory of the general public. *Held*, further, that the words "Pain Killer" was the distinctive trademark of plaintiff, and that even taking the whole title "Perry Davis' Vegetable Pain Killer" to be the trademark, the use of the words "Pain Killer" upon the defendant's

label as aforesaid was an infringement of the plaintiff's trademark. Defendant was enjoined from the use of said words, ordered to account for the profits he had made, and to forthwith destroy all dies, labels, wrappers, and printed papers in his possession, power or control, upon which the plaintiff's said trademark was used. 1867, Sept. 3, *Vice Chancellor's Ct. held at Hamilton, Canada, May*, 1867, Davis *v.* Kennedy, unreported.

§ 689. In the year 1859, the plaintiff, Carl A. H. Schweitzer, who carried on the business of an analytical chemist, invented a preparation of cocoa to which he applied the fancy name of "cocoatina" and which he sold in packets labeled "Schweitzer's cocoatina, or anti-dyspeptic cocoa, registered." It had ever since been known under that name and had now attained an extensive sale. The defendant Atkins had been in the employ of the plaintiff, to whose wife he was related, and upon leaving the plaintiff's establishment, in February 1868, he had received money from the plaintiff for the purpose of enabling him (the defendant) to set up business on his own account. The defendant thereupon entered into partnership with a man named Otto Schweitzer and traded under the name of "Otto Schweitzer, Atkins & Co." Shortly afterwards, the defendant and his partner (who was now abroad) began selling another preparation of cocoa, which they called "cocoatine," and sold in packets labeled "Otto Schweitzer, Atkins & Co.'s cocoatine, registered." The packets and labels of the two firms had a general resemblance in color and form, though the defendants' packets, at the same price as the plaintiff's, were considerably larger in size. The defendants' label contained a description below the title, which the

plaintiff's had not, but in small print. The directions for use were quite different. *Held*, that there had been a fraudulent and colorable imitation on the part of the defendants, and an injunction was granted accordingly. 1868, *Before Malins, V. C.*, Schweitzer *v.* Atkins, 37 *Law Jour. R.* (*N. S.*) *Ch.* 847; S. C., 19 *Law Times R.* (*N. S.*) 6.

§ 690. Any contrivance, design, device, name, symbol, or other thing, may be employed as a trademark, which is adopted to point out the true source and origin of the goods to which said mark is applied, or even to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. The mark, however, must point out the source and origin of the goods, and not be merely descriptive of the style, quality, or character of the goods themselves. The plaintiff originated and applied to cooking stoves of his manufacture, the name "Charter Oak," which was so formed upon the patterns, as to produce the name upon the stoves in combination with a sprig of oak leaves. This name and device was employed to distinguish and designate the plaintiff's articles. *Held*, that said name and device were possessed of the requisite characteristics of a trademark, and that as said stoves were not generally known by the particular device which surrounded the name upon them, but by the name itself, the use of the name "Charter Oak," separated from other parts of the trademark, amounts to an infringement of the maker's rights. 1869, *Supreme Ct. of Missouri*, Filley *v.* Fassett, 44 *Missouri*, 168.

§ 691. The plaintiff, being a shirt-maker in London, invented a particular form of shirt, to which

he gave the name of "Eureka," and used, as a trademark, which he affixed to the shirts, the words "Ford's Eureka Shirt." After the plaintiff had used this trademark for several years, the defendants commenced to use the word "Eureka," affixing it to a shirt in exactly the same place as the plaintiff affixed his mark, also boxes containing small quantities of shirts, just as much as one purchaser would buy, with the mark "Foster, Porter & Company's Improved Eureka." The defendants were restrained by injunction from affixing or using any label or card, or other mark containing the word "Eureka," or from applying the word "Eureka," to or upon any shirts not of the plaintiff's manufacture. 1872, *Ch. Ct. of Appeal*, Ford *v.* Foster, *Law R.* 7 *Chancery Ap. Cas.* 611; S. C., 27 *L. T. R.* (*N. S.*) 219; S. C., 41 *L. J. R.* (*N. S.*) *Ch.* 682; S. C., 20 *W. R.* 318; reversing S. C., 20 *W. R.* 311.

§ 692. The exclusive right to the use of a fancy name as a trademark, is not lost by the inventor habitually using it in conjunction with his own name as maker of the article. *Ibid.*

§ 693. A fancy name which designates a particular kind of article, may be in general use in price lists which circulate between manufacturers and retail dealers, without prejudicing the right of the inventor to the exclusive use of a fancy name as a trademark in the sale of the article to the public. *Ibid.*

§ 694. For twenty years the plaintiffs used the trademark in question, by stamping or labeling it upon shirts, their packages and advertisements. In March, 1871, they registered their trademark in the patent office, under the act of Congress (16 *U. S. Stat. at L.* 210, &c. § 77, &c.). The trademark,

as appeared by the certificate of the commissioner of patents, consists of the words, "The Star Shirt;" also the words, "The Star Shirt," with the device of a six-pointed star therewith; also the device and words, "The ✡ Shirt"—either one or all being used as convenience requires. "Though this device or mark is in part arbitrary and, to that extent, would have no natural or necessary significance in connection with the article manufactured, apart from its use in that connection, yet, by such use of the plaintiffs, in connection with their manufacture and sale of these articles, it has become well known to the trade, and has come to be taken by dealers as a peculiar designation by which the plaintiff's goods are distinguished in the market. It is, therefore, both in its character and use, when taken together, a lawful trademark. It has long been employed by the plaintiffs, and well understood by dealers and the public as designating such articles of their manufacture. The plaintiffs are entitled to protection. Their exclusive right to the use of this trademark is co-extensive with the limits of the United States." 1872, *U. S. Circuit Ct., Conn.*, Morrison *v.* Case, 9 *Blatchf. C. C.* 548.

§ 695. A manufacturer who has produced an article of merchandise (*e. g.*, a new pattern of cloth), and applied to it a particular fancy name, and sold it with a particular mark, under which name and mark it has obtained currency in the market, acquires an exclusive right to the use of such name and mark, and is entitled to restrain all other persons from using such name and mark to denote articles similar in kind and appearance, although he may have no exclusive right of manufacturing the article. If the use of such name and mark by any

other person than the first inventor, has been adopted for the purpose of selling goods of an inferior quality, though of similar external appearance, so that purchasers may be misled into the belief that they are buying the goods of the first inventor, the injury to the first inventor is one for which he is entitled to compensation in damages and relief by injunction. 1872, *Vice Ch. Bacon's Ct.*, Hirst *v.* Denham, *L. R.* 14 *Eq.* 542; S. C., 41 *Law Jour. R.* (*N. S.*) *Chanc.* 752; S. C., 27 *Law Times R.* (*N. S.*) 56.

§ 696. The plaintiff, a woolen manufacturer, introduced into the market cloths of particular textures, made by him, under arbitrary names, as "Turin," "Sefton," "Leopold," and "Liverpool." The defendant copied the patterns, which were not registered, and sold the cloths under the same names. The defendants also used a ticket in sending their cloth to the wholesale dealers, closely resembling that of the plaintiff; but they explained that they purchased the ticket, which was of a simple description, and did not bear the manufacturers' name, from the stock of a stationer, without any intention to copy the plaintiff's. They claimed to be entitled to describe the cloths by the names given to them by the plaintiff. *Held*, that the plaintiff was solely entitled to the names as trademarks; and that the use of the tickets, even if innocent, was unjustifiable. *Ibid.*

§ 697. The device consisting of the word "Star" stamped upon lead pencils, held to be a valid trademark. 1875, *N. Y. Supreme Ct. G. T., First Dept. Dec.* 30, Faber *v.* Hovey, unreported.

§ 698. The plaintiff adopted as a trademark for his stove polish a device of an orb, with rays of

light rising over a body of water, in connection with the words, "*Rising Sun Stove Polish.*" The defendant subsequently used as his trademark for his stove polish a similar device of an orb rising over a body of water, in connection with the words "*Rising Moon Stove Polish.*" The plaintiff filed a bill, and the defendant by his answer admitted above facts, but denied any intentional imitation, or that there was a sufficient resemblance to cause deception. *Held*, by the court, that defendant's trademark was a plain imitation of the plaintiff's, and that the defendant should be restrained by injunction from the use of his said device; from using the name "Rising Moon;" also from using the device of an orb rising over a body of water. 1875, *Phila. Court of Com. Pleas*, Morse *v.* Cornwell, unreported.

See also §§ 44, 375, 379, 395, 431, 433, 871.

VI. *Geographical name.*

§ 705. Though no exclusive right of property can be acquired in the public and well known name of a geographical district, such a right may be acquired in the application of such a name to a particular article of manufacture, if the article has acquired a reputation in the market under such name as a trademark. 1864, *Before Lord Ch. Westbury on Appeal*, M'Andrew *v.* Bassett, 10 *Jurist* (*N. S.*) 550; S. C., 33 *Law J. R.* (*N. S.*) *Ch.* 561; S. C., 12 *Weekly R.* 777; S. C., 10 *Law T. R.* (*N. S.*) 442; affirming S. C., 10 *Jurist* (*N. S.*) 492; S. C., 10 *Law T. R.* (*N. S.*) 65.

§ 706. The plaintiffs were manufacturers of liquorice, and having made in England a new description

of goods from a mixture of juice extracted from roots obtained from Anatolia and Spain, they stamped upon the manufactured article the mark "Anatolia," and sold it to the public and acquired a reputation for it in the market. About six weeks afterwards some of the goods so marked were sent to the defendant with a request that he would make up liquorice in the same form and with the same stamp. Liquorice juice had long been imported from Anatolia, but no one before the plaintiff had used the word "Anatolia" as a mark. *Held*, by Vice Ch. WOOD, and affirmed on appeal, that the word "Anatolia" might be used as a trademark, and that the plaintiff had acquired sufficient property in it to entitle him to an injunction against the defendant. *Ibid.*

§ 707. Ever since the year 1848 the plaintiff, Baron Seixo, had caused his casks to be stamped with his coronet on the top, and with his coronet and the word "Seixo" at the bung; and the evidence showed that his wines had thus acquired in the market the name of "Crown Seixo Wine." When therefore the defendants, in the year 1862, adopted as their device a coronet with the words "Seixo de Cima" (meaning Upper Seixo), below it, the consequence was almost ineveitable that persons with only the ordinary knowledge of the usages of wine trade from Oporto would suppose, that in purchasing a cask of wine so marked, they were purchasing what was generally known in the market as "Crown Seixo" wine. Against the use of such a trademark the plaintiff has a right to have an injunction. Even assuming the truth of what the defendants contend for, *i. e.*, that parts of their vineyards were known by the name of Seixo, that

does not justify them in adopting a device or brand, the probable effect of which is to lead the public, when purchasing their wine, to suppose that they are purchasing wine from the vineyards, not of the defendants, but of the plaintiff. The defendants were enjoined from using the crown or the word "Seixo" on their wine. (There was no evidence to show that the defendants ever offered their wine as "Crown Seixo," but it was proved that they had offered it as "Crown Seixo de Cima;" and a wine broker of eminence deposed that he believed it, when offered by that name, to be the plaintiff's wine.) 1866, *Before Lord Ch. Cranworth on Appeal*, Seixo *v.* Provezende, *L. R.* 1 *Ch.* 192; S. C., 12 *Jurist* (*N. S.*) 215; S. C., 14 *Weekly R.* 357; S. C., 14 *Law T. R.* (*N. S.*) 314.

§ 708. Where plows in reference to which the words "Moline Plow" were used (being manufactured in the town of Moline, Ill.), said words were regarded as a generic term, and as indicating the place at which they were made, and it was *held* that no property could be acquired in words of that character, as constituting a trademark, to the exclusion of others in their use in connection with plows made by them at the same place. 1870, *Supreme Ct. of Illinois*, Candee *v.* Deere, 54 *Ill.* 439.

§ 709. One manufacturer of an article at a particular town, whose wares have gained celebrity, can not appropriate as his own, to the exclusion of other persons in the same place, the name of the place, and thus prevent them from designating their manufactures as of the place where they were actually made. So where a manufacturer of plows at the town of Moline, had been accustome-

to brand or stencil upon the beams of his plows, under his name, the words "Moline, Iil.," and subsequently another manufacturer of plows in the same place, branded plows which he manufactured there, under his own name, with the same words, "Moline, Ill.," it was held there was no violation of any right in the former, because he could not acquire any property in those words, which only indicated the place at which the plows were made. *Ibid.*

§ 710. Where a place has become noted by reason of the excellence of an article manufactured there, another person may choose such place for the manufacture of the same article, for the reason the name has become known in the markets, and with the intention of introducing that name as a part of the description of himself and his goods. *Ibid.*

§ 711. It is obvious that the same reasons which forbid the exclusive appropriation of generic names or of those merely descriptive of the article manufactured, and which can be employed with truth, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer, and could they be appropriated exclusively, the appropriation would result in mischievous monopolies. Could such phrases as "Pennsylvania wheat," "Kentucky hemp," Virginia tobacco," or "Sea Island cotton," be protected as trademarks; could any one prevent all others from using them, or from selling articles produced in the

districts they describe under those appellations, it would greatly embarrass trade, and secure exclusive rights to individuals in that which is the common property of many. It can be permitted only when the reasons that lie at the foundation of the protection given to trademarks are entirely overlooked. 1871, *U. S. Supreme Ct.*, Delaware and Hudson Canal Company *v.* Clark, 13 *Wall.* 311.

§ 712. It must then be considered as sound doctrine that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the appellation as to prevent others inhabiting the district or dealing in similar articles coming from the district from truthfully using the same designation. It is only when the adoption or imitation of what is claimed to be a trademark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True it may be that the use, by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth. *Ibid.*

§ 713. Where coal of one person who early and long mined coal in a valley of Pennsylvania known as the Lackawanna valley had been designated and become known as "Lackawanna coal," *Held*, that

miners who came in afterwards and mined in another part of the same valley, and persons who sold the coal so mined, could not be enjoined against calling their coal "Lackawanna coal," it being in fact and in its generic character properly so designated, although more properly described when specifically spoken of as "Scranton coal" or "Pittston coal," and when specifically spoken of usually so called. *Ibid.*

§ 714. A name may become a trade denomination and as such the property of a particular person who first gives it to a particular article of manufacture. The employment of the name by another person is an invasion of the right of the original manufacturer, who is entitled to protection by injunction. In 1847, W bought certain plant and stock in trade used in the manufacture of starch, with the right to use the name "Glenfield Patent Double Refined Powder Starch" from certain dyers in Glenfield, which was a small property two miles from Paisley. W since then continued to make the article (which acquired a great reputation under the title of "Glenfield Starch") at Paisley, to which place he removed the business, still using water, which was largely employed in the manufacture, from Glenfield. In 1868, C, who had lived at Glenfield for more than twenty years, began manufacturing starch in a shed or out-building of the works of W's assignor at Glenfield, and sold the starch in packets labeled C & Co. Starch and Corn Flour Manufacturers, Glenfield, his name and that of the place being in large capitals. In color, C's labels resembled those of W's, but it appeared that this color was used by most starch manufacturers. There was evidence that C's agent represented his

starch as "Glenfield Starch" and that he thereby got an increased sale for the article. It was proved, however, also, that as regards the first purchasers, the retail dealers, there was no deception; that they well knew that in buying C's starch, they were not buying that made by W, and that W's was the original "Glenfield Starch." *Held*, that W was entitled to an injunction to restrain C from using the word "Glenfield" on his labels and from representing his starch as "Glenfield Starch." *House of Lords*, 1872, Wotherspoon *v.* Currie, 27 *Law T. R.* (*N. S.*) 393; S. C., *Law R.* 5 *Eng.* & *Ir. Ap.* 508; S. C., 42 *Law J.* (*N. S.*) *Ch.* 130; reversing S. C., 23 *Law T. R.* (*N. S.*) 443; S. C., 18 *Weekly R.* 942; and affirming S. C., 22 *Law T. R.* (*N. S.*) 260, and S. C., 18 *Weekly R.* 562.

§ 715. Where the name of a place has by user by a particular maker of a particular article of manufacture, acquired a secondary signification in connection with that manufacture, and has obtained currency and value in the market as the trade denomination of that particular maker's goods, it becomes, in connection with that manufacture, the property of that maker as his trademark, or as part of his trademark. *Ibid.*

§ 716. The name of an article, if it has acquired a name, should not by an honest manufacturer be put upon his goods, if a previous manufacturer has, by applying it to his goods, acquired the sole use of that name. I mean the sole use in this sense; that his goods have acquired by that description a name in the market, so that whenever that designation is used, he is understood to be the maker, where people know who the maker is at all —or, if people have been pleased with an article, it

should be recognized at once by the designation of the article, although the customers may not know the name of the manufacturer. It may very well be that hundreds of people like *Glenfield Starch*, and order it because they think it is the very best starch that they ever used, without having heard the name of Mr. *Wotherspoon*, and without knowing him at all. They say, I want the thing that bears that name, made by the manufacturer who makes it in that way, and there being only one manufacturer who does make it in that way, I want the article made by that manufacturer. Lord Ch. HATHERLY, *House of Lords, Ibid.*

§ 717. An injunction will be granted on an interlocutory motion to restrain the use or imitation of the name of a place, used as a trademark, if the plaintiff proves, *prima facie*, that such name in the market has become to mean the plaintiff's article obtained from such place. 1872, *Before Wickens, V. C.*, Radde *v.* Norman, *Law R.* 14 *Eq.* 348; S. C., 41 *Law Jour. R.* (*N. S.*) *Ch.* 525; S. C., 26 *L. T. R.* (*N. S.*) 788; S. C., 20 *W. R.* 766.

§ 718. In April, 1870, the ducal government of Anhalt granted to Z. the exclusive right of exporting over the sea genuine kainit, out of the ducal mines at Leopoldshall. On the same day Z conferred such exclusive right upon the plaintiffs, who advertised and sold the kainit, as "Genuine Leopoldshall Kainit." The plaintiffs' article attained a high reputation, and became known in the trade as the product of the Leopoldshall mines, and was distinguished by the name of Leopoldshall from all other kinds of kainit. The defendants offered for sale, under the name of "Kainit (Leopoldsalt)," kainit, which had not come from the Leopoldshall

mines. On motion, *held* that the plaintiffs had made out a *prima facie* title to the exclusive use of the word "Leopoldshall" as a trademark, and that, on an interlocutory application, an injunction should be issued restraining the defendants from using the word "Leopoldsalt," or "Leopoldshall," or any colorable imitation of the "Leopoldshall" in connection with kainit brought into the market by them. *Quere*, whether the plaintiffs' title was sufficiently established as against a person who, in ignorance of any claim on the part of the plaintiff, had sold, or offered for sale, the raw Leopoldshall kainit, which he had lawfully got into his possession, with good reason to believe that it was so. *Ibid.*

§ 719. The plaintiffs were engaged in the business of manufacturing cement, or water lime, from quarries or beds lying near Akron, Erie county, N. Y., designated and sold as "Akron Cement," and "Akron Water Lime," the packages containing the same, when sold and offered for sale, having attached to each of them these words: "Newman's Akron Cement Co., manufactured at Akron, N. Y., The Hydraulic Cement known as the Akron Water Lime." Part of these words, viz.: Newman's Akron Cement Co., was printed in capitals, and part, viz.: Akron Water Lime, in large capitals. The defendants being engaged in manufacturing and selling a similar article from quarries or beds situated near Syracuse, Onondaga county, N. Y., and knowing that water lime cement was manufactured and sold by the plaintiffs, under the name of "Akron Water Lime," and "Akron Cement," called their own beds the "Onondaga Akron Cement and Water Lime," and after that, they

sold the water lime and cement, prepared by them, with a label on each package, having these words upon it: "Alvord's Onondaga Akron Cement or Water Lime, manufactured at Syracuse, New York," such water lime and cement being placed upon the market and sold in the same places where that manufactured by the plaintiffs was sold and used. *Held*, that the word "Akron," as used by the plaintiffs, was their trademark by which they designated the article manufactured and sold by them; and that they were entitled to be protected in such use of it, by an injunction restraining the defendants from making use of the word "Akron" as their trademark. 1872, *New York Commission of Appeals*, Newman *v.* Alvord, 51 *N. Y.* 189; affirming S. C., 35 *How. Pr.* 108; S. C., 49 *Barb.* 588.

§ 720. *Held also*, that the case was not one of such doubt as to require the plaintiffs' right to be first established at law. *Ibid.*

§ 721. *Held further*, that to defeat the plaintiffs' right to appropriate the term "Akron" on the ground that it had previously been in common use, such a use of it must be shown as would extend to and include the defendants. That until that was done, the use made of it by the plaintiffs might well be exclusive of the defendants, without being so as to the inhabitants of Akron. That assuming (although not so deciding) that other persons who owned quarries at or near Akron, had the right also to call their cement, Akron Cement, yet it was clear that the plaintiffs, upon the facts of the case, were entitled to protection against the defendants. *Ibid.*

§ 721*a*. I can perceive no reason why a trademark may not be the name of a place. EARL, C., *Ibid.*

§ 722. As a general rule geographical names cannot be appropriated as trademarks, and their use by another will not be enjoined; but the rule has its exceptions, where the intention in the adoption of the descriptive word is not so much to indicate the place of manufacture, as to intrench upon the previous use and popularity of another's trademark. 1873, *N. Y. Supreme Ct., G. T.*, Lea *v.* Wolf, 15 *Abb. Pr.* (*N. S.*) 1; S. C., 1 *Thomp. & C.* 626; S. C., 46 *How. Pr.* 157; modifying S. C., 13 *Abb. Pr.* (*N. S.*) 389.

§ 723. Plaintiff had manufactured at Worcestershire. for many years, an article known as "Worcestershire Sauce." Defendant commenced the manufacture at another place, of an article of similar character, which he named "Worcestershire Sauce." The labels, wrappers, &c., of plaintiff's article were closely imitated in size, color and appearance, and were irresistible proof of an intention of the defendants to deceive the public and to lead purchasers to suppose that the defendant's preparation was the original Worcestershire Sauce, so long manufactured by the plaintiffs. *Held*, that where such an intention exists, the defendants should not be protected in their fraudulent imitation by the pretense that in the words employed the name of a place and the word descriptive of the article only are used. That the defendants, doubtless, might, under proper circumstances, employ the name of a place where an article is manufactured, as well as the word descriptive of its character; but such words must be employed honestly and properly, and not with a design to imitate and deceive to the detriment of another. That plaintiff was entitled to an injunction prohibiting the use of

the words "Worcestershire Sauce" on defendant's bills, labels and wrappers. *Ibid.*

§ 724. As a general rule the name of a town or city cannot be exclusively appropriated as the trademark of any one. 1874, *Supreme Court of Pennsylvania*, Glendon Iron Co. *v.* Uhler, 75 *Penn. St.* 467.

§ 725. The plaintiffs adopted the trademark "Glendon" for the iron manufactured by them; the place where their furnaces were was afterwards made a borough by the name of Glendon. Another company afterwards built a furnace at Glendon, and used the mark "Glendon" on the iron of their manufacture. *Held*, that the latter company could lawfully use said mark of "Glendon." *Ibid.*

§ 726. The commission of a lawful act does not become actionable, although it proceed from a malicious motive. *Ibid.*

§ 727. The plaintiffs, under a grant from the owners, acquired the exclusive right of importing and selling in Great Britain, the mineral water produced by a natural spring, called "Apollinaris" at Arhweiler, in Prussia, which had for some years been known and sold in the English market under the name of "Apollinaris Water," and advertised and sold the same as "Apollinaris Water." Subsequently, the defendants made and sold an artificial mineral water, being the chemical equivalent of the natural water, under the name and description of "London Apollinaris Water, possessing all the properties of the natural water." *Held*, on motion, that the plaintiffs were entitled to an interim injunction to restrain the use of the words "London Apollinaris Water," or of any other name of which the word "Apollinaris" so formed part as to

be calculated to mislead the public. 1875, *Vice Ch. Bacon's Ct.*, Apollinaris Company (limited) *v.* Norrish, 33 *Law T. R.* (*N. S.*) 242.

§ 728. Plaintiff and defendant both manufactured tobacco at Durham, N. C. *Held*, that neither party could exclusively appropriate the word "Durham" as a trademark. 1875, *Supreme Ct. of North Carolina*, Blackwell *v.* Wright, 73 *N. C.* 310. But see § 390.

§ 729. Plaintiff's trademark for the cigarettes of his manufacture consisted of the words "St. James," the device of rays of the sun, and the numerals "½." Defendants imitated said trademark upon cigarettes manufactured by them and defended an action brought to restrain such imitation, claiming that plaintiff had no exclusive right to the words "St. James" as it was a geographical name, nor to the numerals "½," as they contended that such numerals represented that plaintiff's cigarettes were made one-half of Perique and one-half of Turkish tobacco. The court found that although the cigarettes might be so composed, said numerals did not indicate the fact; that they might as well relate to price, to size, to quality, to numbers, as to quality of tobacco. The court also found that defendants, by the use of the words "St. James," intended to defraud the public into the belief that when they bought cigarettes with those words upon the labels, they were buying cigarettes of the plaintiff's manufacture. Defendants were enjoined from the use of said words, device and numerals. 1877, *N. Y. Supreme Ct. S. T.*, Kinney *v.* Basch, unreported.

§ 730. "The interference of courts of equity, instead of being founded upon the theory of protec-

tion to the owners of trademarks, is now supported mainly to prevent frauds upon the public. If the use of any words, numerals or symbols, is adopted for the purpose of defrauding the public, the courts will interfere to protect the public from such fraudulent intent, even though the person asking the intervention of the court may not have the exclusive right to the use of those words, numerals or symbols. This doctrine is fully supported by the latest English cases of Lee *v.* Haley, 5 *Ch. App. Cases, Law R.* 155, and Wotherspoon *v.* Currie, *Law R.* 5 *Eng. & Ir. App. House of Lords*, 508, and also in the case of Newman *v.* Alvord, 51 *N. Y.* 189." VAN BRUNT, J. *Ibid.*

See also §§ 413, 590, 823.

VII. *Patentee, name of.*

§ 731. The purchaser of a patent and of the right to use the name of the patentee for the goods manufactured by him thereunder, has no exclusive right to use of such name after the expiration of the patent, and another manufacturer will not be precluded from using such name in representing that his goods are manufactured according to the patent, provided he does not do so in a manner liable to mislead. 1853, *Vice Ch. Wood's Ct.*, Edelsten *v.* Vick, 11 *Hare*, 78; S. C., 18 *Jurist*, 7; S. C., 23 *Eng. Law & Eq.* 51.

§ 732. Where articles of a particular kind have become generally known in commerce under the name of the original manufacturer (or patentee, as the case may be), any person has a right, after the expiration of the patent, to manufacture such articles and sell them under that name; but he

may not, by inscribing the name, as a proper name, on his shop front or otherwise, lead the public to believe that he is selling as the agent for the original manufacturer. The name "Wheeler & Wilson" machine held to have come to signify the thing manufactured according to the principle of Wheeler & Wilson's patent. 1869, *V. C. James' Ct.*, Wheeler & Wilson Mfg. Co. *v.* Shakespear, 39 *Law J. R.* (*N. S.*) *Ch.* 36.

§ 738. Since 1863 the pursuers had sold their machines as Singer sewing machines, and their machines were exclusively known and sold in the market under that name. It was proved that the name "The Singer Machine," or "The Singer Sewing Machine," meant, and in the trade was well understood as meaning, a machine manufactured by Mr. Singer, or by the Singer Manufacturing Company. It was not proved that the name indicated any special peculiarity in principle or construction. *Held*, that though there is no patent, and other parties are, therefore, entitled to manufacture identically the same article, they are not entitled to sell it under the same name, but that a maker's name so used and appropriated is just as good a trademark, and one as exclusively and effectually appropriated by him as if it were a trademark not consisting of a word at all, but of some particular device in drawing. Interdict granted against the defenders from selling machines not made by the Singer Manufacturing Company as "Singer's Singer Machines," or "Singer Sewing Machines." 1873, *Ct. of Session*, Singer Manuf. Co. *v.* Kimball, 10 *Scottish L. R.* 173; S. C., 45 *Scottish Jurist*, 201. But see Singer Mfg. Co. *v.* Wilson, 24 *W. R.* 1023; S. C., 45 *L. J. R.* (*N. S.*) *Ch.* 490; S. C., 34 *L. T. R. N. S.* 858.

§ 734. The words imprinted upon a patented article of manufacture are common property from the date of the expiration of the patent. 1875, *U. S. Circuit Ct., Ill.*, Tucker Manufacturing Co. *v.* Boyington, 9 *Off. Gaz.* (*U. S. Patent Office*) 455.

§ 735. *Held*, that the words "Tucker Spring Bed," as applied to a spring bed, were common property from the date of the expiration of the patent in such bed. That when a party other than the one who formerly owned the patent manufactured a spring bed, he had the right to designate it as the "Tucker Spring Bed," indicating that it was manufactured under the Tucker patent. *Ibid.*

See Cheavin *v.* Walker, 35 *L. T. R.* (*N. S.*) 757; Ransom *v.* Bentall, 3 *L. J. R.* (*N. S.*) *Ch.* 161; Howe *v.* Howe Machine Co., 50 *Barb.* 236.

NEWSPAPERS.

See PUBLICATIONS.

NOM DE PLUME.

See § 886.

NOSTRUMS.

See MISREPRESENTATION.

NUMERALS.

§ 740. The name of a manufacturer, or a system of numbers adopted and used by him in order to

designate goods of his make, may be the subject of the same protection in equity as an ordinary trade-mark. 1866, *Vice Ch. Wood's Ct.*, Ainsworth *v.* Walmesley, *Law R.* 1 *Eq.* 518; S. C., 12 *Jurist* (*N. S.*) 205; S. C., 14 *Weekly R.* 363; S. C., 14 *Law Times* (*N. S.*) 220; S. C., 35 *Law Journal* (*N. S.*) *Ch.* 352.

§ 741. The name and address of a manufacturer, used by him as a trademark, may have added to and connected with it some peculiar device, vignette, emblem, symbols, forms or figures adopted as auxiliary to the name and address in declaring the true origin and ownership of his merchandise and a wrongful violation of such a trademark may be accomplished, even though the name of the imitator be substituted for that of the original manufacturer, by such an imitation of the device, vignette, emblem, symbols, form, color or figure alone, as indicates a design to deceive, and is calculated to deceive the public as to the true origin and ownership of the goods. Where numbers are associated with the name of the manufacturer upon labels of of a certain form, color, and general arrangement, and in connection with such labels are used by him to indicate his own goods, they may, by virtue of that connection, form an important part of a trademark. 1868, *Supreme Ct. of Conn.*, Boardman *v.* Meriden Britannia Co., 35 *Conn.* 402.

§ 742. A manufacturer has the right to distinguish the goods manufactured by him, by any peculiar mark or device, he may select and adopt, by which they may be known as his in the market, and he is entitled to the protection of a court of equity, in the exclusive use of the peculiar marks or symbols appropriated by him, designating or

indicating the true origin or ownership of the articles to which they are affixed. Plaintiff, a manufacturer of steel pens, had for many years manufactured a peculiar pattern on which was impressed the figures "303" and the words "Joseph Gillott, extra fine." The pens were put up in paper boxes, with a label on top containing the same name and numerals. The pens were known and ordered by dealers as "303" pens. Such figures did not express any quality or size of the pens, but were selected arbitrarily by plaintiff to distinguish the pattern or character of pen to which it was applied. Defendants began the manufacture and sale of a steel pen, closely resembling plaintiff's pen in every particular, on which was stamped "303" and "Esterbrook & Co., extra fine." The pens were put up in boxes of the same size and similar to those of plaintiff, with a label containing the same words and figures, except "Esterbrook & Co.," instead of "Joseph Gillott." In an action brought by plaintiff to restrain defendant from using the figures "303" upon these pens and boxes: *Held*, that plaintiff had acquired the right to the exclusive use of those figures as a trademark, and was entitled to the relief sought. 1872, *N. Y. Com. of Ap.*, Gillott *v.* Esterbrook, 48 *New York*, 374; affirming S. C., 47 *Barb.* 455.

§ 743. Plaintiff's trademark for umbrellas consisted of the numerals "140" in a white oblong placed in the centre of a five-pointed star. Defendants used a mark for umbrellas, consisting of the number "142" in the centre of a sun-burst. The evidence showed that the use of numerals as trademarks among dealers in umbrellas was common—and that no one with ordinary intelligence

or attention could mistake the one device of "142," &c., for the other one of "140," &c. An injunction asked for by the plaintiff was refused. 1873, *N. Y. Ct. of Com. Pleas, S. T.*, Dawes *v.* Davies, nereported.

§ 744. Since 1873, the plaintiff placed upon his packages of cigarettes, amongst other trademarks, an Eastern fez surrounded by rays of light; also, the numerical symbol ½ printed in b. d characters, in red color, with the bar between the two figures oblique and nearly upright; with the figure 1 elevated on the left; with the figure 2 depressed on the right; the symbol as a whole being of such size that the circumference of a circle having a radius of five-eighths of an inch, would just include all of its points. This character of ½ was registered in the U. S. patent office as a trademark in May, 1875. The original idea of the complainant in using said character ½ was to indicate that the cigarettes stamped with it were made up of two kinds of tobacco, in the proportion of half and half. Defendant, in April, 1875, began to put up cigarettes stamped with the same numerical character ½ in broad, scarlet, red color; with the dividing bar oblique and nearly upright, and of size identical with the same character as used by complainant. The plaintiff filed a bill for a perpetual injunction forbidding the use of said trademark by defendant. *Held*, that said numerical character does not *express* the idea of the tobacco being half and half, but that it *indicated* such idea; that therefore, the case being one of nicety and doubt, an injunction against the use of said character *in any form*, upon goods similar to the plaintiff's would not be granted, but that the defendant

should be enjoined from the use of any imprint upon his goods of the character ½ in the form, size, color and style, as used by plaintiff, and that plaintiff had the right to the exclusive use of said character in the form, color, size and style in which he had used it. *Held*, further, that if the use by the complainant of said character ½ had been absolutely arbitrary, there could be no question of his exclusive right to use it stamped in any form upon his goods. 1877, *U. S. Circuit Ct.*, *Virginia*, Kinney *v.* Allen, 4 *Am. Law Times R.* (*N. S.*) 258.

§ 745. Plaintiff used the numerals "½" in connection with certain words and a device as a trademark for cigarettes manufactured and sold by him. Defendants imitated said trademark upon their cigarettes, and in an action brought by plaintiff to restrain such imitation claimed that the use of said numerals by the plaintiff was intended to represent that his cigarettes were made one half of Perique and one half Turkish tobacco. The court found that although plaintiff's cigarettes might be so composed, said numerals did not indicate the fact; that they might as well relate to price, to size, to quality, to numbers, as to the quality of the tobacco, and consequently could not be descriptive of any particular quality, except as they may have been so used in connection with the plaintiff's label. *Held*, therefore, that plaintiff was entitled to protection in the use of said numerals in connection with his cigarettes. 1877, *N. Y. Supreme Ct. S. T.*, Kinney *v.* Basch, unreported.

See also §§ 510, 656, 674, 947.

ONE'S OWN NAME.

See NAME, § 600, *et seq.*

OPERATION OF LAW.

Acquisition of trademarks by operation of law.
See §§ 85, 97, 99, 121, 135, 142, 143, 149.

ORIGIN AND OWNERSHIP.

§ 750. The owner of an original trademark 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. Were such an appropriation to be sanctioned by an injunction the action of a court of equity would be as injurious to the public as it is now beneficial; it would have the effect, in many instances, of creating a monopoly in the sale of particular goods, as exclusive as if secured by a patent, and freed from any limitation of time.

1849, *N. Y. Superior Ct. S. T.*, The Amoskeag Mf'g Co. *v.* Spear, 2 *Sandf. Sup. Ct.* 599.

§ 751. There was no evidence that the mark, which consisted of the initials of a firm surmounted by a crown, was ever current or accepted in the market as a representation of the persons who manufactured, or of the p'ace of manufacture, or otherwise than as a brand of quality; there was nothing to show that the iron marked with the initials ever had a reputation in the market, because it was believed to be the actual manufacture of those who used the mark. *Held*, that said mark was a trade-mark properly so called, *i. e.*, a brand which has reputation and currency in the market as a well-known sign of quality, and would be protected by injunction. 1864, *Before Lord Ch. Westbury on appeal*, Hall *v.* Barrows, 10 *Jurist* (*N. S.*) 55; S. C., 12 *Weekly R.* 322; S. C., 9 *Law Times R.* (*N. S.*) 561; S. C., 33 *Law J. R.* (*N. S.*) *Ch.* 204; reversing S. C., 9 *Jurist* (*N. S.*) 483; S. C., 11 *Weekly R.* 525; S. C., 8 *Law Times* (*N. S.*) 227; S. C., 32 *Law Jour. R.* (*N. S.*) *Ch.* 548; S. C., 1 *N. R.* 543.

§ 752. By the common law, the manufacturer of goods, or the vender of goods for whom they have been manufactured, has a right to designate them by some peculiar name, symbol, figure, letter, form, or device, whereby they may be known in the market as his own, and be distinguished from other like goods manufactured or sold by other persons; and when original with him, the owner of such mark will be protected by the courts in its exclusive use, but only so far as it serves to indicate the origin and ownership of the goods to which it is attached, to the exclusion of such symbols, figures

and combination of words which may be interblended with it, indicating their name, kind or quality. *Held*, that where the alleged imitation by defendants consisted of a picture and label, which were the same as in plaintiffs' alleged trademark only in the use of the words "Washing Powder," the directions for the use of the powder, and in use of paper of the same color as that used by plaintiffs, there was no infringement of plaintiffs' trademark. 1868, *Supreme Ct. of Cal.*, Falkinburg *v.* Lucy, 35 *Cal.* 52.

§ 753. A trademark adopted by a manufacturer or merchant for his goods, to be clothed with the attributes of property entitling the appropriator to protection in its exclusive use must, by word, letter, figure or symbol, designate the true origin or ownership of the goods. When any mark, symbol or device is used merely to indicate the name, quality, style, or size of an article, it can not be protected as a trademark. 1868, *Supreme Ct. of Conn.*, Boardman *v.* Meriden Britannia Co., 35 *Conn.* 402.

§ 754. A name can only be protected as a trademark when it is used merely as indicating the true origin and ownership of the article offered for sale, but never when it is used to designate the article itself, and has become by adoption and use its proper appellation. 1869, *Philadelphia Ct. of Com. Pleas, Pa.*, Ferguson *v.* Davol Mills, 7 *Phila.* 253; S. C., 2 *Brews.* 314.

§ 755. No property can be acquired in words, marks or devices which do not denote the goods or property or place of business of a person, but only the kind or quality of the article in which he deals. *Ibid.*

§ 756. It is requisite that the device or symbol should perform the office of a finger board and indicate the name and address of the manufacturer, to invest it with the attributes and entitle it to the protection of a trademark. *Ibid.*

§ 757. The bill charged that the complainants are the manufacturers of goods known as silesias or bleached and dyed cotton twillings; that many years ago, by great outlay of time and money, and by improved machinery, &c., they succeeded in producing the manufactured article in question; and that more than thirty years ago they devised and have ever since used a certain trademark and name for the said goods, which consists of a circular label with the letter "K" in the centre, which letter is surrounded by plain lines and ornamental tracings extending outward from the centre and having nothing written or printed upon it except, a little above the top of the letter "K," in an open space between two of the circular lines, the printed letters "No." and at the bottom of the same the letters "Yds." That one of said labels is placed on every piece of goods manufactured and forwarded to market by them, and by long use this mark has become identified with the said goods, and that the goods have come to be known in the markets of the world and to the trade everywhere by the said labels or trademarks, and are known and called by the name of the "K" silesias. That the defendants are engaged in the manufacture and sale of goods similar in appearance, but inferior in quality to theirs, put up in pieces and covered with wrappers similar to those of complainants, and that defendants affix upon one end of each piece an imitation copy and counterfeit of said label or

trademark, whereby defendants are defrauded out of their profits. The defendants denied the fraud charged, and asserted that the plaintiffs' device did not constitute a trademark such as the law will protect. *Injunction refused*, on the ground that the alleged trademark has no name, words, signs, or marks by which in any possible manner or degree the origin or ownership of complainants' goods are indicated, or the place of sale or manufacture pointed out to distinguish them as the complainants' goods. *Ibid.*

§ 758. A generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, cannot be employed as a trademark and the exclusive use of it be entitled to legal protection. As was said in the well considered case of Amoskeag Manufacturing Company *v.* Spear, "the owner of an original trademark 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 had no right to the 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 names or qualities. He has no right to appropriate a sign or a symbol, which from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose." 1871, *U. S. Supreme Ct.*, Delaware & Hudson Canal Company *v.* Clark, 13 *Wallace*, 311.

§ 759. The trademark must, either by itself or by association, point distinctively to the origin or

ownership of the articles to which it is applied. The reason of this is that unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived. The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because said adoption is in effect representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right, are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another. The trademark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association. *Ibid.*

§ 760. The petitioners' trademark consisted of the words "1847, Rogers Bros. A. 1." The Rogers brothers superintended the petitioners' spoon and fork manufactory, directed as to the style and quality of such goods, upon which said tradmark was placed, and had the general supervision of the manufacturing and sale thereof. The petitioners furnished all the capital, power and machinery, employed and paid laborers, and controlled the sale and disposition of the goods manufactured. The respondents contended that said trademark did not indicate the true origin of the goods. *Held*, that the representation that the Rogers brothers were

the manufacturers, was true in a certain sense, but that the petitioners were, in another sense, the manufacturers. "Like all other symbols and devices used as trademarks, its import was not at first perhaps fully understood. The effect, as well as the value of a trademark, is the work of time and experience. This probably was no exception to the rule. However this may be, it seems to have been well understood by the trade at the date of this petition, that goods bearing that stamp were manufactured by the petitioners." *Held*, that the trademark sufficiently indicated the origin and ownership of the goods. 1872, *Supreme Ct. of Errors, Conn.*, Meriden Britannia Company *v.* Parker, 39 *Conn.* 450.

PARTIES.

§ 765. The plaintiff and another person, who carried on distinct trades at different places of business, had derived from a common predecessor in their respective businesses, the right to use the name of Dent as a trademark. The defendants having infringed this right: *Held*, on demurrer, that the plaintiff, without averring special damage, might sue alone for an injunction and for the delivery up of the articles so marked to have the name erased. *Held*, also, that he might sue alone for an account of profits made by the defendant out of articles so marked, and for payment to the plaintiff of such part of such profits as the plaintiff should be entitled to. 1861, *Before V. C. Wood*, Dent *v.* Turpin, Tucker *v.* Turpin, 2 *J. & H.* 139;

S. C., 30 *Law J. R.* (*N. S.*) *Ch.* 495; S. C., 7 *Jurist* (*N. S.*) 673; S. C., 4 *L. T. R.* (*N. S.*) 637.

§ 766. Two persons, sons of the one who had originated the manufacture of certain tobacco pipes and designated them as "Southorn's Brosely Pipes," on the death of their father, manufactured at Brosely, but at separate establishments and for their separate benefit, pipes of a like character. One of the brothers instituted a suit to restrain the use of this trademark, the other declining to join in such suit. *Held*, that the one brother might alone file a bill for an injunction and an account. 1865, *Before V. C. Wood*, Southorn *v.* Reynolds, 12 *Law T. R.* (*N. S.*) 75.

§ 767. It is unnecessary in a petition for an injunction brought by one who has the sole interest in the trademark, to join as a party a silent partner in the business whose existence is unknown to the public. 1865, *Supreme Ct. of Conn.*, Bradley *v.* Norton, 33 *Conn.* 157.

§ 768. When the manufacturer of goods wrongfully stamped with the trademark of the petitioner conducted the business through an agent, who, with his knowledge and consent, was held up by his principal to the public as the proprietor, and as far as the public could reasonably judge, was the proprietor: *Held*, that an injunction against the farther use of the trademark should be granted in an action to which the principal was not made a party. *Ibid.*

§ 769. In an action to enjoin the violation of a trademark, persons who are not the publishers or makers of the infringing article, and who are engaged as the vendors thereof, may be joined as defendants with the former. The acts of both parties

are to be regarded as kindred, and both wrong-doers may be joined in one action. It is enough to support an injunction against several persons, that particular acts of fraud, kindred in character, are charged against them. 1867, *N. Y. Com. Pleas, S. T.*, Matsell *v.* Flanagan, 2 *Abb. Pr.* (*N. S.*) 459.

§ 770. In a suit to enjoin the use of a corporate name, the corporation whose name is alleged to be wrongfully used must be a party plaintiff or defendant, but if such corporation refuse to bring such suit upon request, its bondholder or creditor may do so and make such corporation a party defendant. 1870, *U. S. Circuit Ct.* Newby *v.* Oregon Central R. R. Co., 1 *Deady*, 609.

See also §§ 809, 820.

PARTNERSHIP.

§ 780. *Injunction to restrain surviving partners* from using the name of a deceased partner in the firm of the trade refused. The Lord Chancellor said that the use of the testator's name could not subject his name to the trade debts, and that the fraud upon the public was no ground for the plaintiff's (the executor of the deceased) coming into the court of chancery. 1791, *Before the Lord Chancellor*, Webster *v.* Webster, 3 *Swanston*, 490.

§ 781. A and B carried on the business of pencil-makers, under the firm name of A & L. A died and B carried on the business under the firm of B & Co., *successors to* A & L. *A's executor having* commenced the same business, under the firm of A & L, an injunction was granted to restrain him from using that firm name until the right should

have been tried at law. 1835, *Vice Ch. Shadwell*, Lewis *v.* Langdon, 7 *Simon*, 421.

§ 782. Although the personal representatives of a deceased partner may have a right to participate in the property in a trademark owned by the firm, the surviving partner has a sufficient interest in the mark to entitle him to file a bill to enjoin its use by another. 1846, *Vice Chancellor's Ct.*, Hine *v.* Lart, 10 *Jurist*, 106.

§ 783. If two parties are concerned in getting up a medicine, both contributing to the compound as a partnership action, neither can claim the exclusive use of the name or trademark used in connection therewith. 1851, Coffeen *v.* Brunton, 5 *McLean*, 256 (*U. S. Circuit Ct., Ind.*).

§ 784. A former copartner may be restrained from continuing the use of the signs containing the old firm name, without sufficient alterations or additions to give distinct notice of a change in the firm. And the absolute refusal of the defendant, before suit brought, to remove such signs, dispenses with any obligation on the part of the plaintiff to contribute to the expense of the removal, or from allowing reasonable time therefor. 1857, *N. Y. Supreme Ct. S. T.*, Peterson *v.* Humphrey, 4 *Abb. Pr.* 394.

§ 785. A surviving partner is not entitled, without the consent of the representatives of the deceased partner, to use the firm name upon goods manufactured by himself. *It seems*, that a firm name, which the firm has rendered valuable, is, like other assets of the partnership, held in common after the death of one partner, by the survivor and the deceased's representatives. 1858, *N. Y. Superior Ct. S. T.*, Fenn *v.* Bolles, 7 *Abb. Pr.* 202.

§ 786. Hobart Fenn had been in partnership with the defendant Bolles in the manufacture of faucets, under the firm name of Hobart Fenn & Co. In an action brought by the administratrix of the estate of Fenn, deceased, to settle the partnership affairs, *on application of the plaintiff, the defendant* was enjoined, until the hearing, from using the name of Hobart Fenn, or Hobart Fenn & Co., upon any faucets manufactured by the defendant. *Ibid.*

§ 787. A, B and C carried on the business of stuff merchants at X under the firm of A & Co. A sold to B and C his share in the business, and the good will thereof, and B and C (with A's assent) announced themselves to the world as "B & C, late A & Co." Some time afterwards A resumed the business of a stuff merchant at X with other persons, under the name of "A & Co." and under circumstances showing it to be his intention to represent to the public that his was the old firm. The court granted an interim injunction restraining A from carrying on the business of a stuff merchant at or in the immediate neighborhood of X under the firm of "A & Co." or from otherwise holding himself out as the successor of the old firm. 1859, *Vice Ch. Wood's Ct.*, Churton *v.* Douglas, 5 *Jurist* (*N. S.*) 887; S. C., 1 *H. V. Johns.* 174; S. C., 7 *W. R.* 365.

§ 788. The defendant was one of the proprietors and the editor of a weekly periodical called "Household Words." *Held*, on a dissolution of the partnership, that he was not justified in advertising that the publication would be discontinued; for that the right to use the name must be sold for the benefit of all the partners, it being part of the partnership assets. But *held* that he might advertise the discontinuance of the publication as regards

himself. 1859, *Rolls Ct.*, Bradbury *v.* Dickens, 27 *Beavan*, 53.

§ 789. On the dissolution of and winding up of a partnership, where a valuable part of the partnership consists in the good-will of the business carried on by the partners (publishing a newspaper) such value, as much as the furniture of the office or debts due to the firm, must be protected and disposed of for the benefit of the creditors of the firm, or of the partners jointly. Where there is a dissolution of partnership in the business of publishing a newspaper, and the whole title to the paper is owned by one of the partners or a purchaser under the firm, the court has no right, in the absence of any covenant or restriction on the subject, to restrain or interdict the establishment, by the partner, of another paper devoted to the same objects, provided the latter paper is sufficiently distinguished from the former to prevent the doctrine of piracy of trademarks from applying. 1859, *N. Y. Superior Ct. S. T.*, Dayton *v.* Wilkes, 17 *How. Pr.* 510.

§ 790. Where it appeared that the defendants, in having connected themselves with the plaintiffs in the business of manufacturing, advertising and selling pills by a particular name, or designation, and having induced the plaintiffs to expend large sums of money in advertising, &c., the pills so manufactured and then suddenly and without notice, in an unjustifiable manner, and apparently from improper motives, severed their connection with the plaintiffs and set up the same business for themselves: *Held*, that an injunction should be granted, restraining the defendants from using the name or designation ("Dr. Morse's Indian Root Pills") used by the plaintiffs, in designating, mark-

ing, labeling, advertising or selling the pills manufactured by the plaintiffs; and also restraining the defendants from using either of the labels or trademarks of the plaintiffs, or any other labels or trademarks made so similar to the plaintiffs' as would be calculated to deceive the public. 1860, *N. Y. Supreme Ct. S. T.*, Comstock *v.* White, 18 *How. Pr.* 421.

§ 791. The supreme judicial court of Massachusetts has no power to enjoin the use of a trademark which consists in part of the name of one with whom some of the defendants were formerly associated as partners, and which was invented, adopted and used by them during his lifetime, without objection on his part, and has been used by them ever since; but on the application of his executors, the court has power, under Gen. Sts. c. 56, § 4, to restrain the use of his name in their business and firm without having obtained his written consent in his lifetime, or that of his executors since his death, although such use has continued for more than six years. 1861, *Mass. Sup. Jud. Ct.*, Bowman *v.* Floyd, 3 *Allen* (*Mass.*) 76.

§ 792. A receipt given by executors for money due and paid to the estate of a deceased person from former partners, in which the latter are mentioned by the name of the former partnership, under which they continued to carry on business, will not be construed as a written consent to the continued use of the name of the deceased in the new business and firm. *Ibid.*

§ 793. Partnership property includes the good will of the business and the right to use the trademark; and on the purchase by a surviving partner from the executors of a deceased partner of the

partnership stock at a valuation, the value of the good will and the trademark must be taken into account. 1863, *Before Lord Ch. Westbury on appeal*, Hall *v.* Barrows, 33 *Law Jour. R.* (*N. S.*) *Ch.* 204; S. C., 9 *Law T.* (*N. S.*) 561; S. C., 12 *Weekly R.* 322; S. C., 10 *Jurist* (*N. S.*) 55; reversing S. C., 9 *Jurist* (*N. S.*) 483; S. C., 11 *Weekly R.* 525; S. C., 8 *Law Times* (*N. S.*) 227; S. C., 32 *Law J. R.* (*N. S.*) *Ch.* 548; S. C., 1 *N. R.* 543.

§ 794. By articles of copartnership it was provided, that if either of the partners should die before the expiration of the copartnership, the surviving partner should have the option of taking to himself all the stock belonging thereto on paying to the executors of the party dying, the value of his share. The firm were in the habit of using as a trademark the initial letters of the names of the original manufacturers of the articles sold; but the mark had ceased to be a representation that the articles on which it was impressed were the manufacture of the persons whose initials it bore, and had come to be a mere brand, denoting the quality of the articles. *Held*, reversing the decision of the Master of the Rolls, that the exclusive right to the trademark belonged to the partnership as part of its property, and must be included in the valuation. *Ibid.*

§ 795. Upon the formation of a partnership with a person entitled to the benefit of a trademark, in the absence of express provision in relation to it, it becomes an asset of the partnership. 1864, *Ch. Cl. of Appeal*, Bury *v.* Bedford, 10 *Jurist* (*N. S.*) 503; S. C., 33 *Law Jour. R.* (*N. S.*) *Ch.* 465; S. C., 12 *Weekly R.* 726; S. C., 10 *Law Times* (*N. S.*) 470; S. C.. 4 *N. R.* 180: reversing S. C., 11 *Weekly R.*

973; S. C., 8 *Law Times* (*N. S.*) 847; S. C., 32 *Law Jour. R.* (*N. S.*) *Ch.* 741; S. C., 9 *Jurist* (*N. S.*) 956; S. C., 1 *N. R.* 5.

§ 796. Upon the decease of one partner, a decree was made for the sale of the business as a going concern, and it was proposed to sell to any purchaser "the right to hold himself out as the successor of the firm of Samuel Johnson & Sons." *Held*, that the particulars of the sale ought to explain that the surviving partner, William Johnson, had still a right to carry on the same business in the same town in his own name. On appeal, it was *held* that the words "with the exclusive right in the purchaser to hold himself out as the successor to the said firm of S. Johnson & Sons," should be stricken out, and these words added: "The sale will give to the purchaser both the premises in which the business has been carried on and the benefit to be derived from the habits of the customers resorting to such premises, but it will not prevent any of the persons heretofore interested in the business, or those who may represent them, from carrying on the like business." 1864, *Rolls Court*, Johnson *v.* Hellely, 34 *Beav.* 63; S. C., on appeal, 2 *De Gex, J. & S.* 446.

§ 797. On the dissolution of a partnership each partner is, in the absence of any special agreement, entitled to trade under the name or style of the old firm. 1865, *Rolls Court*, Banks *v.* Gibson, 34 *Beav.* 566; S. C., 13 *Weekly R.* 1012; S. C., 34 *Law J. R.* (*N. S.*) *Ch.* 592.

§ 798. The plaintiff's husband, B, and the defendant for many years carried on business under the style of B & Co. The plaintiff, on the death of her husband, continued the partnership in pursu-

ance of a proviso in the articles of partnership. The plaintiff and defendant afterwards dissolved partnership by mutual consent, and no stipulation was made with respect to the use of the name of the firm. The defendant continued to trade under the style of B & Co., while the plaintiff traded in her own name, B. There was evidence to show that customers of the plaintiff had been deceived by the use of the name of the old firm, and had sent to the defendant orders intended for the plaintiff; but there was no evidence of fraud on the part of the defendant. *Held*, that the plaintiff was not entitled to an injunction to restrain the defendant from trading as B & Co. *Ibid.*

§ 799. A partnership deed witnessed that the lands, mills, and machinery, which theretofore had belonged exclusively to M (one partner) should remain his sole property, subject during the partnership to be used for all partnership purposes; and provided that the retiring partners should, at the end of the partnership, be paid, by M's promissory notes, the value of their respective shares in the partnership stock and capital. No mention was made therein of the good will, name of the firm, or trademarks. After eight years the partnership was dissolved. The outgoing partners insisted that M should pay them for the name, good will, and trademarks, at a valuation. *Held*, that M was entitled to the name, &c., upon paying the outgoing partners pursuant to the deed; but without their being separately valued. The petition, praying an injunction to restrain M from using the name &c., was dismissed with costs. Dickson *v.* M'Master, (Affirmed with the court of C. A., with this variation, that in taking the account, the good will

should be valued separately.) *Gamble's Index*, 983; S. C., 11 *I. Jur.* (*N. S.*) 202.

§ 800. R. Scott and the plaintiff, W. Scott, carried on business at N. and G. in partnership, under the firm of R. and W. Scott. By an agreement for dissolution it was agreed that one of the partners should remain at N. but there was no stipulation by which either party bound himself not to continue the business, but only that they would not carry it on together. There was no disposition of the good will to the partner who remained at N. Neither party was to use the name of the firm except so far as might be necessary in winding up the partnership affairs. Shortly after the date of the agreement, W. Scott retired from the business and set up business for himself at T near N. The inscription used by the firm over the door of their place of business at G had been "R. and W. Scott, of N." R. Scott made over his business at N and G to the defendants, who, at their premises at G made use of the inscription "Scott and Nixon, late R. and W. Scott, of N." On the application of the plaintiff, the court granted an injunction restraining them from using such an inscription, inasmuch as it amounted to a representation that they had succeeded to the business of the late firm. *Held further*, that the plaintiff need not prove special damage. 1866, *Vice Ch. Wood's Ct.*, Scott *v.* Scott, 16 *L. T. R.* (*N. S.*) 143.

§ 801. Fay, J, R and T, as copartners, began the business of manufacturing machinery at Worcester, in 1852, under the firm name of F & Co.; and Fay, J, R and C, as copartners, began a similar business at Cincinnati in 1853, under the same firm name, using it as the style of the concern and

as a trademark. Fay died in 1854. Ever since his death, J, R and C, copartners, continued the business at Cincinnati with all the rights as to the use of the name of F and Co., which their firm had originally; and J, R and T, copartners, continued the business at Worcester, under the name of F and Co., with the assent of F's representatives, until 1861, when their firm was dissolved, and its orders, correspondence and good will were sold to T, who thereafter engaged in the business of buying and selling, but not of manufacturing machinery. *Held*, that J, R and C, could not maintain a bill in equity to restrain T from using the name of F and Co. in his business, and attaching it to machinery which he sells made by other persons than himself. 1867, *Supreme Jud'l Ct. of Mass.*, Rogers *v.* Taintor, 97 *Mass.* 291.

§ 802. One tradesman has no right to use the trademarks or names previously adopted and used by another, so as to induce purchasers to believe, contrary to the fact, that they are buying the articles to which the marks were originally applied. Trademarks are property, and a person using such marks without the sanction and authority of the owner will be restrained by injunction, even where it does not appear there was any fraudulent intent in their use, and will be required to account for the profits derived from the sale of goods so marked. Accordingly, where the defendants S and H had become entitled by articles of dissolution of partnership to certain wrappers and labels belonging to the late firm, and had stipulated not to use them for any purpose except for re-wrapping medicines coming back in bad order, and said S and H sold said labels to the defendants C and P in order that

they might be used for medicines manufactured by C and P in imitation of the plaintiff's preparations: *Held*, that the defendants S, H, C and P, should be enjoined and that the plaintiff should be compensated by having an account taken. 1870, *Md. Ct. of Appeals*, Stonebreaker *v.* Stonebreaker, 33 *Md.* 252.

§ 803. Upon the dissolution of a firm composed of the plaintiff, Edgar H. Reeves, and the defendants, the former, by a written conveyance, sold and transferred to the latter, all his interest in the partnership property and effects. Such property and effects were not described. *Held*, that the defendants, by such conveyance, did not acquire the right to use the firm name of "E. H. Reeves & Co.," under which the business of the partnership had previously been conducted, as a label on their goods, or to advertise themselves as the successors of such firm. 1871, *N. Y. Superior Ct. S. T.*, Reeves *v.* Denicke, 12 *Abb. Pr.* (*N. S.*) 92; criticising and disapproving Peterson *v.* Humphrey.

§ 804. That there may be and is "property" in a name seems to be conceded, and the names of newspapers, hotels and places of amusement are instances of this species of property. Such names may be dealt with as property, and are the subject of sale and transfer, and are often of great value. Where the name under which a business of any nature is carried on, is that of the *proprietor*, it would require clear and express words of conveyance to secure a transfer to a purchaser of the right to continue the use of such name, for his convenience or profit. When, therefore, the name and style of a mercantile firm is that of the principal, and most responsible and influential member of the partnership, the mere transfer of the interests of

such member, in the partnership property, will not convey the partnership name to the purchaser, or give to him the right to continue its use against the consent of such person. *Ibid.*

§ 805. In the sense of a very common practice of persons who have acquired the property of an old and well established mercantile firm, of using the term "successors to" such firm, there may be an assumed right to so continue the use of such firm name. But such common practice does not give the right. It can be acquired only by a grant from the owner, and when such grant has not been made there is no succession to it. *Ibid.*

§ 806. It is a very common mistake to suppose that a purchaser of the property of a mercantile firm is the "successor" of the firm. He succeeds to the property, to all that is conveyed to him, but to nothing more; and he has no more right to describe himself as the successor of such firm because he has purchased its property, than he has to designate himself the successor of a manufacturing company from which he had casually purchased some goods. *Ibid.*

§ 807. One Daniel Simmons, who, from 1842, had been engaged in the business of making axes, took the plaintiffs into partnership with him in 1848, under the name of "D. Simmons & Co." which they used on their stamps and labels. The firm continued until Simmons's death in 1860, without any change in the trademark. In October, 1861, plaintiffs made an arrangement with Jonas Simmons, the legatee of Daniel Simmons, and with the executors of the latter, under which they continued the use of the name "D. Simmons & Co." as their trademark. *Held*, that the plaintiffs are entitled

to use the trademark "D. Simmons & Co.," and that Jonas Simmons did not have (at least after October, 1861) any right to use that name. 1872, *N. Y. Supreme Ct. Circuit*, Weed *v.* Peterson, 12 *Abb. Pr.* (*N. S.*) 178.

§ 808. On a dissolution of partnership between S and R, all the property of the partnership was bought by R, and paid for on a valuation, but he did not pay for good will, *nominatim*. S was living, and not a bankrupt. *Held*, that R was not entitled to continue to use the name of S, in the style of the firm. 1872, *V. Ch. Wood's Ct.*, Scott *v.* Rowland, 26 *Law Times R. N. S.* 391; S. C., 20 *Weekly R.* 508

§ 809. A entered into a copartnership with B, soon after dissolved it and formed with C a partnership under the name of A & Company. Two years afterwards A died, and his administrator conveyed to B the right to use A's name in his business. *Held*, that the administrator and B might join in a bill in equity under the Gen. Sts. c. 56, § 3, to restrain C from continuing to do business under the name of A & Company. 1872, *Mass. Sup. Judl Ct.*, Morse *v.* Hall, 109 *Mass.* 409.

§ 810. A trader, who has been a manager or a partner in a firm of established reputation, has a right, on setting up an independent business, to make known to the public that he has been with that firm; but he must take care not to do so in a way calculated to lead the public to believe that he is carrying on the business of the old firm, or is in any way connected with it. 1872, *Ch. Ct. of Appeal, L. J. J.*, Hookham *v.* Pottage, *L. R.* 8 *Ch.* 91; S. C., 27 *L. T. R.* (*N. S.*) 595; S. C., 21 *W. R.* 47; affirming S. C., 26 *L. T.* (*N. S.*) 755, and S. C., 26 *W. R.* 720.

§ 811. The plaintiff, an old established tailor, took the defendant, who had been his foreman, into partnership, and the business was carried on under the name of H & P. The partnership was afterwards dissolved by a decree of the court, in which it was provided that the business of the partnership should belong to the plaintiff. The plaintiff accordingly kept up the shop under the name of H & Co. Subsequently the defendant set up a shop only a few doors from the plaintiff's shop, and painted over the door the words "P, from H & P." *Held* (affirming the decree of *Malins, V. C.*), that having regard to the manner in which the names were painted up, the defendant had done that which was calculated to lead the public to suppose that he was still connected with the old firm, and that the plaintiff was entitled to an injunction. *Ibid.*

§ 812. William P. Winchester, was, in 1847, the surviving member of the firm of "E. A. and W. Winchester," which established a soap manufactory in C in 1821, and used the firm name as a trademark. In that year said Winchester formed a partnership with the defendant for the purpose, as the articles stated, "of continuing the business in the same name and style of the late firm." The articles provided that William P. Winchester might dissolve the partnership at any time (in which case the defendant should have no claim except for his share of accrued profits), and might by his will give the right to his relatives to become members of the firm, which should be continued under the same name. William P. Winchester died in 1850, and by his will directed that his trustees should allow the firm of "E. A. and W.

Winchester," if the defendant should be a member thereof, to continue in possession of the testator's land at a certain rent, and, if desired, to borrow $100,000 from his personal estate, if not needed for payment of bequests, unless all his trustees (one of whom should always be a member of the firm) should deem it proper to withdraw such real and personal property; and he named the plaintiffs and the defendant executors and trustees. The defendant continued the business under the same name, first alone and then with partners, using the firm name as a trademark, until 1867, when the partnership was dissolved. In 1868, the executors and trustees sold the manufactory with the fixtures and utensils to L. *Held*, that the plaintiffs could not maintain a bill in equity to restrain the defendant from using the name "E. A. and W. Winchester," as a trademark, and to compel him to join in an agreement to transfer to L the right to use it. 1872, *Sup. Jud'l. Ct. Mass.*, Sohier *v.* Johnson, 111 *Mass.* 238.

§ 813. When a firm under a contract with the owner has the right to the exclusive use of a trademark, and during the partnership one of the firm enters into an agreement with the owner, whereby the previous contract is canceled and a new one made, giving to such member the exclusive use of the trademark for a certain number of years, on certain conditions, and at the end of that term, the conditions having been performed, the sole and exclusive right and title to the trademark: *Held*, that such partner took and held the contract, and all the rights and interests given thereby, as trustee for the firm. When one partner, during the partnership, negotiates respecting, and obtains the exclu-

sive use of a right in which the firm was interested, he will be declared to hold such use in trust for the firm. 1875, *N. Y. Superior Ct. G. T.*, Weston *v.* Ketcham, 39 *N. Y. Superior Ct.* 54; and see S. C., 51 *How. Pr.* 455.

§ 814. In the trademark case last above put, the other partners, after knowledge of the contract made by their copartner, expressed their disapprobation, but did not immediately resort to their legal remedy, and notwithstanding the act of their copartner still continued the firm, and in its business used the trademark, and manufactured under it as before, and paid to the owners out of the firm's funds the sums stipulated to be paid; yet it appearing that the copartner who procured the contract for his own benefit alone knew the secret of the manufacture, *Held*, a forced acquiescence, which would not sustain a finding of ratification. If they had moved in the matter adversely, they would, in asserting their remedy, not have possessed the knowledge by the use of which the capital employed in the manufacture (all of which was contributed by them) might be made remunerative. *Ibid.*

§ 815. Although in the case last above put the defendant does not know the secret of the manufacture, and was selling under the trademark an article different from that represented by it, yet (whatever may be the effect of these elements in other cases) no cause of action arises therefrom against him in favor of one who has no more right to the trademark than he has. *Ibid.*

§ 816. Defendant, survivor of the firm of Phelan & Collender, on decease of his partner, purchased of his executors all the trademarks and the business of the old firm; he continued the business, describ-

ing himself as "H. W. Collender, successor to Phelan & Collender," and describing his billiard tables as "Phelan & Collender's Standard American Tables." Plaintiff, a son of said deceased, was engaged in the same business, and alleged that defendant by use of the words "successor to Phelan & Collender" and said description on billiard tables, was injuring his business by inducing customers of the late firm, who would otherwise have dealt with plaintiff, but who had been misled by the use of such name, to deal in billiard tables with defendant. *Held*, that plaintiff's right of action did not rest on his relation ship to his deceased father, nor upon any right or interest in the concerns of the late firm, but solely on the ground that his name was Phelan, and that he was engaged in the business of manufacturing and selling billiard tables, and that his business was injured by the use of that name by defendant, in connection with his business; that any other Phelan, who happened to be in the same business, would have the same legal right to enjoin the use of the name by defendant, and could maintain an action for that purpose if plaintiff could do so; and that, as he did not allege that the defendant had used the name Phelan in such a way as to make it appear to be that of plaintiff himself, or had resorted to other artifice, to induce the belief that the establishment of defendant was the same as that of plaintiff, or to mislead customers to purchase of him under the belief that they were buying of plaintiff, or were buying articles of plaintiff's manufacture, he was not entitled to any injunction. 1875, *N. Y. Supreme Ct. G. T.*, Phelan *v.* Collender, 6 *Hun*, 244.

§ 817. **A, C & Co.** being the successors by purchase of Stillman & Co., woolen manufacturers,

continued to use "Stillman & Co." as a trademark on their ticket for goods. Latimer, Stillman, & Co. the lessees of a mill formerly used by Stillman & Co., known both as the "Stillman Mill," and as the "Seventh Day Mill," also used "Stillman & Co." as a trademark. On a petition for injunction, brought by A, C & Co., against Latimer, Stillman, & Co., to prevent their so using the words "Stillman & Co.," it appearing that no deception could be charged on either complainants or respondents, and that no person of the old firm of Stillman & Co., was a member of the firm of A, C & Co. *Held*, that the injunction could not be granted. *Held*, further, that a manufacturer has the right to label his goods with his own name or that of his mill, if no fraudulent purpose is intended. 1876, *Supreme Ct. of R. I.*, Carmichael *v.* Latimer, unreported.

§ 818. *Query.* If the English practice of retaining a firm name, when no original partner remains, is generally recognized in American law? *Ibid.*

See also §§ 614, 767, 870.

PARTNERSHIP NAME.

See PARTNERSHIP.

PATENT.

As to the use of the word "Patent," see MISREPRESENTATION.

As to the right to use the name of a patentee, see PATENTEE (NAME OF).

See also §§ 4, 32, 510.

PATENTEE—NAME OF.

See NAME.

PERIODICALS.

See PUBLICATIONS.

PLAYS.

See PUBLICATIONS.

PLEADING.

§ 820. D, the inventor of a medicine, employed P, a foreigner, residing abroad, to manufacture it for him there, and D sold it in England for his own sole profit. A label and seal denoting that the medicine was manufactured by P and sold by D, were affixed to each of the bottles in which it was sold. The defendants imitated the labels and seals, and D & P filed a bill for an injunction and an account. Demurrer allowed on the ground that it did not appear that P had any interest in the labels and seals—the parties asking joint relief, not being entitled to joint relief. 1828, *High Ct. of Chancery*, Delondre *v.* Shaw, 2 *Sim.* 237.

§ 821. The declaration, after stating that the plaintiffs prepared, vended and sold, for profit, a certain medicine called "Morrison's Universal Medicine," which they were accustomed to sell in boxes wrapped up in paper, which had those words printed thereon, alleged that the defendant, intending to injure the plaintiffs in the sale of their said medicines, deceitfully and fraudulently prepared medicines in imitation of the medicines so prepared by the plaintiffs, and wrapped up the same in paper, with the words "Morrison's Universal Medicine" printed thereon, in order to denote that such medicine was the genuine medicine prepared and sold by the plaintiffs; and that the defendant deceitfully and fraudulently vended and sold, for his own lucre and gain, the last mentioned boxes of the said articles, represented by him to be medicines by the name and description of "Morrison's Universal Medicine" which had been prepared and sold by the plaintiffs; whereas, in truth, the plaintiffs had not been the preparers, &c., thereof. *Held*, on a motion to arrest the judgment, that the declaration disclosed a sufficient cause of action. Verdict for plaintiff sustained. 1841, *Ct. of Com. Pleas*, Morrison *v.* Salmon, 2 *Man. & Gr.* 385.

§ 822. In actions on the case in trademark cases, it is enough,—at least after verdict—to allege generally, that, by means of the premises, the plaintiff was deprived of the sale of divers large quantities of goods, and lost the profits that would otherwise have accrued to him therefrom. 1847, Rodgers *v.* Nowill, 11 *Jurist*, 1037; S. C., 5 *C. B.* (*Man. Gr. & Sc.*) 109; S. C., 17 *L. J. R.* (*N. S.*) *C. P.* 52; S. C., 6 *Hare*, 325.

§ 823. A declaration stated that the plaintiff

had *established* a bank in London called "The Bank of London," and was the first person who had established a bank by or under that name, and had established the said bank at great expense, and caused the name to be published and affixed on the offices of the said bank so that the same might be seen and known by the public, and had caused prospectuses of the said bank to be printed and circulated with the said name and title of "The Bank of London" thereon, and the said bank was then commonly known by the name of, and was the only bank named or styled, "The Bank of London," whereby the plaintiff *had acquired and was acquiring great gains and profits.* It then proceeded to allege that the defendants, intending to *injure the plaintiff in his said bank and the said business of his said bank*, afterwards, and while his said bank was the only bank named or styled "The Bank of London," wrongfully and fraudulently established a certain other bank in London, under the name, style and title of "The Bank of London" *in imitation of, and as representing, the said Bank of London of the plaintiff*, and wrongfully and fraudulently transacted business at the said bank so established by the defendants under the said name, and under the false color and pretense, that the same was the bank established by the plaintiff; and that thereby the plaintiff had been prevented from carrying on his business at the said bank so established by him, so fully and extensively as he would otherwise have done, *and had been deprived of profits*, and that by means of the premises, divers persons were induced to believe and did believe that the bank so established by the defendants was the bank called "The Bank of

London" established by the plaintiff. *Held*, that the declaration disclosed no cause of action, it not being averred that the plaintiff had ever carried on the business of a banker. 1856, *Ct. of Com. Pleas*, Lawson *v.* Bank of London, 18 *Common Bench*, 84.

§ 824. Where the complaint set up that the plaintiffs and defendant entered into an agreement whereby the former agreed to sell and did sell to the latter twenty thousand empty papers or bags for seeds with the plaintiffs' label thereon, and two thousand bags of seeds with the plaintiffs' label thereon, for the sum of $52.27; that the defendant agreed to pay said sum and to fill said empty bags with seeds of good quality and sell or dispose of them so filled and the bags of seed purchased of the plaintiffs, with their labels on the same, in Dutchess County, New York, and nowhere else; and that the plaintiff fulfilled their part of said agreement, but that the defendant, wrongfully intending to injure the plaintiffs in their business and reputation as seedsmen, filled said empty seed bags with seeds of a poor quality and sold or disposed of them, together with the said bags of seeds sold to him by the plaintiffs, at divers other places than in said Dutchess County, by reason of which premises the plaintiffs had suffered damages to the extent of $200. *Held*, that the contract for sale of said empty bags with the plaintiffs' labels thereon, for the purposes aforesaid, was against public policy and void, and that—as the consideration is entire—a demurrer to said complaint was well taken. 1857, *N. Y. Supreme Ct., G. T.*, Bloss *v.* Bloomer, 23 *Barb.* 604.

§ 825. In an action on the case, where the

declaration alleged in substance that the defendant, well knowing the plaintiffs' trade mark "Roger Williams Long Cloth," and for the purpose and with the effect of deceitfully passing off his own goods for those of the plaintiffs, did stamp the words "Roger Williams" upon cotton cloth not manufactured by the plaintiff, and to his serious injury: *Held*, that under the rule that a partial imitation of a trademark, if calculated to deceive, will support an action, this is a sufficient allegation of an invasion of the plaintiffs' rights. 1860, *Supreme Ct. of R. I.*, Barrows *v.* Knight, 6 *R. I.* 434.

§ 826. A declaration alleged that the plaintiff was employed by the defendant to make certain articles, and that the defendant fraudulently directed the plaintiff to place on each of the said articles a mark which was the trademark of one R; and that the defendant did so innocently, and was thereby subjected to a chancery suit at the suit of R, which he had to pay a large sum to compromise. *Held*, that as this suit could have been prosecuted by R successfully for an injunction and an account, the declaration showed a good cause of action. 1861, *Queen's Bench*, Dixon *v.* Fawcus, 7 *Jurist* (*N. S.*) 895; S. C., 30 *Law J. R.* (*Q. B.*) 137; S. C., 9 *Weekly R.* 414; S. C., 3 *Law Times R.* (*N. S.*) 693; S. C., 3 *El. & El.* 537.

§ 827. In an action brought to restrain the defendants from infringing plaintiffs' trademark and for damages, an answer alleging that the defendants had sold only a very small and specified quantity of merchandise bearing the label complained of, and that the same was sold to plaintiffs' agent at their request and that the use of the label was accidental,

without intent to defraud plaintiffs, or imitate their label and did not represent the article to be the plaintiffs', is not frivolous. 1832, *N. Y. Superior Ct. G. T.*, Guilhon *v.* Lindo, 9 *Bosw.* 605.

§ 828. Complainants alleged that they are entitled to the sole and exclusive right to manufacture and sell a certain preparation known as Dr. Simmons' Liver Regulator or Medicine, and have acquired right thereto by purchase; and that they have expended large sums of money in manufacturing and advertising it, by which it has become widely known and justly celebrated for the purposes it is intended to accomplish. And that they have adopted certain trademarks, in which their packages are put up; and that the plaintiff in error has commenced to sell a preparation which he calls by nearly a similar name, and is putting it up in packages of similar form and size, and that the general appearance and printed indorsements thereon, is intended to take advantage of the reputation acquired by the reputation of Zeilen & Co., which they allege is a fraud upon their rights, &c. To which bill a demurrer was filed, which was overruled by the court. *Held*, that as the demurrer admits that what was done, was done intentionally to take advantage of the reputation of the complainants' "Simmons' Liver Medicine," the court below did not err in retaining the bill for a hearing to let the whole matter be determined upon its merits. 1871, *Supreme Ct. of Ga.*, Ellis *v.* Zeilen, 42 *Ga.* 91.

§ 829. A sale of a mineral spring carries to the purchaser the right to use the trademark of the waters; and in an action by the purchaser to enjoin third persons from infringing, the complaint need

not allege any express assignment of the trademark. 1871, *N. Y. Ct. Appeals*, Congress & Empire Spring Company *v.* High Rock Congress Spring Company, 45 *N. Y.* 291; S. C., 10 *Abb. Pr.* (*N. S.*) 348; reversing S. C., 57 *Barb.* 526.

§ 830. In an action for damages for infringement of a trademark, an answer denying knowledge of plaintiff's ownership of the trademark, and any intention to do wrong, and averring a single sale of the simulated article, is not frivolous; these allegations being important on the question of damages. 1871, *N. Y. Supreme Ct. S. T.*, Faber *v.* D'Lassey, 11 *Abb. Pr.* (*N. S.*) 399.

§ 831. A bill was filed to restrain the defendants from issuing a prospectus calculated to mislead the public into the belief that the business carried on by the defendants was the plaintiffs' business. The bill stated that one of the defendants (C. J. Christie), had been adjudicated a bankrupt, and prior thereto had lost his situation as secretary of St. Marylebone Female Charity School, in consequence of having been charged with intent to defraud one S by false cheques; that he had been committed for trial and the money, in respect of which the charge had been made, subsequently paid by one of his relatives, and that S had then withdrew from prosecution—that the defendants were persons of no means. Exceptions were taken only to those statements regarding the charge made against the defendant C. J. Christie as being scandalous and impertinent. *Held*, that it was relevant to the issue to state what were the antecedents of the defendants, who they were, from whence they came, and how they had been employed; that though the matter was scandalous, as it was

relevant to the issue it was not impertinent, and that the exceptions should be overruled. Christie *v.* Christie, *Vice Ch. Malins*, *Weekly Notes*, 1873, 7; S. C., reversed, *L. J. J. Ibid.* 70.

§ 832. In an action to restrain the violation of a trademark, a counter-claim on the part of defendant alleging that he is himself the owner of the name, that plaintiff has wrongfully used it, and asking that plaintiff be restrained from such use, and be required to pay damages for the infringement of the defendant's right thereto, is proper; and if the allegations are sustained, defendant is entitled to the relief sought. It is a cause of action connected with the subject of the action set forth in the complaint, and so falls within the definition of a counter-claim, as given by the Code of Procedure (§ 150). 1874, *N. Y. Com. of App.*, Glen & Hall Mfg. Co. *v.* Hall, 61 *N. Y.* 226; rev'g S. C., 6 *Lans.* 158.

PRACTICE.

§ 840. *It seems*, that on a motion to dissolve an injunction restraining the use of a trademark, granted on the complaint and affidavits, the plaintiffs are not at liberty to read new affidavits to support the allegations in the complaint. *Per* WOODRUFF, J. Whether in a case wherein the defense rest upon new matter set up in the answer, in avoidance of the facts charged in the complaint, but admitting the charges to be true, the answer may be regarded as itself an affidavit, so as to permit counter affidavits by the plaintiffs? *Quere.* 1855, *N. Y. Common Pleas, G. T.*, Merrimack Mfg. Co. *v.* Garner, 4 *E. D. Smith*, 387; S. C., 2 *Abb. Pr.* 318.

§ 841. Where a preliminary injunction is dissolved on the ground that the plaintiff's legal title to his trademark is doubtful, it is proper to impose, as a condition to such dissolution, that the defendants enter into an undertaking to keep an account of their sales and render the same when required by the order of a competent court. The plaintiff to establish in the action his legal title, if he can, as well as any other grounds of relief, upon the trial. The undertaking to be considered as security for keeping the account and rendering it. 1857, *N. Y. Superior Ct. S. T.*, Fetridge *v.* Merchant, 4 *Abb. Pr.* 156.

§ 842. If a party is examined as a witness, his refusal to answer a cross question, pertinent to the issue, is his own act. It must entail upon him the loss of his testimony in his own favor, or may subject him to the usual compulsory process to compel a witness to testify if his adversary require it. 1860, *N. Y. Superior Ct. G. T.*, Burnett *v.* Phalon, 11 *Abb. Pr.* 157; S. C., 19 *How. Pr.* 530.

§ 843. Whether a referee appointed merely to compute and report the damages sustained by the plaintiffs by reason of the violation of their trademark, admitting he has the power to strike out the plaintiff's testimony in chief, for refusing to answer a pertinent question, on cross examination, has the power to issue a compulsory process to require the plaintiff to answer. *Quere? Ibid.*

§ 844. The better practice is for the referee to give a certificate setting forth the questions, with the objections in detail of the witness to answering them, and his decision upon them, that the *court* may pass upon the remedy. *Ibid.*

§ 845. Where, however, the referee in such case

struck out the plaintiff's testimony as to damages, for his refusal to answer a pertinent question on his cross examination, and then closed the case, and thereby shut out all testimony on that question, which might have formed a general exception to the report: *Held*, that an exception to this decision brought up the case to be regularly passed upon by the court. *Ibid.*

§ 846. In trademark cases, under the Code of Procedure, the judgment cannot direct the damages to be assessed by a sheriff's jury. The proofs must be taken by the court or referee. 1862, *N. Y. Superior Ct. G. T.*, Guilhon *v.* Lindo, 9 *Bosw.* 605.

§ 847. Where in an action brought to enjoin the use by defendant of plaintiff's trademark and for damages, judgment is ordered for frivolousness of defendant's pleadings, the judgment should be either in the form proper where nothing is left to be ascertained but the amount of damages, or it should simply adjudge the pleading frivolous and leave the plaintiff to apply to the court for the relief he seeks. *Ibid.*

§ 848. The plaintiff in an action is entitled to an injunction at the time of issuing the summons upon the complaint alone, if it makes a proper case and is verified in the manner stated in the one hundred and thirteenth section of the practice act (*Laws of California*), but if he asks for an injunction thereafter, he must do so upon affidavits. Where an injunction has been granted without notice to the defendant, he may move to dissolve, first upon the papers, whatever they may have been, upon which it was granted, or second, upon the papers upon which it was granted and affidavits on the part of the defendant, with or without the answer. If the

defendant rests his motion on the papers upon which the injunction was granted, the plaintiff can make no further showing, but must stand upon his complaint, or his complaint and affidavits, as the case may be; but if the defendant makes a counter showing, by affidavits, with or without the answer, the plaintiff may meet it with a further showing on his part. If the defendant moving to dissolve an injunction, uses his verified answer for that purpose, he makes it an affidavit in the sense of section 118 of the practice act for all the purposes of his motion; and, as in the case of his use of affidavits for that purpose without the answer, the plaintiff is equally entitled to reply by way of affidavits on his part. 1868, *Supreme Ct. of Cal.*, Falkinburg *v.* Lucy, 35 *Cal.* 52.

§ 849. An appeal from a decree granting an injunction to restrain the use of a trademark ordered to be advanced, on the ground that the injury done to the defendant by the continuance of the injunction, if wrongly granted, would be irreparable. 1870, *Before the Lords Justices*, Lazenby *v.* White, *Law R.* 6 *Ch. Ap.* 89; S. C., 19 *W. R.* 291.

§ 850. In a suit in equity to restrain an alleged infringement of a trademark right in the title of a publication, where it did not appear whether or not the public was actually deceived, or in danger of being deceived, it was referred to a master, to ascertain and report whether such was the fact. 1872, *U. S. Circ. Ct. Maine*, Osgood *v.* Allen, 1 *Holmes*, 185; S. C., 6 *Am. Law T. R.* 20.

PRIOR USE.

§ 856. In asserting a prior use of the trademark, the claim is not supported by proof that one term of

the same appeared incidentally in a longer phrase, whereof the conspicuous element was quite different; for instance, a trademark, in 1865, of "Genuine Durham Smoking Tobacco" is not invalidated by the defendant's use in 1860, of a brand of "Best Spanish Flavored Durham Smoking Tobacco," where the pleadings and proofs show that "Durham" was used incidentally and without significance; and the characteristic and descriptive phrase was "Best Spanish Flavored," having special reference to a flavoring compound, which was claimed as a discovery in the treatment of the article. 1872, *U. S. Circ. Ct. Va.*, Blackwell *v.* Armistead, 5 *Am. Law Times*, 85.

§ 857. Three brothers, William, Asa H. and Simeon S. Rogers, were engaged for many years in the business of manufacturing plated spoons and forks, sometimes as partners under the name of "Rogers Brothers," and sometimes as stockholders in joint stock corporations. The goods manufactured by such partnerships and corporations were stamped with various devices, each of which contained the name "Rogers." In 1862, all such partnerships and corporations, with one exception, had ceased to do business, and the three brothers entered into a contract with the plaintiffs, by which the latter agreed to manufacture such goods under their supervision. The goods so manufactured were stamped "1847, Rogers Bros., A 1," which stamp differed somewhat from any stamp previously used. The plaintiffs claimed protection, not in the words, "Rogers Brothers," but "Rogers Bros," with the figures "1847" prefixed and the letter and figure "A 1" annexed. The respondent contended that the name "Rogers Brothers" could not lawfully be used by

the plaintiffs as a trademark, for the reason that long before the plaintiffs commenced to stamp their goods with that name, it had been appropriated by other manufacturers for that purpose, and for the reason that it was then well known in the market as a brand for the goods of manufacturers other than the plaintiffs. *Held*, that the plaintiffs acquired a lawful right to the use of such name as a part of their trademark. That the mere fact that the name "Rogers Brothers" had been previously used by other persons and corporations, could not, of itself, operate to prevent the plaintiffs from acquiring a right to the use of the same name as a part of their trademark. That said partnerships and corporations, save one, having lost or surrendered the right to said name by ceasing to manufacture goods, the right to the use of their own name reverted to the Rogers brothers, who might under certain legal restrictions impart that right to the plaintiffs. That the respondent had no cause of complaint, or right to derive any advantage from the fact that the trademarks of the plaintiffs and said single corporation which used the name "Rogers & Brothers," resembled each other. 1872, *Supreme Ct. of Errors, Connecticut*, Meriden Britannia Co. *v.* Parker, 39 *Conn.* 450.

See § 262, ACQUISITION OF TRADEMARKS.

PUBLICATIONS.

I. Publications—generally, § 865.
II. Advertisements, circulars, &c., § 867.
III. Books, plays, &c., § 877.
IV. Newspapers, § 890.

I. *Publications—generally.*

§ 865. The court will not protect the owner of a mischievous or libelous publication by restraining the publication of it by other persons. 1802, *Lord Ch. Eldon*, Walcot *v.* Walker, 7 *Ves. Jr.* 1; 1817, *Lord Ch. Eldon*, Southey *v.* Sherwood, 2 *Mer.* 435.

§ 866. The court of chancery has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation. The publication of a notice stating that the plaintiff was a partner in a bankrupt firm, restrained. 1869, *Vice Ch. Malins*, Dixon *v.* Holden, *L. R.* 7 *Eq.*, 488. See 1 *H. L. C.* 363; 11 *Beav.* 112; *L. R.* 6 *Eq.* 551; *L. R.* 2 *Ch.* 307.

II. *Advertisements and Circulars.*

§ 867. The defendant, a chemist and druggist, had inserted advertisements in the public journals, so expressed as to induce the world at large to believe that certain pills sold by him, and intended for the cure of consumption, were pills prepared and sold by him, with the sanction of the plaintiff, who was a physician of great eminence, practising in the metropolis, and celebrated for his skill in cases of consumption. *Held*, on application for special injunction to restrain the publication of such advertisements, that the court had no jurisdiction to grant the same, the injury being that of defamation

rather than injury to property. 1848, *Rolls Ct.*, Clark *v.* Freeman, 17 *Law J. R. Ch.* (*N. S.*) 142; S. C., 12 *Jur.* 149; S. C., 11 *Beav.* 118.

§ 868. Plaintiffs, who were manufacturers, had moved for an injunction to restrain the defendants from selling any cotton sewing thread by the name of "Glacé," or "Patent Glacé Thread," or having labels or wrappers with the words "Glacé" or "Patent Glacé" thereon, those terms being claimed by the plaintiffs as their trademarks. The court directed the motion to stand over, with liberty to the plaintiffs to bring such action as they might be advised. The plaintiffs published in the newspapers, and circulated by means of handbills, a report of the proceedings on the motion, in which report it was, amongst other things, stated that it was "established in evidence that the plaintiffs were the first to use the word in question." The defendants moved to restrain publication of the report, on the ground that it was untrue, the fact being that evidence was not gone into on the motion; and that it would have the effect of obstructing justice, and prejudicing the defendants' case. The court considered that the publication, though unfair, was not a libel, and not such as would obstruct the course of justice, and refused the motion; the costs to be costs in the cause. 1860, *Vice Ch. Stuarts' Ct.*, Brook *v.* Evans, 2 *L. T. R.* (*N. S.*) 740; S. C., affirmed, 29 *L. J. R.* (*N. S.*) *Ch.* 616.

§ 869. The plaintiffs and defendants carried on business of a similar description. On the expiration of the term in a lease of certain works of the plaintiffs, where they had carried on their business, the defendants, fifteen months afterwards, had pro-

cured a lease of the same works, with the exception of certain mines of clay. The defendants issued a circular and card tending to lead the public to suppose that the defendants had succeeded to the business of the plaintiffs, and were working the same material as the plaintiffs had formerly used. *Held*, that, although the words of the circular and card might be literally true, yet, if they tended to mislead the public, the court would restrain them from further circulating or issuing such or any similar circular or card. 1861, *Vice Ch. Wood's Court*, Harper *v.* Pearson, 3 *Law Times R.* (*N. S.*) 547.

§ 870. The defendant Foster had carried on business as an insurance broker as a member of the firms of Foster, Lacy, & Co., and Bashall, Lacy, & Co. By indenture, it was agreed that said firms should be dissolved, and that the plaintiff Burrows should have the benefit and advantages of the business and connections of the said two firms, and should be at liberty to make such arrangements as he might think proper with said Lacy for forming a new copartnership, with a view to continue the business of the said two firms. After the said dissolutions and formation of the new firm, the defendant Foster sent circulars to the old correspondents and business connections of the late firms, announcing the dissolution of his firm of Foster, Lacy, & Co., stating that he should continue to act as an insurance broker as theretofore, and soliciting the favor of their esteemed orders. The defendant was enjoined from further sending said circulars, from representing his business to be in continuation of that of the firms dissolved, and from soliciting any of the customers of said dissolved firms. 1862, *Ch.*

Ct. of Appeal, L. J. J., Burrows *v.* Foster, 1 *New R.* 156.

§ 871. The court does not recognize property in unpatented articles, and will not interfere to restrain the sale of spurious articles, though described to be the same as those manufactured by another, unless such articles are held out by the imitator to be the manufacture of that other person. Where B invented and sold a secret medicine called chlorodyne, and F advertised a spurious imitation of it as "the original chlorodyne," and in consequence of said advertisement B added the words "the original and only genuine" to the description under which he had previously advertised his medicine, and continued to advertise it in that manner, and the evidence showed that F's article was not mistaken for B's, but only that F was taken to be the first inventor. *Held*, that B was not entitled to an injunction to restrain F from issuing such advertisements. That although the court believed the statements of B, that he was the original inventor, it could not interfere with the defendant making a counter-statement, much as it disapproved of his conduct and disbelieved his statements. 1864, *Vice Ch. Wood's Ct.*, Browne *v.* Freeman, 4 *N. R.* 476; and see S. C., 12 *Weekly R.* 305.

§ 872. A circular was used by parties then recently in the employ of a firm of manufacturing engineers, which informed the trade and public that they had commenced business on their own account, and made precisely the same goods as their former employers, with great improvements in the same, and could sell them at a much reduced price as being satisfied with smaller profits. It appeared that several customers of the former firm

had been deceived by this circular, and removed their custom to the new firm. *Held*, that the facts in the circular not being such as there stated, the same was a deceit upon the trade and the public, and, as such, an injunction was granted to restrain the further issuing of the circular, &c. 1868, *Vice Ch. Gifford's Ct.*, Stevens *v.* Paine, 18 *Law T. R.* (*N. S.*) 600.

§ 873. Whether, apart from circumstances showing a fraudulent intention, a person has a right to advertise himself as "agent for the sale of" a particular article without authority from any definite principal? *Quere.* 1869, *Vice Ch. James' Ct.*, Wheeler and Wilson Manufacturing Company *v.* Shakespear, 39 *L. J. R.* (*N. S.*) *Ch.* 36.

See also §§ 341, 580.

III. *Almanacs, Books, Magazines, Songs, Plays, &c.*

§ 877. Where it appeared that the plaintiff was proprietor of a magazine published monthly and called "The Wonderful Magazine," and the defendant after leaving the plaintiff's employ commenced the publication of a similar magazine under the same title with a similar device on the cover, and that on inspection the defendant's magazine appeared to be a succeeding number of the plaintiff's publication, it taking up the same article in continuation which had been left unfinished in the middle of a sentence in plaintiff's number preceding defendant's publication, the defendant was enjoined from selling his said publication, or from publishing any other work as being a continuation of the plaintiff's work, but he was not enjoined from the

publication of an original work of the same nature and under a similar title. 1803, *Lord Ch. Eldon*, Hogg *v.* Kirby, 8 *Vesey Jr.* 215.

§ 878. The defendant, a publisher, advertised for sale certain poems, which he falsely represented by advertisement to be the work of Lord Byron. He was restrained by injunction from publishing in the plaintiff's name, or as his work, the several poems mentioned in the advertisement or any parts thereof. 1816, *Lord Ch. Eldon*, Lord Byron *v.* Johnston, 2 *Mer.* 29.

§ 879. Unless the case is so clear, that there can be no reasonable doubt with regard to the legal right, the court should not exercise its equitable jurisdiction till the legal right is ascertained. Hence, where the plaintiff was the owner of a publication called "The Pictorial Almanack," and the defendant of one called "Old Moore's Family Pictorial Almanack," there being little or no resemblance with regard to the substance and internal portion of the two works, the covers of both being decorated with a pictorial representation of the observatory at Greenwich—the court finding that the similarity in the appearance of the covers was not likely to deceive any one: *Held*, that the case was not sufficiently clear to entitle the plaintiff to an injunction, and the defendant undertaking to keep an account the injunction granted by the Vice Chancellor was dissolved, with liberty to the plaintiff to bring an action. 1846, *Ct. of Chancery*, Spottiswoode *v.* Clark, 10 *Jurist*, 1043.

§ 880. Where a publisher published a song with a title page containing a picture of the singer who had brought the song into notice, and the words, "Minnie, sung by Madame *Anna Thillon* and Miss

Dolby at *Julien's* Concerts, written by George Linley," &c., and another music publisher subsequently published the same melody, with different words and upon the title page they placed a similar portrait of Madame Anna Thillon, with the words, "*Minnie Dale*, sung at *Julien's* Concerts (and always encored) by Madame *Anna Thillon;* the music composed by *H. S. Thompson*," &c., this song having never, in truth, been sung by Madame Anna Thillon at Julien's Concerts. *Held*, that this was a palpable attempt to induce the public to believe that the song so published was the same as that of the first publishers, and at their suit an injunction was granted on interlocutory application to restrain this or any similar infringement of their right to the name and description of their song. 1855, *Vice Ch. Wood's Ct.*, Chappell *v.* Sheard, 2 *Kay & J.* 117.

§ 881. The plaintiffs having published a song, on the title page of which was a portrait of Madame Anna Thillon and the words "Minnie, sung by Madame Anna Thillon and Miss Dolby at Julien's Concerts, written by George Linley," &c., and this song having become very popular, the defendant subsequently published another song, consisting of different words to the same air, with a title page on which there was a different portrait of Madame Anna Thillon, copied from an American publication, and the words, "Minnie, dear Minnie, Madame Thillon." *Held*, that this was an obvious attempt to palm off the defendant's publication for that of the plaintiffs, which had obtained the public favor, and this attempt was restrained by an interlocutory injunction without imposing upon the parties the necessity of trying the right at law.

1855, Chappell *v.* Davidson, 2 *Kay & J.* 123. On appeal, the court did not consider the fraud clearly made out and therefore: *Held*, that the injunction ought only to be continued on the terms of the plaintiff undertaking to bring an action and to be answerable in damages. 1856, *Ch. Ct. of Appeal, L. J. J.*, Chappell *v.* Davidson, 8 *De G. M. & G.* 1.

§ 882. H, in 1863, registered an intended new magazine, to be called "Belgravia." In 1866, such magazine not having appeared, M, in ignorance of what H had done, projected a magazine with the same name, and incurred considerable expense in preparing it, and extensively advertising it in August and September, as about to appear in October. H, knowing this, made hasty preparations for bringing out his own magazine before that of M could appear, and in the meantime accepted an order from M, for advertising M's magazine on the covers of his own publications, and the first day on which he informed M that he objected to his publishing a magazine under that name was the 25th of September, on which day the first number of H's magazine appeared. M's magazine appeared in October. *Held*, on bill filed by M (affirming the decision of STUART, V. C.), that M's advertisements and expenditure did not give him any exclusive right to the use of the name "Belgravia," and that he could not restrain H from publishing a magazine under the same name, the first number of which appeared before M had published his. That the mere intention, and the declaration of intention, to use a name will not create any property in that name, and that there can be no protection in the court of chancery for the intended name during the course of manufacture of the article which is to bear that name

Held, on bill filed by H, that H's registering the title of an intended publication could not give him a copyright in that name, and that, in the circumstances of the case, he had not acquired any right to restrain M from using the name as being H's trademark. That if M had not been interfered with, and had been allowed to publish a magazine, and to sell it for some time, he would have obtained, according to the doctrine of trademarks, a right to continue the exclusive use of that name, as indicating a monthly periodical. 1867, *Ch. Ct. of Appeal*, Maxwell *v.* Hogg; Hogg *v.* Maxwell, *Law R.* 2 *Ch.* 307; S. C., 36 *L. J. R.* (*N. S.*) *Ch.* 433.

§ 883. Words which in their ordinary and universal use denote the virtues, such as "Charity," "Faith," can not ordinarily be appropriated by any one as a title or designation for a book, play, &c., written, &c., by him, treating or enforcing, symbolizing, &c., a virtue, to the exclusion of any other person who may write, &c., a book, play, &c., treating upon, enforcing, symbolizing, &c., the same virtue. There may be cases where a title is made use of in bad faith, or to promote some imposition, or to inflict a wrong, when a court of justice should interfere to prevent its use or to compensate a party who has in consequence sustained an injury. 1874, *N. Y. Superior Ct.*, *S. T.*, Isaacs *v.* Daly, 39 *N. Y. Superior Ct.* (7 *J. & S.*) 511.

§ 884. The plaintiff, in December, 1873, deposited in the copyright office at Washington the title of a play called "Charity," and copyrighted such dramatic composition. The defendant, in January, 1874, purchased manuscript copies of a different play, also called "Charity," prepared it for performance in February following, and advertised it

for public representation on March 3, 1874. Plaintiff's motion for an injunction was denied on the grounds stated in the preceding section. *Ibid.*

§ 885. Plaintiff for upwards of eight years had been engaged in selling pills under the name of "Magic Cure" for the treatment of malarial diseases. The subject of diseases in general, and of malarial diseases in particular, with a description of the effects expected to be secured by use of the "Magic Cure," was treated of in a small pamphlet with red cover, called "The Little Red Book. New Series, 1875." The pamphlet contained a large number of commendatory letters, and references were made to persons named. Defendant was at one time employed by plaintiff in said business. After that relation was terminated he commenced to sell pills called "Moore's Pilules" for malarial diseases. He also published a book called the "Red and White Book," with the figures "50, 50" at foot of first and top of last page of cover; the words "The" and "White" and the figures were printed with white letters, while the words "Red Book" were printed in red letters. The same subject was discussed in defendant's as in plaintiff's book, but in a different manner. His book had no commendatory letters, but a list of references was in it, containing most of the names in plaintiff's book. The points of difference were prominent and striking, although by the red cover, the title and the references, indicated a disposition on the part of the defendant to impose on plaintiff's customers. *Held*, that plaintiff was not entitled to an injunction *pendente lite*. Courts of equity will interfere to prevent one person from imposing upon or deceiving the customers of another by means of

simulated labels, marks, indicia or advertisements, but it must be shown that the devices adopted are such as would ordinarily lead persons dealing in the articles to suppose them to be the same. 1875, *N. Y. Supreme Ct. G. T.*, Tallcot *v.* Moore, 13 *N. Y. Supreme Ct.* 106.

§ 886. The plaintiff had acquired a reputation for his literary productions under the *nom de plume* of "Mark Twain." The defendant obtained permission from the plaintiff to publish one of his essays in a pamphlet entitled "Fun, Fact and Fancy," containing advertisements, anecdotes, sketches, &c., and the plaintiff delivered to the defendant a volume of essays which had been published but not copyrighted, in order that one essay therefrom might be selected for said pamphlet. The defendant published in said pamphlet six essays purporting to have been written by "Mark Twain," and with the false statement upon the title page that said essays had been revised and selected by the author "Mark Twain" for said pamphlet. Five of said essays had been taken from the volume delivered by the plaintiff as aforesaid, and the remaining essay had not been written by the plaintiff. The defendant was enjoined *pendente lite* from using said *nom de plume* on the title page of said pamphlet or as the author or revisor of any pamphlet or book, or from publishing any matter alleged to have been written by the plaintiff under the *nom de plume* of "Mark Twain," except one essay from said volume delivered to the defendant as aforesaid; and defendant was permitted to state upon the title page of said pamphlet that the book contained among other things a sketch by "Mark Twain."

1873, June 12 and July 11, *N. Y. Supreme Ct. S. T. 1st Dist.*, Clemens *v.* Such, unreported.

See also §§ 139, 201, 203, 490.

IV. *Newspapers.*

§ 890. "Let an injunction be awarded to restrain the defendants B and H, their servants, workmen and agents, from printing and publishing, composing, and offering for sale the newspaper in the pleadings mentioned, called 'The Real John Bull' or 'The Old Real John Bull,' and from printing, or publishing, or exposing or offering for sale any newspapers or newspaper as and for a continuation of the plaintiff's said newspaper called 'The Real John Bull;' until," &c. Edmonds *v.* Benbow, February 20, 1821, *A.* 572; settled by the *V. Ch.*; *Seton on Decrees*, 3rd Edition, 905. See Tonson *v.* Walker, 3 *Swan.* 681.

§ 891. A person having sold a newspaper establishment, together with the name of the paper, has no right to publish another paper as that which he has sold. 1825, *Ch. Sandford, N. Y.*, Snowden *v.* Noah, *Hopkins Ch.* 347.

§ 892. Plaintiff acquired from defendant the right to publish at the city of New York "*The National Advocate.*" Defendant subsequently published at said city "*The New York National Advocate.*" *Held*, that there was such a difference as to warrant the court in refusing an injunction to restrain defendant. That where there is so great a difference as to afford room for reasonable doubt, a court of equity will not interfere by injunction, but will leave the parties to their remedy at law. *Ibid.*

§ 893. The name of a newspaper is the proper subject of property, and may be a trademark. *Ibid.*

§ 894. One who assumes the name of another's newspaper for the fraudulent purpose of imposing upon the public, and of supplanting him in the good will of his paper, may be restrained. 1840, *Ch. Walworth, N. Y.*, Bell *v.* Locke, 8 *Paige*, 75.

§ 895. To entitle the complainant to the interposition of the court of chancery to restrain the use by defendant of the name of complainant's newspaper, the name of the complainant's paper must be used in such a manner as to be calculated to deceive or mislead the public, and to induce them to suppose that the paper printed by the defendant is the same as that which was previously being published by the complainant; and thus to injure the circulation thereof. *Ibid.*

§ 896. *Held*, that the name "*New Era*" was not sufficiently assimilated to the name "*Democratic Republican New Era*," the type and other incidents being dissimilar, to entitle plaintiff, the owner of the latter, to an injunction. *Ibid.*

§ 897. The plaintiff, C. G. P., became by purchase in February, 1856, the proprietor of a weekly newspaper called "The Britannia," which he subsequently incorporated with another newspaper called "The John Bull," and issued the publication under the title of "The John Bull and Britannia." The plaintiff had not registered his name at the stamp office, under the act for that purpose, as the proprietor for either newspaper. On April 12, a notice was inserted in "The Britannia" to the effect that the paper would be united with "The John Bull." On April 19, the defendant J. M., who had been the printer and publisher of "The

Britannia," issued a publication called the "True Britannia," in imitation and as a continuation of "The Britannia." The bill was filed against the defendant as the proprietor of the new newspaper to restrain him from publishing it. The defendant in his affidavit said that A B was the registered proprietor of the "True Britannia," and that he was the printer and publisher only. On motion for an injunction, the court ordered the defendant to be restrained from printing and publishing, &c., the "True Britannia," or any other newspaper as a continuation of "The Britannia." 1856, *Vice Ch. Stuart*, Prowett *v.* Mortimer, 2 *Jurist* (*N. S.*) 414.

§ 898. The registered proprietors of "Bell's Life in London and Sporting Chronicle," published weekly, at the price of five pence, filed a bill against the proprietors and publishers of a new newspaper called "The Penny Bell's Life and Sporting News," and which was published at the price of one penny. The evidence produced showed that from the similarity of the two names, mistakes had occurred, and were likely to occur, on the part of the public, and that inquiries had been made at the office of "Bell's Life in London" for "The Penny Bell's Life." On motion on behalf of the plaintiffs, the court granted an injunction to restrain the defendants from the use of the words "Bell's Life" in the title of their newspaper. 1859, *Vice Ch. Stuart*, Clement *v.* Maddick, 5 *Jurist* (*N. S.*) 592; S. C., 1 *Gif.* 98.

§ 899. In October, 1857, A being the proprietor of a weekly publication called "The London Journal," the price of which was one penny, assigned his copyright and interest therein to B for value, and en-

tered into a covenant with B not to publish, either alone or in partnership with any other person, any weekly periodical of a nature similar to "The London Journal." In May, 1859, A issued an advertisement, announcing the publication by him on June 1, following, of a daily newspaper, to be called "The Daily London Journal." The order for an injunction against A restraining his publication was affirmed on appeal, upon B undertaking to abide by any order the court might make as to damages and to bring an action against A within one week. 1859, *Ch. Ct. of Appeal, L. J. J.*, Ingram *v.* Stiff, 5 *Jurist* (*N. S.*) 947.

§ 900. The law of trademarks is applicable to newspapers. 1867, *N. Y. Com. Pleas, S. T.*, Matsell *v.* Flanagan, 2 *Abb. Pr.* (*N. S.*) 459.

§ 901. The courts in exercising their power to restrain the use of another's trademark, do not confine their interference to names, symbols, marks, or designs originating with the person first using them. The enforcement of the doctrine that trademarks shall not be simulated does not depend entirely upon the alleged invasion of individual rights, but as well upon the broad principle, that the public are entitled to protection from the use of previously appropriated names or symbols in such manner as to deceive them, by inducing or leading to the purchaser of one thing another. It is not necessary to the exercise of judicial powers that the plaintiffs should have any other property in the name used than that possessed by any other person. The employment of words or names in common use may be adopted by various persons in the same business, employment or manufacture, in competition of trade or business, and be encouraged by all the attributes

of courts and communities, but such use must be independent and free from the charge of deceitful simulation. Hence, where the plaintiffs had long published a newspaper entitled "The National Police Gazette" and the defendant thereafter published a paper entitled the "United States Police Gazette" and printed in a way actually to deceive purchasers and readers, the latter was enjoined. *Ibid.*

§ 902. The principles upon which equity enjoins a defendant from imitating the plaintiff's trademarks do not apply to the publication of newspapers, except so far as to protect the proprietor of a paper in the use of the name adopted by him for such paper. 1868, *N. Y. Superior Ct. S. T.*, Stephens *v.* De Conto, 4 *Abb. Pr.* (*N. S.*) 47; S. C., 7 *Robertson*, 343.

§ 903. If, in an action brought to restrain the publication of defendant's newspaper, upon the ground that he is infringing trademarks adopted by the plaintiff in the publication of a newspaper previously established, it appears that the names of the two papers are so different, that, considering the dissimilarity of type and general appearance, one is not liable to be mistaken for the other, no injunction can be granted. *Ibid.*

§ 904. The right of property in what is commonly denominated the "good will" has never been protected, except where it had been made the subject of some express covenant between the parties. It may be sold by private agreement, and the stipulation of the parties in respect to it will be enforced; but in the absence of any covenant, and on a purchase at an involuntary sale, the vendee is not subrogated to all the rights of the original owner. Hence *it would seem* to follow that where a public

administrator sells at public auction the right, title and interest which a decedent had in his lifetime in a newspaper, including the good will thereof, the purchaser would not acquire such a right of property in the name or title of the newspaper, as would prevent the same name being assumed afterward by another person. *Ibid.*

§ 905. The proprietors of a long established weekly comic periodical called "Punch" moved to restrain the publication of "Punch and Judy," a rival periodical of like character, and of the same size as and somewhat similar in appearance to "Punch," but with a different illustration on the cover and sold at a less price. It was in evidence that another well known comic periodical was published weekly under the name of "Judy": *Held*, that the adoption of the whole title, Punch and Judy, was no infringement of the plaintiff's right to use and property in, the name Punch; and that the general public were not likely to be misled into purchasing the defendant's publication by mistake for that of the plaintiffs. And the motion for injunction was refused—without costs. 1869, *Vice Ch. Malins*, Bradbury *v.* Beeton, 39 *Law Jour. R.* (*N. S.*) *Ch.* 57; S. C., 21 *L. T. R.* (*N. S.*) 323; S. C., 18 *W. R.* 33.

§ 906. The class of persons to be considered in trademark cases are those of common intelligence and observation. The court will not interfere for the sake of heedless people who know not, or will not take the trouble to see, what they are purchasing. *Ibid.*

§ 907. A court of equity will protect a person in the use of a trademark, such as the name of a newspaper, although the name adopted is one that be-

longs to the language of the country, and may be employed in any way, or for any purpose, which will not defraud individuals or deceive the public. 1876, *N. Y. Supreme Ct. S. T.*, American Grocer Publishing Association *v.* Grocer Publishing Co., 51 *How. Pr.* 402.

§ 908. A newspaper establishment is a subject of property and of contract, and the right to it may be protected by a court of equity, and a person who sells *such an establishment has no right to continue* a publication as the same, but he may set up a different rival paper. If the question whether the rival paper is the same or different be doubtful, that doubt is a sufficient reason to refuse an injunction and to leave the parties to their remedies at law. *Ibid.*

§ 909. If it appears that the defendant's paper is an imitation or simulation of the plaintiffs' paper, and as such designed to mislead the public, an injunction will be granted. *Ibid.*

PUFFERY.

See MISREPRESENTATION.

PURCHASE.

See ASSIGNMENT.

QUACK MEDICINES.

See MISREPRESENTATION.

QUALITY.

§ 912. The owner of a trademark is entitled to recover damages for its violation notwithstanding that the goods upon which the simulated mark is placed are not inferior in quality. 1833, *King's Bench*, Blofield *v.* Payne, 1 *N. & M.* 353; S. C., 4 *B. & Ad.* 410; S. C., 3 *L. J. R.* (*N. S.*) 68.

§ 913. It is no answer to a suit for the violation of a trademark that the simulated article is equal in quality to the genuine. 1845, *Vice Ch. Sandford, N. Y.*, Coats *v.* Holbrook, 2 *Sandf. Ch.* 586; S. C., 3 *N. Y. Leg. Obs.* 404.

§ 914. It is wholly immaterial whether the simulated article manufactured by the defendant is or is not of equal goodness and value to the real article manufactured and put up for sale by the complainant. 1846, *N. Y. Ct. of Errors*, Taylor *v.* Carpenter, 11 *Paige*, 292; S. C., 2 *Sandf. Ch.* 603.

§ 915. It is of no importance that the manufacture of the defendants is of equal or even superior quality to that of the plaintiff's; they have nevertheless no right to use the latter's trademark, or to make and use any imitation of it to help or increase their trade in the article. 1872, *N. Y. Superior Ct. S. T.*, Cook *v.* Starkweather, 13 *Abb. Pr. N. S.* 392.

For words denoting quality see DESCRIPTIVE NAME, § 640, *et seq.*; and WORDS, § 1010, *et seq.*

QUESTIONS OF FACT AND OF LAW.

§ 920. In an action on the case brought for imitating the plaintiff's trademark; *held*, that it was

properly left to the jury to say, first, whether there was, in fact, so close a resemblance in the marks used, as would deceive persons of ordinary skill; and, *secondly*, *whether the defendants used the* mark with the intention of supplanting the plaintiff, or whether it was done in the ordinary course of business in execution of orders. 1842, *Court of Com. Pleas*, Crawshay *v.* Thompson, 4 *M. & G.* 357; S. C., 11 *L. J. R.* (*C. P.*) 301; and see Rodgers *v.* Nowill, 17 *L. J. R.* (*N. S.*) *C. P.* 52.

§ 921. Where the plaintiff used the words "Roger Williams Long Cloth," upon cotton cloths as a trademark, and the defendant used the words "Roger Williams" *upon cotton cloths*: *Held*, that the court could not, as matter of law, decide that such partial use of the designation of his goods appropriated by the plaintiff was not designed, calculated and effectual to carry out the fraud charged, and must leave that to be settled upon the evidence by the jury. 1860, *Supreme Ct. of R. I.*, Barrows *v.* Knight, 6 *R. I.* 434.

§ 922. The first question which arises in trademark cases is one of fact, and is, whether the mark used by the defendant is a colorable imitation of a genuine trademark of the plaintiff? That is a question to be determined at law by a jury, and in equity by the judge. If it be found that the trademark used by the defendants is not a colorable imitation of the genuine mark, the whole thing is at an end; there is no imitation, and the person may go on using it. 1862, *Rolls Court*, Cartier *v.* Carlisle, 31 *Beav.* 292; S. C., 8 *Jurist* (*N. S.*) 183.

See also EVIDENCE.

REGISTRATION.

Registration of trademarks, see STATUTES (CONSTRUCTION OF), and § 295.

REGISTRATION OF PRINTS AND LABELS.

§ 923. The act of Congress of June 18, 1874, is to be regarded as an amendment of the copyright laws. To acquire a copyright in any print or label deposited in the patent office, it is essential that the title of the print or label be first deposited in pursuance of the provision of the U. S. Revised Statutes concerning copyrights. 1877, *U. S. Circuit Ct., Southern Dist. of New York*, Marsh *v.* Warren, 4 *Am. L. T. R.* (*N. S.*) 126.

REMEDIES.

§ 928. An action on the case for the violation of a trademark may be maintained without proof of special damage. 1837, *Sup. Jud'l Ct. of Mass.*, Thomson *v.* Winchester, 19 *Pick.* 214.

§ 929. An action on the case may be maintained by a manufacturer against another manufacturer who marks his goods with the known and accustomed mark of the plaintiff, where the mark used by the defendant resembles the plaintiff's mark so closely as to be calculated to deceive, and as to induce persons to believe the defendant's goods to be of the plaintiff's manufacture—and the defendant uses such mark with intent to deceive—and sells the goods so marked,

as and for goods of the plaintiff's manufacture; and proof of special damage is not necessary. 1847, Rodgers *v.* Nowill, 11 *Jurist*, 1037; S. C., 5 *C. B.* (*Man. Gr. & S.*) 109; S. C., 17 *L. J. R.* (*N. S.*) *C. P.* 52. And see S. C., 6 *Hare*, 325.

§ 930. The violation of a trademark will be enjoined and the party violating may be compelled to produce the articles to which the spurious brands are attached, to the end that such brands may be canceled or erased, at the cost and expense of the defendant. 1862, *N. Y. Ct. of Com. Pleas*, *S. T.*, Jurgensen *v.* Alexander, 24 *How. Pr.* 269.

§ 931. An injunction was obtained to restrain the defendants, who were wharfingers, from parting with certain goods, on the ground that they had been imported with counterfeit trademarks. U, who was not a party to the suit, had *bona fide* advanced money before bill filed, on the security of the dock warrants. Upon motion by U, *pro interesse suo*: *Held*, that he had a priority, in respect to his advance, over the plaintiffs' costs of suit, he undertaking to destroy the counterfeit marks and paying the costs of the motion. That the wharfingers' charges and costs of suit were the first charges upon the goods; U to pay these costs and add them to his advance, and the total to form the second charge; the plaintiff's costs of suit to be the third charge. 1864, *Rolls Ct.*, Ponsardin *v.* Peto, 33 *Beav.* 642; S. C., 10 *Jurist* (*N. S.*) 6; S. C., 12 *W. R.* 198; S. C., 33 *L. J. R.* (*N S.*) *Ch.* 371.

§ 932. S, having engaged in the manufacture of various medicines and other preparations adopted and used thereon certain labels and trademarks, to

distinguish his medicines and preparations from all others. These labels and trademarks were generally known to the trade and consumers, so that by them the preparations were distinguished, recognized and bought. The manufacture and sale of these preparations had become the source of profit and emolument to S. Certain persons thereupon fraudulently engaged in the manufacture of medicines and other preparations and sold large quantities thereof, with labels and trademarks corresponding with those used by S, or with only a colorable difference, and designed to deceive the public, and to enable the vendors to obtain for their medicines the celebrity which the medicines and preparations of S had in the market. On application by S it was *Held:* that he was entitled to be protected by injunction and to be compensated by having an account taken. 1870, *Maryland Court of Appeals*, Stonebreaker *v.* Stonebreaker, 33 *Md.* 252.

See also CONTEMPT; INJUNCTION; STATUTES, CONSTRUCTION OF.

RESEMBLANCE.

See IMITATION.

SECRET.

See TRADE SECRET.

SCIENTER.

See INTENT.

SIGNS.

§ 940. **A sign containing a firm name used over the doorway of a store may be the subject of a trademark.** 1857, *N. Y. Supreme Ct. S. T.*, Peterson *v.* Humphrey, 4 *Abb. Pr.* 394.

§ 941. **The plaintiff, a son and former partner of John Burgess, manufactured and sold for many years "Burgess's essence of anchovies" at No. 107 *Strand;* and carried on business there, after the death of his father, under the style of John Burgess & Son, which had been used previously to his father's death. The defendant, W. H. Burgess (a son of the plaintiff), who had been employed for many years by the plaintiff and had been permitted to reside on the premises No. 107 Strand, opened a house in King William street, and had letters and figures over his shop front, as follows; on one window "W. H. Burgess," on the other window "107 Strand," and in the intermediate space over the fanlight, "late of." The defendant was enjoined from the use of the words "107 Strand," "late of," and also from continuing a plate which he had on the sides of his shop door with the words "Burgess' Fish Sauce Warehouse, late of 107 Strand; "but was not enjoined from using the words "Burgess's essence of anchovies" on the article sold by him.** 1853, *High Ct. of Chancery,* Burgess *v.* Burgess, 3 *De G. M. & G.* 896: S. C.,

17 *Jur.* 292; S. C., 22 *Law Jour. R.* (*N. S.*) *Ch.* 675; S. C., 17 *Eng. L. & Eq.* 257.

§ 942. Where Smith, a tradesman, who had been in the employ of a large firm, put his own name over his shop, but on the plates under the shop windows, and on the sun awning "from Thresher & Glenny," his former employers; the word "from" being much small than the words, "Thresher & Glenny," and it was proved that some persons had been misled into thinking that the shop was the shop of "Thresher & Glenny:" The court *Held*, that what Smith was doing, was calculated to mislead the incautious, unwary and heedless portion of the public; and on bill by Thresher & Glenny, granted an injunction restraining him from using the name of their firm about his shop in such a way as to mislead the public into the belief that his shop was the shop of Thresher & Glenny, or that their business was carried on there. 1865, *Vice Ch. Kindersley*, Glenny *v.* Smith, 11 *Jurist* (*N. S.*) 964; S. C., 13 *L. T. R.* (*N. S.*) 11; S. C., 2 *Dr. & Sm.* 476; S. C., 6 *New R.* 363.

§ 943. There is no question but that if a man, having been in the employment of a firm of reputation, sets up in business for himself, he has a right in any way in which he thinks fit (provided he does not use names, marks, letters or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are those of another person), to inform the public that he has been in such employment, and in that way to appropriate to himself some of the benefit arising from the reputation of his former employers. But in so doing he must take especial care that it is done in

such a way as not to mislead the public to the detriment of his former employers. *Ibid.*

§ 944. The use of a simulated card, advertisement, or sign, calculated to deceive the incautious or unwary, whereby a party may be deprived of his just gains and profits, will be restrained by injunction. Accordingly, where the plaintiff's sign was "Colton Dental Association," and the defendant, a former employee of the plaintiff, used cards and had a sign over his office in form following: Dr. F. R. Thomas, late operator at the Colton Dental Rooms, the words "late operator at" in small letters, the court held the cards and signs to be deceptive, and compelled their discontinuance, until changed. 1868, *Ct. of Com. Pleas, Phil. Pa.*, Colton *v.* Thomas, 2 *Brews.* 308.

§ 945. The plaintiff was the proprietor of an oyster saloon, No. 214 Broadway, and had a sign over the door of "The Captain's Live and Let Live Oyster and Dining Saloon." Defendants carried on the same business next door and put up a sign with the words "G. W. Chadsey & Co's. Great Eastern Live and Let Live Dining Saloon." The defendants were enjoined from using the words "Live and Let Live." Genin *v.* Chadsey, a New York case, cited in 2 *Brews.* 330.

§ 946. The parties to the suit were severally engaged in selling ready made clothing. They occupied adjoining rooms in the same block, fronting on the same street. The complainant caused to be put up on the wall of the building, over the entrance to his store, the words "Mammoth Wardrobe;" below it and over the door, his name in large gilt letters; on top of the building a sign in these words: "W. N. Gray's Great Wholesale and

Retail Clothing Emporium;" on the windows on either side of the entrance, other words indicative of his business, including his name; he also advertised his place of business and his trade in the local newspapers and the directory, as the "Mammoth Wardrobe," uniformly connecting with it his name and the number of his room. Subsequently to complainant's adoption of the words "Mammoth Wardrobe," defendant painted the same words on an awning erected over the entrance to his store, and below them his name and the number of his room; he also placed his name in large gilt letters over his door; and above the awning, and on the building, below the awning and near the entrance, a card displaying "The Mammoth Wardrobe," and defendant's name. Defendant advertised in the same newspapers and directory as complainant, but without mentioning the place of business as the "Mammoth Wardrobe." Complainant applied for a temporary injunction. *Held*, that without the suggestion of falsehood or suppression of truth in words or acts, there can be no fraud. That even if the words "Mammoth Wardrobe" were such that they might be appropriated as a trademark by having first been arbitrarily applied by complainant, they not being an appropriate term according to general usage to describe such a place, still great doubt might be entertained whether the defendant had not by the addition of his name, number and other marks, so distinguished the designation of his establishment from that of the complainant, that though each was called the "Mammoth Wardrobe," they were not identical or so nearly so as to require close inspection to detect the difference.

The court could not see how any person could fail to recognize the two establishments; that it was difficult to believe that any customers attracted by the advertisements, and guided by them and seeing the two stores, or only the defendant's, could make any mistake. Application denied. 1871, *Mich. Circ. Ct.*, Gray *v.* Koch, 2 *Mich. N. P.* 119.

§ 947. Joseph Hall had been engaged in the manufacture and sale of thrashing machines at No. 10 Water street, in the city of Rochester, and put up a sign with No. 10 upon it, and his shop was known by that number. On the death of said Hall, in the Spring of 1869, the premises and property of said Hall were sold by his executors to the defendant, who continued the business at the same place, and designated his place of business as "Old Joseph Hall's Agricultural Works, No. 10 South Water St." The plaintiff, prior to the Fall of 1869, carried on the business of manufacturing agricultural implements at Brighton, some two and a half miles from Rochester. In the Fall of 1869 they rented a small office on South Water street, near to defendant's shop; and, with intent to injure defendant, put on the store the words and figures "No. 10," thereby indicating their place of business as being "No. 10" South Water street. The number was put upon the implements manufactured by them. The plaintiff was restrained from using said number as its trademark, or keeping the same on its office or building in South Water street, or using it in any way in imitation of the defendant's trademark. 1874, *N. Y. Commission of Appeals*, Glen and Hall Manufacturing Co. *v.* Hall, 61 *N. Y.* 226; reversing S. C., 6 *Lans.* 158.

§ 948. Where one has established a business at

a particular place, from which he has or may derive profit, and has attached to such business a name indicating to the public where it is carried on, he thereby acquires property in the name, which will be protected from invasion by a court of equity on principles analogous to those in case of the invasion of a trademark. *Ibid.*

§ 949. The plaintiffs composed the firm of Devlin & Co., engaged in the clothing business in Broadway, New York. The defendant, whose name was John S. Devlin, was engaged in the same business and in the same street, and had upon his place of business a sign with the words "Devlin & Co." thereon. The use of the words "& Co." by defendant was found by the court to be the use of a deliberate falsehood to attract the plaintiffs' custom, and he was enjoined from using the firm name "Devlin & Co." in any manner, and in the injunction it was further ordered "that the said John S. Devlin be, and he is hereby confined—whenever the word or words 'Devlin' appears or is used in his advertisements, signs, placards, slips, or other means and modes of making known his business or place of business, or offering for sale or selling his goods, wares and merchandise—to his own proper Christian, middle and surname, conjoined and without monograms, signs, or other devices which may tend to mislead or induce the public or any other person as aforesaid; and it is further ordered that the said John S. Devlin be confined to the use of his own name—John S. Devlin or J. S. Devlin—without the use of any monogram containing the initials J. S. or other device; but nothing herein is to be construed or interpreted as preventing the said defendant from using his own name in his advertisements, signs or

placards." Subsequently to said injunction the defendant made use of a sign containing the number of his store and the words "J. S. Devlin's Clothing" so arranged as to attract and fix the public eye on the words "Devlin's Clothing." The court adjudged the defendant in contempt for violating said injunction. 1875, *N. Y. Supreme Ct. G. T.*, Devlin *v.* Devlin, 4 *Hun*, 651; S. C., affirmed by *N. Y. Ct. of Appeals*, not yet reported.

See also BUILDINGS, and §§ 124, 125 and 1023; also PARTNRESHIP.

STATUTES—CONSTRUCTION OF.

§ 957. The statute of 1845, making it a penal offense to vend merchandise, having thereon forged or counterfeited trademarks, knowing them to be such, &c., without disclosing the fact to the purchaser, would prevent the vendor from recovering the price of the goods sold, if he knew that the marks were forged or counterfeited. But it must appear that the vendor had such knowledge or that there was a warranty of the genuineness of the goods, or some representation on his part, to prevent a recovery. 1849, *N. Y. Superior Ct., G. T.*, Rudderow *v.* Huntington, 3 *Sandf.* 252.

§ 958. In Massachusetts a bill in equity to restrain the fraudulent use of trademarks cannot be maintained under St. 1852, c. 197, without alleging and proving that such use was for the purpose of falsely representing the articles so marked to be manufactured by the plaintiff. 1854, *Sup. Jud'l Ct. of Mass.*, Ames *v.* King, 2 *Gray*, 379.

§ 959. The statute of 1863, of the State of Cali-

fornia, concerning trademarks, does not take away the common law remedy for the protection of the same, from those who do not register their trademark according to the provisions of the act. 1865, *Supreme Ct. of Cal.*, Derringer *v.* Plate, 29 *Cal.* 292.

§ 960. By the terms "peculiar name," letters, marks, devices, figures, or other trademark or name, as used in the statute concerning trademarks (Hittel's Laws, art. 7, 134 [Cal.]), is not meant the established and proper names by which the "articles" to which they are attached, and by which they are known in the market, nor something indicating their actual kind, character, or quality, but by them is meant, as the subjects of protection against infringement, something new, not before in use,—something of the manufacturer's own invention, or first put to use by him,—something peculiar to him, and not common to him and others,—something which is intrinsically foreign to the "articles" themselves, and only serves to designate them because it has been fancifully put to that use, in disregard of all natural relations. The statute does not vest in the manufacturer or vendor, as the case may be, any exclusive property in the "articles" manufactured or sold, nor in names or the words which most aptly apply and properly describe them; and even if such were the proper construction of the statute, it would be void for want of power in the legislature to enact it. If the statute goes beyond the common law and embraces within its protection matter which relates to kind, character, or quality of "articles," it is not perceived why it does not trench upon the law of copy and patent rights, and is therefore void. It is sug-

gested, but not decided, that the terms used in the statute, to wit: "to designate it as an article of peculiar kind, character, or quality," were inadvertently incorporated into it under a mistaken notion of the functions of a trademark, and that in respect to those terms the statute can have no intelligible operation. 1868, *Supreme Ct. of Cal.*, Falkinburgh *v.* Lucy, 35 *Cal.* 52.

§ 961. The statute of Missouri concerning trademarks, Gen. Stat. 1865, p. 912, was not designed to weaken or abridge any existing rights, or any future right to a trademark, which might be acquired by appropriation and use. A written claim to a disputed trademark, filed in the office of recorder of deeds in the county of St. Louis, under the act of March, 1866, Gen. Stat. 1865, p. 912, cannot avail the manufacturer of stoves in another State. 1869, *Supreme Ct. of Mo.*, Filley *v.* Fassett, 44 *Mo.* 168.

§ 962. Under the provisions of section 4 of chapter 306, Laws of 1862 (New York) entitled "an act to prevent and punish the use of false stamps, labels or trademarks," as amended by section 2 of chapter 209, Laws of 1863, to render a person liable to the penalty therein prescribed, the act complained of must have been done with intent to defraud some person or persons, or some body corporate. 1871, *N. Y. Court of Appeals*, Low *v.* Hall, 47 *N. Y.* 104.

§ 963. Section 77 of the act of July 8, 1870 (16 U. S. Stat. at Large, 210), provides, as a requirement for obtaining a trademark, the filing, in the patent office, of a declaration under oath, as to the right to the trademark. A certificate by the commissioner of patents, of the deposit, for registration,

of a trademark, of which a copy is thereto annexed, and of the filing of a statement, of which a copy is annexed to the certificate (but which statement does not contain any such declaration), and that the party depositing the trademark has otherwise complied with the act, and that the trademark has been registered and recorded, and will remain in force for a period named in the certificate, is not evidence of the filing of such declaration. 1872, *U. S. Circ. Ct. N. Y.*, Smith *v.* Reynolds, 10 *Blatchf.* 85.

§ 964. The firm of J & Co., in registering a trademark for paints in the patent office under sections 77, &c., of the act of July 8, 1870 (16 U. S. Stat. at Large, 210), filed as the names of the parties desiring the protection of the trademark, and their residences and places of business: "J & Co., of No. 276 Pearl street, in the city of New York, County and State of New York, and engaged in the manufacture and sale of paints at said New York," and nothing further: *Held*, that it was not necessary to record the name of each of the individual partners of the firm, and his place of residence, and that the residence and place of business of the firm, as the party desiring the protection, were sufficiently stated. *Ibid.* p. 100.

§ 965. The act requiring that the "the class of merchandise, and the particular description of goods comprised in such class, by which the trademark has been or is intended to be appropriated" shall be recorded, where a trademark is claimed for paints generally, any further statements than merely specifying paints as the class of merchandise, without specifying any description of paints, is unnecessary. *Ibid.* p. 100.

§ 966. The illustration of a crown was claimed by J & Co., as a trademark for paints generally, under said act, and it was alleged that R had infringed such right, and it appeared that a brand of a crown had been used by B, for white lead alone, of a particular quality and description, made by him continuously, from a period prior to the use and to the registration, of such brand as a trademark by J & Co., and until R purchased from B his paints, materials and labels, and the right to use them, including the labels embodying the device of a crown, and that R, from the time of his purchase, which was prior to such registration, had continuously used the device of a crown on some description of paints: *Held*, that, at the time of registering the trademark, J & Co. had no right to the use of it for paints generally, because R then had a right to use it for the class of paints for which B, as well as R, had previously used it. *Ibid.* p. 100.

§ 967. A registration under the act of Congress must stand or fall, as a whole, for that to which the registration declares it is intended to appropriate it, there being no provision to maintain a suit on it, where the grant is valid as to a part but not as to the whole. *Ibid.* 100.

§ 968. The protection given by the act of July 8, 1870 (16 U. S. Stat. at L. 210, 211), to the use of a trademark, is to the exclusive use of such trademark only so far as regards the particular description of goods set forth in the statement filed under said act as the particular description of goods to or by which the trademark has been, or is intended to be, appropriated; and the prohibition is only against the use, by another, of substantially the same

trademark on goods of substantially the same descriptive qualities as such particular description of goods set forth in such filed statement. 1873, *U. S. Circ. Ct. N. Y.*, Osgood *v.* Rockwood, 11 *Blatchf.* 310.

§ 969. A statement filed by O set forth that his trademark consisted of the word "Heliotype," "in connection with the production and publication of prints," and that "the particular article of trade" upon which he had used it was "the prints" which he designated as "Heliotype." Such prints were made by a process to which the name "Heliotype" was applied, and which was a process secured by letters patent of the United States, under which O was the sole licensee. The defendant used the word "Heliotype" on prints published by him, which were not made by such patented process. *Held*, that the right of O to the recorded trademark was limited to its use on prints made by such patented process. *Ibid.*

§ 970. The act of Congress of July 8, 1870,— providing for the registration of trademarks,— does not (at least in a State court) furnish any further or greater protection than the court might have previously given. 1873, *N. Y. Superior Ct. S. T.*, Popham *v.* Wilcox, 14 *Abb. Pr.* (*N. S.*) 206; S. C. on appeal, 38 *N. Y. Super. Ct.* 274.

§ 971. The act to protect merchants, &c., against counterfeit trademarks, approved February 22, 1870 (Adj. Sess. Acts 1870), was designed to protect foreign as well as domestic trademarks, and may be invoked by citizens of other States and countries. 1874, *Supreme Ct. of Missouri*, State of Missouri *v.* Gibbs, 56 *Mo.* 133.

§ 972. *Query*,— whether, when a trademark,

registered under the act of Congress consists of a combination of words, letters, monograms and pictures, it is infringed when the whole combination is not used. 1875, *U. S. Circuit Ct. Ill.*, Tucker Mfg. Co. *v.* Boyington, 9 *Off. Gaz.* (*U. S. Patent Office*) 455.

§ 973. A person who had been using for upwards of a year a trademark bearing the word "registered," it having been registered under the copyright act 1862 (25 & 26 Vic. c. 68), applied for its registration under the trademark registration act 1875, but the registrar, acting on the instructions of the commissioners of patents, one of whom is the lord chancellor, who is empowered by the act to make general rules as to registration, declined either to register the trademark with the word "registered," or to allow the advertisements required by the act before registration to be issued bearing the word "registered" as part of the trademark. An application under section 5 of the act, for an order directing the registrar to take the necessary steps for the registration of the trademark in its entirety was refused. *Semble*, the copyright act of 1862 (25 & 26 Vic. c. 68), is not applicable to trademarks. 1875, *V. C. Hall's Ct.*, *In re* Meikle's Trademark, 24 *W. R.* 1067; S. C., 46 *L. J. R.* (*N. S.*) *Ch.* 17.

§ 974. The trademarks registration act of 1875 (38 & 39 Vic. c. 91), and the trademarks registration amendment act of 1876 (39 & 40 Vic. c. 33), construed. 1877, *V. C. Malins*, *In re* Barrow's Application, 46 *Law J. R.* (*N. S.*) *Ch.* 450; S. C., 25 *W. R.* 407, 564; S. C., 36 *L. T. R.* (*N. S.*) 291.

See also § 284.

SYMBOLS.

See DEVICES.

TRADEMARKS.

§ 979. I.—By whom property in trademarks may be possessed.

See GENERAL PRINCIPLES AND DEFINITIONS; ALIENS; PARTNERSHIP; ASSIGNMENT, &C.

II.—The manner in which property in trademarks may be acquired and transferred.

See GENERAL PRINCIPLES AND DEFINITIONS; ACQUISITION; ASSIGNMENT; ACQUIESCENCE; ABANDONMENT; LICENSE; LACHES; PRIOR USE; EXCLUSIVE RIGHT; PARTNERSHIP; REGISTRATION; OPERATION OF LAW.

III.—Of the requisite components of trademarks to entitle him who owns them to protection in their exclusive use as property.

See ORIGIN AND OWNERSHIP; NAME; WORDS; DEVICES; LETTERS; NUMERALS; MISREPRESENTATION; QUALITY.

IV.—To what a trademark may be applied.

See VEHICLES; PUBLICATIONS; SIGNS; GENERAL PRINCIPLES AND DEFINITIONS.

V. Of the violation and infringement of the right of property in trademarks.

See IMITATION; PUBLICATIONS; LABELS; NAME; LETTERS; NUMERALS; WORDS; DEVICES; MISREPRESENTATION; QUALITY; INTENT; CAUSE OF ACTION; DEFENSES.

VI.—Remedies.

See REMEDIES; CONTEMPT; INJUNCTION; DAMAGES; CRIMES; STATUTES (CONSTRUCTION OF).

TRADEMARKS IN GENERAL.

§ 980. **An injunction will not be made to include the manner of boxing an article, the phraseology of cautions, and other incidents which are to be considered open to the public.** 1867, *N. Y. Supreme Ct., G. T.*, Gillott *v.* Esterbrook, 47 *Barb.* 455.

§ 981. **If an article is an artificial compound of worth, of such fame as to be in demand, and its ingredients and the proportion of their admixture the result of the study, information and skill of the owner, and known only to him, an imitation of any proper symbol by which he guaranteed to the purchaser the verity and origin of the compound, would be a violation of the rights of both. And why? For that the purchaser has a right to have the very thing which he seeks, and the owner has the right that the very thing sought shall be sold at his profit. It does not alter this right that the compound held for sale and sought for, is made by nature and not by art. The owner of its sole place of production is the exclusive owner of it in the last case, as in the first. And in the last case, as in**

the first, the buyer seeks that very thing. And both have the right that the truthful symbol or device which tells of the genuineness of its origin shall not be imitated with intent or effect to deceive. It is the peculiarity of the article, its merit which is individual and exclusive, which attracts the buyer. It is the sole power, from having sole control of the place of origin, to furnish this peculiarity, which is the advantage of the owner and is his property of value. The trademark adopted is the indication to the first of where he may feed his desire, and the protection to the last that he shall keep the profit of being the one who does feed it. 1871, *N. Y. Court of Appeals*, The Congress and Empire Spring Company *v.* The High Rock Congress Spring Company, 45 *N. Y.* 291; S. C., 10 *Abb. Pr.* (*N. S.*) 348; reversing S. C., 57 *Barb.* 526.

§ 982. When the spring first known as and named "Congress Spring" produces natural water of peculiar medical and curative properties, possessed by no other spring, the words "Congress Water," and "Congress Spring Water" appropriately indicate the origin and ownership of the water flowing from Congress Spring, and the word "Congress" used in connection with the bottling and sale of such water, is a proper and legitimate trademark. *Ibid.*

§ 983. A barrel of peculiar form and dimensions, irrespective of any marks or brands impressed upon, or connected with it, cannot become a lawful trademark, or a substantive part of a lawful trademark, so as to invest the claimant with an exclusive right to use it. 1871, *U. S. Circ. Ct. of Cal.*, Moorman *v.* Hoge, 2 *Sawyer*, 78.

§ 984. The defendants were restrained from sell-

ing "any preparation or compound under the name and style of "J. B. Wilder & Co.'s Stomach Bitters" printed, stamped or engraved upon the bottles, labels, wrappers, covers, boxes or packages thereof, also from using the bottle herein exhibited marked 'B 2,' and from imitating or causing to be imitated in any manner, either the bottle or label of the plaintiff herein marked respectively, 'A, and B.'" Wilder *v.* Wilder, *Ct. of Chan. Ky.*, cited in Moorman *v.* Hoge, 2 *Sawyer*, 89.

§ 985. Although the name adopted by dealers for their article be not one to the exclusive use of which they are entitled, yet the peculiar style of the package in which they put up the article, and the combination constituting the label may be protected. Where a peculiar device is applied to a box or barrel especially prepared to display it, the special preparation of the box or barrel constitutes a part of the trademark, and may participate in its protection. This principle applied, to protect plaintiffs in the use of a barrel with a red rim and a glazed surface on the head, with the letters A A A and a Maltese cross, and to enjoin defendants from using a similarly prepared head with the letters XXX and a crown. 1872, *N. Y. Superior Ct. S. T.*, Cook *v.* Starkweather, 13 *Abb. Pr.* (*N. S.*) 392.

§ 986. The plaintiffs since 1855 had rolled their carpets upon a hollow stick, which stick, when put into the centre of their rolls of carpet, they claimed to be their trademark. The stick consisted of two pieces, ground on the inside, so that when the two pieces were put together they formed a shell with a rectangular opening and with the corners of the outside rounded off so that the ends of the stick or shell formed an octagonal ring. This ring was

both visible and tangible in each end of each roll of carpet. The stick or shell was made the length of the rolls of carpet, so as to exhibit the rings. The shell was adopted in 1855 and used continuously ever since by plaintiffs as a trademark, and was registered as a trademark in the U. S. patent office in 1871. The defendants, in 1872, commenced to make and sell carpets rolled upon sticks resembliny the sticks used by the plaintiffs. The plaintiffs filed a bill to enjoin the defendants from the use by them of such sticks for carpets. The evidence in the case showed that such sticks in rolls of carpet indicated to the public that the goods containing them were made by the plaintiffs; that any one seeing the shells in carpets would suppose them to be the plaintiffs' goods; and that the use by the defendants of said sticks would deceive the public. *Held*, that said stick as claimed by plaintiffs was a good and valid trademark, that they were entitled to its exclusive use; and that the defendants should be enjoined and pay to the plaintiffs the profits and gains received by them in consequence of their infringement, together with such damages as plaintiffs had suffered thereby. 1873, *U. S. Circuit Ct. Penn.*, The Lowell Manufacturing Company *v.* Larned, unreported.

§ 987. *It seems* doubtful whether in a collateral proceeding the court is empowered to restrain a party from the use of a trademark, awarded to him in the established course of procedure, by the commissioners of patents. 1876, *N. Y. Supreme Ct. S. T.*, Decker *v.* Decker, 52 *How. Pr.* 218.

TRADE SECRET.

§ 995. **An injunction granted to restrain the use** of a secret in the compounding of a medicine, not being the subject of a patent, and to restrain the sale of such medicine by a defendant, who acquired the knowledge of the secret in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence. A plaintiff not having the privileges of a patentee, may have no title to be protected in the exclusive manufacture and sale of a medicine against the world; but he may notwithstanding have a good title to protection against the particular defendant. The injunction restrained the sale of medicine by the defendant under the name of the medicine prepared according to the secret preparation, not on the ground of the use of the name alone, but because it was by the use of the name that the defendant was availing himself of the breach of faith and contract. The defendant acquired the secret from T M, and such communication was a breach of faith on the part of T M towards the plaintiff. 1851, *Before the Vice Chancellor*, Morison *v.* Moat, 9 *Hare*, 241.

§ 996. *Semble.* It might have been different, if the defendant had been a purchaser for value of the secret without any notice of any obligation affecting it. *Ibid.*

See also §§ 144, 152, 242, 612.

TRANSFER.

See ASSIGNMENT.

USE.

See ACQUISITION; PRIOR USE; EXCLUSIVE RIGHT.

VEHICLES.

See §§ 87, 88, 326, 594.

VENDOR.

§ 1000. A commision merchant who sells an article under a simulated trademark, knowing its character, is liable to a suit to restrain its further sale, by the proprietor of the trademark, and will be subjected to the costs of such suit. 1845, *Vice Ch. Sandford*, Coats *v.* Holbrook, 2 *Sandf. Ch.* 586 (*N. Y.*).

§ 1001. The venders of an article of merchandise are entitled to the exclusive use of a trademark adopted by them to distinguish such article, although they do not manufacture the goods to which it is applied. 1846, *N. Y. Court of Errors*, Taylor *v.* Carpenter, 11 *Paige*, 292; S. C., 2 *Sandf. Ch.* 603.

§ 1002. Goods were sold by an auctioneer, without any warrant or misrepresentation, and the same turned out to be spurious, and the labels upon them forged and counterfeited. *Held*, that such facts constituted no defense to an action upon a note given for the purchase price; there being no proof that the auctioneer knew the fact of the spurious nature

of the goods, or that he had any better means of judging of their genuineness than the buyers. 1849, *N. Y. Superior Ct. G. T.*, Rudderow *v.* Huntington, 3 *Sandf.* 252.

§ 1003. If one manufactures goods himself, and puts upon them the trademark of another, though he may not know to whom that mark belongs, he must at least know that he has himself no right to the mark. That knowledge makes him liable to account for the profits he may have realized by his conduct. But if one buys goods from a third party, believing them to be genuine, while in fact they are spurious, it is not until he has been told that they are so that he can be considered to be guilty of any fraud, or to be liable to render any account. 1864, *Master of the Rolls*, Moet *v.* Couston, 10 *Law Times R.* (*N. S.*) 395; S. C., 33 *Beav.* 578.

§ 1004. The defendants, who had innocently bought and sold as genuine an article which was in fact spurious, were restrained from selling it with the plaintiff's trademark, but were not ordered to account for the profits they had made. *Ibid.*

§ 1005. The plaintiff being a thread manufacturer of repute, the defendant bought in the market thread, wound on spools, not made by the plaintiff, of inferior quality, and cheaper than his, and not bearing his name, but marked with the name of a firm of winders of thread, who were known to be accustomed to purchase of the plaintiff thread in the hank for the purpose of winding, and selling it when wound. Defendant sold the goods to a wholesale customer, with the assurance (given, as he said, without knowledge of any misrepresentation) that they were of the plaintiff's

make, and invoiced them to the customer under the description of certain numbers, which the plaintiff had adopted and exclusively used in order to designate his particular manufacture. The customer attached the plaintiff's name and numbers to the spools of thread, and retailed it to the public as of the plaintiff's make. *Held*, that, though the plaintiff had suffered a serious wrong, yet that there had not been that clear and distinct representation given to the world by the defendant of the goods being the goods of the plaintiff which would justify the court in granting an injunction against him, and the bill was dismissed, but without costs. 1866, *Vice Ch. Wood's Ct.*, Ainsworth *v.* Walmesley, *Law R.* 1 *Eq.* 518; S. C., 12 *Jurist*, (*N. S.*) 205; S. C., 14 *Weekly R.* 363; S. C., 14 *Law T.* (*N. S.*) 220; S. C., 35 *Law J.* (*N. S.*) *Ch.* 352.

See also § 769.

VIOLATION.

See INFRINGEMENT.

WORDS.

§ 1010. The court of chancery will not grant an injunction to restrain the issue of goods bearing labels containing a false representation, when such falsehood is not an infringement of any right vested in the plaintiff. The persons to whom prize medals have been awarded by the commissioners of the

International Exhibition, have not *ipso facto* any special property in the nature of a trademark in the words "prize medal." Therefore, where a person who had not obtained such a medal issued his goods with labels affixed to them bearing the words "Prize Medal, 1862," the court refused to interfere at the instance of a person who had obtained such a medal. *Semble:* If it had been shown that an order for "Prize Medal Pickles" would in the trade be answered by supplying the plaintiff's pickles, there might be some foundation for the interference of the court; because that depends upon the presumption that the purchaser does not know the name of the merchant and rests entirely on the reputation acquired by the particular goods. 1863, Batty *v.* Hill, 1 *H. & M.* 264; S. C., 11 *W. R.* 745; S. C., 8 *L. T. R.* (*N. S.*) 791; S. C., 2 *N. R.* 265.

§ 1011. The complainers, Wotherspoon and Co., manufacturing confectioners, applied for an interdict against the respondents, John Gray and Co., to prohibit them from vending lozenges made by the respondents or others except the complainers, under the style and title of "Victoria Lozenges," and from imitating, &c. The complainers said they were the first to apply the term "Victoria" to the lozenges manufactured by them, and thereby acquired right to the exclusive use of that name as a trademark. On the other hand, the respondents contended that the complainers had no exclusive right to the article, and no exclusive right to the same, even supposing they had been the first to apply the term "Victoria" to lozenges, which was denied. It was said to be quite a common thing to apply the name "Victoria" to

shawls, perfumery, and fancy articles in all sorts of trades, and that the first use of such a name by one manufacturer of an article well known in the trade gave him no exclusive right to the name, so as to prevent other traders from giving the same name to a similar article which is fairly and openly represented to be manufactured by themselves. The Lord Ordinary thought the doctrine well founded, and that by calling their lozenges "Wotherspoon's Victoria Lozenges" the complainers were not entitled to prevent the respondents from selling their lozenges under the name of "John Gray and Company's Victoria Lozenges." Interdict refused. 1863, *Court of Sessions, Scotland*, Wotherspoon *v.* Gray, 36 *Scottish Jurist*, 24.

§ 1012. A company cannot, by user, acquire an exclusive right to use, in its title of incorporation, a general term descriptive merely of the locality with which the business carried on by the company is connected; and the court will not restrain the use of such general term by a new company, even though it be in evidence that the former company may have been prejudiced by similarity of name. Protection of the word "Colonial" refused. 1864, *Rolls Court*, Colonial Life Assurance Company *v.* Home and Colonial Assurance Company (Limited), 33 *L. J. R.* (*N. S.*) *Ch.* 741; S. C., 33 *Beav.* 549.

§ 1013. Where the name "Ne Plus Ultra" had become common in the trade as applied to needles, it was held, that anybody might use that name to designate any quality of needles he pleased. 1866. *Vice Ch. Wood's Ct.*, Beard *v.* [illegible] 13 *L. T. R.* (*N. S.*) 747.

§ 1014. Where words, or names, are in common

use, the law does not permit such an appropriation of them to be made, so far as they are comprehended by such use, and for that reason, words and names having a known or established signification cannot, within the limits of such signification, be exclusively appropriated to the advancement of the business purposes of any particular individual, firm or company. The inability to make such appropriation out of them arises out of the circumstance that on account of their general or popular use, every individual in the community has an equal right to use them; and that right is, in all cases, paramount to the rights and interests of any one person, firm or company. What may alike be claimed and used by all, cannot be exclusively appropriated to advance the interests of any person. Numerous cases have been before the courts in which this limitation upon the use of words and names as trademarks has been maintained and established, and no good reason can be given for questioning or impeaching their conclusion. DANIELS, J. 1867, *N. Y. Supreme Court, G. T.*, Newman *v.* Alvord, 49 *Barb.* 588; S. C., affirmed, 51 *N. Y.* 189.

§ 1015. But while this limitation is entirely reasonable, there can be no propriety in extending it beyond the circumstance upon which it is founded. And accordingly any member of the community whose interests and business may be promoted by doing so, should be at liberty to apply even names and words in common use to the products of his industry, in such a manner as to indicate their origin or particular manufacture, where such application will not intrench upon and be in no way included in their use by the public. By doing so,

the rights of no member of the community can be in any manner infringed, and no public inconvenience whatever can be occasioned by it. The public will still be left at full liberty to use such words or terms as they were used before; while for specical purposes, a new office or purpose may be imposed upon them. In cases of that description no greater inconvenience or embarrassment can be found in protecting parties in the enjoyment of the new use or purpose engrafted upon a popular term than has been found in extending that protection to the case of a word created for the occasion, which was done in the case of Burnett *v.* Phalon. DANIELS, J. *Ibid.*

§ 1016. The object of the law in cases of this description, is to restrain and prevent fraud upon the manufacturer, and imposition upon the public. And that object would be entirely defeated, in many cases, if courts of justice were bound to withhold their protection from persons who imposed a new office and signification upon an old word for the purpose of rendering it serviceable as a trademark. There is no more reason for allowing a person's business to be laid open to the fraudulent invasions and misrepresentations of competing manufacturers and dealers in such a case than there would be where the term was entirely new and previously unused. Where one person, by means of superior skill, intelligence and industry, has created a valuable trade for his goods or wares in the market, and identified such trade by the appropriate use of terms, labels or devices, the party who simulates those terms, labels, or devices, for the purpose of diverting or securing the trade to himself, is guilty of a double fraud—upon the person creating the

trade and also upon the public. The man who goes upon the market in that manner, substantially represents that the goods or wares which he offers for sale are those of the person who first secured the public confidence for them. And the act embodies all the essential elements of fraud. The appropriation or use of terms of a public nature is sustained by well-considered and well-established authorities. DANIES, J. *Ibid.*

§ 1017. The use of the words "Washing Powder:" *Held*, not to constitute an infringement of plaintiff's label and trademark, which had those words upon them. 1868, *Supreme Ct. of Cal.*, Falkinburg *v.* Lucy, 35 *Cal.* 52.

§ 1018. In an action brought to enjoin the defendant from using the plaintiff's trademark, if the plaintiffs can be pronounced the first to use the word claimed by them, although it be a popular term, and one in general use, *e. g.*, the word Bismarck, as a designation of a particular style of goods made by them, and to have acquired by its manufacture and sale under that name a valuable interest in such designation, the defendant may be restrained from using it to the same purpose. The plaintiffs had the right to appropriate such name, in common with others, for a new purpose, and having done so, are entitled to avail themselves of all the advantages of their superior diligence and industry. 1868, *N. Y. Ct. of Com. Pleas, S. T.*, Meserole *v.* Tynberg, 4 *Abb. Pr.* (*N. S.*) 410; S. C., 36 *How. Pr.* 14.

§ 1019. There is no reason for making any distinction between a common word or term used for an original or new purpose which has accomplished its object and a new design adopted by a manufac-

turer. Both give currency to the articles to which they are applied, and distinguish them from other manufactures of a similar character. *Ibid.*

§ 1020. The word, symbol, or term, abstractly considered, is not the subject of special right or property, but it may become so when the application of it identifies a particular manufacture, and the thing made, and the word, term or symbol, as applied to it, are synonymous. Property in a word, for all purposes, cannot exist, but property in a word, as applied by way of a stamp upon goods, does exist the moment the goods once get into the market so stamped. Reputation in the market, whereby the stamp gets currency and an indication of superior quality, or of some other circumstance which would render the article so stamped acceptable to the public, is property. *Ibid.*

§ 1021. No absolute right of property can exist in a word. A person may enjoy the exclusive right to use a particular word upon a particular article, and yet have no right in respect to the same word when applied to another article. 1869, *N. Y. Supreme Ct., S. T.*, Amoskeag Manufacturing Co. *v.* Garner, 55 *Barb.* 151; S. C., 6 *Abb. Pr.* (*N. S.*) 265.

§ 1022. The Amoskeag Manufacturing Company had for making years manufactured *cotton cloths* exclusively, to which it applied the word "Amoskeag" as a trademark. The defendants subsequently made *prints*, and also used the word "Amoskeag." *Held*, that defendants had not invaded plaintiff's trademark. *Ibid.*

§ 1023. Terms in common use to designate a trade or occupation, in connection with other words indicating that a particular class of merchandise of the same general description is specially dealt in,

cannot be exclusively appropriated by any one as a trademark. The words "Antiquarian Book Store" cannot be protected as a trademark. 1870, *Supreme Ct. of Cal.*, Choynski *v.* Cohen, 39 *Cal.* 501.

§ 1024. Where there are a great number of persons who produce the same article, "original" means the first inventor. That is the meaning of the word "original" which the court of chancery has always recognized. The original inventor of a new manufacture, and persons claiming under him, are alone entitled to designate such manufacture as "the original;" and if he or they have been in the habit of so designating their manufacture, an injunction will be granted to restrain another manufacturer from applying the designation to his goods, 1871, *Rolls Court*, Cocks *v.* Chandler, *Law R.* 11 *Eq.* 446; S. C., 19 *Weekly R.* 593; S. C., 24 *Law Times* (*N. S.*) 379; S. C., 40 *L. J. R.* (*N. S.*) *Ch.* 575. And see § 610.

§ 1025. The original inventor of a sauce known as "Reading Sauce" had by long acquiescence lost the right of preventing other persons from manufacturing and selling a similar article under the same name. The plaintiff, who was successor in trade of the original inventor, described his sauce as "The Original Reading Sauce," and on a bill by him to restrain the defendant from selling his sauce by the same title, an injunction was granted against the use of the word "original," notwithstanding the original inventor's said acquiscence. There was no evidence that the defendant had ever sold any of his own Reading Sauce as the plaintiff's Reading sauce, or that any one had ever purchased the defendant's sauce in mistake for the plaintiff's Reading Sauce. *Ibid.*

§ 1026. When the spring first known as and named "Congress Spring" produces natural mineral water of peculiar medical and curative properties, possessed by no other spring, the words "Congress Water" and "Congress Spring Water" appropriately indicate the origin and ownership of the water flowing from Congress Spring, and the word "Congress," used in connection with the bottling and sale of such water, is a proper and legitimate trademark. 1871, *N. Y. Court of Appeals*, The Congress and Empire Spring Company *v.* High Rock Congress Spring Company, 45 *N. Y.* 291; S. C., 10 *Abb. Pr.* (*N. S.*) 348; reversing S. C., 57 *Barb.* 526.

§ 1027. Undoubtedly words or devices may be adoped as trademarks which are not original inventions of him who adopts them, and courts of equity will protect him against any fraudulent appropriation or imitation of them by others. Property in a trademark, or rather, in the use of a trademark or name, has very little analogy to that which exists in copyrights, or in patents for inventions. Words in common use, with some exceptions, may be adopted, if, at the time of their adoption, they were not employed to designate the same or like articles of production. The office of a trademark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may, in many cases, be done by a name, a mark, or a device well known, but not previously applied to the same article. 1871, *U. S. Supreme Court*, Delaware and Hudson Canal Company *v.* Clark, 13 *Wall.* 311.

§ 1028. Though it is not necessary that the word adopted as a trademark should be a new creation,

never before known or used, there are some limits to the right of selection. This will be manifest when it is considered that in all cases where rights to the exclusive use of a trademark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities. *Ibid.*

§ 1029. Plaintiff had been engaged since 1851, in manufacturing gin in Holland; the name "Wolfe's Schiedam Aromatic Schnapps" impressed on the bottles and forming part of the labels was devised by him to denote his goods; in the trade this name was fully recognized as his trademark; the phrase "Schiedam Schnapps" was fully recognized as his peculiar property, in that it expressed the origin and ownership of his goods, and suggested to the general public, who had occasion to buy gin, the liquor made, imported and bottled by him. Defendants had for some time been putting up and selling a gin adulterated with water in bottles similar in appearance to those of plaintiffs, with labels which were merely colorable imitations of the name, mark, devices and symbols of plaintiff, being headed "Wolfe's Aromatic Schiedam Schnapps," and signed at the foot "Wolfe" instead of the "Udolpho Wolfe" of the genuine label, and with words blown on the sides of the bottles well calculated to mislead a purchaser who did not make an unusually careful scrutiny. "It is vain for defendants to urge that the several words which compose the name given by plaintiff

to his goods are not new. His combination of these words is proved to have been new, and it is proved to indicate the origin and ownership of the liquor, and the defendants have no right to filch this combination, or any important part of it, in such a way as to mislead the purchaser as to its real origin and ownership." Defendants were enjoined from selling any article under the name of "Wolfe's Aromatic Schiedam Schnapps" or "Aromatic Schiedam Schnapps" or "Schiedam Schnapps," or from using any imitation of said name. 1872, *Supreme Ct. of Louisiana*, Wolfe *v.* Barnett, 24 *La. An.* 97. But see §§ 648, 661, 664.

§ 1030. Plaintiff claimed to be solely and exclusively possessed of and entitled to the recipe for making a certain medical preparation or ointment called "Dr. Johnson's or Singleton's Golden Ointment" or "Singleton's Golden Eye Ointment," known in the trade and to the medical profession and the public generally by the name of "The Golden Ointment." It was alleged that the receipe was discovered between two or three hundred years ago by Dr. Johnson, a celebrated physician. The defendant had for some time past sold a preparation called "Dr. Rooke's Golden Ointment," and the suit was instituted by plaintiff for an injunction to restrain defendant from selling, or publishing or advertising for sale any ointment, or medical preparation in the nature of an ointment, under the title of "Dr. Rooke's Golden Ointment," or under any other title or description which should be an infringement of the title and designation of the plaintiff's "Golden Ointment," on the ground that the plaintiff had an exclusive right to the use of the word "Golden," as applied to ointment. The

right to the description "Golden Ointment" was the subject of litigation as far back as 1832, and in the case at that time before the court the plaintiff obtained an injunction. Plaintiff moved for an interlocutory injunction. The Vice Chancellor said that, considering the existing state of the authorities, all he could decide at present was, that he was not at liberty to grant an interlocutory injunction, but must order the motion to stand over to the hearing of the cause. 1872, *V. C. Wickens*, Green *v.* Rooke, *W. N.* 1872, 49.

§ 1031. Where words or names are in common use, no one person can claim a special appropriation of them to his peculiar use; but where words and the allocations of words, have, by long use, become known as designating the article of a particular manufacturer, he acquires a right to them, as a trademark, which competing dealers cannot fraudulently invade. The essence of the wrong is the false representation and deceit. When the improper design is apparent, an injunction should be issued. 1873, *N. Y. Supreme Ct. G. T.*, Lea *v.* Wolf, 15 *Abb. Pr.* (*N. S.*) 1; S. C., 1 *T. & C.* 626; S. C., 46 *How. Pr.* 157; modifying S. C., 13 *Abb. Pr.* (*N. S.*) 389.

§ 1032. Words which in their ordinary and universal use denote the virtues, such as "Charity," "Faith," &c., cannot ordinarily be appropriated by any one as a title or designation for a book, play, &c., written, &c., by him, treating or enforcing, symbolizing, &c., a virtue, to the exclusion of any other person who may write, &c., a book, play, &c., treating upon, enforcing, symbolizing, &c., the same virtue. There may be cases where a title is made use of in bad faith, or to promote some imposition,

or to inflict a wrong, when a court of justice should interfere to prevent its use or to compensate a party who has in consequence sustained an injury. 1874, *N. Y. Superior Ct. S. T.*, Isaacs *v.* Daly, 39 *N. Y. Superior Ct.* (7 *J. & S.*) 511.

§ 1033. There can be no right to the use of mere generic words. Hence, "Julienne," designating a manufactured article for julienne soup, does not denote origin or ownership, and like "Schnapps" and "Club House Gin," it is a word used merely to designate the article or its quality. 1875, *N. Y. Superior Ct. S. T.*, Godillot *v.* Hazard, 49 *How. Pr.* 5.

§ 1034. The words "conserves alimentaire," which are alike applicable to every description of preserved or dessicated food, do not relate exclusively to the name or quality of any particular preparation, and are therefore the subject of an exclusive appropriation in connection with words which do not denote the name or quality; and in that sense they may be regarded as designating the true origin or ownership of a manufacture upon the label on which they appear. *Ibid.*

§ 1035. A copy of the coat of arms of the city of Paris, when in connection with other marks, words or devices, not denoting name or quality, will cover a property in it, which will prevent its use in the same connection or combination by another person. *Ibid.*

§ 1036. The words "conserves alimentaire," or the coat of arms of the city of Paris as a symbol, used upon packages of "Julienne" for julienne soup, could, if it was necessary, be separately regarded as a trademark. *Obiter. Ibid.*

§ 1037. Where it was shown that the word

"Caporal" had been used in connection with manufactured tobacco for many years prior to its appropriation by the plaintiff as a trademark it was *held*, that he was not entitled to its exclusive use as a trademark for tobacco. 1877, *N. Y. Supreme Ct. S. T.*, Kinney *v.* Basch, unreported.

§ 1038. The symbols of a crown, a horseshoe, and words "Best," "Scrap," "Plating," &c., are symbols and words common to the iron trade. 1877, *V. C. Malins*, *In re* Barrow's Application, 46 *L. J. R.* (*N. S.*) *Ch.* 450; and see S. C., on appeal, 25 *Weekly R.* 564.

See DESCRIPTIVE NAME, FANCY NAME, and also § 193.

TRADEMARK TABLE.

EXCLUSIVE OF FRENCH CASES.

I. FANCY NAMES AND DEVICES PROTECTED.

"*Pessendede*" (watches). 1833, Vice Chancellor's Ct., Eng., Gout *v.* Aleploglu.

"*H. H.* 6" (ploughshares). 1834, Vice Chancellor's Ct., Eng., Ransom *v.* Bentall.

"*Morrison's Universal Medicine.*" 1841, Common Pleas, Eng., Morrison *v.* Salmon.

"*Taylor's Persian Thread.*" 1844, U. S. Circuit Ct., STORY, J., Taylor *v.* Carpenter; 1846, N. Y., Ct. of Errors, Taylor *v.* Carpenter; 1854, Vice Ch. WOOD, Eng., Taylor *v.* Taylor.

"*Ethiopian*" (stockings). 1846, Vice Chancellor's Ct., Eng., Hine *v.* Lart.

"*Chinese Liniment.*" 1849, U. S. Circuit Ct., Ind., Coffeen *v.* Brunton.

"*Pain Killer.*" 1850, Sup. Ct., R. I., Davis *v.* Kendall; 1867, Vice Ch.'s Ct., Canada, Davis *v.* Kennedy.

"*Genuine Yankee Soap.*" 1857, N. Y. Superior G. T., William *v.* Johnson; 1863, N. Y. Superior S. T., Williams *v.* Spence.

"*Cocoaine*" (Infringement: "*Cocoïne*"). 1359, N. Y. Superior, 1867, N. Y. Court of Appeals, Burnett *v.* Phalon.

"*Roger Williams Long Cloth.*" 1860, Sup. Ct., R. I., Barrows *v.* Knight.

"*Dr. Morse's Indian Root Pills*" 1860, N. Y. Sup. S. T., Comstock *v.* White.

"*Cross Cotton.*" 1861, Vice Ch. Wood, Eng., Cartier *v.* May.

"*Excelsior*" (soap). 1863, Vice Ch. Wood, Eng., Braham *v.* Bustard.

"*L. L.*" (whiskey). 1863, Lord Ch. Brady, Ireland, Kinahan *v.* Bolton.

"*Diamond State*" (matches). 1865, N. Y. Superior, G. T., Swift *v.* Dey.

"303" (pens). 1877, N. Y. Supreme, 1872; N. Y. Com. of Appeals, Gillott *v.* Esterbrook.

"*Sweet Opoponax of Mexico*" (perfume). 1867, N. Y. Sup. G. T., Smith *v.* Woodruff.

"*Mrs. Winslow's Soothing Syrup.*" 1867, N. Y. Com. Pleas. G. T., Curtis *v.* Bryan.

"*Govan**" (iron). (Infringement: "*Coats **"). 1867, Sessions, Scotland, Dixon *v.* Jackson.

"*Cocoatina*" (Infringement: "*Cocoatine*"). 1868, Vice Ch. Malins, Eng., Schweitzer *v.* Atkins.

"*Bismarck*" (collars). 1868, N. Y. Com. Pleas, S. T., Messerole *v.* Tynbergh.

"*The Hero*" (jars).

"*The Heroine*" (jars). 1868, Com. Pleas, Phil. Pa., Rowley *v.* Houghton.

"*Charter Oak*" (stoves). 1869, Sup. Ct. Mo., Filley *v.* Fassett.

"*Bovina*" (pomade). (Infringement: "*Bovoline*"). 1869, Lockwood *v.* Bostwick.

"*Live and Let Live*" (restaurant sign). Genin *v.* Chadsey.

"*Hall's Vegetable Sicilian Hair Renewer.*" 1870, Com. Pleas, Phil. Pa., Gillis *v.* Hall.

"*Grenade Syrup.*" 1870, N. Y. Sup. S. T., Rillet *v.* Carlier.

"*Original Reading Sauce.*" 1871, Rolls Ct., Eng., Cocks *v.* Chandler.

"*Congress Water*" "*Congress Spring Water.*" 1871, N. Y. Ct. of Appeals, Congress & Empire Spring Co. *v.* High Rock Congress Spring Co.

"*Turin*" (cloth).
"*Leopold*" "
"*Sefton*" "
"*Liverpool*" "
1872, Vice Ch. Bacon, Eng., Hirst *v.* Denham.

"*Eureka*" (shirts). 1872, Ch. Ct. of Appeals, Eng., Ford *v.* Foster.

"*Exactly twelve yards*" (in Turkish).
"*Exactly twelve yards*" (in Armenian).
"*Exactly twelve yards*" (in Roman). 1872, Ch. Ct. of Appeals, Eng., Broadhurst *v.* Barlow.

"*Aromatic Schiedam Schnapps.*" 1872, Sup. Ct. La., Wolfe *v.* Barnett. *Contra*, Wolfe *v.* Goulard; Burke *v.* Cassin.

"*Keystone Line*" (steamships). 1872, Com. Pleas, Phil. Pa., Stetson *v.* Winsor; 1872, Com. Pleas, Phil. Pa., Winsor *v.* [illegible]de.

"*The ✱ Shirt*" 1872, U. S. Circuit, Conn., Morrisou *v.* Case.

"*Mark Twain*" (*nom de plume*). 1873, N. Y. Sup. S. T., Clemens *v.* Such.

"*Conserves Alimentaire.*" 1875, N. Y. Superior S. T., Godillot *v.* Hazard.

"½" (cigarettes). 1877, N. Y. Sup. S. T., Kinney *v.* Basch, and see Kinney *v.* Allen.

"*B. B. H*" (iron). 1877, Ch. Ct. of Appeals, Eng., In re Barrow's Application.

See also, 1842, Crawshay *v.* Thompson; 1861, Henderson *v.* Jorp; 1862, Cartier *v.* Carlile; 1863, Hall *v.* Barrows; 1863, Edelsten *v.* Eldesten; 1863, Wotherspoon *v.* Gray; 1871, Sohl *v.* Geisendorf; 1872, Smith *v.* Reynolds; 1875, Morse *v.* Cornwell, and other cases in the digest.

II. GEOGRAPHICAL NAMES.

a. Protected.

"*Anatolia*" (liquorice). 1864, Vice Ch. Wood, Eng., McAndrew *v.* Bassett.

"*Seixo*" (wine). 1866, Lord Ch. Cranworth, Seixo *v.* Provezende.

"*Pall Mall Guinea Coal.*" 1869, Ch. Ct. of Appeal, Eng., Lee *v.* Haley.

"*Glenfield*" (starch). 1872, House of Lords, Wotherspoon *v.* Currie.

"*Leopoldshall*" (kainit). 1872, Vice Ch. Wickens, Eng., Radde *v.* Norman.

"*Akron*" (cement). 1872, N. Y. Com. of Appeals, Newman *v.* Alvord.

"*Worcestershire*" (sauce). 1873, N. Y. Sup. S. T., Lea *v.* Wolf.

"*Appollinaris*" (mineral water). 1875, Vice Ch. Bacon, Eng., Appollinaris Co. (Limited) *v.* Norrish.

"*St. James*" (cigarettes). 1877, N. Y. Sup. S. T., Kinney *v.* Basch.

And see other cases in the digest.

b. Not protected.

"*Colonial.*" 1864, Rolls Ct., Eng., Colonial Life Assurance Co. *v.* Home and Colonial Life Assurance Co. (Limited).

"*Moline, Ill.*" (ploughs). 1870, Sup. Ct. Ill., Candee *v.* Deere.

"*Lackawanna*" (coal). 1871, U. S. Sup. Ct., Delaware and Hudson Canal Co. *v.* Clark.

"*Glendon*" (iron). 1874, Sup. Ct., Pa., Glendon Iron Co. *v.* Uhler.

"*Durham*" (tobacco). 1875, Sup. Ct., N. C., Blackwell *v.* Wright, and see Blackwell *v.* Armistead.

And see other cases in the digest.

III. DESCRIPTIVE NAMES AND WORDS IN COMMON USE NOT PROTECTED.

"*Dr. Johnson's Yellow Ointment.*" 1783, Kings Bench, Singleton *v.* Bolton.

"*Velno's Vegetable Syrup.*" 1813, Vice Chancellor's Ct., Eng., Canham *v.* Jones.

"*Thomsonian Medicines*." 1837, Sup. Jud'l Ct., Mass., Thomson *v.* Winchester.

"*A. C. A*" (tickings). 1849, N. Y. Superior S. T., Amoskeag Mfg. Co. *v.* Spear.

"*Cylinder*" (glass).
"*Lake*" (do.)
"*New York*" (do.)
"*Galen*" (do.) 1853, N. Y. Sup. S. T., Stokes *v.* Landgraff.

"*Balm of Thousand Flowers*." 1857, N. Y. Superior, S. T., Fetridge *v.* Wells; and see Fetridge *v.* Merchant.

"*Aromatic Schiedam Schnapps*." 1859, N. Y. Sup. S. T., Wolfe *v.* Goulard; 1873, Sup. Ct., Cal., Burke *v.* Cassin. *Contra*, Wolfe *v.* Barnett.

"*Club House Gin*." 1860, N. Y. Superior, G. T., Corwin *v.* Daly.

"*Paraffine Oil*." 1862, Vice Ch. Wood, Eng., Young *v.* Macrae.

"*Prize Medal*, 1862" (pickles). 1863, Vice Ch. Wood, Eng., Batty *v.* Hill.

"*Extract of Night Blooming Cereus*." 1864, Com. Pleas, Phil. Pa., Phalon *v.* Wright.

"*Old London Dock Gin*." 1865, N. Y. Com. Pleas, S. T., Bininger *v.* Wattles.

"*Parlor Match*." N. Y. Superior, G. T., Swift *v.* Dey.

"*Holbrook's*" (school apparatus). 1866, Chicago, Superior Ct., Sherwood *v.* Andrews.

"*Ne plus ultra*" (needles). 1866, Vice Ch. Wood, Eng., Beard *v.* Turner.

"*Liebig's Extract of Meat.*" 1867, Vice Ch. Wood, Eng., Liebig's Extract of Meat Co. (Limited) *v.* Hanbury.

"*Ferro-Phosphorated Elixir of Calisaya Bark.*" 1867, N. Y. Com. Pleas; 1874, N. Y. Ct. of Appeals, Caswell *v.* Davis.

"*Washing Powder.*" 1868, Sup. Ct. Cal., Falkinburgh *v.* Lucy.

"*Desiccated Codfish.*" 1868, N. Y. Com. Pleas, G. T., Town *v.* Stetson.

"*Wheeler and Wilson*" (sewing-machines). 1869, Vice Ch. James, Eng., Wheeler and Wilson Mfg. Co. *v.* Shakespear. But see Singer Mfg Co. *v.* Kimball, and Singer Mfg. Co. *v.* Wilson.

"*Antiquarian Book Store.*" 1870, Sup. Ct. Cal., Choynski *v.* Cohen.

"*A No.* 1" (ploughs).
"*A X No.* 1" do.
"*No.* 1" do.
"*X No.* 1" do.
"*No.* 3" do.
"*B. No.* 1" do. 1870, Sup. Ct. Ill., Candee *v.* Deere.

"*Nourishing Stout.*" 1873; Vice Ch. Malins, Raggett *v.* Findlater.

"*Gold Medal.*" 1874, N. Y. Ct. of Appeals, Taylor *v.* Gillies.

"*Charity*" (name of a play). 1874, N. Y. Superior S. T., Isaacs *v.* Daly.

"*Julienne*" (for julienne soup). 1875, N. Y. Sup. S. T., Godillot *v.* Hazard.

"*Tucker Spring Bed.*" 1875, U. S. Circuit Ill., Tucker Mfg. Co. *v.* Boyington.

"*Best*" (iron).
"*Scrap*" do.
"*Plating*" do.
1877, Ch. Ct. of Appeal. In re Barrow's Application.

"*Cherry Pectoral*" (medicine for coughs, colds, &c.). 1877, N. Y. Com. Pleas, G. T., Ayer *v.* Rushton.*

And see Edelsten *v.* Vick; Wotherspoon *v.* Gray; and other cases in the digest.

IV. ALLEGED TRADEMARKS NOT PROTECTED, BY REASON OF MISREPRESENTATION.

"*Hooqua's Mixture.*" 1857, Pidding *v.* How.

"*Medicated Mexican Balm.*" 1842, Perry *v.* Truefitt.

"*Dr. Wistar's Balsam of Wild Cherry.*" 1847, Fowle *v.* Spear.

"*Flavell's Patent Kitchener.*" 1853, Flavell *v.* Harrison.

"*Kathairon.*" 1855, Heath *v.* Wright.

"*Balm of Thousand Flowers.*" 1857, Fetridge *v.* Wells. And see Fetridge *v.* Merchant.

"*Meen Fun.*" 1860, Hobbs *v.* Francais.

* Now in the Court of Appeals for review.

"*Extract of Night Blooming Cereus.*" 1864, Phalon *v.* Wright.

"*Patent Plumbago Crucibles.*" 1866, Morgan *v.* M'Adam.

"*Golden Crown Cigars.*" 1869, Palmer *v.* Harris.

"*Laird's Bloom of Youth, or Liquid Pearl.*" 1872, Laird *v.* Wilder.

"*Mason's Patent, November* 30, 1858." 1874, Consolidated Fruit Jar Co. *v.* Dorflinger.

"*Capcine Plasters.*" 1877, Seabury *v.* Grosvenor.

See also. 1848, Patridge *v.* Menck; 1865, Leather Cloth Co. (Limited) *v.* American Cloth Co.; 1866, Sherwood *v.* Andrews; 1875, Eastcourt *v.* Estcourt Hop Essence Co. (Limited), and other cases in the digest.

V. INJUNCTIONS REFUSED BY REASON OF DELAY, ACQUIESCENCE, FAILURE OF PROOF, AND WANT OF JURISDICTION.

"*Great Mogul*" (cards). 1742, Blanchard *v.* Hill.

"*M. C.*" (tin plates). 1857, Motley *v.* Downman.

1847, London and Provincial Law Assurance Society *v.* London and Provincial Joint Stock Life Ins. Company.

"*London Manure Co.*" 1848, Purser *v.* Brain.

1854, Ames *v.* King; 1855, Merrimack Mfg. Co. *v.* Garner.

"*Aramingo Mills.*" 1860, Colloday *v.* Baird.

1866, Green *v.* Shepherd; 1866, Beard *v.* Turner; 1866, Ainsworth *v.* Walmesley.

"*Lloyd's Euxesis.*" 1870, Hovenden *v.* Lloyd.

"*Silver Brook Whiskey.*" 1871, Seltzer *v.* Powell.

1871, Isaacson *v.* Thompson.

"*Golden Ointment.*" 1872, Green *v.* Rooke.

"*Chlorodyne.*" 1874, Browne *v.* Freeman.

1874, Rodgers *v.* 1875, Rodgers; Eastcourt *v.* Estcourt Hop Essence Co. (Limited).

And see other cases in the digest.

VI. NAMES OF HOTELS AND VEHICLES; BUSINESS SIGNS, &C.

"*Irving House,*" protected. 1850, N. Y. Superior S. T., Stone *v.* Carlan.

"*Revere House,*" protected. 1851, Sup. Jud'l Ct. Mass., March *v.* Billings.

"*Irving House,*" protected. 1851, N. Y., Superior S. T., Howard *v.* Henriques.

"*Howe's Bakery,*" protected. 1860, N. Y. Superior G. T., Howe *v.* Searing.

"*What Cheer House.*" 1863, Sup. Ct. Cal., Woodward *v.* Lazar.

"*McCardel House*," protected. 1864, N. Y. Sup. G. T., McCardel *v.* Peck.

"*Prescott House*," protected. 1871, N. Y. Superior, S. T., Deiz *v.* Lamb.

"*Antiquarian Book Store*," not protected. 1870, Sup. Ct. Cal., Choynski *v.* Cohen.

"*Mammoth Wardrobe*," not protected. 1871, Circuit Ct. Mich., Gray *v.* Koch.

"*Wood's Hotel*," protected. 1875, Circuit Ct. Ill., Woods *v.* Sands.

And see 1836, Knott *v.* Morgan; 1853, Burgess *v.* Burgess; 1857; Peterson *v.* Humphrey; 1865, Glenny *v.* Smith; 1868, Colton *v.* Thomas; 1874, Glen and Hall Mfg. Co. *v.* Hall; 1875, Devlin *v.* Devlin; 1876, Booth *v.* Jarrett; and other cases in the digest.

VII. LABELS.

a. Protected.

See, 1816, Day *v.* Day; 1831, Day *v.* Binning; 1843, Croft *v.* Day; 1845, Coats *v.* Holbrook; 1847, Franks *v.* Weaver; 1849, Amoskeag Mfg. Co. *v.* Spear; 1853, Edelsten *v.* Vick; 1854, Shrimpton *v.* Laight; 1854, Taylor *v.* Taylor; 1856, Walton *v.* Crowley; 1856, Stewart *v.* Smithson; 1857, Clark *v.* Clark; 1857, Williams *v.* Johnson; 1861, Dale *v.* Smithson; 1865, Harrison *v.* Taylor; 1865, Southorn *v.* Reynolds; 1867, Stephens *v.* Peel; 1867, Curtis *v.* Bryan; 1868, Boardman *v.* Meriden Britannia Co.; 1869, Lockwood *v.* Bostwick; 1870, Dixon Crucible Co. *v.* Guggenheim; 1871, Hostet-

ter *v.* Vowinkle; 1871, Gardner *v.* Bailey; 1871, Abbott *v.* Baker and Confectioners' Tea Association; 1872, Blackwell *v.* Armistead; 1873, Lea *v.* Wolf; 1874, Brown *v.* Mercer; 1875, Godillot *v.* Hazard; 1876, Amoskeag Mfg. Co. *v.* Garner; 1877, Kinny *v.* Basch; 1877, Hennessy *v.* Wheeler; and other cases in the digest.

b. Not protected.

See, 1846, Partridge *v.* Menck; 1850, Foot *v.* Lea; 1855, Merrimack Mf'g. Co. *v.* Garner; 1860, Colloday *v.* Baird; 1863, Woolam *v.* Ratcliff; 1865, Leather Cloth Co. (Limited) *v.* American Cloth Co. (Limited); 1866, Ainsworth *v.* Walmesley; 1867, Blackwell *v.* Crabb; 1867, Faber *v.* Faber; 1868, Falkinburgh *v.* Lucy; 1869, Bass *v.* Dawber; 1869, Ferguson *v.* Davol Mills; 1868, Amoskeag Mfg. Co. *v.* Garner; 1871, Scoville *v.* Toland; 1875, Blackwell *v.* Wright; and other cases in the digest.

VIII. PUBLICATIONS.

See, 1802, Walcott *v.* Walker; 1803, Hogg *v.* Kirby; 1816, Lord Byron *v.* Johnston; 1877, Southey *v.* Sherwood; 1821, Edmonds *v.* Benbow; 1825, Snowden *v.* Noah; 1840, Bell *v.* Locke; 1846, Spottiswoode *v.* Clark; 1848, Clark *v.* Freeman; 1850, Jollie *v.* Jaques; 1855, Chappell *v.* Sheard, Chappell *v.* Davidson; 1856, Prowett *v.* Mortimer; 1859, Clement *v.* Maddick; 1859, Dayton *v.* Wilkes; 1859, Ingram *v.* Stiff; 1859, Bradbury *v.* Dickens; 1860, Brook *v.* Evans; 1860, Har-

per *v.* Pearson; 1862, Burrows *v.* Foster; 1864, Browne *v.* Freeman; 1867, Hogg *v.* Maxwell, Maxwell *v.* Hogg; 1868, Stevens *v.* Paine; 1868, Stephens *v.* De Conto; 1868, Kelly *v.* Hutton; 1869, Dixon *v.* Holden; 1869, Bradbury *v.* Beeton; 1869, Wheeler and Wilson Mfg. Co. *v.* Shakespear; 1872, Osgood *v.* Allen; 1873, Christie *v.* Christie; 1873, Clemens *v.* Such; 1874, Isaacs *v.* Daly; 1875, Tallcott *v.* Moore; 1876, American Grocer Publishing Association *v.* Grocer Publishing Co; and other cases in the digest.

IX. FIRM NAMES.

See, 1791, Webster *v.* Webster; 1835, Lewis *v.* Langdon; 1857, Peterson *v.* Humphrey; 1858, Fenn *v.* Bolles; 1859, Churton *v.* Douglas; 1861, Bowman *v.* Floyd; 1864, Johnson *v.* Hellely; 1864, Bury *v.* Bedford; 1865, Banks *v.* Gibson; 1866, Dickson *v.* M'Master; 1866, Scott *v.* Scott; 1867, Rodgers *v.* Taintor; 1871, Reeves *v.* Denicke; 1872, Weed *v.* Peterson; 1872, Scott *v.* Rowland; 1872, Morse *v.* Hall; 1872, Sohier *v.* Johnston; 1875, Phelan *v.* Collender; 1876, Carmichael *v.* Latimer; and other cases in the digest.

X. RESTRAINT IN THE USE OF ONE'S OWN NAME.

See, 1824, Sykes *v.* Sykes; 1843, Croft *v.* Day; 1847, Rodgers *v.* Nowill; 1850, Holloway *v.* Holloway; 1853, Burgess *v.* Burgess; 1857, Clark *v.*

Clark ; 1855, Southorn *v.* Reynolds ; 1867, Howe *v.* Howe Machine Co.; 1869, Emerson *v.* Badger ; 1870, Stonebreaker *v.* Stonebreaker ; Coats *v.* Platt ; 1871, Lazenby *v.* White ; 1872, James *v.* James ; 1872, Hallett *v.* Cumston ; 1872, McGowan Bros. Pump and Machine Co. *v.* McGowan ; 1872, Meriden Britannia Co. *v.* Parker ; 1874, Wolfe *v.* Burke ; 1875, Meneely *v.* Meneely ; 1875, Devlin *v.* Devlin ; 1875, Gourard *v.* Trust ; 1876, Decker *v.* Decker ; 1877, Prince Metallic Paint Co. *v.* Carbon Metallic Paint Co.; and other cases in the digest.

DIGEST OF FRENCH DECISIONS.

BY

FRANCIS FORBES,

COUNSELLOR AT LAW.

PREFATORY NOTE.

Before the revolution there were no trademarks, as now understood, in France. There were certain obligatory marks required to be placed on objects of manufacture to designate the manufacturer, the quality of the goods, and mode of manufacture. Trademarks, as we understand them, were, therefore, of no advantage. In 1791, the legislature abolished all laws with reference to the surveillance of the mode of manufacture, and obligatory marks. Private marks soon came into use, and being protected by no law, were infringed. The people, also, were cheated by spurious goods. Protection was first accorded to marks by the law of 19 brumaire, year VI (1797), relative to the guarantees of articles of gold and silver. This law obliged each manufacturer to mark with a private stamp, in addition to that of the government, every article of gold and silver that went from his factory.

By law of 23 nivôse, year IX (1801) manufacturers of hardware and cutlery at Orleans, and by law of 7 germinal, year X (1802), manufacturers

of oriental hosiery were authorized to stamp their goods with private marks. No penalty, however, was named for an infringement of a mark.

The first general law on the subject of trade-marks, is dated 22 germinal, year XI (1803). Title IV of that act granted to every manufacturer or artisan the right to apply a particular mark to his products, and to obtain the exclusive use thereof, by its deposit at the registry of the Tribunal of Commerce. Infringements were punished by the penalties against forgery of private writings; and damages to owner of mark.

By law of 1809, marks were required to be deposited with the secretary of the "Counsel des Prud'hommes," in addition to their deposit at the registry of the Tribunal of Commerce.

The Penal Code (enacted 1810, art. 142), punished by imprisonment those counterfeiting marks of commercial houses, and (art. 143), by degradation from civil rights those improperly using genuine stamps, marks and seals.

The severe penalties, pronounced against infringement of the above laws, made their enforcement nearly impossible. The decree of September 5, 1810, only imposed a fine of three hundred francs on those who infringed the marks allowed by law of 23 nivôse, year IX, on hardware and cutlery.

In the interest of consumers, three decrees, April 1, 1811, September 18, 1811, and December 22, 1812, rendered marks of manufacture obligatory on each cake of soap made. Omission or untruthfulness of mark, or any fraud in manufacture by the introduction of substances designed to change the quality of the soap, subjected the maker to a fine of three thousand francs.

By decree of July 25, 1810, the manufacturers of the city of Louviers were granted the exclusive right to use a yellow and blue border to their cloths. A decree of December 22, 1810, granted to all other cities of France the right to use borders peculiar to themselves. The infringement of the mark of Louviers was punished by a fine; that of a city, the same as expressed in law of year XI. Thus, what was a misdemeanor in one case, was a felony in the other. These decrees never went into execution, as the first was suspended by notice April 30, 1811; and the other was superseded by that of December 17, 1813, granting to every manufacturer of cloth the right to adopt a border of his choice.

Various laws were made between 1810 and 1824, requiring stamps and marks to be placed on cloths and playing cards by their manufacturers (to facilitate the collection of duties on foreign fabrics, &c.), and on poisons by pharmaceutists.

The general law of July 18, 1824, left in force the law of year XI, and sections 142 and 143 of the Penal Code in reference to marks, and sought to protect the use of names of persons and places.

In 1857 a general law, superseding all former laws, in relation to marks, was passed.* But it did not repeal nor supersede the law of 1824, in ref-

* The phrase "mark of manufacture or of commerce" is used in the law; marks of manufacture being the marks used by the manufacturer to distinguish his manufactures, and marks of commerce those employed by the merchant to distinguish the goods sold by him. The whole phrase may be translated by one word, —trademark. French authors, in translating trademark into the French language, have used one or other of said terms, *marque de fabrique* or *marque de commerce*. In the treaty of 1869, between France and the United States, *trademark* and *marque de fabrique* are used interchangeably.

erence to names, &c., nor take away the right of action which existed under art. 1382, of the Civil Code, for unlawful rivalry in business. The law of 1857 is not intended as a verification by the state of the quality or nature of the merchandise, but only as a proof of its origin.

In 1873 a law was made granting the guaranty of the government to the genuineness of a trademark, by the stamp of the government affixed under certain regulations.

Under a treaty made with France April 16, 1869, citizens of the United States enjoy the same rights to trademarks in France as French citizens. Before the treaty our citizens had no right of action in France for infringements of trademarks.

That the reader may have a better understanding of the cases digested, extracts from such of the statutes referred to, as are of use, are given. The statute applicable to each case will be evident either from the date or direct reference in the syllabus.

The cases have been arranged, with a few exceptions, chronologically. Those in reference to practice and local interests have been omitted.

F. F.

NEW YORK, *Nov.* 15, 1877.

FRENCH STATUTES.

LAW OF 22 GERMINAL YEAR XI (1803).

RELATIVE TO FACTORIES AND WORKSHOPS.

Title IV. Of Private Marks.

Art. 16. The infringement of private marks, which every manufacturer or artisan has the right to apply upon the objects of his manufacture, gives rise,—1st, to damages and interest to him whose mark shall have been infringed ; 2nd, to the application of the penalties pronounced against forging private writings.

Art. 17. The mark shall be considered as infringed when the words " Façon de * * *" (style of) and at the end the name of another manufacturer, or of another city shall have been inserted.

Art. 18. No one can bring an action for infringment of his mark, unless he has made it known at the beginning in a legal manner, by the deposit of a copy in the registry office of the tribunal of commerce where the chief place of manufacture or the shop is situated.

CIVIL CODE (MARCH 21, 1804).

Art. 1382. Every act of man which causes dam-

age to another, obliges the one by whose fault it has happened to repair it.

Article 1383. Every one is responsible for the damage which he has caused, not only by his act, but also by his negligence or by his imprudence.

PENAL CODE (FEBRUARY 10, 1810).

Art. 142. Those who shall have counterfeited the marks intended to be placed in the name of the government on the different kinds of agricultural products or merchandise, or who shall have made use of these false marks; those who shall have counterfeited the seal, stamp or mark of any one in authority, or of a private banking or commercial establishment, or who shall have made use of counterfeit seals, stamps or marks, shall be punished by imprisonment.

(In 1863, this law was amended and modified. It is not necessary for our purpose to give amendment.)

LAW OF JULY 28, 1824.

Article 1st. Whosoever shall either affix, or make appear by addition, retrenchment or by any alteration, upon manufactured articles, the name of a manufacturer other than he who is the producer, or the name of a manufactory other than that where said articles were made, or finally, the name of a place other than that of the manufacture, shall be punished by the penal-

ties specified in article 423 of the Penal Code, without prejudice to a decree for damages if there be occasion therefor. Every merchant, factor or retailer, whosoever, shall be liable to an action when he shall knowingly have exposed for sale, or put in circulation objects marked with fictitious or altered names.

Article 2nd. In consequence hereof the infraction above mentioned shall cease, notwithstanding Art. 17, of the law of April 12, 1803 (22 Germinal year XI), to be comprised in the infringement of private marks, provided for by articles 142 and 143 of the Penal Code.

LAW OF JUNE 23, 1857, ON TRADEMARKS.

Title I. Right of Property in Marks.

Art. 1. The mark of manufacture or of commerce is optional. However, decrees rendered in the form of rules of public administration may always make it, in particular cases, obligatory for the products which they specify. Are considered as marks of manufacture and of commerce; names under a distinctive form, "*titles*," *emblems*, *imprints*, stamps, seals, vignettes, reliefs, letters, numerals, wrappers and every other sign serving to distinguish the products of a manufactory or the objects of trade.

Art. 2. No one can claim exclusive ownership in a trademark unless he has deposited two copies of the trademark at the Registry of the Tribunal of Commerce of his domicile.

Art. 3. The deposit has effect for only fifteen years.

The ownership of the mark can always be preserved for a new term of fifteen years by means of a new deposit.

Art. 4. (Fees.)

Title II. Dispositions Relative to Foreigners.

Art. 5. Foreigners who possess in France establishments of industry or of commerce enjoy, for the products of their establishments, the benefit of the present law, on fulfilling the formalities that it prescribes.

Art. 6. Foreigners and French citizens whose establishments are situated outside of France have also the benefit of this law for the product of their establishments, if. in the countries where they are situated, treaties have established reciprocity for French marks. In this case the deposit of foreign marks takes place at the Registry of the Tribunal of Commerce of the department of the Seine.

Tittle III. Penalties.

Art. 7. Are punished by a fine, of from fifty francs to three thousand francs, and by an imprisonment of from three months to three years, or by one of these punishments :

1st. Those who have counterfeited a mark, or used a counterfeit mark.

2nd. Those who have fraudulently placed on their products, or the objects of their commerce, a mark belonging to another.

3rd. Those who have knowingly sold, or placed

on sale, one or more products invested with a counterfeit mark or one fraudulently affixed.

Art. 8. Are punished by a fine, of from fifty francs to two thousand francs, and by an imprisonment, of from one month to one year, or by one of these penalties:

1st. Those who, without counterfeiting a mark, have made a fraudulent imitation of it proper to deceive the buyer, or have made use of a mark fraudulently imitated;

2nd. Those who have made use of a mark, bearing indications of the kind to deceive the purchaser as to the nature of the product;

3rd. Those who have knowingly sold, or placed on sale, one or more products invested with a mark fraudulently imitated, or bearing indications of a kind to deceive the buyer as to the nature of the product.

Art. 9. Are punished by a fine, of from fifty francs to one thousand francs, and by an imprisonment of from fifteen days to six months, or by one of these penalties:

1st. Those who have not fixed upon their products a mark declared obligatory.

2nd. Those who have sold, or placed on sale, one or more products, not bearing the mark declared obligatory for that kind of products.

3rd. Those who have contravened the provisions of the decrees rendered in execution of article first of the present law.

Art. 10. The penalties established by the present law cannot be cumulated.

The greatest penalty is alone pronounced for all the acts anterior to the first process.

Art. 11. (Penalties may be doubled in case of repetition of offense.)

Art. 12. Article 463 of the Penal Code may be applied to misdemeanors under the present law.

Art. 13. (Offenders may be deprived of their rights to participate in certain elections, for a term of less than ten years.)

The court may order the posting of the judgment in places that it determines, and its insertion in full or by extracts in the newspapers that it designates; the whole at the expense of the condemned.

Art. 14. The confiscation of the products, the mark of which shall be found to be contrary to the provisions of articles 7 and 8, even in case of acquittal, can be ordered by the court, as well as the instruments and utensils which specially served for the commission of the wrong. The court may order that the confiscated products be delivered to the proprietor of the mark counterfeited or fraudulently affixed, or imitated, independently of ampler damages, if there be occasion therefor. It prescribes, in every case, the destruction of the mark found to be contrary to the provisions of articles 7 and 8.

Art. 15. (Imposition of obligatory marks must always be decreed. The court may decree the confiscation of the products in case of condemnation for same offense within five years.)

Title IV. Jurisdiction.

Art. 16. Civil actions relative to marks are brought before the civil tribunals and judged as summary matters.

In case of an action brought criminally, if the defendant raises for his defense questions relative to the ownership of the mark, the tribunal

of *Police Correctionelle* passes judgment on the question.

Articles 17 and 18. (Regulate proceedings before the courts.)

Title V. General and Transitory Arrangements.

Art. 19. (Provides that all foreign products bearing the mark or name of a manufacturer resident in France, or the name, or the place of a French factory, shall be excluded from France, or seized.)

Article 20. All the regulations of this law are applicable to wines, eau-de-vie, and other drinks, to animals, grains, flour, and generally to all agricultural products.

Articles 21, 22, and 23. (Provide for deposit of trademarks: that law shall take effect in six months: for rules of deposit and publication; and that this law shall not affect previous deposits.)

LAW OF NOVEMBER 26, 1873.

Relative to the establishment of a stamp, or special sign designed to be placed on trademarks.

Art. 1. Every proprietor of a mark of manufacture or of commerce, deposited in conformity to the law of June 23, 1857, is entitled, on his written demand, to have placed by the State, either on the paper label, band or wrapper, or on the metal label or seal, on which is shown his mark, a special printed or impressed stamp, designed to affirm the authenticity of said mark.

The stamp may be placed on a mark which forms part of the objects themselves, if the administration considers them capable of receiving it.

(The remainder of the law refers to details of its administration.)

FRENCH DECISIONS.

§ 1050. *Initials of proper names.—Requisites of mark.—Registry.*—Vignettes, containing the letters G. F., interlaced with the letter N, followed by a space for a numeral,—printed by a copper plate on slips of paper,—were pasted by both complainant and defendant on their goods. The only difference between the two marks was the letter C, placed by defendant so as to appear to form part of the letter F. Complainant had registered his mark. *Held*, that the manufacturer who adopts a mark ought to arrange it so that it cannot be confounded with that of another manufacturer who has already made use of it. This is applicable even in the case of simple letters of the alphabet, initials of manufacturer's name.

2. An imprint on paper attached to the manufactured object, may be a trademark.

3. Property in a mark is not acquired by the formality of registry. Registry is only required as a condition precedent to the action for infringement. Gurrin *v.* Forest, C. de Cass., 28 May, 1822, *Journal du Palais*, 1822, 386.

§ 1051. *Damages.*—Damages ought to be calculated according to the loss of the complainant, and not according to the profits that the infringer has

been able to make. C. de Nancy, 20 March, 1827, Germain *v.* Sevene, Sirey, 30, 1, 365. *Huard M. de Fab.* p. 47.

§ 1052. *Held*, on the contrary, that the infringers ought to restore to the complainants, whose property they have usurped, all the illegitimate benefits which they have realized by aid of their fraudulent practices; that they also ought to account for the profits which they have deprived complainants of, and to repair the wrong which they have caused by the depression of the price of the merchandise manufactured, and the rise of the price of the raw material, usual and almost necessary consequences of an unlawful rivalry; they ought also to indemnify largely complainants for all they have suffered in their credit, sacrifices of all kinds which they have been obliged to submit to, and all the expenses which they have been obliged to sustain to protect their rights. On these conditions only can the great industries which honor the country, and which have too often to fight against the culpable maneuvers of infringers, maintain and defend themselves. Tribouillet *v.* Monn'er, Tr. Com. de la Seine, 8 Aug. 1857, *Huard M. de Fab* p. 48. See Blanc de la Contrefaçon, p. 682.

§ 1053. *Name as mark.—Use of name of third party.*—A. Seignette & Pontier had been for a long time in the export brandy trade at Rochelle, when a new export house was formed at Surgires (E. Seignette & Co.), which stamped its casks of brandy A. Seignette, by means of a hot iron, in precisely the same style as the old house. E. S. & Co. claimed that they were authorized by Alex. Seignette of the United States, a brother of one of the partners, to use his name. Use of the mark A. Seignette, or

any other similar mark by defendants enjoined. A commercial house can demand that another house in the same trade use a different mark from that which it has stamped for a long time on its exports. Seignette *v.* Seignette, C. de Poitiers, 12 July, 1833, *Journal du Palais*, 1833, 678.

§ 1054. *Numerals.—Infringement.—Change of mark ordered.*—The mark adopted must be so distinct from the marks of other manufacturers, that it cannot be confounded with them. When a manufacturer, adding numerals to his name, has used for a long time the mark *Dumas* 32, another manufacturer cannot, by adding numerals to the name of his partner, take the mark *Dumas* 132. There is too little difference between these two marks, to prevent their being confounded. In consequence, the use of the mark *Dumas* 132, was enjoined.

In case of unintentional resemblance between two marks, the court, although denying any damages for infringement, should always order the suppression or change of the marks to prevent future confusion. Dumas *v.* Bernard and Dumas, C. de Riom, 18 February, 1834, *Journal du Palais*, 1834, 178.

§ 1055. *Generic term.* The word ink is a generic term, which every one may make use of, but no one but the first possessor can use the words, encre de la petite virtu, (*ink of the little virtue.*) Larenaudiere *v.* Perine-Guyot, C. de Paris, July 24, 1835, *Huard M. de Fab.* p. 15.

§ 1056. *Star.* A star, printed upon a colored card, without initial letters indicative of the name of the manufacturer, or of the place of manufacture, is a good trademark. Lelarge *v.* Brossom, C. de Rouen, 30 Nov. 1840, *Journal du Palais*, 1840.

§ 1057. *Geographical name.*—A manufacturer of lime, who without being the exclusive proprietor of the quarry from which the rough material is taken, calls his products by the name of the district where the quarry is situated, cannot hinder another manufacturer of lime, who uses the same quarry, from giving his products the same name. De Lalen *v.* Grignon, C. de Cass, 24 February, 1840, *Journal du Palais*, 1840.

§ 1058. *Name.*—The merchant who sells, as coming from one manufacturer, products of another manufacturer, and who uses on his goods and labels the name of the first, renders himself liable in damages to him whose name he has usurped. The mark used was *Satin Bonjean.* This was applied to cloth for pantaloons, and was claimed by defendants to have become generic. Bonjean was the original manufacturer, the plaintiffs his successors and proprietors of the name under Law of 1824. Royer *v.* Birtiche, C. de Paris, 13 March, 1841, *Journal du Palais*, 1841.

Note. Nevertheless there are objects to which general usage has given a name, *e. g.*, lamps of the kind called *Carcel*, which are all called Carcel, although they are not made at the factory of Carcel, or his successors.

§ 1059. It is not necessary that the emblems adopted as trademarks be new; it is necessary and it is sufficient that their application be new. Robertson *v.* Langlois, Tr. Comm. de la Seine, 31 March, 1841, *Huard M. de Fab.* p. 12. *Id.* Sevin *v.* Provost, Tr. Comm. de la Seine, 14 October, 1847, *Huard M. de Fab.* 12.

§ 1060. *One's own name.*—Whenever the mark is made up of the name of the person who uses

it, others, who have the same name, have an equal right to use it; and one cannot forbid its use by the other. Mounier *v.* Jobit, C. de Bordeaux, 25 June, 1841, *Journal du Palais*, 1841.

§ 1061. *Descriptive name.*—The phrase "siccatif brillant" (brilliant dryer) although indicating a fact, is nevertheless not a necessary title to the product, and is a good mark. Aff. Raphanel Tr. de Comm. de Paris, 5 October, 1843, Gaz. des Trib. *Huard M. de Fab.* p. 15.

§ 1062. *Right lines, not a trademark.* Right lines running parallel upon the surface of a cake of soap do not constitute a commercial designation worthy of the protection of the court. Dinsilly *v.* Droux, Tr. de la Seine, 28 February, 1844, *Huard M. de Fab.* p. 19.

§ 1063. *Form of product.* The form given to a product,—*e. g.*, the form of a pipe,—is not analogous to a mark of manufacture. It is only a simple designation of merchandise protected by article 1382 of the Code Napoleon. Fiolet *v.* Duval, Tr. de Morlaix, 25 March, 1844, *Huard M. de Fab.* p. 19.

§ 1064. *Hidden mark.* The device which manufacturers of champagne place on the part of the cork inserted in the bottle is a trademark. A court cannot refuse to grant an injunction against the infringement of such a mark, because, being placed in the interior of the bottle, it is not apparent, and could not therefore serve to deceive purchasers. Min. Pub. *v.* Bernard, C. de Cass, 12 July, 1845, *Journal du Palais*, 1845, p. 655.

§ 1065. *Limitation of actions for infringement.* Infringement of a mark, or of a name, cannot be legalized by the longest use. The proprietor of a

name or a mark is always at liberty to bring his suit, when, and against whom he pleases. 24 July, 1846, Tr. d'Amiens, Rooult *v.* Audicy (Vinaigre d'Orleans), *Id.* 31 December, 1852, C. de Gunoble, Gamni *v.* Rivorri (Liqueur du la Grande Chartrum), *Id.* 2 August, 1854, C. du Paris, Chrétien *v.* Balmount (Vai du Sunel Tr.) *Huard Marque de Fab. Tr.* p. 831.

§ 1066. *Wrapper, imitation, damages.*—By the court. * * As the suit is brought by the appellant for the fraudulent imitation by Boudin of the envelopes which contain the product placed on sale; * * as the inspection, only of the seized packages and their comparison with those placed on sale by the appellant suffices to demonstrate that by the yellow color of the first wrapper, by the rose color, and by the ornaments and medals of the prospectus annexed, and by the green color of the band, in a word, by the care used in the whole disposition of the packages manufactured and sold by Boudin, to give them a resemblance to those made by Lecoq and Bargoin, Boudin has attempted to facilitate a confusion between the two, &c. Judgment for plaintiffs, damages. (Under C. C. § 1382). Lecoq and Bargoin *v.* Boudin, C. de Lyon, 15 Jan. 1851, *Journal du Palais*, 1853, vol. 2, p. 308.

§ 1067. *Seal on bottle cork, color of wax, bottle.*—A vendor of mineral water cannot close his bottles with a seal like that already adopted by a rival. In this case he was enjoined not only from using the seal, but also the same colored wax. The court refused an order for a change in the peculiar form of bottle, since that was in general use. André *v.* Budoit, C. de Lyon, August 21, 1851, *Journal du Palais*, 1851, 2, 643.

§ 1068. *Naming an invention.—Gazogène.—Infringement.* The name given by a manufacturer to an apparatus of his invention, belongs to him as a mark of his goods, and the sign of his trade, so that no other can employ the same title to distinguish like products. The word *gazogène* belongs to the one who first applied it to an apparatus for instantly making *seltzer water*, although this name was already employed to designate an apparatus for producing illuminating gas. In effect it is not a generic name, when it is applied to an apparatus having a different use. Riche *v.* Briet, C. de Paris, 19 January, 1852, *Journal du Palais*, 1852, 1, 196.

§ 1069. *Form.* To the first user belongs the special form given to a product, if the form is not required by the nature of the object. Aubineau *v.* Gillemont, Tr. Comm. de la Seine, 17 Feb. 1852, *Huard M. de Fab.* 18. See § 1078.

§ 1070. *Marks not attached.—Infringement.*—There is no infringement when the marks have been made separate from the goods, and never placed thereon. Aff. Barbeir, C. de Paris, 18 Febuary, 1852, *Dulloz*, 1852, 1, 269.

§ 1071. *Eau de Botot.—Name in common use.—Form of bottles.—Infringement.*—When a liquid known by the name of its inventor, has entered into common use, the impression of its title on the body of the bottles intended to contain it, is not a mark of manufacture susceptible of exclusive property.

Impressing a mark on empty bottles does not constitute a punishable act. Barbier *v.* Bouman, C. de Cass, 9 July, 1852, *Journal du Palais*, 1852, 1, 413.*

* Changed by law of 1857. See § 1185.

§ 1072. *Vignette.—Public buildings.*—The vignette adopted by a manufacturer to distinguish his productions, and which he places upon the boxes and wrappers in which they are shipped, constitutes his trademark, even though the vignette represents a public establishment belonging to the State, which had previously been placed on a scientific publication. (A work of art distinguished from a mere print used to designate a certain thing.) Ben *v.* Larband, C. de Riom, 23 Nov. 1852, *Journal du Palais*, 1853, 1, 244.

§ 1073. *Generic name.—Vineyard proprietors.*—The use by a merchant in his marks and labels of a generic name, previously used by another, does not render him liable to a suit for damages by the latter, especially if he has introduced in his name and the vignettes accompanying it, such changes as to avoid all confusion.

BY THE COURT. As the plaintiffs have not chosen for the essential features of their mark, a proper name susceptible by itself of being property; as they have not adopted a fancy name, which by a species of first occupation they had a right to claim as their exclusive property; as the title under which they export their product—*Les propriétaires de vignobles*, in English, *Vineyard proprietors*, is a generic term, belonging to an indefinite number of proprietors; as the term is similar to a name belonging to several persons, of which the law has never enjoined the use by the owner, even though a person of the same name has adopted it for a mark of his products, * * judgment for defendant, &c.

Salignac & Co., had obtained an injunction in England. They were required by this judgment to

have it dissolved. Salignac *v.* Savanier, C. de Bordeaux, 19 April, 1853, *Journal du Palais*, 1854, 1, p. 129.

§ 1074. *Generic name.—Au petit pot.*—Although a product has been sold from time immemorial in a little pot (*un petit pot*), the words "at the little pot" (au petit pot), do not constitute on that account a generic name, and the one who first adopted it has an incontestable right to the exclusive use. Ruffy *v.* Gérard, Trib. de Comm. de la Seine, 8 February, 1854, *Huard Marque de Fab.* 15.

§ 1075. *Title of inventor.*—No one but the true inventor has the right to describe himself as the inventor of a patented article, even though the patent shall have expired and fallen into public use. Therefore the patentee,—and after his decease his son as heir,—has an action to prevent such usurpation, and for damages. (Defendant falsely described himself as "Inventor of apparatus called distillatory kitchens.") Peyre Sons *v.* Rocher, C. de Rennes, 12 March, 1855, 1 *Ann. de la Pro.* 183.

§ 1076. *Fancy name.—Label of champagne wines.* Thomas used for two years a label on champagne sold by him containing the words, "Marquis de Lorme, Sillery mousseux," a fancy name. Lorvie used same words on champagne, contending on trial that they were fictitious, and indicated neither the maker, or place of manufacture, and no rights passed to the plaintiff. It does not appear that remainder of label was imitated.

Held, that although the use of an anonymous name as above might lead to abuses, yet rivals in business could not take the mark of a merchant or

manufacturer, and deprive him of his customers by a confusion impossible to be avoided. Decree for injunction, destruction of mark on boxes and bottles of wine belonging to defendant, and damages. C. de Paris, 5 November, 1855, Thomas *v.* Lovie, 1 *Ann. de la Pro.* 222.

§ 1077. *Infringement of name.—Acquiescence.—Initials.—Façon de.*—The name of a manufacturer or merchant is property; therefore a manufacturer cannot use on his wrappers and bills the name of another manufacturer, even by putting before it the word *façon* (style), unless it is proved that by long usage and by the tacit or express consent of the interested person, the name has become the usual title of the article, serving to indicate in commerce a certain kind of manufacture. If in the latter case, it is exceptionally permitted to those not owners of the name to use it, it is on the condition that it be used in a manner avoiding confusion between the products of different manufacturers.

2. A manufacturer may take for his trademark the initial letters of his name; but in that case he cannot stop the use of the same letters in a different order. Thus the manufacturer who has taken for his trademark S. T. cannot object to another using the letters T. S., although there results an easy confusion between the two establishments. Bricard *v.* Teissier, C. de Cass, 24 Dec. 1855, 2 *Ann. de la Pro.* 18.

§ 1078. *Emblems.—Form of product.—Infringement.*—Plaintiffs were manufacturers of solid laundry bluing in cakes in the form of sad-irons, with the raised figures of women on one side in the act of ironing, and on the other, of washing or placing clothes on lines to dry. Regular deposit was made

of their mark. Defendants made their bluing also in the form of sad-irons with the figure of a woman on one side in the act of washing or ironing.

Held, in the lower court, that since there was only a resemblance in *form* and in the *figures* between the two products, and it was not easy for any one to be deceived, because each bore the name of the manufacturer, and the boxes which enclosed the cakes were not alike in color or inscription, and there was rather a resemblance than servile imitation, plaintiffs had no right of action. On appeal judgment was reversed, it being held that defendants had infringed the marks and emblems adopted by plaintiffs; that the circumstance that the bluing of defendants bore his name was unimportant, as the difference in name did not justify the usurpation of a mark which most generally guides the purchaser. Damages. Boilley *v.* Jollivet, C. de Lyon, 14 May, 1857, 3 *Ann. de la Pro.* 253.*

§ 1079. *French citizen and foreigner.—Infringement of trademark.*—The French courts have jurisdiction of an action for unlawful rivalry brought by a French citizen against a stranger, even though the act took place in a foreign country. Bloc *v.* Hinks-Wils, C. de Paris, 25 Jan. 1856, 2 *Ann. de la Pro.* 57.

* The French editor in a note says, that the court appears to have decided that a special form of a product could become a trademark. But he thinks the imitation of the form of a product is only an unlawful rivalry in trade (under C. C. 1382), and the same cannot be a trademark. Held, that the square form of a bottle was not an invention of the plaintiff, and by itself did not constitute a trademark, serving to designate the origin and identity of his product. Tissier *v.* Lecampion, C. de Paris, 8 Nov. 1855, 1 *Ann. de la Pro.* 190.

§ 1080. *Signs.—Unlawful rivalry.—Ficticious partnership.—Maison de la Mère Moreaux.*—Mr. and Mrs. Moreaux carried on a liquor store at place de l'Ecôle No. 4, Paris, known as *Maison Moreaux or Maison de la Mère Moreaux*, from 1822 to 1846, when they sold it to Mr. and Mrs. Lessure. In 1852, Mr. Lessure died, and some time afterwards his widow (the establishment having been managed by her brother) sold it to Robineau, the plaintiff. The brother formed a partnership with Duriot, his co-defendant, giving to it his trade of "liquoriste." Shortly after, they put on their shop front, and on their labels and manufactures, "*Moreaux, fils de la Mère Moreaux, et Duriot.*" The Tribunal of Commerce held Moreaux had a right to use his own name, but not to add it to anything to lessen the rights of Robineau, and directed the words "de la Méré Moreaux" to be erased from defendants' signs, &c.

On appeal by Robineau it was contended for him that the partnership of Duriot & Moreaux fils was fictitious. By defendants, that there was no fraud; that Moreaux fils had been engaged all his life in the manufacture of liquors, and had only used his right, in associating himself with Duriot, to bring to the partnership his name and trade. He had no part in the sale to Robineau, and was not personally bound by any guaranty to him. Held, that when a person bearing the name of a commercial house associates himself with a rival house, and it appears from the circumstances of the case, and especially from the stipulations of the agreement, that the partnership is only a fraudulent means invented with a view to establish

a confusion between the two houses, the court can order the suppression of the name of the pretended partner, although, being son of the founder of the first house, he had personally continued in the exercise of the same kind of industry. Robineau *v.* Duriot, C. de Paris, 28 Jan. 1856, 2 *A. n. de la Pro.* 54.

§ 1081. *Firm name.—Similarity of names and title.—Concurrence dèloyale.*— Where a partnership has introduced into its firm name, even in the second place, the name of another partnership, —*e. g.*, Richer et Cie., in Huguin, Richer et Cie., and the addition was made with the end of making a *concurrence dèloyal* (unlawful rivalry), the courts may order the suppression of the name of the partner which causes confusion between the two firms. (Richer was taken into the business that his name might be used.)

2. The inventor who has sold to an associate the property and exclusive use of patented apparatus to which he has given his name can afterwards neither use the same apparatus nor give anew his name to apparatus, even different, which he uses in the same trade. Richer & Co. *v* Huguin, Richer & Co., Trib. de Comm. de la Seine, 5 Mar. 1856, 2 *Ann. de la Pro.* 126.

§ 1082. *Infringement of name and trademark.—Foreigners.*—A stranger not domiciled in France has no right of action to enjoin the use of his name or trademark.

But a Frenchman who proves himself the owner of a name and trademark, legally registered in France, has an action to enjoin not only the use of such name and trademark, but also the imita-

tions of it which may cause confusion.* Farina *v.* Camus, Trib. de Comm. de la Seine, 24 Mar. 1856, 2 *Ann. de la Pro.* 159.

§ 1083. *Wrappers.—Like form, color and size.*—Plaintiff sold chemical paper enclosed in a maroon colored pasteboard roll. This roll had been deposited with the Register of the Tribunal of Commerce. Defendants put up and sold the same paper in pasteboard rolls of the same form, size, and color. Held, that these circumstances were sufficient to cause a confusion between the goods of the two parties. An injunction was granted. Damages. Poupier *v.* Laurençon, Trib. de Comm. de la Seine, 4 Apl. 1856, 2 *Ann. de la Pro.* 363. See § 1085.

§ 1034. *Announcement as "successor."*—The purchaser of the stock and good will of a firm, of which he was a member, has a right to announce himself under the name of the former firm, adding that he is successor. Biétry *v.* Marcel, C. de Paris, 28 June, 1856, 2 *Ann. de la Pro.* 252.

§ 1085. *Wrappers.—Similarity of form, color, &c.*—G., a biscuit manufacturer, deposited according to law, four packages of biscuit, wrapped in white paper, "glacé," with a label, "At the Biscuits of the Crown," printed in gold, and designs of medals at each corner, the French arms in the center, and at the two ends an escutcheon with the words "a la vanille" (vanilla). R., a biscuit manufacturer, also wrapped his biscuits in white paper, "glacé," with a label printed in gold, and a vignette bearing medals at each angle. At the center appeared the

* By treaty Americans now have the same right of action in France as Frenchmen have in America.—*Treaty of* 1869.

French arms, and at the corners escutcheons with the words "Glacés à la vanille."

Held, that R. had made the wrappers of his biscuits, as well in form as in color and dimensions, in a manner to establish as true a resemblance as possible with the wrappers of G., and to cause confusion with the products of that house, and should be enjoined. Damages awarded. Guillout *v.* Richard, C. de Paris, 10 Dec. 1856, 3 *Ann. de la Pro.* 123.

§ 1086. *Rivalry.—Employee and employer.*—M. & P., photographers, established at No. 3 B. de Capucins, employed H. and V. The latter afterwards established themselves at No. 11 same street, with a sign reading "Herlich, Vust & Co. in this house, ex-artists of the house Mayer and Pierson, where they had the honor to paint the photographic portraits of their Majesties the Emperor and Empress, as well as of the principal dignitaries of the Crown, the King of Wurtemburg and of Portugal, Abd-el-Kader, &c." On suit brought, H. & V. voluntarily omitted the words "ex-artists of the house Mayer & Pierson," retaining the remainder. They contended that the artist added by painting, to the stiff photographs previously taken, and that they had performed this work for M. & P. That they had a right to say so, because they had always retained possession of their artistic talent, and therefore they could claim the authorship of the portraits which they had painted in the workshop of their old employers.

Held, that H. & V. could not use the name of their old employers. Also that no employee or artist working on account of a commercial house, can claim the right to preserve his individuality in the work on which he has been engaged. Also, that

H. & V. should pay damages and costs. Mayer *v.* Herlich, Trib. de Comm. de la Seine, 23 Jan. 1857, 3 *Ann. de la Pro.* 63.

§ 1087. *Industrial name.*--D. formed a company with title "*Caisse des reports.*" V. & Co. adopted same name in addition to their own name previously used. On objection being made, they changed it to "*Caisse general de reports*," which could mislead the public into believing that D's place was but a branch of V's. *Held*, that there is an infringement of a trade name when that which is taken by the rival can lead to confusion between the two establishments, although one may not be literally the reproduction of the other. Damages not withheld when change has been tardily made. D'Inville *v.* Vergniolles, C. de Paris, 6 Feby. 1857, 3 *Ann. de la Pro.* 202.

§ 1088. *Fancy name.—Paper Job.*—Jean Bardou, a manufacturer of cigarette paper, marked them with his initials J. B., which he separated by a lozenge, so that the mark appeared to be the word "Job." The public called for Job paper. L., another manufacturer of cigarette paper, associated with himself one Job and took the mark "Job," saying, that as his partner was named Job, he had a better right to use the mark than Bardou, who had only acquired it by the error of the public. (B. had previously (1852) brought suit against L. in the police court, for counterfeiting his trademark, and obtained judgment, that he (B.) was entitled to the word "Job," as his trademark.) Held, that L. & J. should be restrained from using the word "Job." Damages. Bardou *v.* Lassausée, Trib. de Comm. de la Seine, 26 Feby. 1857, 3 *Ann. de la Pro.* 125.

§ 1089. *Sign.—Rights of successors.*—The merchant who, in selling his stock in trade, gives to the buyer the right to use his name and title as *successor*, can stop the purchaser from using on his sign, advertisements and manufactures, his (the seller's) name alone, without adding his (the purchaser's) own name and his position as successor. Bautain *v.* Mercklein, C. de Paris, 21 March, 1857, 3 *Ann. de la Pro.* 207.

§ 1090. *Like names.—Signs.—Unlawful rivalry.*—Pinaud & Amour were hatters at No. 87 Rue Richelieu, under style *Maison Pinaud.* René Pineau afterward established himself in same business at No. 91, under title *Maison Pineau.* He used on the lining of his hats a servile imitation of the escutcheon of P. & A. and every endeavor to turn to his profit their trade.

Held, that although Pineau had the right to use his own name on his shop, he should suppress the word *Maison;* that he should change the escutcheon on the lining of his hats; that he should add to his name Pineau his given name René; and that these two names should be placed on his shop, his bill-heads and commercial letters in the same line and like characters. Pinaud *v.* Pineau, Trib. de Comm. de la Seine, 28 May, 1857, 4 *Ann. de la Pro.* 86.

§ 1091. *Generic name.—Toile ménage* (*household cloth*) is not a fancy name which can become the property of a single manufacturer, it having been used for many years by various manufacturers of Alsace. Both parties embroidered the words *toile ménage* in red letters on their goods, but used other marks to indicate their manufacture. Held, no infringement. Rian *v.* Bernheim, C. de Colmar, 16 June, 1857, 4 *Ann. de la Pro.* 216.

§ 1092. *Business signs.—Pharmacie Centrale de France.*—Plaintiffs were proprietors of a pharmacy, and were the first to use the sign *Pharmacie Centrale de France.* Defendants afterwards called theirs *Pharmacie Rationale Centrale de France.* They were enjoined the use of the words *Centrale de France.* Damages. Dorvault *v.* Hureaux, Trib. de Comm. de la Seine, 24 July, 1857, 4 *Ann. de la Pro.* 125.

§ 1093. *Labels.—Title of products.—Café des Gourmets.—Infringement.*—When a manufacturer has adopted for his products a special title—as *Café des Gourmets* (the gourmand's coffee)—and legally deposited his labels, another who imitates not only the shape of the boxes and labels of the first, but also uses the phrase *Aux Vrais Gourmets* (true gourmands), instead of *Café des Gourmets*, is guilty of unlawful rivalry and should be enjoined and adjudged to pay damages. Guérineau *v.* Argant, Trib. Civ. de la Seine, 13 Aug. 1857, 4 *Ann. de la Pro.* 155.

§ 1094. *Same trademark as* § 1093.—Defendants in this case substituted the words *Café des Connoisseurs* for *Café des Gourmets*, imitating, however, the arrangement and text of the label of the plaintiffs, excepting the name and place of manufacture. The same was printed in blue instead of black. Held, there was an infringement of trademark under law of 1857. Guérineau *v.* Mignon, Trib. Corr. de la Seine, 27 January, 1858, 4 *Ann. de la Pro.* 157.

§ 1095. *Labels.—Circulars.—London Dispensary.*—The use on circulars and labels of the title *London Dispensary, and Pharmacie de l'Ambassade d'Angleterre* (Pharmacy of the English Em-

bassy), which had been previously used by an English pharmaceutist at Paris, is an act of unlawful rivalry in business, and subjects the offender to an action for damages and injunction (Civil Code, § 1382). Schorthose *v.* Hogg, Trib. de Comm. de la Seine, 25 March, 1858, 4 *Ann. de la Pro.* 225.

§ 1096. *Figure of woman representing "Pharmacy."*—When a pharmaceutist has adopted for his products a label showing a woman representing Pharmacy, having one hand on a book, as a symbol of science, and in the other a caduceus; another pharmaceutist is liable for infringement and unlawful rivalry who uses a label on which he reproduces the same figure in similar framework, even though he uses different details,(*e. g.*, different arrangement of the accessories to the figure of the woman,)and the names of the two houses be given. Dorvault *v.* Teissier, C. de Paris, 28 April, 1858, 4 *Ann. de la Pro.* 298.

§ 1097. *Names and labels.—Form of bottles.*—Although the manufacture of *l'eau de Botot* (Botot water) has become public, manufacturers of that *water* are not allowed to use the same form of bottles and seals as the successors of Botot, the original proprietors of the water, nor to sell their products as *veritable eau de Botot* (pure Botot water). Barbier *v.* Simon, Trib. de Comm. de la Seine, 8 April, 1858, 4 *Ann. de la Pro.* 191; affirmed on appeal, 5 *Id.* 366.

2. To same effect, case on Elixir Raspail. Combier-Destre *v.* Maller-Laudas, Trib. de Comm. de la Seine, 13 August, 1857, 3 *Ann. de la Pro.* 351.

§ 1098. *Generic name.—Benzine parfumé.*—When the word used to qualify a product is generic, as *perfumed* applied to benzine, *benzine par-*

fumé (perfumed benzine), no one can claim exclusive property in such word. Thibierge *v.* Dupont, Trib. de Comm. de la Seine, 6 August, 1858, 4 *Ann. de la Pro.* 400.

§ 1099. *Geographical Name.*—Admitting that the name of a place of manufacture, under law of 1857, may become a trademark, it is only so when it is used in a special form.

2. There is neither infringement of a trademark, nor unlawful rivalry in putting on tiles the words près Massy (near Massy), although another manufacturer had previously adopted as a trademark the word *Massy*, if in practice the title, Carreaux de Massy (tiles of Massy), is applied to tiles manufactured in the neighborhood, as well as in *Massy* itself. Bisson-Aragon *v.* Aragon, C. de Paris, 3 June, 1859, 5 *Ann. de la Pro.* 216

§ 1100. *Geographical Name.—Vallée d' Aure.*—The name of a place cannot become the property of one who has chosen to make it his trademark, except when the place itself is his private property. In consequence the other producers of the same country may use the same name. It is even so in case the title, though known previously, had acquired celebrity in commerce, by the use of him who introduced it into his mark. There is no unlawful rivalry, in employing for similar products, the same name of place, and receptacles of the same form and size, when they are distinguished by the name or special mark of the maker. Neither plaintiffs nor defendants did business in the valley (*Aure*), whose name they used, but placed its name on butter shipped by them to Brazil. No regard was had to the origin of the butter. Levigoureux *v.* Lecomte, Trib. Civ. de Havre, 3 June, 1859, 5

Ann. de la Pro. 279. See also Duru *v.* Pinet, C. de Grenoble, 11 February, 1870, 16 *Ann. de la Pro.* 355.*

§ 1101. *Pseudonyme.*—The author or artist who makes himself known under a pseudonyme becomes the owner of the name, and can prevent the use of the same by another in trade, should he himself engage in trade. Tournachon *v.* Tournachon, C. de Cass, 6 June, 1859, 5 *Ann. de la Pro.* 214.

§ 1102. *Labels.*—Labels composed and sold by a lithographer are not his trademarks. They can only be protected as artistic designs under the law in relation to designs.

BY THE COURT.—The trademark regulated by the law of June 25, 1857, is the characteristic sign by which the manufacturer distinguishes the product of his factory, or the merchant, the object of his trade; it is not itself, and cannot become, a product of manufacture or an object of trade. By the use that a merchant may make of a label in applying it to a receptacle containing a product of his manufacture, it is possible that the label may become for him a trademark. It will be for him a distinctive sign or seal of his product without being the subject of his trade; whereas, so far as the plaintiffs are concerned, these labels can never be other than the products themselves of their manufacture, and the special object of their industry. Lalande *v.*

* 1. It was held under law of 1824, that a manufacturer who affixed to his goods the name of a place other than that of his factory, was liable to an action by a manufacturer of the same kind of goods in the place whose name had been adopted. Blaise *v.* Pitet, C. de Paris, 12 August, 1864, 11 *Id.* 38.

2. If the name belongs to a private domain, it is protected. (Grande Chartreuse.)

Appel, C. de Paris, 7 June, 1859, 5 *Ann. de la Pro.* 248.

§ 1103. *Name.—Vinaigre de Bully.*—When a manufacturer has given his name to a special product of his manufacture (*e. g.*, Bully, his name, to vinegar, thus, *vinaigre de Bully*), no one can employ the same name to indicate similar products to the detriment of the former or his successor. Lenercier *v.* Millin, Trib. Comm. de la Seine, 1 July, 1859, 5 *Ann. de la Pro.* 360.

§ 1104. *Fancy Name.—Poudre brésilienne.—Infringement. Poudre brésilienne*, a name given to a powder for destroying insects, is a good trademark.

2. Defendant is guilty of an infringement of the trademark, if he use it on packages of his own, although the powder contained therein may be that manufactured by the owner of the mark, Gourbeyre *v.* Bodevin, C. de Paris, 9 July, 1859, 5 *Ann. de la Pro.* 250.

§ 1105. *Signs.*—Every merchant who has a sign has a right to oppose the adoption by a rival of a sign which can cause confusion with his own, even though the rival was the first in the particular line of business. Sign and name *Sultan* were used first, *Au Grand Sultan* last. The latter was ordered to be taken down because there was not sufficient difference between the two. Ben-Sadoun *v.* Nessim-Dalian, Trib. de Comm. de la Seine, 7 September, 1859, 5 *Ann. de la Pro.* 419.

§ 1106. *Misrepresentation.*—Article VIII. of the law of 1857, which punishes the use of a mark designed to deceive the purchaser in reference to the nature of the product, is not applicable to a notice placed on a kind of food for fowls, indi-

cating a greater quantity of phosphate than that which it really contains. Min. Public *v.* Heuzé, C. de Cass, 30 Dec. 1859, 18 *Ann. de la Pro.* 186.

§ 1108. *Secret remedy.—Name of inventor.—Rob dépuratif de Boyveau-Laffecteur.*—Defendants used the name of the remedy sold by plaintiff, but added the words in italics, "rob végétal dépuratif, *formule* de Boyveau-Laffecteur." The remedy itself had become public property. *Held*," that when the manufacture and sale of an article has become public property, any one may advertise and sell the same by the name which the inventor gave to it, and by which it is usually known.

2. This principle applies also to the name of the inventor, if his name has become by his own action a necessary element in the title of the product; but his name may only be used as a simple designation of the thing, and not in such a manner as to lead the public into error as to the individuality of the manufacture and the source of the product.

3. A secret remedy especially, which has become public, may be advertised and sold by any one under the name of the inventor, preceded by the words, *selon la formule de . . .* if the inventor himself gave his name to it,—it being understood always, that the advertisement and labels are so arranged as not to create a false impression as to the manufacturer. Giraudeau de Saint-Gervais *v.* Charpentier, C. de Cass, 31 January, 1860, 6 *Ann. de la Pro.* 100.

§ 1109. *Imitation of bottles, wrappers and labels.*—Defendant, manufacturer of ferruginous pills, imitated the form and color of the bottles,

and the wrappers and labels of plaintiff, manufacturer of a similar article, but changed the form of the bottles slightly, and the title as shown by the italicized words "Unalterable carbonate of iron pills *according to the formula* of Vallet, approved by the Academy of Medicine." *Held*, that defendant had a culpable intention to imitate the mark of plaintiff in such a manner as to deceive the public, and cause a confusion in their mind between the true product sold by plaintiffs and the false. Frère et Vallet *v.* Mauchien, Trib. Corr. de la Seine, 15 February, 1860, 6 *Ann. de la Pro.* 113.

§ 1110. *Initials.*—Plaintiff, a manufacturer of velvet, was the owner of a trademark, representing two fames, one blowing a trumpet, the other supporting a crown of flowers, in which were placed the initials J. B. D. Defendant, also a manufacturer of velvet, used as a trademark an anchor, surmounted by a star; below the anchor were traced the initials J. B. D. Held no infringement. David *v.* Brossier, C. de Lyon, 20 Nov. 1860, 7 *Ann. de la Pro.* 119.

§ 1111.—*Similarity of names. — Analogous trades.*—Whenever there is a similarity between the surname and Christian name of two rival traders, the one who has been the longest established has the right to demand that the new-comer take such measures as are necessary to prevent confusion between their establishments. For this purpose the new-comer may be required to suppress his Christian name on his signs, bill-heads and labels, and add to his name a distinguishing qualification. Laurens *v.* Laurens, Trib. de Conn. de Marseille, 11 April, 1861, 7 *Ann. de la Pro.* 221.

§ 1112. *Infringement.*—When there exists in the vignettes and names or titles used, sufficient differences to prevent confusion between the different products, there is not a fraudulent imitation of marks in the sense of the law of 1857. Claye *v.* Célard, C. de Lyon, 27 Nov. 1861, 8 *Ann. de la Pro.* 259.

§ 1113. *Joint trademark between manufacturers of same place.*—Manufacturers of a city or locality may agree upon a common mark for their products. In such case, those of the manufacturers who have regularly deposited this common mark, have an action against the manufacturers of another locality who have adopted a mark likely to cause confusion between the products of the two places.

2. A border composed of four rose-colored threads running from one end to the other of cloth, indicating that it was manufactured in a certain locality, is a trademark, and it is an infringement to adopt for the same kind of cloth a like arrangement of threads, although the threads be red instead of rose-colored. Ricque *v.* Forges, C. de Paris, 28 Nov. 1861, 8 *Ann. de la Pro.* 25.

§ 1114. *Mark in common use.*—Although the deposit of a trademark establishes a presumption of property in him who has made the deposit, this presumption may be destroyed by proof tending to show that the mark was in common use previous to the deposit.

2. A manufacturer cannot appropriate in a specific industry, by deposit, a mark in general use. Somborn *v.* Menser, C. de Metz, 31 Dec. 1861, 8 *Ann. de la Pro.* 78.

§ 1115. *Fancy name.—Liqueur du Mont Carmel.*—BY THE COURT.—Because Faivre deposited

before the defendants, at the office of the secretary of the tribunal of commerce, under the law of 1857, a bottle containing a liquor with the name *Liqueur de Mont Carmel;* and by means of this deposit acquired an exclusive title to this name as a mark of manufacture; and because the name *Mount Carmel* is not a generic name belonging to commerce, but a fancy name drawn from an imaginary province; and Duquaire & Fussy have infringed the mark of manufacture of Faivre by making or selling a liquor under the same name, &c. Damages adjudged. Faivre *v.* Duquaire, Trib. Civ. de la Seine, 18 Mar. 1862, 8 *Ann. de la Pro.* 238.

§ 1116. *Fancy name.—Translation.—Eau écarlate.*—When a manufacturer has given a fancy name to a well-known product, that name belongs to him, and he has an action against those who use either the name adopted, or the translation of it into a foreign language. (*Eau écarlate* was translated into *scarlet water*, and the translation used.) Burdel *v.* Jozeau, Trib. de Comm. de la Seine, 30 May, 1862, 8 *Ann. de la Pro.* 239.

§ 1117. *Imitation.—Papier Job.—Priority of use.*—Although the manufacturer who is sued for the infringement of a mark may prove that it was used previously to the deposit, the owner of the mark may show in opposition that his possession commenced before the use proved.

2. That there be the offense of fraudulently imitating a mark under article 8 of law of 1857, it is not necessary that the imitation be servile; it is sufficicient if it is of the kind to deceive the ordinary buyer. In consequence, the dissimilarities which escape the examination, necessarily superficial, of buyers—such as the name of the manufacturer, or a

notice stating that his products must not be confounded with those of another manufacturer—cannot be invoked as a defense. Bardou *v.* Blanchard, C. de Montpellier, 27 June, 1862, 8 *Ann. de la Pro.* 273.

§ 1118. *Like names.*—If, in principle, every one has the right to carry on any trade he desires under his own name, it is on the condition that he use it so as to avoid all confusion with a house previously existing.

In such case, the court should order the necessary measures to avoid confusion.

(In this case, John Arthur was the first to establish an agency of information for strangers, &c. William Arthur & Co. set up a similar agency. They were required to add to their name, "*House founded in* 1860.") Arthur *v.* Arthur, C. de Paris, 3 May, 1862, 8 *Ann. de la Pro.* 204. To same effect Carnidade *v.* Carnidade, C. de Bordeaux, 16 Aug. 1865, 13 *Ann. de la Pro.* 268.

§ 1119. *Like name of Company.*—The *Lloyd français* was a company of marine assurance, bearing a good reputation. A new company was founded for the same purpose under the name of *Lloyd Central.* Use of name *Lloyd Central* was enjoined. Lloyd Français *v.* Lloyd Central, Trib. de Comm. de la Seine, 7 July, 1862, 8 *Ann. de la Pro.* 412.

§ 1120. *Papier de riz & Papier crème de riz.*—BY THE COURT.—Considering that the manufacture of rice paper (*papier de riz*) is open to the public; that the mark of Prudhon, "60 feuilles de papier crème de riz, système Prudhon et Ce. à Paris; ne pas confondre avec le papier de riz," cannot be regarded as reproducing the mark of Abadie, which

reads as follows: "Papier de riz, formát français. Nouvelle fabrication spéciale. Abadie et Ce, fabricants brevetés s. g. d. g., á Paris. Finesse, solidité douceur."; that the book of Prudhon is rolled and composed of a continuous sheet, which, in unwinding presents a succession of little leaves for enclosing tobacco, having a different appearance from the books of Abadie, which fold flat, and the leaves of which form a little volume; that these differences leave without importance, the only point of resemblance, which exists between the two products, *i. e.*, the salmon color of the wrapper, which cannot be claimed by Abadie. Complaint dismissed—there being neither a violation of law of 1857 or of article 1382 Code Civil—overruling the court below, which held, that "if the use of salmon-colored paper is general and common for enveloping all kinds of products, its use, joined to the words *crème de riz*, reveals an intentional imitation susceptible of creating a confusion with the products of the plaintiff." Abadie *v.* Prudhon, C. de Paris, 8 July, 1862, 8 *Ann. de la Pro.* 263.

§ 1121. *Name of product.—Eau de la Floride and Eau de la Fluoride.*—Plaintiffs deposited the name *Eau de la Floride* as their trademark for a hair dye. Defendants called their dye by the name *Eau de la Fluoride.* In the court of first instance defendant was enjoined the use of the word Floride, or Fluoride. On appeal by defendant, it was contended that plaintiffs represented their dye as a natural water imported from Florida (Floride), whereas, defendant only offered his as a chemical composition of *fluor* with nitrate of lead or silver, from which it derived its name of *Fluoride*; that this chemical term designated the combination of

fluor with less electro-negative bodies. And further, he pretended to have always taken care that there be marked differences between his bottles, labels, prospectuses, advertisements, and prices, and those of plaintiffs. Decree affirmed. Guislain *v.* Labrugnère, C. de Paris, 15 Nov. 1862, 9 *Ann. de la Pro.* 40.

§ 1122. *Pupil.—Name of Patron.*—An apprentice or workman cannot announce himself as a pupil of his former employer, on establishing a business for himself, without the employer's consent. Rommetin *v.* Cretté, C. de Paris, 4 March, 1863, 9 *Ann. de la Pro.* 173. See § 1125.

§ 1123. *Geographical Name.*—A manufacturer who places on his products the name used by another, does not infringe his trademark (Law of 1857), if the name is that of the place where the products are made. The name of a hamlet, situated in the township where the different industries are established, may be taken as the place of manufacture, even though the first person to introduce the product gave the name to the hamlet. Désiré Michel *v.* Achard, C. de Cass, 15 July, 1863, 9 *Ann. de la Pro.* 328. See to same effect, §§ 1099, 1100.*

§ 1124. *Fancy Name. — When Use of True Name Modified.*—The manufacturer who takes for his trademark a name other than his own, can object to the use of the same name, by a manufacturer of a similar article, with such surroundings as to cause confusion. (Plaintiff took as his trademark the word *Joly*, surrounded by an oval. De-

* *Contra*, if the name belongs to a private domain (Grande Chartreuse), §1219, or if it is a fancy name (Mont Carmel), § 1115.

fendant, whose name was Joly, imitated plaintiff's mark.)

2. In such case, the court should order such modifications as it thinks necessary to hinder the confusion produced; especially compelling the last-comer to change his mark, either by adding his given name or by changing the form and dimensions of its surroundings. Massez *v.* Joly, C. de Paris, 20 August, 1863, 10 *Ann. de la Pro.* 318.

§ 1125. *Pupil.—Name.*—A purchaser of a business may bring an action to restrain the former pupils or employees from calling themselves such on their signs or manufactures, and this, although the former head of the establishment authorized them to do so after the sale. Dubois *v.* Demoiselles Louise & Lucile, Trib. de Comm. de la Seine, 27 October, 1863, 10 *Ann. de la Pro.* 187. See § 1122.

§ 1126. *Proper Name.—Name of product. —Elixir et liqueur Raspail.*—Plaintiffs (Raspail & Sons,) brought suit against defendants, manufacturers of a hygienic liquor, invented by Raspail, Sr., to restrain the use on their labels, advertisements and prospectuses, of the name *Liqueur ou Elixir Raspail* (Liquor or Elixir Raspail), &c., also for damages. *Held*, that as Raspail had for a long time authorized the use of his name on the bottles in which the distillers sell the product, known as *Liqueur ou Elixir Raspail*, and had allowed the receipt for the liquor of which he was the inventor, to become public property, and had by that means authorized the manufacture of the liquor, in which he had not reserved an exclusive property, it followed that he had permitted the use of his name,—by which alone the manufacturers could make it known to the public,—and no cause of

action was shown. On *appeal* it was held, that as the liquor of which Raspail had published his formula in the *Manuel Annuaire de Santé*, was known to the public under the name *Liqueur ou Elixir Raspail;* that as Raspail only published his formula, and did not give his name to the public, and the name was an imprescriptible property, Raspail had the right to limit his license in its use, and in default of his continued consent, the use which defendants had made of his name had been without right. Judgment reversed. Raspail *v.* Combier-Destre, C. de Paris, 9 November, 1863, 9 *Ann. de la Pro.* 377.

§ 1127. *Natural product.—Fancy name.—Luciline.—Evidence.*—A fancy name, such as *luciline*, used to designate an essentially natural product, (refined petroleum) is the property of him who first makes use of it, and should be protected as a trademark when its legal deposit has been made.

2. The burden of proof is on the party who pretends that the name has gone into public use. Cohen *v.* Maris, C. de Paris, 28 November, 1863, 10 *Ann. de la Pro.* 105. See § 1114.

§ 1128. *Generic name.—Foreign language.—Peppermint-London. — Misrepresentation.* — The one who, in depositing his trademark, gives to the product the usual name which it bears in common language, without a special title or the addition of a distinctive sign, cannot claim property in the name,—*e. g.*, Peppermint-London.

2. It is so, although the name is translated into a foreign language.

3. If there has been added to the common name the false name of a foreign place of manufacture, there is deceit in the nature of the thing sold, which

deprives the author of the falsehood of his right of action for infringement. Mauprivez *v.* Bouchet, C. de Paris, 26 February, 1864, 10 *Ann. de la Pro.* 320.

§ 1129. *Deposit of mark.— Abandonment.— Use.*—The deposit required by article 2 of law of 1857, is a prerequisite to a suit for infringement of a trademark, but it does not create property in the mark. Therefore, it belongs to the judges of the fact, to decide, in case of a contest on this point, whether the one who made the deposit had either himself, or by others, the exclusive property in the mark, or whether it had in whole or in part fallen into public use.

2. Although the usurpation of the name of a manufacturer is never legal, it is not so of an emblematic sign or of a label which has nothing personal, and a manufacturer can be adjudged to have voluntarily abandoned it. Leroy *v.* Calmel, C. de Cass, 10 March, 1864, 10 *Ann. de la Pro.* 193. See § 1127.

§ 1130. *Fancy name.— Perles d'éther.*— The name *perles*, applied to ether and other pharmaceutical products, is applied to the capsules or envelopes, and not to the medicine itself, and not being otherwise a generic name, and one necessary to distinguish the product, can legally be an object of exclusive property, protected by law of 1857. Clertan *v.* Charpentier, C. de Cass, 22 March, 1864, 10 *Ann. de la Pro.* 341.

§ 1131. *Employee.—Like name.*—An employee cannot state, in his circulars, on entering into business for himself, his services in a house of which he is a rival. In the case of like names the manufacturer who founds a new house, ought by the

addition of his given name, or by some other distinctive qualification to avoid all confusion with the old house. Fould *v.* Honegger, Trib. de Comm. de la Seine, 11 April, 1864, 10 *Ann. de la Pro.* 323. See §§ 1122, 1125.

§ 1132. *Names of Foreign Manufacturers.—Long use in France.*—Although the law of 1857, and the treaty of 1860, between France and England, gave to English manufacturers the right to obtain the exclusive use in France of their names and marks, by making the deposits required by law, this is not the case if the names and marks so deposited had previously gone into general use; consequently the judgment was correct which decided that the English manufacturers have a legal right in France to the special mark which they have deposited by reason of the treaty, but not to the employment of their name, it being proved, that for more than fifty years that name had been used in France, to indicate not the origin, but the nature of certain products. Spencer *v.* Peigney, C. de Cass, 30 April, 1864, 10 *Ann. de la Pro.* 197.*

§ 1133. *Fancy name.—"Encre indienne."*—A fancy name, such as "Encre indienne" (Indian ink), applied to a known product (a common ink), becomes a trademark under the law of 1857, when the legal deposit has been made. Chevénement *v.* Forest, C. de Bordeaux, 30 June, 1864, 10 *Ann. de la Pro.* 446. See § 1116. (Scarlet water).

§ 1134. *Fancy name.—Color and shape of*

* To the same effect, Stubbs *v.* Astier, C. de Paris, 29 April, 1864, 10 *Ann. de la Pro.* 212; S. C., on appeal, C. de Cass, 4 February, 1865; 11 Id. 81. Before the treaty, Spencer *v.* Mennier, C. de Paris, 3 June, 1843, *Journal du Palais*, 1843.

boxes.—The name "*fil d'Alsace*," Alsace thread, is a good trademark when applied to thread.

2. There is an unlawful rivalry in the servile imitation of the form, color and disposition of the boxes of another manufacture, so as to establish a confusion between their products (C. C. 1382). Dollfus *v.* Lallemand, C. de Paris, 5 January, 1865, 11 *Ann. de la Pro.* 110.

§ 1135. *Fancy name.*—"*La trappistine.*"—The fancy name "*La trappistine*," given to a liquor, is a good trademark. There is such an imitation of a mark as to give rise to an action, when the adoption of the names and labels may create a confusion between the products of different manufacturers, even though the name is preceded by the words "*dite*" or "*façon de*" ("said" or "style of").

(The word "*trappistine*" was derived from the name of the convent *La Trappe*, where the liquor was first made.) Michel *v.* Stremler, Trib. de Comm. de la Seine, 17 January, 1865, 11 *Ann. de la Pro.* 284.

§ 1135*a*. *Similarity of names.*—The use of a firm name, identical with that of a firm already existing, is not unlawful in itself, and the use of the name cannot be enjoined. But when the use of the name is accompanied by unwarranted manœuvres, to deceive buyers, the new-comers should be decreed to add such things as are proper to prevent confusion,—especially the mention in their firm name, and in their marks and labels, of the given name of the merchant, and the date when the second house was founded. Louis Roederer & Co. *v.* Théophile Roederer, C. de Paris, 6 February, 1865, 11 *Ann. de la Pro.* 58. See § 1118.

§ 1135*b*. *Cylindrical form.—Cigarette paper.*—The cylindrical shape of a package of cigarette paper is not of itself a good trademark. The imitation of this shape is not an act of unlawful rivalry in business. Prudhon *v.* Villaret, C. de Paris, 24 June, 1865, 11 *Ann. de la Pro.* 443.

§ 1136. *Generic emblem.—Leaf.*—A trademark made up of a number of elements, of which the principal is a vine leaf, a generic object, is not infringed or fraudulently imitated by the use of the same generic object, if accompanied by different names or ornaments, striking to the eye. Denis *v.* Vignier, C. de Bordeaux, 9 August, 1865, 12 *Ann. de la Pro.* 430.

§ 1137. *Name of manufacturer.—Infringement.*—When a label, adopted as a trademark, contains among other distinctive signs the name of the manufacturer, it is not necessary that the name be reproduced or imitated, to constitute an infringement,—it is sufficient if the other parts of the label are so imitated as to tend to deceive buyers. Bass *v.* Harris, C. de Paris, 31 March, 1865, and C. de Cass, 12 August, 1865, 12 *Ann. de la Pro.* 161.

§ 1138. *Imitation of Label.—Generic name.—Serpents de Pharaon.*—A fraudulent imitation of a mark or label, under art. 8, law of 1857, is made when the imitation is of such a nature as to deceive the public. Therefore, differences in details,—such as a modification of the name of the product, and the indication of the name of the manufacturer,—do not take out of the operation of the law, marks and labels on which are imitated the form and arrangement of the labels of another manufacturer in such a manner as to create confusion between their products.

2. The word *serpent*, as applied to a toy made from *sulphocyanide of mercury*, which assumes the form of a serpent on being set on fire, is a generic name. Barnett *v.* Kubler, C. de Paris, 21 March, 1866, 12 *Ann. de la Pro.* 144.

§ 1139. *Fancy name.—Papier Job, and papier Guerre à Job.*—Plaintiff used as his trademark his initials J. B., separated by a lozenge. His cigarette paper became popularly known from this, as Job paper. Defendant sold cigarette paper put in books of the same color as those of plaintiff, but with different ornaments, bearing in large characters, *Guerre à Job. Papier très supérieur. Paris*, 80 Rue de Rivoli, 80 (War on Job. Very superior paper, &c.). On the reverse was a notice that the mark was not the same as that which was called *Job*, but the paper enclosed was rendered superior to the *Job* by the addition of hygienic substances. *Held*, that as the lawful rivalry, which ought to exist between two merchants cannot be extended to embrace the right to make a partisan strife with a rival, and to designate him by name in advertisements and prospectuses running down his goods,—the aim of the advertiser being to turn to his profit the customers of his rival . . . injunction should be granted against the use of the word *Job*, by defendant. Damages. Bardon *v.* Sabatou, Trib. de Comm. de la Seine, 16 May, 1866. 14 *Ann. de la Pro.* 140. Affirmed on appeal, 15 *Id.* 115.

§ 1140. *Name.—Infringement.*—Bertin was a manufacturer of gloves, which he called, *Bertin gloves*. Defendants sold gloves not of Bertin's make, which they called *Bertin gloves*. They were enjoined against the use of the name of *Bertin*, on

goods not made by him. Bertin *v.* Taconnet, C. de Paris, 20 June, 1866, 13 *Ann. de la Pro.* 266.

§ 1141. *Sale of mark.*—A manufacturer may adopt different marks and names for his products. He may sell one of his marks to another. Abadie *v.* Prudon, C. de Cass, 27 July, 1866, 12 *Ann. de la Pro.* 343.

See §§ 1149, 1154.

§ 1142. *Fancy name.—Royal Victoria.*—The union of two English words, such as *Royal Victoria*, constitutes a good trademark in France, even though the same words had been employed separately in labels on similar merchandise, especially on pins,—or even united, but on different merchandise, such as needles.

2. Where a label is composed of a title, such as *Royal Victoria*, and various statements and ornaments, the use of the label with the distinctive title changed (*e. g.*, Royal Victoria to Royal Regina), is a fraudulent imitation of it (Art. 8, Law of 1857). Sargent *v.* Romeu, C. de Paris, 17 January, 1867, 13 *Ann. de la Pro.* 21. To same effect, Sargent *v.* Roger, 12 *Id.* 170.

§ 1143. *Geographical name.—Unlawful rivalry. —Imitation of products.*—When a manufacturer has adopted a mark containing the name of the place where his factory is situated, it is an act of unlawful rivalry on the part of a manufacturer of a neighboring township to servilely imitate the kinds and the styles of the products of the first, and to insert in his prospectuses and letter headings, the name of the same place.

In enjoining such an abuse, however, the use of the name of the place should not be forbidden, if it is necessary to indicate the situation of the manu-

factory, and especially to make known the post office of the manufacturer. (Plaintiff established a reputation as a manufacturer of machine-made tiles at Montchanin. Defendant set up a rival factory at Saint-Julien-sur-d'Heune, five miles away. He imitated not only the tiles of the plaintiff, but also all the changes made by him, and inserted in his mark "*par Montchanin.*") Avril *v.* Perrusson, C. de Dijon, 8 May, 1867, 13 *Ann. de la Pro.* 345.

§ 1144. *Plurality of trademarks.*—There is no law preventing the adoption and use by a manufacturer or merchant, of more than one trademark at the same time. The same trademark may be the property of several persons jointly. Abadie *v.* Berha, C. de Paris, 23 May, 1867, 13 *Ann. de la Pro.* 348.

See §§ 1113, 1141, 1154.

§ 1145. *Crème d'Argent*, applied to a new chemical product, of use in the arts, is a good trademark.

It belongs to the first one who used it, irrespective of the date of deposit with the clerk of the Tribunal of Commerce. Its use by another, without right, before the deposit, does not invalidate the mark. Levy *v.* Bizet, Trib. de Comm. de Rouen, 31 Nov. 1867, 14 *Ann. de la Pro.* 105.

§ 1146. *Imitation.—Like names.*—Charles Camille Heidsieck was a manufacturer and exporter of champagne. Defendants formed an association for the manufacture and exportation of champagne to the United States, and obtained the use of the name of Herman Heidsieck who lived in Saint Louis, U. S. They servilely imitated the mark of Charles Heidsieck upon the corks of bottles, substituting only "Hermann" in place of "Charles;" they also imitated the four red bars on the covers of the bas-

kets enclosing his champagne. *Held*, that the reproduction of the name, the arrangement, and the emblems of a mark in order to cause a confusion between products, and to deceive buyers. is a fraudulent imitation of a mark under arts. 8, 9, 13 and 14, of Law of 1857, even though a person bearing the same name has been associated in the fraud, and his given name substituted for that of the owner of the imitated mark.

2. All those who have participated in such a fraud should be regarded as accomplices, whether they have caused the false marks to be made, or have given directions for the purchase and export of the merchandise fraudulently marked. Heidsieck *v.* Souris, C. de Paris, 11 Dec. 1867, 14 *Ann. de la Pro.* 95.

See §§ 1148, 1189.

§ 1147. *Generic names.—Riz Cartonné.—Papier de riz.*—When a manufacturer has adopted as a trademark for his product, a name which indicates its composition,—*e. g.*, *papier de riz* (rice paper), he cannot forbid the adoption by another manufacturer, in his trade, of the genuine name *rice*,—*e. g.*, as in *riz cartonné* (rice boarded), *feuille de riz* (rice leaf), *rouleau de riz* (rice roll). Lacroix *v.* Abadie, C. de Bordeaux, 17 Dec. 1867, 14 *Ann. de la Pro.* 100.

See § 1120.

§ 1148. *Similar firm name.—Concurrence déloyale.*—The courts have the right to inquire whether a person whose name appears in a firm name is really a partner, or whether his name is used only as a means of unlawful rivalry with another firm, and they may, if fraud is discovered, enjoin the use of the name. See §§ 1081, 1088,

1135*a*. Werlé *v.* veuve Clicquot, C. de Paris. 5 March, 1868, 14 *Ann. de la Pro.* 288.

§ 1149. *Sale of trademark.—Property.—Eau de Mélisse des Carmes.*—The liquor eau de mélisse was known to the public, and the name was in common use. Plaintiff claimed to have purchased from the convent of *Carmes* the secret of the manufacture of the eau de mélisse made by the monks of Carmes, and called *Eau de Mélisse des Carmes*, as well as their trademark, labels and bottles. Defendant made a liquor which he called "*Eau des Carmes déschaussés, la seule véritable eau de mélisse des Carmes*, imitating, at the same time, to a sufficient extent, as was held, to deceive the public, the form and appearance of the labels of plaintiff. The principal defense was that the *eau* was a medicine, and plaintiff, not being a pharmaceutist, had no right to make and sell it. *Held*, that a trademark regularly deposited is property, and is not affected by the right of the owner to manufacture the products of which it is the trademark. Boyer *v.* Boyer, C. de Cass, 8 May, 1868, 15 *Ann. de la Pro.* 162.

§ 1150. * *Name of product.—Eau de Mélisse des Carmes.—Imitation of labels, seals, vials and boxes.*—The name of a product (*e. g., Eau des Carmes* or *Eau de Mélisse des Carmes*), which designates its origin and the name of its inventors, is the property of the latter and their legal representatives. In consequence, the use of that title on labels and goods, as well as on prospectuses and advertisements, is an unlawful rivalry (*concurrence déloyale*), giving rise to an action for an injunction

* This section should immediately precede § 1055.

and damages. The case is still stronger if the marks, labels, vials and boxes of the inventor are imitated, as well as the name.

2. Complete identity of mark is not necessary to constitute an infringement; it is sufficient if the infringing mark resembles the true so as to lead the public into an error prejudical to the proprietor.

Injunction against use of title, also against imitation of labels, vials, &c. Damages. Boyer *v.* Massieu David & Co., Trib. de Comm. de la Seine, 11 April, 1835, C. de Paris, 11 May, 1836, 21 *Ann. de la Pro.* 11.

§ 1151. *Infringement.—Manufacturers of spurious labels.*—The manufacture of trademarks and labels belonging to another, without the consent of the owner, is an infringement of the same under the law of 1857. The use of the trademark or label is not necessary to constitute infringement.

2. A lithographer, in whose establishment labels, in course of manufacture for a person who is not the owner of the trademark thereon, are seized, is liable to the penalties prescribed by the law of 1857. The agent who orders labels made for any other person than the proprietor of the mark is liable to the same judgment as an accomplice. Martell *v.* Badoureau, C. de Paris, 15 May, 1868, 14 *Ann. de la Pro.* 126.

§ 1152. *Descriptive name.*—When the name of a dealer has become, by general use, the name of a product, the successor of the dealer has no right of action for unlawful rivalry against another dealer who has announced for sale the same products under the same name.

(One Ternaux, a dealer in shawls, had given his name to a particular kind of brocade shawls, which

were generally made by manufacturers and called Ternaux shawls.) Bournhonet *v.* Tisseron, C. de Paris, 19 November, 1868, 15 *Ann. de la Pro.* 90.

§ 1153. *Purchasers of articles bearing false trademark* have a right of action against the seller if they bought the same in good faith, and have been adjudged to be guilty of infringement in a suit by the owner of the mark. Sargent *v.* Willems, Trib. Civ. de la Seine, 2 January, 1869, 16 *Ann. de la Pro.* 27.

§ 1154. *Variety of marks of same person.—Family seal.—Acquisition of trademark.*—A manufacturer or merchant may adopt special marks or labels, indicating the quality and nature of the products to which they are affixed, in addition to the mark intended for all his products.

2. Property in a trademark is acquired independently of the legal deposit, by one who first uses and continues to use it. The imitation and usurpation of his rivals, even though they occurred before the deposit, cannot be pleaded against him.

3. Whenever a trademark taken from a family seal has become, by its industrial application, the property of a commercial house, its use by members of the family in their daily social life does not authorize any of them to use it commercially in the same trade with one who had previously adopted it.

4. A trademark is fraudently imitated when the imitation is of such a nature as to deceive buyers. Consequently, differences of detail—such as the introduction of different emblems—do not cure the fault, if the whole tends to cause confusion of products.

(The part of family arms used was a man blowing a trumpet. Subject of manufacture, — sewing

thread.) Kerr *v.* Clark, C. de Paris, 4 February, 1869, 15 *Ann. de la Pro.* 259.

See § 1141.

§ 1155. *Fancy Name.—Deposit.*—A merchant has a right to give a fancy name to articles manufactured by others especially for him.

2. The mark *Marie-Blanche*, applied to silk, not having been legally deposited, the owner has an action for unlawful rivalry (C. C. 1382) against other merchants who use the same name. Jaluzot *v.* Taconnet, C. de Paris, 4 March, 1869, 15 *Ann. de la Pro.* 97.

§ 1156. *Signs.—Former workman.*—Defendant was formerly superintendent of the hat store of Pinaud & Amour. After having received at the Universal Exposition a medal as co-operator, he founded an establishment of his own, using as an announcement sign "Au 1er Avril, ouverture de la chappellerie du Jockey-club et du sport. H. de Henne coopérateur de J. Pinaud et Amour, médaille à l'Exposition de 1867."

(On the first of April, opening of the hat store of the Jockey Club and Sport. H. de Henne, co-operator of J. Pinaud & Amour. Medal of the Exposition of 1867.)

The use of the names J. Pinaud & Amour was enjoined. Pinaud *v.* Henne, Trib. de Comm. de la Seine, 10 March, 1869, 15 *Ann. de la Pro.* 122.

§ 1157. *Name.—Treaty between England and France.*—The name of a person is not a trademark protected by the law of 1857, unless it is used in a special form. The usurpation of a person's name is punishable by the law of 1824.

2. Article 12 of the treaty of January 23, 1860, between France and England, is applicable both to

trademarks and to commercial names which distinguish the articles of a manufacturer or a merchant. Therefore, an English manufacturer who marks his products with his own name, or the name of his predecessors, which he has legally deposited in France, has the right to an action for infringement, under the law of 1824. Wickers *v.* Frion, C. de Cass, 19 March, 1869, 16 *Ann. de la Pro.* 179. To same effect, Wickers *v.* Marchand, C. de Cass, 27 May, 1870, *Id.* 188.

§ 1158. *National coat of arms.* — A national coat of arms cannot become the trademark of a manufacturer. It may form part of a design which is a good trademark.

Plaintiff's mark (on hats) was composed of the English arms, surrounded by a ribbon containing the words "Christy's London" or "Chrysty's Best London." Defendant substituted the words "Quality Superfine London," in place of "Christy's Best London," leaving the mark otherwise the same. Held an infringement. Christy *v.* Daude, Trib. Civ. de la Seine, 30 June, 1869, 16 *Ann. de la Pro.* 31.

§ 1159. *Imitation* of a trademark is only actionable, when it is of such a nature as to deceive the public. This is so under either article 1382 of Code Civil or law of 1857. Prudhon *v.* Bardou, C. d'Alger, 10 July, 1869, 16 *Ann. de la Pro.* 282.

§ 1160. *Signs.—Different place.*—A business sign cannot become a trademark until it is legally deposited as required by law of 1857.

2. The right which results from the priority of use of a sign, does not extend beyond the locality where the use took place. It becomes the exclusive property of the first user in each place.

Plaintiff's establishment at Paris bore the name and sign *Photographie Hélios*. Defendant afterwards commenced business at Troyes, and called his establishment, on his sign, &c., by the same name. Injunction refused. Berthaud *v.* Lancelot, C. de Paris, 21 July, 1869, 16 *Ann. de la Pro.* 290.

See next section.

§ 1161. Defendant in § 1160 brought suit against the plaintiffs therein, for an injunction, to restrain them from using the sign *Photographie Hélios*, in Troyes,—defendant having been the first to use that sign in that place. Injunction granted. Lancelot *v.* Berthaud, C. de Paris, 26 March, 1870, 16 *Ann. de la Pro.* 292.

§ 1162. *Emblems in common use.*—BY THE COURT.—Considering that Hérold deposited as a trademark, May 24th, 1867, at the office of the secretary of the Tribunal of Commerce of the Seine, a design, representing a gilded bee, intended as a stamp for the linings of the hats which he made; that it results from the proceedings, that at a time preceding the deposit of Hérold's mark, Gerbeau was in the habit of stamping his goods with a gilded bee, and that this was known to Hérold. Considering, that as emblem or ornament, the bee is in common use, and that, in adopting it as a trademark, without attempting, by the aid of a combination of distinctive signs, to produce an original design susceptible of a proprietary right, Hérold has misunderstood the spirit of the legislation on the subject, which permits the use of names,—and by analogy of emblems,—in common use, as trademarks, on the condition of producing them in a distinguishing form. . . . . Judgment for

defendant. Hérold *v.* Gerbean, C. de Paris, 22 January, 1870, 16 *Ann. de la Pro.* 76.

§ 1163. *Form of product.—Sewing machine.*—The special form of a product (*e. g.*, of a sewing machine, as it comes from the factory), even though it be new, and has been regularly deposited, cannot be a trademark by itself under the law of 1857.

2. If the usurpation of the form may in certain circumstances give rise to an action, it can only be under article 1382 of the Civil Code. Wilcox *v.* Aubineau, C. de Paris, 23 March, 1870, 17 *Ann. de la Pro.* 32.

See § 1078.

§ 1164. *Label.*—Defendant, J. L. Martel, imitated the label of the older house of J. F. Martel & Co., almost entirely, but added thereto, "House founded in 1870," which could easily escape the notice of purchaser. *Held*, that the act of defendant came within articles 13 and 14 of law of 1857, and was an infringement. Martell *v.* Martel, C. de Bordeaux, 7 July, 1871, 18 *Ann. de la Pro.* 263.

§ 1165. *Confusion.—Borders of cloth.*—Where there exists between two borders of cloth sufficient differences to prevent confusion on the common and ordinary examination made of goods, there is neither infringement or unlawful rivalry. Dugué *v.* Dobot-Descoutures, C. de Caen, 11 December, 1871, 17 *Ann. de la Pro.* 305.

§ 1166. *Imitation.—Color of envelope.—Chocolat Menier.*—There is a fraudulent imitation of a trademark or label, when there is a general resemblance, such as to deceive buyers, between the true mark or label and the one in question.

2. Although the shape of the product and the color of its envelope do not form a part of the

mark, their imitation, joined to that of the label, constitutes an element in the proof of fraudulent intent. Menier *v.* Meunier, C. de Bordeaux, 13 December, 1871, 18 *Ann. de la Pro.* 5.

§ 1167. *Imitation. — Delay.—Chocolat Menier.*—There is a fraudulent imitation of a mark (art. 8, law of 1857), when the principal characteristics and the general aspect of a label, lawfully deposited, are intentionally reproduced, even though the name on the label is not the same, and there be differences of detail.

2. The manufacturer who has made use of infringing labels for less than three years, cannot invoke either as a defense or as an excuse of good faith, the age of the infringing labels, and the fact, that he obtained them from his predecessor, who had made use of them for several years.

(Defendants adopted the color and shape of wrappers of plaintiff, the form of his cakes of chocolate, the same disposition of three medals on the label, but substituted the word Niemen for Menier). Menier *v.* Merget & Kessler, C. de Paris, 3 February, 1872, 18 *Ann. de la Pro.* 18.

§ 1168. *Fraudulent use of siphons bearing trademarks.—Exchange.— Custom.*—Whe ever siphons containing water charged with gas bear the trademark of a manufacturer, another manufacturer has no right to use these siphons for holding the same kind of water, even though it is a custom for different manufacturers to indiscriminately fill the siphons returned by their customers in exchange for others (Art. 1382, C. C.). Pie *v.* Poulet, C. d'Amiens, 10 Feb. 1872, 20 *Ann. de la Pro.* 46.

§ 1169. *Form of product, labels and wrappers.— Chocolat Menier.*—There is a fraudulent imitation

of a mark, and unlawful rivalry in the fact of employing for like products the same shape, the same method of enclosure, the same colored envelopes, and labels of the same size, having the same appearance, even though they differ in the name of the manufacturer. Menier *v.* Louit, Trib. Civ. de Rouen, 19 March, 1872, 18 *Ann. de la Pro.* 21.

§ 1170. *Fancy name.* — *Bougie de l'étoile* (candle of the star), applied to candles, is a good trademark. It is an infringement of it to use the words Bougie de l'étoile, on packages of candles, although accompanied by the word *belge* (Belgic), printed in small characters below.

2. The French tribunals have no jurisdiction over actions for infringements of trademarks out of France. De Milly *v.* Jaussen, Trib. Corr. d'Eperney, 30 April, 1872, 17 *Ann. de la Pro.* 338.

§ 1171. *Use previous to deposit.—Presumption in favor of depositor.—Infringement.—Chocolat Menier.—Abandonment.*—Property in a trademark is acquired by possession and use in addition to the deposit. It is sufficient to sustain an action on a trademark, that the last deposit is valid, without reference to previous deposits, or to use by the plaintiff previous to any deposit.

2. The deposit of a mark raises a presumption of priority in favor of the depositor. It is for his opponents to prove that it was in public use previous to the employment which the depositor made, or that it has since entered into public use by abandonment.

3. The abandonment of a deposited and used mark is not presumed, and the title to the mark

cannot be injured by neglect to prosecute infringements during a long or short period.

See § 1167.

4. When the proprietor of a mark or label, legally deposited, brings an action for the usurpation or imitation of his labels, as well as the form of his goods, the mode of wrapping them, and the color of the envelope, it is no defense that some of these elements were previously in public use. Menier *v.* Buisson, Trib. Civ. de Lyon, 31 July, 1872, 18 *Ann. de la Pro.* 24.

§ 1172. *Name of patented article.—Charbon de Paris.*—The patentee of a conglomerate coal (called Charbon de Paris), and his successors, after the expiration of the patent, have an exclusive right to the name given by him to the patented product,—if it is deposited as a trademark, and is not a necessary title to distinguish the product. Brousse *v.* Cressent, Trib. de Comm. de la Seine, 5 December, 1872, 18 *Ann. de la Pro.* 248.

§ 1173. *Fraudulent use of bottles of manufacturer of waters.*—Whoever fills with water, charged gas, of his own manufacture, bottles of another manufacturer, is guilty of the fraudulent use of the trademark of the other on said bottles, and of deceit (art. 7, § 2, and art. 8, § 2, law of 1857). That the bottles used were returned by his customers instead of his own, makes no difference. Chapotel *v.* Feron, Trib. Corr. de la Seine, 7 February, 1873, 19 *Ann. de la Pro.* 388.

See § 1168, 1177.

§ 1174. *Form.—Name of product.*—Plaintiffs were manufacturers of "*Eau dentifrice du docteur Pierre*" (Dental water of Dr. Pierre). Defendant (Pierre Proux), sold a similar product in bottles

of the same shape and size, under the name "*Eau dentifrice de Pierre.*" Defendant contended that the style of bottles he used was in common use for the purpose; that although the labels had the same form, his name Pierre was not preceded by the word *docteur*. *Held*, that notwithstanding dental water was generally sold in bottles of the same shape as those of defendant, yet the product being for the same purpose, of same color, sold in similar bottles, covered with labels of the same shape, arranged in the same manner, and containing the name Pierre, with the same pricemark as that of plaintiff, confusion between them was easy. Defendant was ordered to adopt the following title "Eau dentifrice de Pierre Proux, Médecin-dentiste, Cours de l'Intendence 42, à Bordeaux," the word Proux, in larger character than Pierre. Chouet *v.* Pierre Proux, Trib. de Comm. de la Seine, 18 February, 1873, 19 *Ann. de la Pro.* 186.

§ 1175. *Infringement.—Paper Job and Joc.*—The word *Joc*, and the initials J. H. B used on like products (cigarette paper) are an infringement of the trademark *Job*, when they are printed in like characters, in the same place, on a cover of the same size, and accompanied by analogous inscriptions and ornaments (Articles 7 and 8, law of 1857). Bardou *v.* Berha and others, Trib. Corr. de la Seine, 20 February, 1873, 18 *Ann. de la Pro.* 65.

§ 1176. *Fancy name.—Deceit.*—Although the merchant who first made use of the name *phospho-guano*, may have a exclusive right to the use of it; he has no action against another who uses the words *phosphate-guano*, or *guano-phosphoazoté*, without remainder of mark.

2. Although, at first, the use of the word *guano*,—

the name of a natural product,—might have been an infraction of the law of 1867 against deceit, it is no longer so, in presence of the general usage of so naming all artificial manures, which are more or less similar to the natural. Lawson *v.* Dechaille, C. de Paris, 26 March, 1873, 18 *Ann. de la Pro.* 72.

For another cause, on same trademark, by same plaintiffs, see Lawson *v.* Wel, C. d'Amiens, 21 June, 1873, 18 *Ann. de la Pro.* 378.

§ 1177. *Fraudulent use of Receptacles. — Custom in same trade.*—When receptacles, such as bags, for natural or manufactured products, bear the trademark or name of a manufacturer or merchant, another person in the same trade cannot use them for his own products, even though in using bags returned by customers, in place of those sent by him, he only followed the general practice of the trade. Nivet *v.* Modenel, C. de Bordeaux, 6 June, 1873, 19 *Ann. de la Pro.* 130.

See § 1168, 1173.

§ 1178. *Fancy name.—Translation of name in common use.*—The manufacturer or merchant who has made the first use of a particular name for his products, and who has made a legal deposit of it, has a right of action against its usurpation and fraudulent use, even though the name be but a translation into a foreign language of a name in common use (articles 1, 7, §§ 2, 13 and 14, law of 1857).

(*Eau divine* [divine water], a name in common use, was translated into Spanish, *Aqua divina*, and deposited as a mark with the secretary of the Tribunal of Commerce.) Coudray *v.* Monpeias, C. de Cass, 14 November, 1873, 19 *Ann. de la Pro.* 31.

See § 1116, l'eau écarlaté, and § 1142, Royal Victoria.

§ 1179. *Firm name.*—A firm name can alone be made up from the names of the partners. Every interested person has the right to demand the suppression from a firm name, of a name which does not belong to any of the partners. Leperche *v.* Ricaumont, C. de Bordeaux, 27 November, 1873, 18 *Ann. de la Pro.* 391.

§ 1180. *Name of patented product.*—The name given by the inventor, to a patented product, becomes public property at the expiration of the patent.* Patents for improvements do not preserve to the owners of the improvements, the right to the name given in the first patent, and prevent it entering into common use.

But, although every one may use the name, no one has the right to use boxes, labels and bill-heads, similar to those of the inventor or his successors. Michel *v.* Gerstlé, C. de Paris, 24 December, 1873, 19 *Ann. de la Pro.* 75.

See § 1130, *Perles d'ether*; § 1172, *Charbon de Paris.*

§ 1181. *Product and process in common use.—Name of inventor.—Emblems.*—Liebig's Extract of Meat Co., an English corporation, having a place of business in Paris, put up an extract of meat, invented by Dr. Liebig, and known in commerce as *Extractum Carnis Liebig.* They made a legal deposit of their trademark, which contained that phrase as an essential part. It was also surrounded with emblems, such as the head of an ox, &c.

* Such is the general principle in cases of generic or necessary names.

Defendants put up an extract of meat under same name. The process and product had been given to the public by Dr. Liebig. On suit brought to restrain defendants from using the name Liebig and infringing their mark, *Held*,

1. That the abandonment of the ownership or use of a proper name was not to be presumed. The inventor of a product or process, who has published it with the intention of giving it to the public, cannot be presumed by that alone, to have abandoned the use of his name to all those who shall prepare the product after his process. Therefore, he preserves the right to either entirely forbid the use of his name, or to grant the exclusive use of it to a commercial house.

2. In such a case the grantees have an action to enjoin the use of the name of the inventor; even its use to indicate that the product had been obtained by his process.

3. A generic emblem, such as the head of an ox, when used as an accessory in a label on extract of meat, is not by itself a trademark. The use of the same figure by others does not constitute an infringement. Titles, such as *Extractum Carnis* or *of meat*, serving to indicate the nature of a product in common use, are not valid trademarks. Liebig, &c. *v.* Coleman, C. de Paris, 12 January, 1874, 19 *Ann. de la Pro.* 83. See § 654.

Appeal, see § 1192.

§ 1182. *Infringement.—Phospho-guano.*—The use of the title *super-phosphoazoté* on a manure, does not of itself constitute an infringement or fraudulent imitation of the title *phospho-guano*, used by another merchant as *part* of a trademark. It must be accompanied by an imitation of the

accessory element of the mark. Lawson *v.* Dior, C. de Caen, 20 January, 1874, 20 *Ann. de la Pro.* 318. See §§ 1176–1191.

§ 1183. *Unlawful rivalry.—General appearance.—Name.—Successors.*—A merchant who imitates the shape of the bottles and labels of another manufacturer on products similar to his, is guilty of unlawful rivalry. This is so, even though the product is in use, and the infringer has introduced in his labels such differences as to enable them to be distinguished from the original when compared directly with them. It is sufficient that the general appearance of the bottles and labels was intended and results in the production of confusion between the products.

2. Although the expiration of the patent for a product gives every one the right to manufacture and sell the product, it does not give the right to use the name of the inventor; especially when the product has not ceased to be made under the name of the inventor by his successors.

3. The successors of an inventor or manufacturer who has manufactured, sold and made known, under his own name, a certain product, have a right of action against the use of the name by rivals in their products, or even in their prospectuses.

4. The successors have a right in their own prospectuses to warn the public against the use of the stolen name.

5. The law of 1857 on marks, has not abolished the law of 22 germinal an. XI., forbidding the use of the name of another manufacturer or of another city, preceded by the words *Façon de, &c.* Landon *v.* Leroux, C. de Paris, 6 February, 1874, 19 *Ann. de la Pro.* 68.

§ 1184. *Use by retailers of mark of wholesale dealer.*—A merchant who buys at wholesale goods, for re-sale at retail,—such as writing paper,—has the right to reproduce the mark of the manufacturer on goods sold by him in small quantities. The court reasoned that this could not be regarded as a fraud; and instead of being an injury to the manufacturer, it had the contrary effect of guaranteeing his goods and increasing their sale. Thomas de La Rue *v.* Massias, Trib. Civ. de la Seine, 7 February, 1874, 21 *Ann. de la Pro.* 321.*

§ 1185. *Infringement.—Proof.*—An infringement or fraudulent use of a mark takes place on the manufacture of the mark or label, independently of any use of same.

2. No law or principle prohibits the owner of a mark from ordering copies of it through a third person, for the purpose of proof of infringement. Reynal *v.* Wolff, C. de Paris, 19 March, 1874, 20 *Ann. de la Pro.* 49.

§ 1186. *Fancy name. — Public use in foreign country.*—The name of a manure, *phospho-guano*, having gone into public use in England, an English manufacturer of the article cannot obtain a legal property in it, as a trademark, by deposit in France, under the trademark treaty between France and England. Lawson *v.* Dechaille, C. de Cass., 21 and 23 March, 1874, 19 *Ann. de la Pro.* 153.

§ 1187. *Infringement.—Fancy name.*—Plaintiff was owner of the trademark *Liqueur du Mont-Carmel.* Defendant manufactured a liquor which

* The editor of *The Annales* takes exception to this decision, saying that fraud should be too easy, if the simple purchase of divisible goods would permit the retailer to multiply the trademark indefinitely.

he called *Carméline, liqueur de Notre-Dame du Mont-Carmel.* The bottles containing plaintiff's liquor were of an antique pattern, whereas those of defendant were of a modern form. *Held*, that there was no infringement, the principal title of defendant's product being *Carméline*, that of plaintiff, *liqueur du Mont-Carmel ;* and otherwise no confusion being possible between the two marks from the appearance of the whole or of parts. Faivre *v.* Boulan, C. de Paris, 4 June, 1874, 19 *Ann. de la Pro.* 378.

§ 1188. *Prior use.—Infringement.*—In opposition to the defense of use of a mark prior to its deposit, the depositor may prove that he was its inventor ; and that, if it was used by third persons before the deposit, it was by his authorization and without an abandonment of his rights.

2. He has an action against an infringer, after the legal deposit, even though it be proved that the use of the mark by the infringer commenced before the deposit, and was only continued afterwards. Guillou *v.* Derossy, C. de Paris, 29 November, 1873, C. de Cass., 20 June, 1874, 19 *Ann. de la Pro.* 321.

See § 1117.

§ 1189. *Like names.—Moët & Chandon.—Moet & Co.—Injunction.*—Although one's family name is his property, he has no right to make it an instrument of unlawful rivalry.

2. A merchant or manufacturer, who, being previously a complete stranger to a certain industry, is called into a new firm, because of the similarity of his name with that of an old house, may be perpetually enjoined against the use of his name in that industry.

3. Plaintiffs were the old house of *Moët &*

Chandon, dating from 1807. The firm Moet & Co. was formed by Leblanc, a brewer of Reims, who brought one Jean Frederic Moet, a clerk in a commercial house at Maëstricht, Holland, to Reims, for the purpose. This Moet had no knowledge of the manufacture of champagne wines, and only came to Reims to profit by the use of his name. Defendants took every precaution against liability to an action by Moët & Chandon, who had a place of business at Epernay, by establishing themselves at Reims, by putting at the head of their bills, letters and shipping receipts, "House founded in 1872," and by reproducing it on the bottom of their corks, where the name of the manufacturer is usually placed in the trade of champagne wines; the two dots over the *e* were also omitted from the name of Moet. These differences were held not sufficient to prevent the deception of the public. Injunction and damages. (Art. 1382, Civil Code.) Moët et Chandon *v.* Moet et Ce., C. de Paris, 31 July, 1874, 19 *Ann. de la Pro.* 311.

§ 1190. *Fancy name of patented article.—Form of mark.—Fraudulent imitation.*—Plaintiff deposited as his mark for umbrella frames, *Paragon de Fox*, stamped on a little coppered plate attached to one of the ribs. Defendant Meurgey, used the words *Paragon M et C*, placed in same manner. *Held*, a fraudulent imitation under article 8, law of 1857.

2. Defendant Teste adopted the form and position of the plate, but stamped his own name on it. *Held*, no infringement.

3. The frames of plaintiff were patented, but the patent had expired. *Held*, that it makes no difference that the product to which a fancy name is

given, is patented, if it was not patented under that name, and the name was not independently of the patent, generic; also that the public have applied the name to all products of a similar kind. This, being independent of the manufacturer, cannot cause him to lose his mark. Fox *v.* Meurgey and Teste, C. de Paris, 19 August, 1874, 19 *Ann. de la Pro.* 327.

Same case on appeal, § 1195.

§ 1191. *Fancy name.—Infringement.—Phospho-guano.*—When a trader has deposited a trademark which is composed of a fancy name, *phospho-guano* and accessory signs and emblems, the whole forming the trademark, the judges of the fact may decide that the depositor did not intend to reserve to himself the right to the name phospho-guano disconnected from the accessory signs. In that case the isolated use of the name is not an infringement (Law of 1857). Gallet-Lefebvre *v.* Goubean, C. de Cass., 30 December, 1874, 20 *Ann. de la Pro.* 314.

See § 1182.

§ 1192. *Name.—Use by public.—Liebig.*—BY THE COURT.—As it results from the proofs of the judgment attacked, that the deposit made by the company is valid and regular; that the use of the name of Liebig in England, as a necessary title of the product to which it was given, is not proven; and if a commission taken there, establishes that there was prepared under the name of Liebig an extract of meat, in certain prescription rooms of apothecaries, these preparations were isolated, in pharmaceutical doses, and did not have the publicity requisite to give Liebig such notice as to require him to protect his name. Objection of contrary decision in English court of chancery, November 19, 1867,

overruled. Appeal dismissed. Demot *v.* Société des héritiers Liebig, C. de Cass., 6 January, 1875, 20 *Ann. de la Pro.* 115.

See § 1181.

§ 1193. *Name of inventor.*—The name of the inventor does not become public property on the expiration of his patent, unless the same is necessary to describe the thing invented. In the case of Jouvin, who had taken a patent for an instrument and process for cutting out kid gloves, and had adopted his own name as a trademark, it became the property of his heirs and representatives after his death, and its usurpation gives rise to an action for damages and an injunction.

2. When, on account of the dissolution and change of firms, there remain two or more who have the right to use the same name in the names of their respective firms, it belongs to the court to prescribe the measures that it deem necessary to prevent confusion; and especially such as to leave to the heirs the benefit of the reputation of their ancestor. It may enjoin a new firm, either from using the name of the inventor alone, without a distinguishing title, or with the word patented joined to it, although the new society may have taken a new patent. Veuve Xavier Jouvin *v.* Jouvin, Doyon et Cie., C. de Paris, 25 January, 1875, 20 *Ann. de la Pro.* 237.

§ 1194. *A stripe on cloth*, composed of one or more threads of different colors, woven either at the border or end, and new by position or arrangement, is a good trademark. (Article 1, law of 1857.)

2. The burden of proof is on the defendant, who claims that the mark legally deposited was in public use prior to the deposit.

(Mark deposited was a green and yellow stripe on elastic webs for shoes.) Cuillieron-Policard *v.* Gadobert, C. de Paris, 27 January, 1875, 21 *Ann. de la Pro.* 62.

See § 1113.

§ 1195. *Combination of elements in common use.—Fraudulent imitation.—Fancy name.*—The union of different elements in common use may constitute a trademark, when such union is of a kind to distinguish the product in a distinct and characteristic manner.

2. There is a fraudulent imitation of a trademark under article 8, law of 1857, when the imitation is of such a kind as to deceive purchasers in regard to the origin of the product.

3. It is for the judges of the fact to decide whether the imitation is of the kind above described; in consequence, the decree escapes the censure of the court of cassation, which condemns a defendant for a fraudulent imitation of a trademark on a finding of fact, "That the imitation does not result solely from the use of the word *Paragon*, but as well from the inscription in relief on a coppered tablet, in every respect like that of plaintiff, and placed on the same part of the umbrella frame, in such a manner as to differ only by the initials, which would only be noticed by a very attentive observer." Fox *v.* Meurgey and Teste, C. de Cass., 6 February, 1875, 20 *Ann. de la Pro.* 213.

See § 1190.

§ 1196. *Fancy name.—Expiration of patent.—General use.—Charbon de Paris.*—The manufacturer who has given to his products a fancy name, cannot maintain an action for its usurpation when he has abandoned it to public use,—*e. g.*, where a

title, such as *Charbon de Paris*, given by an inventor to a conglomerate coal that he has patented, has become by long use, and without opposition on his part, the general name for that kind of product, he cannot by a tardy deposit of the name regain its exclusive property. Brousse *v.* Cressent, C. de Cass., 8 February, 1875, 22 *Ann. de la Pro.* 91.

§ 1197. *Name.—Use by stranger.*—Defendants were dealers in ready-made clothing, in Paris, and put on sale and advertised extensively an overcoat of inferior cloth, which they called the *Montagnac.* They advertised in the *Figaro*, that all the pawn shops of Paris were filled with them as security for loans of 25 francs, when the garment cost but 19. Plaintiffs Montagnac, were manufacturers of cloth at Sedan, of an honorable reputation. They complained that the use of their name in such a manner was prejudicial to them, by causing people to believe that the common cloth of these coats came from their factory.

Defendants were enjoined the use of the name Montagnac. Damages 1,000f. Montagnac *v.* Halphen, Trib. Civ. de la Seine, 12 February, 1875, 20 *Ann. de la Pro.* 95.

§ 1198. *Name.—Lubin.—Sale of use of name.*—Plaintiffs were successors of one Lubin, whose perfumeries and toilet articles had obtained a great reputation. Defendants manufactured articles for the toilet, such as cold-cream, which were put up in pots, &c., bearing labels indicating the nature of the contents, and including the name Jean Lubin, printed in large characters. The name was also printed in the form of a signature on a stamp attached like an English postage stamp. On a slip of paper surrounding the package was printed,

"Exact on each product the signature *Jean Lubin*." Defendants justified the use of this name, which was not their own, by an agreement with one Jean Lubin of Cahors, which granted to them certain receipts of his invention and the right to use his name.

Held, that a proper name is not an article of commerce, and is only property so far as it is connected with a pre-existing business of which it has become the title by the use which has been made of it. Defendants were enjoined against use of name Lubin. Damages. Prot *v.* Hervé, Trib. de Comm. de Lyon, 27 April, 1875, 20 *Ann. de la Pro.* 108.

§ 1199. *Fancy name.—Veloutine.*—The fancy name *Veloutine* applied to a mixture of rice powder and bismuth, is a trademark which, when legally deposited, gives a right of action against those who make use of it without permission on similar productions. Fay *v.* Durand, Trib. Civil de la Seine, 8 May, 1875, 20 *Ann. de la Pro.* 245.

§ 1200. *Name.—Inventor of patented machine. — Howe sewing machine. — Franco-American Treaty.*—Property in a proper name is imprescriptible, and its abandonment is not presumed. It is the same in case of the name of the inventor of a patented machine, even though his patent has expired, and, in common language, the patented machine is called by his name. This usage, though constant, cannot rob an inventor of his name, especially if he has not ceased to manufacture and sell machines of the same kind.

2. He is an infringer of a name under law of 1824, who puts it on a machine not made by himself, although he places before it the words *system of*, or adds his own name.

The treaty of 1869 between the United States and France, and that of 1860 between England and France, stipulating reciprocal guaranties of trade-marks, includes the names of business men which distinguish their goods. Howe Machine Co. *v.* Maquaire, C. de Paris, 18 November, 1875, 20 *Ann. de la Pro.* 353. Case below reported *Id.* 337.

§ 1201. *Infringement.—Eau de toilette de Lubin* is infringed by the title *Eau de toilette aux fruits et fleurs de Lupin*, or *Eau de toilette du Liban* (toilet water, . . .), used on the labels of the same kind of product when, by the arrangement of the words, and resemblances of the bottles and labels, it is apparent that there was an intention to establish a confusion between the products.

2. It makes no difference that the infringing trademark was deposited at a date prior to that infringed. Prot *v.* Cabridens, Trib. Civ. de la Seine, 22 November and 16 December, 1875, 20 *Ann. de la Pro.* 369.

§ 1202. *Fraudulent imitation.—Eau de mélisse.* —Plaintiff's label (legally deposited) was printed in black on a white ground, *Eau des Carmes déchaussés de la rue de Vaugirard, de Boyer, Rue Taranne, No.* 14, *à Paris.* Blown on his bottles were the words *Eau des Carmes*, BOYER, *rue Taranne, No.* 14. Defendant Roger Boyer put up eau de mélisse in bottles on which were blown *Eau de mélisse de Boyer, pharmacien à Paris.* His labels were printed in black, on a white ground, *Eau de mélisse des Carmes préparée par R. Boyer, Rue Taranne, No.* 6. The boxes in which the bottles were put up, were imitated. Defendant claimed that there were sufficient differences between the products to distinguish them.

Held, that it is sufficient to constitute a fraudulent imitation of a mark under article 8 of law of 1857, that the general aspect of the infringing mark be the same, and that designed resemblances of certain details, such as the form, color and arrangement of labels, stamps and seals, be of such a kind as to deceive inattentive or inexperienced buyers.

2. In such a case the fraudulent intent may be established not only by resemblances of the labels and other distinctive signs deposited, but also by accessory facts, such as the shape of the receptacles, the method of packing, &c., which do not constitute a trademark in themselves. When a merchant has made himself known in a certain industry, or in the manufacture of certain goods, rival merchants of the same name should, more than any others, avoid resemblances of marks of such a kind as to lead to confusion. A. Boyer *v.* R. Boyer, C. de Paris, 27 November, 1875, 21 *Ann. de la Pro.* 20.

See §§ 1149, 1150.

§ 1203. A. Boyer, mentioned in section 1202, brought suit against Cassius Boyer and Ratel, who, in selling Eau de mélisse, used a square label printed in black on a white ground, *Eau de mélisse des Carmes Saint-Jacques, C. Boyer, Rue Brezin, No.* 33, *Paris.* The name C. Boyer was printed in the same manner as that of plaintiff, but at the left of the label instead of the right. The type employed was different.

Held, that there is a fraudulent imitation of a mark, the moment that the labels and stamps employed present resemblances of such a kind as to deceive any number of buyers, even though differences had been introduced and the name modified.

A. Boyer *v.* Cassius Boyer, Trib. Corr. de la Seine, 9 December, 1875, 21 *Ann. de la Pro.* 25.

§ 1204. *Treaty between France and England.—Fraudulent imitation.*—Article 12 of the treaty of commerce of January 23, 1860, between France and England, includes names and initials, as well as other marks; and allows Englishmen who have legally deposited their marks in France, to bring actions for fraudulent imitation of the same as well as for infringement by a servile copy.

2. There is a fraudulent imitation of a trademark under article 8 of law of 1857, when the resemblances and general appearance of the whole infringing mark are intentionally of such a kind as to establish confusion between the two marks, even though a careful comparison of the two would bring to light sufficiently striking differences, such as different names or initials—a sphinx in place of a lion. Lister *v.* Chardin, Trib. Corr. de la Seine, 28 December, 1875, 21 *Ann. de la Pro.* 72.

§ 1205. *Infringement.—Printing labels.*—The manufacture of trademarks is an infringement, independent of any use of same, or of any injury to the owner. It is sufficient that injury is possible. Lithographers are guilty of infringement, who have made and delivered infringing labels, with bills showing that they believed they were working for persons not the owners, although in reality the order had been given by the direction of the latter for the purpose of proving the infringement. This is not so, if it is proved that the owners of the mark were guilty of any manœuvres to entrap the confidence and good faith of the lithographers. Reynal *v.* Wolff, C. de Cass., 15 January, 1876, 21 *Ann. de la Pro.* 5.

See § 1151.

§ 1206. *Limitation of action for infringement.*—"*Exact the signature.*"—Where a manufacturer has manifested by several successive deposits, and by suits against infringers, the intention to preserve the ownership of his trademark, it is no defense to an action for infringement, that he has neglected to bring suit against other infringers for a greater or less time.

2. The use of the words, *Exact the signature*, . . on the labels of a younger house, is an evidence of bad faith, to be considered in judging of a fraudulent imitation. Boyer *v.* Lemit, C. de Paris, 15 Jauuary, 1876, 21 *Ann. de la Pro.* 27.

§ 1207. *Name, when trademark.—Use after expiration of patent.*—"*Dit.*"—Names of persons, even though deposited, are not good trademarks, unless they are used in a distinctive form. The unauthorized use on a machine of the name of the inventor, unaccompanied by distinguishing accessories, is not an infringement under articles 7 and 8 of law of 1857, but may be a usurpation of name under law of 1824, and article 423 of Penal Code.

2. The expiration of a patent does not give the use of the name of the inventor to the public, unless he has voluntarily abandoned it, or by his own act the patented object cannot be otherwise designated. In the latter case, third parties who manufacture the same or analogous products should avoid every use of the name tending to deceive purchasers as to the origin of the articles made by them.

3. The manufacturer is guilty of a violation of the law of 1824, who places the name of the inventor on similar machines preceded by the word *dit* (called), in small letters, concealed among accompanying designs in such a manner as to show the

name only, and to produce a confusion between the products. Rogier *v.* Frappier, C. de Paris, 10 March, 1876, 21 *Ann. de la Pro.* 65.

§ 1208. *Master and servant.—Formation of new establishment.*—An employee who founds a new commercial house, has no right to mention the name of his former employer in his circulars. Use of name enjoined. Courtois *v.* Holzmann, Trib. de Comm. de la Seine, 30 March, 1876, 21 *Ann. de la Pro.* 111.

See § 1131.

§ 1209. *Name of iuventor.—Use of, after expiration of patent.—Howe.—Bijou.*—An English company which has obtained from an American company the exclusive right to make and sell in Europe a certain kind of sewing machine, and to use the name and trademarks of the American inventor, has a right of action in France against infringers of said name and marks, by virtue of the treaties of 1860 and 1862 with England.

2. The inventor of a patented machine and his assignors or heirs preserve the exclusive right to use his name after the expiration of the patent, unless it is proved that he has voluntarily abandoned it to the public.

3. Although any one may manufacture the machine after the expiration of the patent, he may not add to it the name of the inventor, either alone or with any qualification,—*e. g.*, *Bijou*, thus, *Howe-Bijou.* Howe Machine Co. *v.* Brion, C. de Paris, 26 May, 1876, 21 *Ann. de la Pro.* 170.

See § 1214.

§ 1210. *False designation of place of manufacture.*—The manufacturer is guilty of unlawful rivalry who gives to his products the name of a

place different from that of production, when there exists in the place whose name is taken, a manufacturer whose products have already acquired a celebrity under its name. In such a case the first occupant has a right of action for the suppression of the name which may cause confusion, as well from the letter-heads as from the trademarks of his rival. Lonquéty *v.* Famchon, C. de Douai, 6 July, 1876, 21 *Ann. de la Pro.* 317.

See § 1143.

§ 1211. *Fraudulent imitation.*—Plaintiff's deposited trademark consisted of a square label, reading as follows:

USINES DÉ WYGMAEL
E. REMY ET C^e
AMIDON ROYAL DE RIZ
MEDAILLE D'OR
EXPOSITION—Paris, 1867—UNIVERSELLE
LOUVAIN

These words were surrounded by a frame-work of medals, obtained at various exhibitions.

Defendants adopted a new label in 1875, as follows:

AMIDONNERIE
S^t REMY O^lse
AMIDON DE RIZ
MÉDAILLE D'ARGENT
EXPOSITION—Paris, 1867—UNIVERSELLE
MAISON FONDÉE EN 1822

It was printed like plaintiff's in white on a blue ground; the framework was of medals nearly the same as plaintiff's; the shape square.

BY THE COURT.—Although neither the blue color of the paper, nor the white color of the letters, nor the square form of the label, were property of plaintiffs, they having been in universal use for a

long time to designate these products, yet considering that in the mark of the plaintiff, the name Remy et Ce. forms the essential and characteristic sign, as well because it is the name of the manufacturers of the Amidon as because it is printed at the head of the label in large characters, and it is the name which best distinguishes the merchandise to purchasers. Considering that defendant, instead of announcing his goods in his labels by his name, concealed the same completely, and searched for a means of inscribing the name Remy in the same surroundings as the plaintiffs,—*i.e.*, at the head of his mark in large characters; that, for the purpose of giving himself the appearance of right, in 1875 he gave the name of Saint-Remy to his mill, situated in the commune of Agnetz, arrondissement of Clermont (Oise), when previously it had borne the name of *Moulin Lessier;* that it is certain that the arbitrary change of name had no other object than the right to inscribe the name Remy on his mark, and confound it with that of plaintiffs; that the imitation and fraud is also shown by the arrangement of the medals, the ribbons and framework represented in this mark, so that these resemblances, with the name Remy, are of such a kind as to deceive the public on the origin of the merchandise. . . . . defendants are guilty under law of 1857, articles 8, 13, 14. Damages and confiscation of labels. Remy *v.* Mauger, C. de Paris, 8 July, 1876, 21 *Ann. de la Pro.* 200.

§ 1212. *Like names.—Unlawful rivalry.—Injunction.*—When a merchant makes use of the similarity of his name and that of an old and well-known house, with the evident intent of profiting by its

notoriety, the proper courts have authority either to order the necessary measures to avoid all confusion or to enjoin the use of the name in the same kind of industry as that of the older house.

2. It is an act of unlawful rivalry on the part of a merchant or manufacturer to mention a known and old house, in such a way as to cause those who do not know well the two establishments, to suppose that his is the oldest and the most interested in hindering confusion. Veuve Erard *v.* Nicolas Erard and Coda, C. de Paris, 29 July, 1876, 21 *Ann. de la Pro.* 277.

§ 1213. *Pharmaceutical preparations.—Name of compounder.—Fancy name.—Fraudulent imitation.*—In matters of pharmaceutical preparations as well as in all others, the fancy name given to a product by its inventor or proprietor is, like his surname, his exclusive property unless he has abandoned it, or the preparation has no other distinguishing name.

2. For a fraudulent imitation of a mark under article 8 of law of 1857, it is not necessary that the whole label should be imitated; it is sufficient if the title of the preparation is taken and an analogous though different name of maker, the remainder of the labels being different.

(Defendants, when asked for a bottle of *Elixir tonique antiglaireux of Dr. Guillié*, sold a bottle with a label bearing at the top the name of the pharmacy Négre, and in the center the title *Elixir tonique antiglaireux F. Guillié.* The remainder of the label was different from that of Paul Gage, manufacturer of the true elixir.) Ministère Public *v.* Négre, C. de Grenoble, 31 August, 1876, 2 *Ann. de la Pro.* 225.

§ 1214. *Name. — Foreign firm. — Action in France. — Rights of assignee. — Treaty between France and England.*—The assignee of the name and trademark of a foreigner has a right to invoke the legislation and treaties which protect this name and mark in his own country. The special legislation and treaties which regulate this kind of property in the country of the assignor are immaterial. Therefore, an English company, having its factory in England, assignee of the name and marks of an American, has the right, under the treaties between France and England, to follow in France the usurpation of the name of the American, without the necessity of examination as to whether American legislation and Franco-American treaties authorize such action.

2. Article 12 of the Commercial Treaty of January 23, 1860, between France and England, applies not only to trademarks, but also to surnames, (*e. g.* Howe) serving to distinguish the products of a manufacturer or merchant.

3. When a defendant who has usurped a name, demands a new trial on the ground that the name has entered into public use as the title of the product manufactured, the judgment against him, finding as a fact that the plaintiff has done everything to preserve his exclusive property in the name, and the defendant has made a fraudulent use of it to deceive purchasers, is correct. Compagnie Howe *v.* Onfray, C. de Paris, 13 November, 1875, C. de Cass., 18 November, 1876, 21 *Ann. de la Pro.* 305.

See § 1209.

§ 1215. *Fraudulent imitation.—Eau de melisse des Carmes.*—The wording of plaintiff's label was

Eau des Carmes déchaussés de la rue de Vaugirard de Boyer, Rue Taranne No. 14, *à Paris*,—of defendants was *Eau de mélisse des Carmes de la rue de Vaugirard de Gélin, No.* 105, *a Paris*, The bottles of each were of the same form and size, and had the name of the product blown in the glass; they were corked in the same way, sealed with a red seal in the same place, and put up for sale, at wholesale, in similar boxes, with inscriptions and designs equally tending to establish confusion between the two. Defendant claimed that all the dealers in *eau de mélisse* had adopted like bottles and boxes, and that his name and address were sufficient to prevent any confusion.

Held, a violation of article 8 of law of 1857. Boyer *v.* Gélin, C. de Paris, 14 December, 1876, 22 *Ann. de la Pro.* 66.

§ 1216. *Name.—Injunction against use of.*—Whenever a merchant lends his name for the purpose of causing an unlawful rivalry with another, he commits such a wrong as to authorize the court to enjoin the use of his name in the specific trade. J. F. Martell & Co. *v.* J. L. Martel & others, C. de Bordeaux, 17 July, 1876, C. de Cass., 27 March, 1877, 22 *Ann. de la Pro.* 94; Same Case below, 21 *Id.* 284.

§ 1217. *Fraudulent imitation.—Papiers Job and Jop.*—The use of the of the word *Jop* is a fraudulent imitation of the trademark *Job*, when the character and color of the letters are the same, and the surrounding designs and inscriptions are similarly arranged. Bardou *v.* Roux, Trib. Corr. de Toulouse, 3 May, 1877, 22 *Ann. de la Pro.* 139.

§ 1218. *Name of manufacturer.—Sale.*—The name of a manufacturer, when used in a peculiar

form as a trademark, (*e.g.*, a copy of the signature) is an object of sale together with the good will and stock of his business, and may be resold by the assignee. Reasoning of court,—the stamp (copy of signature) being the only means of establishing the source of the goods, and of retaining the custom depending upon it, has become, by force of the circumstances, an accessory to the business transferred to Morel—it can, consequently, be a matter of assignment to a second purchaser. Compere *v.* Bajou, C. de Paris, 16 June, 1854, *Upton's Trademarks.*

§ 1219. *Liquors de la grande Chartreuse.*—The liquor generally known as *Chartreuse*, having acquired a great celebrity in France, was extensively imitated. The suits were so numerous that it is considered desirable to group them together irrespective of dates. In 1852, Louis Garnier, head of the convent of the Grande Chartreuse, legally deposited his trademarks and labels. In suit against Rivoire (4 *Ann. de la Pro.* 115), the Tribunal of Commerce of Grenoble decided, December 31, 1852, that Garnier was the sole owner of the liquor known as *Chartreuse*, which takes its name from the place of its manufacture, and enjoined defendants against the use of the title *liqueur de Chartreuse.* Damages were refused, however, because of the tolerance of the monks up to that time. On appeal defendants contended that the word *Chartreuse* had become a generic term to designate the kind of liquor made by the monks of Chartreuse.

The principles announced by the lower court were affirmed by the cour de Grenoble, May 25, 1853, saying, "that the name *Chartreuse*, which was only an abbreviation of the label of the Chartreuse monks,

was not a generic name, such as a name would be which was derived from the nature of the liquor or the substance of which it was composed; that this liquor had been thus named because it had been invented at the monastery of the Grande Chartreuse, and was made there by the Chartreuse monks, so that this name designated at the same time *the inventors, the manufacturers and the place of manufacture*, and it constitutes, under each one of these, a distinctive mark; a name which cannot be applied with truth to a similar or analogous product manufactured at Grenoble by Rivoire frères."

The judgment added that the monks not having a monopoly of their liquor, yet not having made known their process, Rivoire had the right to compound a similar liquor, if he could, and in default of another name to give it one drawn from its similarity even,—such as *Imitation Chartreuse*, on condition that they be written in identical characters, or so that they may not have the effect to turn away the customers of the monks. C. de Grenoble, 23 May, 1852, Garnier *v.* Rivoire, 4 *Ann. de la Pro.* 115.

§ 1219 A. One Berthe, pretending to manufacture his liquors in the Commune of Saint Pierre, in which is the *Grand Chartreuse Monastery*, claimed the right to place on his labels, *liqueur fabriquée à Saint-Pierre de Chartreuse.*

He was adjudged guilty of a violation of law of 1824, and of article 423 of Penal Code, and ordered to pay a fine of 125 francs, and 500 francs damages, with insertion of notice in two newspapers. Garnier *v.* Berthe, Trib. Com. de Grenoble, April 2, 1857, 4 *Ann. de la Pro.* 119.

§ 1219 B. In 1868, numerous suits were brought

against parties in and about Paris, where a trade in spurious *Chartreuse* had sprung up. Five of them are reported at page 226 of the *Annales*, vol. 14 (L. Garnier *v.* Ludière and others), another (L. Garnier *v.* Paul Garnier) at p. 252, *Id.*

The same cases on appeal are reported at p. 353, *Id.* Some of the defendants reproduced the label of plaintiffs, but added in characters almost imperceptible the words, *Imitation of the*, and name or initials of the distiller. Another reproduced the label with the exception of *Grande Chartreuse*, in place of which was printed *Grande Chevreuse* in the same characters. Another substituted *Liqueur hygiénique de la Grande Chartreuse*, printed in two lines, in place of *Grande Chartreuse*, the remainder of label being similar. Defendants sought to establish their good faith, and the absence of any real damage, resulting from the long tolerance of the monks, and from the difference in price of the true and imitation liquors, and the differences of labels.

It was held in these cases, according to the circumstances of each, that there is an infringement of a trademark (article 7 of law of 1857), the moment that the intention to imitate results in the reproduction of the trademark with only such differences as are due to imperfect workmanship. Also that the offense of fraudulent imitation (article 8, law of 1857), may exist though the fraudulent mark would not necessarily deceive all purchasers; consequently the indication of the name of the manufacturer or even the substitution of another name for the product, is not sufficient to remove the offense.

That the manufacturer who sells products with labels in imitation of those of another manufacturer,

is, equally with the retail dealer, liable to the penalties established by the law, although the substitution of his (the manufacturer's) name forbids the belief that the retail dealers to whom he delivered his goods had been personally deceived as to their nature or origin.

That it is not necessary to establish that the retailers at whose stores these products were seized have deceived one or more consumers. It is sufficient that the mark or label be in its entirety of the kind to deceive a certain number of purchasers. Garnier *v.* Ludiére, *Id. v.* others, C. de Paris, November 25, and December 30, 1868, 14 *Ann. de la Pro.* 353.

§ 1219 C. In 1869 an action was brought against one Maitre whose labels had the same general appearance as those of the monks, but also important differences. They were of the same size, shape and color, and the inscription was arranged in the same way, but, 1st, instead of being round, the darkened pearls which form the frame-work, were alternately round and oblong; 2nd, in place of LIQUEUR FABRIQUÈE À LA GR^DE CHARTREUSE, was read, LIQUEUR FABRIQUÉE COMME À LA GR^DE CHARTREUSE; 3rd, in place of the signature L. Garnier with the globe surmounted by a cross, they bore the signature Gullifet et Ce. In 1859, Gullifet & Co. deposited this mark as required by law. Defendant being a retailer plead good faith. *Held* the defendant's mark was calculated to deceive buyers, and cause those who were not attentive at the instant of purchase to believe that the contents of these bottles was a product of the Convent of the Grande Chartreuse. Defendant was condemned to pay a fine of 100f. and 300f. damages to plaintiffs (article 8, law of 1857). Garnier *v.* Maitre, Trib.

Corr. de la Seine, January 27, 1859, 15 *Ann. de la Pro.* 87.

§ 1219 D. In the decisions previously given (1219 B, case of Garnier *v.* Garnier), the court decided that the word *Chartreuse* was the name of a certain kind of liquor, and did not, by itself, indicate the place of manufacture, and its usurpation did not, therefore, come under law of 1824.

Paul Garnier, after the decision of 1868, modified his labels by replacing the darkened pearls, which had been objected to, by a solid frame work, and substituting in place of his former title the words *liqueur chartreuse fabriquée par P. Garnier.* Soon after he issued a second edition, and added at the bottom of the label *Noyon* (Oise)—his residence. In a third kind of label, larger than the other, with no framework, he placed the word CHARTREUSE, in large characters with his signature and the word NOYON.

In court of first instance, *Held* that the title *Chartreuse* was a generic name, given to a certain kind of liquor invented by the Chartreuse monks; that it had been for a long time in common use, and did not indicate by itself the place of manufacture. On appeal, *Held* that the name of *Chartreuse*, applied to liquor compounded at the Grande Chartreuse, is not a generic name, such as a name derived from the nature and composition of the liquors, but an abbreviation of the labels of the Chartreuse monks, indicating at once the inventor, the manufacturer and the place of manufacture.

Therefore, it is a usurpation of name of place of manufacture, under law of 1824, for a manufacturer to use the word Chartreuse to designate a liquor

more or less similar to that of the convent of the Grande Chartreuse.

It is so even though the labels used by the manufacturer differs from that of the monks, and indicates a different place of manfacture. Louis Garnier *v.* Paul Garnier, C. de Paris, 5 February, 1870, 16 *Ann. de la Pro.* 209; Same Case, again reported, 17 *Id.* 249. Affirmed by Court of Cassation, 26 April, 1872, *Id.* 257.

§ 1219 E. The action detailed in 1219 D was in the criminal court. A civil action was also brought on same state of facts.

Held, that the ownership of a title or a mark is acquired by the first use of it, independently of any deposit. Consequently, although the deposit is necessary as a prerequisite to an action under the law of 1857 the use previous to the deposit which a manufacturer or merchant has made of a title or of a mark, cannot be pleaded as causing it to fall into common use. No more can the unpermitted use of it by a third person be pleaded.

The title *Chartreuse*, employed by the Chartreuse monks to designate the liquor made by them at the Grand Chartreuse, is their exclusive property, indicating at the same time the manufacturer and the place of manufacture.

Therefore the Chartreuse monks have an action to enjoin all other manufacturers or dealers against the use of the words *Chartreux* or *Chartreuse* to designate liquors or elixirs not coming from the Grande Chartreuse. Louis Garnier *v.* Paul Garnier, C. de Paris, 19 May, 1870, 16 *Ann. de la Pro.* 219; Same Case again reported, 17 *Id.* 241.

The preceding judgment was followed in case of

L. Garnier *v.* Martin, Trib. Civ. de la Seine, 31 May, 1870, 16 *Ann. de la Pro.* 229.

§ 1219 F. When a manufacturer has adopted complex trademarks, it is sufficient to sustain an action that he has deposited his principal trademarks from which the former were made up. Therefore, *one is liable to the penalties fixed by* article 8 of law of 1857, who has used one or more elements of the deposited marks, although the mark used, such as the stamp on the corks of bottles, has not been made the special and distinct subject of deposit, if otherwise its use is of a kind to deceive buyers as to the origin of the product. Appeal from Tribunal correctionnel. Grezier *v.* Chedeville, C. de Paris, 11 June, 1875.

APPENDIX

CONTAINING

UNITED STATES TRADEMARK STATUTES; RULES OF PRACTICE AND OFFICIAL FORMS IN TRADEMARK CASES IN THE UNITED STATES PATENT OFFICE; STATUTE, RULES AND OFFICIAL FORMS FOR THE REGISTRATION OF PRINTS AND LABELS AND TRADEMARK TREATIES AND CONVENTIONS WITH THE UNITED STATES.

UNITED STATES TRADEMARK STATUTES.

TRADEMARKS.

TITLE LX, Rev. Stat., chap. 2, p. 963:

SEC. 4937. *Registration of trademarks authorized.**—Any person or firm domiciled in the United States, and any corporation created by the authority of the United States, or of any State or Territory thereof, and any person, firm, or corporation resident of or located in any foreign country which by treaty or convention affords similar privileges to citizens of the United States, and who are entitled to the exclusive use of any lawful trademark, or who intend to adopt and use any trademark for exclusive use within the United States, may obtain protection for such lawful trademark by complying with the following requirements:

First. By causing to be recorded in the Patent Office a statement specifying the names of the parties, and their residences and place of business, who desire the pro-

* 8 July, 1870, c. 230, s. 77, v. 16, p. 210.

tection of the trademark; the class of merchandise, and the particular description of goods comprised in such class, by which the trademark has been or is intended to be appropriated; a description of the trademark itself, with fac-similes thereof, showing the mode in which it has been or is intended to be applied and used; and the length of time, if any, during which the trademark has been in use.

Second. By making payment of a fee of twenty-five dollars, in the same manner and for the same purpose as the fee required for patents.

Third. By complying with such regulations as may be prescribed by the Commissioner of Patents.

SEC. 4938. *Accompanying declaration under oath.**—The certificate prescribed by the preceding section must, in order to create any right whatever in favor of the party filing it, be accompanied by a written declaration verified by the person, or by some member of the firm or officer of the corporation by whom it is filed, to the effect that the party claiming protection for the trademark 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 in any such near resemblance thereto as might be calculated to deceive; and that the description and facsimiles presented for record are true copies of the trademark sought to be protected.

SEC. 4939. *Restriction on the registration of trademarks.*†—The Commissioner of Patents shall not receive and record any proposed trademark which is not and cannot become a lawful trademark, or which is merely the name of a person, firm, or corporation, unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons, or which is identical with a trademark appropriate to the same class of merchandise and belonging to a different owner, and already registered or received for registration, or which so nearly resembles

* 8 July, 1870, c. 230, s. 77, v. 16, p. 210.
† Ibid., s. 79, p. 211.

such last-mentioned trademark as to be likely to deceive the public. But this section shall not prevent the registry of any lawful trademark rightfully in use on the eighth day of July, eighteen hundred and seventy.

SEC. 4940. *Time of receipt of trademark for registration to be certified.**—The time of the receipt of any trademark at the Patent Office for registration shall be noted and recorded. Copies of the trademark 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 trademark shall be brought in controversy.

SEC. 4941. *Duration of protection of registered trademark, and renewal.*†—A trademark registered as above prescribed shall remain in force for thirty years from the date of such registration; except in cases where such trademark 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. Such trademark during the period that it remains in force 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 trademark, or substantially the same, or so nearly resembling it as to be calculated to deceive, upon substantially the same description of goods. And at any time during the six months prior to the expiration of the term of thirty years, application may be made for a renewal of such registration, under regulations to be prescribed by the Commissioner of Patents. The fee for such renewal shall be the same as for the original registration; and a cer-

* 8 July, 1870, c. 230, s. 80, p. 211.
† Ibid., s. 78, p. 211.

tificate of such renewal shall be issued in the same manner as for the original registration; and such trademark shall remain in force for a further term of thirty years.

SEC. 4942. *Remedy for infringement of registered trademarks.**—Any person who shall reproduce, counterfeit, copy, or imitate any recorded trademark, and affix the same to goods of substantially the same descriptive properties and qualities as those referred to in the registration, shall be liable to an action on the case for damages for such wrongful use of such trademark, 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 his trademark and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful use.

SEC. 4943. *Restriction upon actions for infringement.*†—No action shall be maintained under the provisions of this chapter by any person claiming the exclusive right to any trademark which is used or claimed in any unlawful business, or upon any article which is injurious in itself, or upon any trademark 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.

SEC. 4944. *Penalty for false registration of trademarks.*‡—Any person who shall procure the registry of any trademark, or of himself as the owner of a trademark, or an entry respecting a trademark in the Patent Office, by making any false or fraudulent representations or declarations, verbally or in writing, or by any fraudulent means, shall be liable to pay any damages sustained in consequence of any such registry or entry to the person injured thereby; to be recovered in an action on the case.

* 8 July, 1870, c. 230, s. 79, v. 16, p. 211.
† Ibid., s. 84, p. 212.
‡ Ibid., s. 82.

SEC. 4945. *Former rights and remedies preserved.**—Nothing in this chapter shall prevent, lessen, impeach, or avoid any remedy at law or in equity, which any party aggrieved by any wrongful use of any trademark might have had if the provisions of this chapter had not been enacted.

SEC. 4946. *Saving as to rights after expiration of term for which a trademark has been registered.*†—Nothing in this chapter shall be construed by any court as abridging or in any matter affecting unfavorably the claim of any person to any trademark after the expiration of the term for which such trademark was registered.

SEC. 4947. *Regulations for transfer of rights to trademarks.*‡—The Commissioner of Patents is authorized to make rules, regulations, and prescribe forms for the transfer of the right to the use of trademarks, conforming as nearly as practicable to the requirements of law respecting the transfer and transmission of copyrights.

AN ACT

To punish the counterfeiting of trademark goods and the sale or dealing in of counterfeit trademark goods.

Approved August 14th, 1876.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATESOF AMERICA IN CONGRESS ASSEMBLED.—*Penalty for selling or offering for sale goods bearing a fraudulent trademark.*—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 trademark pursuant to

* 8 July, 1870, c. 230, s. 83, v. 16, p. 211.
† Ibid., s. 78.
‡ Ibid., s. 81.

the statutes of the United States, to which, or to the package in which the same are put up, is fraudulently affixed said trademark, or any colorable 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.

SEC. 2. *Penalty for affixing fraudulent trademark.*—That every person who fraudulently affixes, or causes or procures to be fraudulently affixed, any trademark registered pursuant to the statutes of the United States, or any colorable 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.

SEC. 3. *Penalty for putting up packages bearing fraudulent trademark.*—That every person who fraudulently fills, or causes or procures to be fraudulently filled, any package to which is affixed any trademark, registered pursuant to the statutes of the United States, or any colorable 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.

SEC. 4. *Manufacturing fraudulent trademark.*—That any person or persons who shall, with intent to defraud any person or persons, knowingly and willfully 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 colorable imitation of any die, plate, brand, engraving, or mould of any private label, brand, stamp, wrapper, engraving on paper or other substance, or trademark, registered pursuant to the statutes of the United States, shall, upon conviction thereof, be punished as prescribed in the first section of this act.

SEC. 5. *Dealing in fraudulent trademark.*—That any person or persons who shall, with intent to defraud any person or persons, knowingly and willfully 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 colorable imitation of any private label, brand, stamp, wrapper, engraving, mould, or trademark, registered pursuant to the statutes of the United States, shall, upon conviction thereof, be punished as prescribed in the first section of this act.

SEC. 6. *Possession of empty box or package having registered trademark with intent to defraud.*—That any person who shall, with intent to injure or defraud the owner of any trademark, 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 trademark, 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.

SEC. 7. *Proceedings to detect fraudulent trademark. Jurisdiction of United States courts.*—That if the owner of any trademark, 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 makes such oaths that any counterfeits or colorable imitations of his said trademark, 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 trademark 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 the 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 authorizing 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 trademarks, colorable 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 trademarks, colorable 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 purposes 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 trademarks, colorable 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.

SEC. 8. *Penalty for abetting violation of preceding sections.*—That any person who shall, with intent to defraud any person or persons, knowingly and willfully 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.

UNITED STATES PATENT OFFICE.—RULES IN TRADEMARK CASES.

TRADEMARKS.

84. *Trademarks, how to secure them.*—Any person or firm domiciled in the United States, and any corporation created by the authority of the United States, or of any State or Territory thereof, and any person, firm, or corporation resident of or located in any foreign country which, by treaty or convention, affords similar privileges to citizens of the United States, and who are entitled to the exclusive use of any lawful trademark, or who intend to adopt and use any trademark for exclusive use within the United States, may obtain protection for such lawful trademark by complying with the following requirements, to wit:

First. Proceeding necessary.—By causing to be recorded in the Patent Office the names of the parties, and their residences and place of business, who desire the protection of the trademark.

Second. The class of merchandise and the particular description of goods comprised in such class, by which the trademark had been or is intended to be appropriated.

Third. A description of the trademark itself, with fac-similes thereof, and the mode in which it has been or is intended to be applied and used.

Fourth. The length of time, if any, during which the trademark has been used.

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.

Sixth. The compliance with such regulations as may be prescribed by the Commissioner of Patents.

Seventh. The filing of a declaration, under the oath of the person, or of some member of the firm or officer of the corporation, to the effect that the party claiming protection for the trademark has a right to the use of the same, and that no other person, firm, or corporation has a right to such use, either in the identical form or having such near resemblance thereto as might be calculated to deceive, and that the description and fac-similes presented for record are true copies of the trademark sought to be protected. The oath must also state the citizenship of the person desiring registration.

The petition asking for registration should be accompanied with a distinct statement or specification, setting forth the domicile and residence of the applicant, the length of time the trademark has been used, the mode in which it is intended to apply it, and the particular description of goods comprised in the class by which it has been appropriated, and giving a full description of the design proposed, particularly distinguishing between the essential and the non-essential features thereof.

85. *How long the right may inure.*—The protection for such trademark will remain in force for thirty years, and may, upon the payment of a second fee, be renewed for thirty years longer, except in cases where such trademark 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 force in this country, by virtue of the registration, at the same time that it becomes of no effect elsewhere.

86. *Proper subjects for trademarks.*—No proposed trade mark will be received or recorded which is not and cannot become a lawful trademark, or which is merely the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons, or which is identical with a trademark appropriate 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 trademark as to be likely to deceive the public; but any lawful trademark rightfully used at the time of the passage of the act relating to trademarks (July 8, 1870) may be registered.

Proceedings in the office.—All applications for registration are considered in the first instance by the Trademark Examiner. From adverse decision by such Examiner upon the applicant's right to registration, an appeal directly to the Commissioner will lie, no fee being charged therefor.

In case of conflicting applications for registration, the Office reserves the right to declare an interference, in order that the parties may have opportunity to prove priority of adoption or right; and the proceedings on such interference will follow, as nearly as practicable, the practice in interferences upon applications for patents.

87. *Fac-similes to be filed.*—Where the trademark can be represented by a fac-simile which conforms to the rules for drawings of mechanical patents, such a drawing may be furnished by applicant, and the additional copies will be produced by the photo-lithographic process, at the expense of the Office. Or the applicant may furnish one fac-simile of the trademark, mounted on a card ten by fifteen inches in size, and ten additional copies, upon flexible paper, not mounted, as in designs, but in all cases the mounted fac-simile or the drawing must be signed by the appli-

cant or his authorized attorney, and the signature must be attested by two witnesses.

88. *Trademarks assignable.*—The right to the use of any trademark is assignable by any instrument of writing, and such assignment must be recorded in the Patent Office within sixty days after its execution, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice. The fees will be the same as are prescribed for recording assignments of patents.

OFFICIAL FORMS.

Petition.

11.—FOR THE REGISTRATION OF TRADEMARK.

To the Commissioner of Patents:

Your petitioner [or petitioners, if a firm] respectfully represents that he [or it, if a corporation] is engaged in the manufacture of ———, at ———, and at ———, ———, and that he is entitled to the exclusive use upon the class of goods which he manufactures of the trademark described in the annexed statement or specification, and illustrated in the accompanying fac-simile.

He therefore prays that he may be permitted to obtain protection for such lawful trademark under the law in such cases made and provided.

A. B.

Specification.

20.—FOR A TRADEMARK.

[*If the application is made by a corporation or a firm this form should be modified to conform to the facts.*]

To all whom it may concern:

Be it known that I, [here insert the name of the appli cant,] domiciled in the [United States, or in the Dominion

of Canada, or, as the case may be,] and residing at ———, and doing business at ———, in the county of ———, and State of ———, have adopted [or intend to adopt] for my use a trademark for ———, of which the following specification is a full, clear, and exact description:

My trademark consists of the letters and words, S. N. & Co.'s Buckeye Sheetings. These generally have been arranged as shown in the accompanying fac-simile; above and below a figure of a man represented as ascending the side of a mountain and carrying a banner, upon which is inscribed the word "Buckeye;" and the whole has been inclosed within an ornamental border substantially like that shown in the fac-simile. But the figure of the man with the banner may be omitted, or some other device substituted for it, and the border may be changed at pleasure or omitted altogether without materially changing the character of my trademark, the essential features of which are the letters S. N. & Co.'s and the word-symbol Buckeye.

This trademark I have used in my business for ten years last past.

The class of merchandise to which the trademark is appropriated is ———; and the particular description of goods [comprised in said class] upon which I use my said trademark are ———. I have been accustomed to print it in blue ink upon each piece of said goods, and also to have it printed on labels, which I afterward paste upon said articles or on boxes and cases containing the same.

A. B.

Witnesses: C. D.
F. H.

30.—DECLARATION OF APPLICANT FOR REGISTRATION OF A TRADEMARK.

[*If the application is made by a corporation, or a firm, this form should be modified to conform to the facts.*]

STATE OF ———, *County of* ———, *ss:*

A. B., being duly sworn, deposes and says that he is the

applicant named in the accompanying petition; that he verily believes that the facts set forth in the foregoing specification are true; that he has a right to the use of the trademark described in said specification; 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 description and fac-similes presented for record are true copies of the trademark sought to be protected, and that he is a citizen of the United States, (or, a citizen of the Republic of France, or, as the case may be.)

A. B.

Sworn to and subscribed before me this 15th day of ———, 187-.

E. F.,

Justice of the Peace.

REGISTRATION OF PRINTS AND LABELS.

By an act* of Congress entitled "An act to amend the law relating to patents, trademarks, and copyrights," approved June 18, 1874, (to take effect on and after the 1st day of August, 1874,) it is provided, in the 3d section thereof, that certain prints and labels may be registered in this Office:

SEC. 3. That in the construction of this act the words "Engraving," "cut," and "print" shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such print or labels, in conformity with the regulations pro-

* See Marsh *v.* Warren, cited at foot of page 517.

vided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label, not a trademark, six dollars, which shall cover the expense of furnishing a copy of the record under the seal of the Commissioner of Patents, to the party entering the same.

SEC. 4. That all laws and parts of laws inconsistent with the foregoing provisions be and the same are hereby repealed.

SEC. 5. That this act shall take effect on and after the first day of August, eighteen hundred and seventy-four.

By the word "print," as used in the said act, is meant any device, picture, word or words, figure or figures, (not a trademark,) impressed or stamped directly upon the articles of manufacture, to denote the name of the manufacturer or place of manufacture, style of goods, or other matter.

By the word "label," as therein used, is meant a slip or piece of paper, or other material, to be attached in any manner to manufactured articles, or to bottles, boxes, and packages containing them, and bearing an inscription, (not a trademark,) as, for example: the name of the manufacturer or the place of manufacture, the quality of goods, directions for use, &c.

By the words "articles of manufacture"—to which such print or label is applicable by said act—is meant all vendible commodities produced by hand, machinery, or art.

But no such print or label can be registered unless it properly belongs to an article of commerce, and be as above defined; nor can the same be registered as such print or label when it amounts to a lawful trademark.

To entitle the owner of any such print or label to register the same in the Patent Office, it is necessary that five copies of the same be filed, one of which copies shall be certified under the seal of the Commissioner of Patents, and returned to the registrant.

The certificate of such registration will continue in force for twenty-eight years.

The fee for registration of a print or label is six dollars, to be paid in the same manner as fees for patents.

The benefits of this act seem to be confined to citizens, or residents, of the United States.

FORM OF APPLICATION FOR REGISTRATION OF PRINTS AND LABELS.

[Making necessary changes to suit each case.]

[FOR AN INDIVIDUAL.]

To the Commissioner of Patents:

The undersigned, A. B., of the city of Brooklyn, county of Kings, and State of New York, and a citizen of the United States, [or resident therein, as the case may be,] hereby furnishes five copies of a label [or print, *as the case may be*,] to be used for ———, of which he is the sole proprietor.

The said label [or "print"] consists of the words and figures, as follows, to wit: [Description.]

And he hereby requests that the said print [or label] be registered in the Patent Office, in accordance with the act of Congress to that effect, approved June 18, 1874.

——— ———

Proprietor.

BROOKLYN, N. Y., *August* 1, 1874.

[FOR A CORPORATION.]

To the Commissioner of Patents:

The applicant, a corporation created by authority of the laws of the State of New York, [or other authority, as the case may be,] and doing business at ———, in said State, hereby furnishes five copies of a label, [or "print," *as the case may be*,] to be used for ———, of which it is the sole proprietor.

The said label consists of the words and figures as follows, to wit: ——— [Description.]

And it is hereby requested that the same label [or print] be registered in the Patent Office, in accordance with the act of Congress to that effect, approved June 18, 1874.

Witness the seal of said corporation at ——, ——, 1874.

[L. S.]

———— ————,

President, [or other officer.]

NOTE.

The registration of copyright matter is, by law, under the control of the Librarian of Congress, at Washington. At the time of the enactment of the trademark law of July 8, 1870, it was the custom of the Librarian of Congress to enter, under the provisions of the copyright law, labels and prints of commerce, many of which embraced legal trademarks. Notwithstanding the existence of a separate statute in 1870 for the registration of trademarks, the Librarian of Congress, in entering labels and prints of commerce, gave a semblance of protection to many trademarks, of which the labels and prints entered by him were the mere vehicles. To remedy this difficulty was the object of the amendment to the copyright law of June 18, 1874, referred to herein as the act for the registration of prints and labels. By this amendatory act the Librarian of Congress is restricted, in the registry of copyright matter, to pictorial illustrations or works connected with the fine arts, and is prohibited from registering labels or prints designed to be used for any other articles of manufacture, *i. e.*, articles of commerce. These are now registrable at the Patent Office; while matter properly coming within the definition of copyright subject matter, as contained in the act of June 18, 1874, is registrable at the office of the Librarian of Congress.*

*The act of Congress of June 18, 1874, is to be regarded as an amendment of the copyright laws. To acquire a copyright

TREATIES AND CONVENTIONS.

RUSSIA, 1868.

ARTICLE respecting trademarks, additional to the Treaty of Navigation and Commerce of December 6-18, 1832, between the United States of America, and His Majesty the Emperor of Russia, concluded at Washington, January 27, 1868; ratification advised by Senate, July 25, 1868; ratified by President, August 14, 1868; ratifications exchanged at St. Petersburgh, September 21, 1868; proclaimed, October 15, 1868.

The United States of America and His Majesty the Emperor of all the Russias, deeming it advisable that there should be an additional article to the treaty of commerce between them of the 6-18th December, 1832, have for this purpose named as their plenipotentiaries, the President of the United States, William H. Seward, Secretary of the State; and His Majesty the Emperor of all the Russias, the Privy Councillor, Edward de Stoeckl, accredited as his Envoy Extraordinary and Minister Plenipotentiary to the United States.

And the said Plenipotentiaries, after an examination of their respective full powers, which were found to be in good and due form, have agreed to and signed the following

ADDITIONAL ARTICLE.

The high contracting parties, desiring to secure complete and efficient protection to the manufacturing industry of their respective citizens and subjects, agree that any

in any print or label deposited in the Patent Office, it is essential that the title of the print or label be first deposited in pursuance of the provisions of the Revised Statutes, concerning copyrights. 1877, U. S. Circuit Court, Southern Dist. of N. Y., Marsh *v.* Warren, 4 *Am. Law Times R.* (*N. S.*) 126.

counterfeiting in one of the two countries, of the trade-marks affixed, in the other on merchandise, to show its origin and quality, shall be strictly prohibited and repressed, and shall give ground for an action of damages in favor of the injured party, to be prosecuted in the courts of the country in which the counterfeit shall be proven.

The trademarks in which the citizens or subjects of one of the two countries may wish to secure the right of property in the other, must be lodged exclusively, to wit: the marks of citizens of the United States in the Department of Manufactures and Inland Commerce at St. Petersburgh, and the marks of Russian subjects at the Patent Office at Washington.

This additional article shall be terminable by either party, pursuant to the twelfth article of the treaty to which it is an addition.* It shall be ratified by the President, by and with the advice and consent of the Senate of the United States, and by His Majesty the Emperor of all the Russias, and the respective ratifications of the same shall be exchanged at St. Petersburgh within nine months from the date hereof, or sooner if possible.

In faith whereof the respective Plenipotentiaries have signed the present additional article in duplicate, and affixed thereto the seal of their arms.

Done at Washington the twenty-seventh day of Janu-

* The twelfth article of the treaty of December 6-18, 1832, is as follows :

ARTICLE XII.

The present treaty, of which the effect shall extend in like manner to the Kingdom of Poland, so far as the same may be applicable thereto, still continue in force until the first day of January, in the year of our Lord one thousand eight hundred and thirty-nine, and if, one year before that day, one of the high contracting parties shall not have announced to the other, by an official notification, its intention to arrest the operation thereof, this treaty shall remain obligatory one year beyond that day, and so on until the expiration of the year which shall commence after the date of a similar notification.

ary, in the year of Grace one thousand eight hundred and sixty-eight.

WILLIAM H. SEWARD, [L. S.]
EDWARD DE STOECKL, [L. S.]

DECLARATION by and between the United States and the Empire of Russia, respecting previous treaty stipulations in regard to trademarks. Signed March 16-28, 1874.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a Declaration concerning trademarks, for the purpose of defining and rendering more efficacious the stipulations contained in the additional article of the 27th of January, 1868, to the treaty of Commerce and Navigation between the United States and the Emperor of Russia of the 18th of December, 1832, was concluded and signed at Saint Petersburg by their respective plenipotentiaries on the 16th-28th day of March, 1874, the original of which Declaration is word for word as follows:

DECLARATION.

The Government of the United States of America and the Government of His Majesty the Emperor of all the Russias having recognized the necessity of defining and rendering more efficacious the stipulations contained in the additional article of the 15th-27th January, 1868, to the Treaty of Commerce and Navigation, concluded between the United States of America and Russia, on the 6th-18th December, 1832, the undersigned, duly authorized to that effect, have agreed upon the following arrangements:

ARTICLE I.

With regard to marks of goods or of their packages, and also with regard to marks of manufacture and trade, the citizens of the United States of America shall enjoy in

Russia, and Russian subjects shall enjoy in the United States, the same protection as native citizens.

ARTICLE II.

The preceding article, which shall come immediately into operation, shall be considered as forming an integral part of the Treaty of the 6th-18th December, 1832, and shall have the same force and duration as the said Treaty.

In faith whereof the undersigned have drawn up and signed the present Declaration, and affixed thereto their seals.

Done in duplicate in the English and Russian languages at St. Petersburg this 16th-28th day of March, 1874.

[SEAL.] MARSHALL JEWELL.
[SEAL.] GORTCHACOW.

And whereas the said Declaration has been duly ratified, and the same, by virtue of a decree of His Imperial Majesty the Emperor of all the Russias, has gone into effect in the Empire of Russia:

Now, therefore, I, ULYSSES S. GRANT, President of the United States, have caused the said Declaration to be made public, to the end that the same, and every clause and part thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this twenty-fourth day of November, in the year of our Lord one thou-
[SEAL.] sand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-ninth.

U. S. GRANT.

By the President:

HAMILTON FISH,
Secretary of State.

BELGIUM, 1868.

ADDITIONAL ARTICLE to the treaty of commerce and navigation of July, 17, 1858, between the United States of America and His Majesty the King of the Belgians, relative to trademarks; concluded at Brussels December 20, 1868; ratification advised by Senate April 12, 1869; ratified by President April 18, 1869; ratifications exchanged at Brussels June 19, 1869; proclaimed July 30, 1869.

The President of the United States of America, and His Majesty the King of the Belgians, deeming it advisable that there should be an additional article to the treaty of commerce and navigation of the 17th July, 1858, have for this purpose named as their Plenipotentiaries, namely:

The President of the United States, Henry Shelton Sanford, a citizen of the United States, their Minister Resident near His Majesty the King of the Belgians; and His Majesty the King of the Belgians, the Sieur Jules Vander Stichelin, Grand Cross of the Order of the Dutch Lion, &c., &c., &c., his Minister of Foreign Affairs. Who, after having communicated to each other their full powers, have agreed to and signed the following

ADDITIONAL ARTICLE.

The high contracting parties, desiring to secure complete and efficient protection to the manufacturing industry of their respective citizens, agree that any counterfeiting in one of the two countries of the trademarks affixed in the other on merchandise, to show its origin and quality, shall be strictly prohibited, and shall give ground for an action of damages in favor of the injured party, to be prosecuted in the courts of the country in which the counterfeit shall be proven.

The trademarks in which the citizens of one of the two countries may wish to secure the right of property in the other, must be lodged, to wit: the marks of citizens of the United States at Brussels, in the Office of the Clerk of the

Tribunal of Commerce; and the marks of Belgian citizens at the Patent Office, in Washington.

It is understood that if a trademark has become public property in the country of its origin, it shall be equally free to all in the other country.

This additional article shall have the same duration as the before-mentioned treaty of the 17th July, 1858, to which it is an addition.* The ratifications thereof shall be exchanged in the delay of six months, or sooner if possible.

In faith whereof, the respective Plenipotentiaries have signed the same, and affixed thereto their seals.

Done at Brussels, in duplicate, the 20th of December, 1868.

H. S. SANFORD. [L. S.]

JULES VANDER STICHELIN. [L. S.]

BELGIUM, 1875.

TREATY between the United States of America and His Majesty the King of the Belgians, concerning commerce, navigation and trademarks; concluded March 8, 1875; ratification advised by Senate March 10, 1875; ratified by President March 16, 1875; ratified by King of the Belgians June 10, 1875; ratifications exchanged at Brussels June 11, 1875; proclaimed June 29, 1875.

The United States of America on the one part, and His Majesty the King of the Belgians on the other part, wish-

* The duration of the treaty of the 17th July, 1858, is fixed by the following article thereof, viz:

ARTICLE XVII.

The present treaty shall be in force during ten years from the date of the exchange of ratifications, (ratifications exchanged April 16, 1859,) and until the expiration of twelve months after either of the high contracting parties shall have announced to the other its intention to terminate the operation thereof, each party reserving to itself the right of making such declaration to the other at the end of the ten years above mentioned, and it is agreed that, after the expiration of the twelve months of prolongation, accorded on both sides, this treaty and all its stipulations shall cease to be in force.

ing to regulate in a formal manner their reciprocal relations of commerce and navigation, and further to strengthen, through the development of their interests, respectively, the bonds of friendship and good understanding so happily established between the governments and people of the two countries; and desiring with this view to conclude, by common agreement, a treaty establishing conditions equally advantageous to the commerce and navigation of both States, have to that effect appointed as their Plenipotentiaries, namely: The President of the United States, Hamilton Fish, Secretary of State of the United States, and His Majesty the King of the Belgians, Maurice Delfosse, Commander of the Order of Leopold, &c., &c., his Envoy Extraordinary and Minister Plenipotentiary in the United States: who, after having communicated to each other their full powers, ascertained to be in good and proper form, have agreed to and concluded the following articles:

. . . . . .

ARTICLE XV.

The high contracting parties, desiring to secure complete and efficient protection to the manufacturing industry of their respective citizens, agree that any counterfeiting in one of the two countries of the trademarks affixed in the other on merchandise, to show its origin and quality, shall be strictly prohibited, and shall give ground for an action of damages in favor of the injured party, to be prosecuted in the courts of the country in which the counterfeit shall be proven.

The trademarks in which the citizens of one of the two countries may wish to secure the right of property in the other, must be lodged, to wit: the marks of citizens of the United States, at Brussels, in the office of the clerk of the tribunal of commerce, and the marks of Belgian citizens, at the Patent Office in Washington.

It is understood that if a trademark has become public

property in the country of its origin, it shall be equally free to all in the other country.

ARTICLE XVI.

The present treaty shall be in force during ten years from the date of the exchange of the ratifications, and until the expiration of twelve months after either of the high contracting parties shall have announced to the other its intention to terminate the operation thereof; each party reserving to itself the right of making such declaration to the other at the end of the ten years above mentioned; and it is agreed that after the expiration of the twelve months of prolongation accorded on both sides, this treaty and all its stipulations shall cease to be in force.

ARTICLE XVII.

This treaty shall be ratified, and the ratifications shall be exchanged at Brussels within the term of nine months after its date, or sooner if possibe.

In faith whereof, the respective Plenipotentiaries have signed the present treaty in duplicate, and have affixed thereto their seals at Washington, the eighth day of March, eighteen hundred and seventy-five.

HAMILTON FISH. [SEAL.]

MAURICE DELFOSSE. [SEAL.]

FRANCE, 1869.

CONVENTION between the United States of America and His Majesty the Emperor of the French, concerning trademarks; concluded April 16, 1869; ratification advised by Senate April 19, 1869; ratified by President April 30, 1869; ratifications exchanged at Washington July 3, 1869; proclaimed July 6, 1869.

The United States of America and His Majesty the Emperor of the French, desiring to secure in their respective

territories a guarantee of property in trademarks, have resolved to conclude a special convention for this purpose, and have named as their Plenipotentiaries: the President of the United States, Hamilton Fish, Secretary of State, and His Majesty the Emperor of the French, J. Berthemy, Commander of the Imperial Order of the Legion of Honor, &c., &c., &c., accredited as his Envoy Extraordinary and Minister Plenipotentiary to the United States; and the said Plenipotentiaries, after an examination of their respective full powers, which were found to be in good and due form, have agreed to and signed the following articles:

ARTICLE I.

Every reproduction in one of the two countries of trademarks affixed in the other to certain merchandise to prove its origin and quality is forbidden, and shall give ground for an action of damages in favor of the injured party, to be prosecuted in the courts of the country in which the counterfeit shall be proven, just as if the plaintiff were a subject or citizen of that country.

The exclusive right to use a trademark for the benefit of citizens of the United States in France, or of French subjects in the territory of the United States, cannot exist for a longer period than that fixed by the law of the country for its own citizens.

If the trademark has become public property in the country of its origin, it shall be equally free to all in the other country.

ARTICLE II.

If the owners of trademarks, residing in either of the two countries, wish to secure their rights in the other country, they must deposite duplicate copies of those marks in the Patent Office at Washington, and in the clerk's office of the tribunal of commerce of the Seine, at Paris.

ARTICLE III.

The present arrangement shall take effect ninety days

after the exchange of ratifications by the two governments, and shall continue in force for ten years from this date.

In case neither of the two high contracting parties gives notice of its intention to discontinue this convention, twelve months before its expiration, it shall remain in force for one year from the time that either of the high contracting parties announces its discontinuance.

ARTICLE IV.

The ratifications of this present arrangement shall be exchanged at Washington within ten months, or sooner if possible.

In faith whereof, the respective Plenipotentiaries have signed the present convention in duplicate, and affixed thereto the seal of their arms.

Done at Washington, the sixteenth day of April, in the year of our Lord one thousand eight hundred and sixty-nine.

HAMILTON FISH. [SEAL.]
BERTHEMY. [SEAL.]

AUSTRIA, 1871.

CONVENTION between the United States of America and His Majesty the Emperor of Austria, relative to trademarks; concluded at Vienna November 25, 1871; ratification advised by Senate January 18, 1872; ratified by President January 27, 1872; ratifications exchanged at Vienna April 22, 1872; proclaimed June 1, 1872.

The United States of America and His Majesty the Emperor of Austria, King of Bohemia, &c., and Apostolic King of Hungary, desiring to secure in their respective territories a guarantee of property in trademarks, have resolved to conclude a special convention for this purpose, and have named as their Plenipotentiaries:—

The President of the United States of America, John Jay, their Envoy Extraordinary and Minister Plenipotentiary from the United States to His Imperial and Royal Apostolic Majesty; and His Majesty the Emperor of Austria and Apostolic King of Hungary, the Count Julius Andrássy of Csik Szent Király and Kraszna Horka, His Majesty's Privy Counsellor and Minister of the Imperial House and of Foreign Affairs, Grand Cross of the Order of St. Stephen, &c., &c., &c., who have agreed to sign the following articles:

ARTICLE I.

Every reproduction of trademarks which, in the countries or territories of the one of the contracting parties, are affixed to certain merchandise to prove its origin and quality, is forbidden in the countries or territories of the other of the contracting parties, and shall give to the injured party ground for such action or proceedings to prevent such reproduction, and to recover damages for the same, as may be authorized by the laws of the country in which the counterfeit is proven, just as if the plaintiff were a citizen of that country.

The exclusive right to use a trademark for the benefit of citizens of the United States in the Austro-Hungarian Empire, or of citizens of the Austro-Hungarian Monarchy in the territory of the United States, cannot exist for a longer period than that fixed by the law of the country for its own citizens. If the trademark has become public property in the country of its origin, it shall be equally free to all in the countries or territories of the other of the two contracting parties.

ARTICLE II.

If the owners of trademarks, residing in the countries or territories of the one of the contracting parties, wish to secure their rights in the countries or territories of the other of the contracting parties, they must deposit duplicate copies of those marks in the Patent Office at Wash-

ington, and in the Chambers of Commerce and Trade in Vienna and Pesth.

ARTICLE III.

The present arrangement shall take effect ninety days after the exchange of ratifications, and shall continue in force for ten years from this date.

In case neither of the high contracting parties gives notice of its intention to discontinue this convention twelve months before its expiration, it shall remain in force one year from the time that either of the high contracting parties announces its discontinuance.

ARTICLE IV.

The ratifications of this present convention shall be exchanged at Vienna within twelve months, or sooner if possible.

In faith whereof the respective Plenipotentiaries have signed the present convention as well in English as in German and Hungarian, and have affixed thereto their respective seals.

Done at Vienna the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and seventy-one, in the ninety-sixth year of the Independence of the United States of America, and in the twenty-third year of the reign of His Imperial and Royal Apostolic Majesty.

JOHN JAY. [L. S.]
ANDRÁSSY. [L. S.]

GERMAN EMPIRE, 1871.

CONVENTION between the United States of America and the German Empire, respecting Consuls and Trademarks; concluded at Berlin December 11, 1871; ratification advised by Senate January 18, 1872; ratified by President January 26, 1872; ratifications exchanged at Berlin April 29, 1872; proclaimed June 1, 1872.

The President of the United States of America and His

Majesty the Emperor of Germany, King of Prussia, in the name of the German Empire, led by the wish to define the rights, privileges and immunities, and duties of the respective Consular Agents, have agreed upon the conclusion of a Consular Convention, and for that purpose have appointed their Plenipotentiaries, namely :

The President of the United States of America, George Bancroft, Envoy Extraordinary and Minister Plenipotentiary from the said States, near His Majesty the Emperor of Germany ; His Majesty the Emperor of Germany, King of Prussia, Bernard König, His Privy Councillor of Legation ; who have agreed to and signed the following articles :

* * * * * * *

ARTICLE XVII.

With regard to the marks of labels of goods, or of their packages, and also with regard to patterns and marks of manufacture and trade, the citizens of Germany shall enjoy in the United States of America, and American citizens shall enjoy in Germany, the same protection as native citizens.

ARTICLE XVIII.

The present convention shall remain in force for the space of ten years, counting from the day of the exchange of the ratifications, which shall be exchanged at Berlin within the period of six months.

In case neither party gives notice, twelve months before the expiration of the said period of ten years, of its intention not to renew this convention, it shall remain in force for one year longer, and so on, from year to year, until the expiration of a year from the day on which one of the parties shall have given such notice.

In faith whereof the Plenipotentiaries have signed and sealed this Convention. Berlin, the 11th of December, 1871.

[L. S.] GEO. BANCROFT.
[L. S.] B. KOENIG.

ENGLAND.

We are informed that a treaty is being negotiated between England and the United States.

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