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THE

LAW OF TRADE MARKS

AND THEIR REGISTRATION,

AND MATTERS CONNECTED THEREWITH;

INCLUDING

A CHAPTER ON GOODWILL.

TOGETHER

With Appendices

CONTAINING

PRECEDENTS OF INJUNCTIONS, ETC.;

THE TRADE MARKS REGISTRATION ACTS, 1875-7,

AND THE RULES AND INSTRUCTIONS THEREUNDER;

THE MERCHANDISE MARKS ACT, 1862,

AND OTHER STATUTORY ENACTMENTS;

THE UNITED STATES STATUTE, 1870,

AND THE TREATY WITH THE UNITED STATES, 1877.

WITH A COPIOUS INDEX.

BY

LEWIS BOYD SEBASTIAN, B.C.L., M.A.,

LATE EXHIBITIONER OF EXETER COLLEGE, AND VINERIAN LAW SCHOLAR IN THE UNIVERSITY OF OXFORD, AND OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

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TO

THE RIGHT HON. SIR GEORGE JESSEL,

MASTER OF THE ROLLS,

THE

Following Work

IS,

BY PERMISSION,

MOST RESPECTFULLY DEDICATED.

PREFACE.

In this book an attempt is made to present a complete view of the Law of Trade Marks in this country. It is hoped that it may at least be found to be of some service to those who have to consider the numerous questions which are now constantly arising in connexion with that branch of Law.

Where practicable, the *ipsissima verba* of the various learned judges who decided the cases to which reference is made are given, as it is thought that their views are best expressed in the language they themselves advisedly employed. Where the same case, as frequently happens, is reported in several places, the version quoted is that which appears in the report of most authority. Two references are given for the same case only where the one report supplements the other. The cases cited are brought down to March, 1878, in order to effect which some cases have had to be quoted which are not as yet reported in the books; in such instances the quotations are usually made from the *Times* reports.

A considerable number of American cases have been cited, containing the decisions of acute and practised lawyers, delivered after full consideration of English as well as American authorities. Such decisions are, it is admitted, "intrinsically entitled to the highest respect" (*a*); and though they are, of course, not in

(*a*) Per Patteson, J., in *Beverley* v. *Lincoln Gas Light and Coke Co.*, 6 Ad. & E. 829–37; and see per V.-C. Bacon, in *Dawson* v. *Bank of Whitehaven*, L. R. 4 Ch. D. 639–48.

*

any way binding upon British Courts, it may reasonably be anticipated that English judges will in similar circumstances arrive at similar conclusions with the Courts of the United States. The American cases have generally been cited from the "Reports of Trade Mark Cases" (*a*), by Mr. ROWLAND COX, or, in the more recent instances, from the "American Reports" (*b*).

The Author's thanks are due to Mr. T. W. H. DAVIES, of the Trade Marks Registry Office, who most kindly gave his assistance in the revision of Appendix B, containing the recent Registration Acts, Rules, and Instructions.

In explanation of the considerable list of Addenda, and of the supernumerary pages in Appendix B, it may be mentioned that the book was in print before the end of November last, but has been kept back to await the re-issue, in an enlarged shape, of the Rules and Instructions, which was then in contemplation and has now been effected. The case of *Singer Manufacturing Co.* v. *Wilson*, in the House of Lords (p. xxxiv., *infrd*), demands special attention.

L. B. S.

2, NEW SQUARE, LINCOLN'S INN,
March 1*st*, 1878.

(*a*) Robert Clarke & Co., Cincinnati, 1871. (*b*) J. D. Parsons, Albany.

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ADDENDA ET CORRIGENDA.

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3, note (*b*), add "And a trade mark may belong to the exporter and not to the manufacturer, *Robinson* v. *Finlay*, W. N. 1877, p. 237."

8, ,, (*c*), for "notes (*e*) and (*f*)," read "notes (*c*) and (*f*)."

9, line 14, the ";" should be placed after "(*d*)."

10, the decision in *Singer Manufacturing Co.* v. *Wilson*, was reversed in the House of Lords. See *post*, p. xxxiv.

16, note (*e*), add "And an official stamp or brand can never become a private trade mark, *Chase* v. *Mayo*, 7 Lathrop, 343."

24, ,, (*c*), for "24 W. R. 819," read "L. R. 3 Ch. D. 659."

26, ,, (*a*), for "11 H. & C.," read "11 H. L. C."

34, ,, (*c*), add "And see *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298; *James* v. *James*, L. R. 13 Eq. 421; *Mitchell* v. *Condy*, 37 L. T. N. S. 268; *Condy* v. *Mitchell*, *ib.* 766; *Massam* v. *Thorley's Cattle Food Co.*, L. R. 6 Ch. D. 574; *Linoleum Manufacturing Co.* v. *Nairn*, W. N. 1878, p. 29; and *post*, pp. 64, 172."

35, ,, (*b*), add "Where a person who had used and registered the word 'Valvoline' in connexion with his trade mark on oil, sought to restrain the registration by another person of the word 'Valvoleum' in connexion with his totally different trade mark for oil, the Master of the Rolls refused the application on the ground that both words simply meant 'valve oil,' and that such a term could not be appropriated by any individual, and he instanced a case where Lord Romilly, M.R. had dismissed a suit of *Rowlands* v. *Bereidenbach*, in which Mr. Rowlands sought to establish a right to the word 'Macassarine.' *In re Horsburgh*, February 2nd, 1878. In *Linoleum Manufacturing Co.* v. *Nairn*, W. N. 1878, p. 29, the Plaintiffs had invented and patented a new kind of floor covering which they named 'Linoleum;' in an action by them, after the expiration of the patents, to restrain the use of the name by other persons, Fry, J., refused to prohibit the use of the appropriate name of the article, saying that 'by using the name "linoleum" during the time when no one else could make the article the Plaintiffs had not acquired an exclusive right to it.' In *Bulloch, Lade & Co.* v. *Gray*, 19 Journ. of Jurisp. 218, the Sheriff of Lanarkshire held that 'Loch Katrine Whiskey' only meant whiskey made with water from that lake."

38, ,, (*h*), the reference for "*Cheavin* v. *Walker*" should be "L. R. 5 Ch. D. 850."

39, ,, (*c*), for "L. R. 18 Ex.," read "L. R. 18 Eq."

42, ,, (*f*), add "In *Siegert* v. *Findlater*, W. N. 1878, p. 14, Fry, J., restrained the use by the Defendant of the term 'Angostura Bitters,' by which the Plaintiffs' goods were known; and the *fraudulent* use of the words 'St. James' cigarettes' has been restrained in America, *Kinney* v. *Basch*, 1 'Trade Marks,' 183."

46, ,, (*b*), add "In *Carver* v. *Bowker*, Nov. 10th, 1877, 1 'Trade Marks,' 252, the V.-C. of Lancaster held that the plaintiffs' right to certain initials was proved, but that a true trade mark could not consist of mere numerals. On the other hand, the Supreme Court of New York has restrained the *fraudulent* use of the symbol '½,' *Kinney* v. *Basch*, *ib.* 183."

49, ,, (*c*), add "No length of exclusive user of an official stamp by an official person, in his official capacity, can give him a private right therein, *Chase* v. *Mayo*, 7 Lathrop, 343."

59, line 8, for "omitting," read "varying."

59, note (*i*), add "And see *Mitchell* v. *Condy*, 37 L. T. N. S. 268; *Condy* v. *Mitchell*, *ib.* 766."

60, ,, (*d*), for "*Millbourn*," read "*Milbourn*." Add "And see *Mitchell* v. *Condy*, 37 L. T. N. S. 268; *Condy* v. *Mitchell*, *ib.* 766."

62, ,, (*b*), add "See *In Re Powell*, 1 'Trade Marks,' 237."

67, line 4 from bottom, for "manufacturer," read "manufacture."

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68, note (*c*), add "In *Metzler* v. *Wood*, Dec. 17th, 1877, V.-C. Malins held that the title and general appearance of the title page of 'Hemy's new and revised edition of Jousse's Royal Standard Pianoforte Tutor,' was calculated to deceive persons intending to purchase 'Hemy's Royal Modern Tutor for the Pianoforte,' and an injunction was granted."

73, „ (*d*), add "But see *Singer Manufacturing Co.* v. *Wilson*, in the House of Lords, p. xxxiv., *infrd.*

75, „ (*c*), add "*Mitchell* v. *Condy*, 37 L. T. N. S. 268; *Condy* v. *Mitchell*, *ib.* 766; *Wilson* v. *Maxfield*, L. J. Notes of Cases, 1875, p. 51."

78, „ (*k*), for "L. R. 1 h.," read "L. R. 1 Ch."

90, „ (*c*), add "And see *R.* v. *Foster*, 13 Cox, 393."

110, „ (*c*), add "Where an auctioneer, in contempt of an injunction, offered for sale 'Vanity Fair' cigarettes, supposing the notice of injunction served on him not to be properly authenticated, but no sale was effected, V.-C. Malins made no order for committal, on the Defendant apologizing, submitting to the injunction, and paying all the costs. *Marcovitch* v. *Bramble, Wilkins, & Co.*, Jan. 24th, 1878."

112, line 9 from bottom, for "were," read "was."

113, note (*a*), add "In *Robinson* v. *Finlay*, W. N. 1877 p. 237, it was held that, under the circumstances, a certain trade mark on cotton cloths belonged to the exporter and not to the manufacturer."

115, „ (*a*), add "And see *Twentsche Stoom Bleekery Goor* v. *Ellinger & Co.*, 26 W. R. 70."

124, „ (*d*), add "Thus in *Re Hyde & Co.*, W. N. 1878, p. 10, it was held that the words 'Bank of England' had long ceased to be a trade mark in respect of sealing-wax, by reason of the user for six years of those words on sealing-wax by persons other than the original inventors, without interference by the latter, and the registration of the lapsed trade mark was accordingly rescinded."

147, „ (*d*), add "*Twentsche Stoom Bleekery Goor* v. *Ellinger & Co.*, 26 W. R. 70."

150. It appears to be now unnecessary to prove actual fraud in cases of trade name: see *Singer Manufacturing Co.* v. *Wilson*, in the House of Lords, *post*, p. xxxiv.

153, note (*a*), add "And see *Mitchell* v. *Condy*, 37 L. T. N. S. 268; *Condy* v. *Mitchell*, *ib.* 766 (The Condy's Fluid Co.), and *Massam* v. *Thorley's Cattle Food Co.*, L. R. 6 Ch. D. 574 (Thorley's Cattle Food Co.), in both of which cases the injunction was refused."

153, „ (*f*), add "In *Milner* v. *Reed*, Feb. 3rd, 1870, V.-C. Wickens (when Vice-Chancellor of Lancaster) restrained the use of the name 'The Oldfield Lane Doctor.' See Bryce on Trade Marks, p. 90; In *Braham* v. *Beachim*, Fry, J., W. N., 1878, p. 43, the principal Plaintiff and her trustees were owners of all the collieries within the parish of Radstock, which they had formerly designated 'The Radstock Coal Works,' but they had since used the term 'Radstock Collieries,' coupled with the Plaintiff's name. The Defendants, who had collieries within the Radstock coal district, but not in the parish, and raised coal of the quality known as 'Radstock coal,' called themselves 'The Radstock Colliery Proprietors,' and were restrained by injunction." (See p. xxxiv. for form of injunction.)

155, „ (*d*), after *Dence* v. *Mason*, W. N. 1877, p. 23, add, "the injunction in this action was made perpetual by V.-C. Malins at the hearing, Feb. 12th, 1878."

160, „ (*b*), add, "But in *Charleson* v. *Campbell*, Court of Session Cases, 4th Ser. IV. 149, the Scotch Court held that the proprietor of an hotel called 'The Station Hotel' was not entitled to restrain the use by the proprietor of another hotel in the same neighbourhood from calling his 'The Royal Station Hotel,' considering that the term 'Station Hotel' was a mere descriptive appellation, in which there could be no monopoly, and that, in any case, the addition of the word 'Royal' would afford sufficient distinction."

161, note (*b*), add "And see *Heinrichs* v. *Berndes* (M. R.), W. N. 1878, p. 10; L. J. Notes of Cases, 1878, p. 11."

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166, „ (*e*), add "In *Reid* v. *Sibbald*, 18 Journ. of Jurisp. 392, the Sheriff of Linlithgowshire restrained a tradesman, named Sibbald, from sending threatening letters to his debtors, signed "Andrew Roberts," or "Roberts" with any other christian name, at the instance of a sheriff's officer named 'William Roberts,' who might be brought into discredit in the discharge of his duties."

172, „ (*d*), add "And see *Thorley's Cattle Food Co.* v. *Massam*, L. R. 6 Ch. D. 582."

173, „ (*a*), add "In *Dence* v. *Mason*, V.-C. M. Feb. 12th, 1878, the Defendant was restrained from styling himself the 'original inventor,' or 'original discoverer' of the Essence of Beef, the V.-C. holding that even if he had been the first to actually compound the article, which was not satisfactorily proved, he was not entitled to make such statements, inasmuch as he was in the employ of the Plaintiff's predecessor in business at the time when he said he made it for the first time."

177, „ (*a*), add "*Mitchell* v. *Condy*, 37 L. T. N. S. 268; *Condy* v. *Mitchell*, *ib.* 766."

180, „ (*c*), add "And as to the connexion between trade marks and goodwill, see *Dickson* v. *McMaster & Co.*, 18 Irish Jurist, 202.

181, „ (*c*), for "p. 266," read "p. 267c."

184, „ (*b*), add "See *Smith* v. *Smith*, 4 Wend. 468."

188, „ (*c*), add "*Mitchell* v. *Condy*, 37 L. T. N. S. 268; *Condy* v. *Mitchell*, *ib.* 766."

192, „ (*a*), add "*Lee* v. *Ehrhart*, 19 L. T. N. S. 637; *Smith* v. *Smith*, 4 Wend. 468; *Sander* v. *Hoffman*, 19 Sickels, 248."

192, „ (*d*), add "Compare *Lee* v. *Ehrhart*, 19 L. T. N. S. 637, where it was held that there was no breach."

192, „ (*e*), add "And see *Smith* v. *Smith*, 4 Wend. 468; *Sander* v. *Hoffman*, 19 Sickels, 248."

193, „ (*e*), add "Where one R. Brand, who had been induced to enter into partnership with F. Mason, in order that his name might be used so as to deceive the public by its similarity to the name of 'Brand & Co.' retired from the partnership and refused permission to F. Mason to continue the use of his name, it was held that the former partnership gave no right to its continued use. *Dence* v. *Mason*, V.-C. M. Feb. 12th, 1878. And see *Dickson* v. *McMaster & Co.*, 18 Irish Jurist, 202.—212.

195, „ (*a*), add "And see *Mitchell* v. *Condy*, 37 L. T. N. S. 268; *Condy* v. *Mitchell*, *ib.* 766."

195, „ (*d*), add *Dickson* v. *McMaster & Co*, 18 Irish Jurist, 202.

199, „ (*a*), add "The injunction was made perpetual at the hearing, V.-C. M. Feb. 12th, 1878."

216, „ (*b*), add "In *Re Hyde & Co.*, W. N. 1878, p. 10, on the motion of various firms aggrieved, the Master of the Rolls made an order rectifying the register by the removal therefrom of the words 'Bank of England,' which had been registered as a trade mark on sealing wax, but were in fact common to the trade."

217, „ (*c*), add "In *Re Farina*, 26 W. R. 261, V.-C. Hall refused to restrain the registration by one person of a coat of arms which formed an important part of the registered trade mark of another person, on the ground that the simple medallion could not be mistaken for the opponent's compound trade mark, and stated that in his opinion the question whether registration should be allowed or not ought to depend on this—whether the opponent would, independently of the Registration Acts, have been entitled to restrain the use by the applicant of the mark which he proposed to register. And see *Ex parte Orr Ewing & Co.*, 47 L. J. Ch. 180."

217, „ (*d*), add "The words 'calculated to deceive' in this part of § 6 refer to an element of deception inherent in the mark itself, without regard to any comparison with other marks, such as an improper use of the word 'patent,' so that a mark which is the first of a kind to be registered may yet contain words 'calculated to deceive' within this. *Per* Sir G. Jessel, M.R. In *Re Horsburgh*, Feb. 2nd, 1878."

232, at end of rule 29, add note (*b*). "In *In re Powell*, 1 'Trade Marks,' 237, two owners of the same mark were registered by order of the Court."

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235, note to rule 43, add "In *In re Salamon*, 1 'Trade Marks,' 135, where the question was one of title to a trade mark, and as to its user by the applicant, the Master of the Rolls directed an action to be brought to try the right, and said that each case should be mentioned to the Court for a direction; simple questions of law should be tried on special case; of fact, on motion; of directions as to carrying out the Act, by summons in chambers. Where the King of Saxony, as the registered proprietor of certain trade marks on porcelain, opposed the registration of certain marks by a person named Elb, V.-C. Hall directed the application on the part of the King to be made by way of motion, the applicant for registration to have liberty to move with notice that day week for a direction to have the matter brought on in some other way: *Ex parte the King of Saxony*, 1, 'Trade Marks,' 245. And see *Ex parte Orr Ewing & Co.*, 47 L. J. Ch. 180, and *In Re Farina*, 26 W. R. 261. So of an application to remove a mark from the register. *In Re Hyde & Co.*, W. N. 1878, p. 10. *In Re Horsburgh*, M. R. Feb. 2nd, 1878, came on as an adjourned summons; and so, too, *In Re Powell*, 1 'Trade Marks,' 237."

256, line 9 from bottom, for "1875-6," read "1875-7."

211. After form 22, add

22a. BRAHAM *v.* BEACHIM, Feb. 12th, 1878.

Name of Colliery.—Injunction until certain events.

Injunction restraining the Defendants, &c., "unless and until they shall acquire a colliery or coal mine within the parish of Radstock, in the county of Somerset, from trading under, or using the name or style of 'The Radstock Colliery Proprietors,' or any other name or style signifying or implying that the Defendants are the proprietors of any collierics or coal mines at Radstock. And an injunction restraining the Defendants, &c., until they shall have become authorized to sell or supply coal raised or gotten from a colliery or coal mine within the parish of Radstock, from using any name or style signifying or implying that they are selling or supplying, or are authorized to sell or supply, coal raised or gotten from any colliery or coal mine within the parish of Radstock, and from using any name or style of 'The Radstock Collieries,' or otherwise infringing the trade mark, or name, or style of 'The Radstock Collieries,' used or adopted by the Plaintiffs in respect of the business of their collieries and coal mines at Radstock aforesaid."—Fry, J.

Massam v. *Thorley's Cattle Food Co.* is now reported at			L. R. 6 Ch. D. 574.
Thorley's Cattle Food Co. v. *Massam*	"	"	L. R. 6 Ch. D. 582.
Moët v. *Pickering*	"	"	L. R. 6 Ch. D. 770.
In re Mitchell	"	"	L. R. 7 Ch. D. 36.
Ex parte Orr Ewing & Co	"	"	47 L. J. Ch. 180.
In re Walkden Aërated Waters Co.	"	"	1 "Trade Marks," 39.

In *Singer Manufacturing Co.* v. *Wilson*, on appeal, Dec. 13th, 1877, the House of Lords reversed the decision in the courts below (by which the Plaintiffs had been held to fail on their own evidence), without prejudice to any question in the case, and remitted the case to the Chancery Division, with liberty to the Defendants to apply for leave to adduce *viva voce* evidence in reply to the Plaintiffs' evidence, and liberty to the Plaintiffs and Defendants to apply to cross-examine, and directed the Court to dispose of the case upon the whole of the evidence; thus holding, in effect, that where a name is used and known as indicating a particular maker's goods, there may be infringement without actual fraudulent intention on the part of the infringer, even though the latter has not placed the name upon his goods, if he has otherwise so acted as to produce deception; that in the case in question the Plaintiffs had shown a *primâ facie* case, but that, inasmuch as the Plaintiffs' evidence only was before their Lordships, they were not in a position to decide finally whether the name "Singer" was really indicative of the Plaintiffs' manufacture or of a principle of construction, or whether the Defendants' conduct was in fact calculated to deceive.

The decision in *Condy* v. *Mitchell*, the cross suit to *Mitchell* v. *Condy*, 37 L. T. N. S. 268, has been affirmed on appeal, *ib.* 766.

THE LAW OF TRADE MARKS.

CHAPTER I.

GENERAL INTRODUCTION.

General principle of trade-mark law.

THE general principle upon which the Courts exercise jurisdiction in the case of trade marks is, that "a man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person" (*a*). "Supposing the rival trader to have obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods, or from the higher price which the public are willing to give for them, rather than for the goods of other manufacturers whose reputation is not so high. Where, therefore, a manufacturer has been in the habit of stamping the goods which he has manufactured with a particular mark or brand, so that thereby persons purchasing goods of that description know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp. By doing so he would be substantially representing the goods to be of the manufacture of the manufacturers who had previously adopted the stamp or mark in question, and so would or might be

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

depriving him of the profit he might have made by the sale of the goods which, *ex hypothesi*, the purchaser intended to buy. The law considers this to be wrong towards the person whose mark is thus assumed, for which wrong he has a right of action, or, which is the more effectual remedy, a right to restrain by injunction the wrongful use of the mark thus pirated" (*a*).

Function of trade mark.

The function of the trade mark is to give the purchaser a satisfactory assurance of the make and quality of the article he is buying. Thus, it was said by Lord Cottenham, C. (*b*), "take a piece of steel; the mark of the manufacturer from whom it comes is the only indication to the eye of the customer of the quality of the article; so it is of blacking, or any other article of manufacture, the particular quality of which is not discernible by the eye." It is on the faith of the mark being genuine, and representing a quality equal to that which he has previously found a similar mark to indicate, that the purchaser makes his purchase.

Mere statement of quality no trade mark.

Yet, while the object of the trade mark is to indicate quality, a mere English adjective, or word in common use (*c*), which indicates quality and nothing more, not serving to connect the goods with any particular manufacturer or seller, cannot be appropriated as a trade mark, for no person can be permitted to exclude others from the use of words common to all, even in their application to goods, and without such exclusive appropriation, the mark is a mere statement, offering no guarantee, and making no one responsible for its correctness.

Exception.

Marks, however, which do serve to indicate the production of a certain manufacturer, though at the same time subject to variation for the purpose of denoting different qualities, are entitled to protection (*d*).

(*a*) Per Lord Cranworth, C., in *Seixo* v *Provezende*, L. R. 1 Ch. 192.

(*b*) In *Spottiswoode* v. *Clarke*, 2 Ph. 154.

(*c*) *Braham* v. *Bustard*, 1 H. & M. 447; *Raggett* v. *Findlater*, L. R. 17 Eq. 29. See *In re Barrows*, L. R. 5 Ch. D. 353.

(*d*) *Hirst* v. *Denham*, L. R. 14 Eq. 542. See *Stokes* v. *Landgraff*, 17 Barb. 608; R. Cox, 137; *Gillott* v. *Kettle*, 3 Duer, 624; R. Cox, 148; *Gillott* v. *Esterbrook*, 47 Barb. 455; R. Cox, 340; 3 Sickels, 374.

Trade mark not always indicative of actual manufacturer.

The use of the trade mark is not in all cases to designate the maker of the substance to which it is attached, though that is usually so; it may indicate some other person who has expended labour on the article, so that, as finished, it owes some portion of its value to him. Thus, in a case in the Supreme Court of New York (*a*) it was held that, where one person manufactured cotton cloths, and another printed them, the mark was indicative of the printer and not of the original manufacturer.

May be indicative of selector.

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

May indicate natural products.

To go farther, it is not necessary that the goods to which the mark is affixed should be manufactured goods at all; it is sufficient if the vendors, whose property the trade mark is, have alone the opportunity of procuring the article in question, so that the trade mark indicates accurately the source from which the article is derived. This is particularly the case with mineral waters and similar productions (*c*). A mere name, however, for a natural product which is available by all the world, cannot be exclusively appropriated by an individual, who possesses no exclusive access to its source (*d*).

Advantages of use of trade marks.

The protection of trade marks is beneficial to the public, since it enables them to buy, with confidence that they are getting what they require; at the same time it is

(*a*) *Amoskeag Manufacturing Co.* v. *Garner*, 55 Barb. 151; R. Cox, 541.

(*b*) *Hirsch* v. *Jonas*, L. R. 3 Ch. D. 584.

(*c*) *Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 242; *Apollinaris Co.* v. *Edwards*, Seton, 4th ed. 237 (Apollinaris Water); *Radde* v. *Norman*, L. R. 14 Eq. 348 (Leopoldshall Kainit); *Congress and Empire Spring Co.* v. *High Rock Congress Spring Co.*, 57 Barb. 526; R. Cox, 599 (Congress Spring Water).

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

beneficial to the manufacturer, since it affords him the means of securing the benefit of the custom which he deserves and which is intended for him. So advantageous did the adoption of a trade mark speedily prove to be that, in 1742, Lord Hardwicke, C., said, that "every particular trader had some particular mark or stamp" (*a*).

Southern v. *Howe.*

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

Blanchard v. *Hill.*

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

Singleton v. *Bolton.*

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

Sykes v. *Sykes.*

In 1824, it was for the first time perceived that goods sold with a pirated mark attached, though they might not

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

(*b*) *Southern* v. *Howe*, Popl. 141; 3 Cro. 471; 2 Rolle, 28.

(*c*) 2 Atk. 484.

(*d*) *Ubi supra.*

(*e*) 3 Doug. 293.

(*f*) See *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; 33 L. J. Ch. 199; 11 H. L. C. 523, and other cases.

deceive an immediate purchaser, yet might deceive an ultimate purchaser, who might have no notice of the fraud (*a*).

Requisites to entitle to damages at Common Law.

This case marks the last stage of development in the law of trade marks as recognised at Common Law (*b*); and the requisites necessary to entitle a plaintiff to recover damages are, in accordance with the judgment of Sir T. Wilde, C. J., in *Rodgers* v. *Nowill* (*c*), that he shall have been accustomed to use a certain mark upon goods of his manufacture to denote that that is so, that that mark is known in the trade (*d*), and that the defendant has imitated the mark and sold goods bearing it, as and for the plaintiff's goods, with intent to defraud (*e*).

Equity—*Millington* v. *Fox*.

In Equity, the protection to the manufacturer and the public was carried a stage farther in 1833 by the decision of Lord Cottenham, in *Millington* v. *Fox* (*f*), since which time it has not been necessary to prove an actual fraudulent intention, the remedy being obtainable if the defendant's conduct has been such as to produce the effects of fraud, though he may, in fact, have acted in perfect innocence.

Limits to Court's interposition.

It is, however, "no part of the duty of the Court to enforce the observance of the dictates of morality" (*g*), and, therefore, if a defendant "has an abstract right to do what he has done, the Court must permit it, however opposed to one's moral sense" (*h*). The Court will not interfere,

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

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

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

(*d*) Registration, provided the connexion with the goodwill of the business is observed, is now equivalent to public use of a mark: Trade Marks Act, 1875, § 2.

(*e*) See, however, the Judicature Act of 1873, § 25, by which the rules of Equity are to prevail.

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

(*g*) Per Sir W. P. Wood, V.-C., in *Batty* v. *Hill*, 1 H. & M. 264.

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

simply on the ground that there is a misrepresentation, unless some right belonging to the plaintiff has been interfered with (*a*).

Acquisition of trade marks.

The mode of acquiring a right to a trade mark is now regulated by the Trade Marks Registration Acts, 1875-7 (*b*). The trade mark must accord with the definition contained in section 10 of the Act of 1875 (*c*), and not be obnoxious to the restrictions of section 6, and it must be registered, or, if it has been used before the passing of the Act, application must have been made for registration, and have been refused, in which case a certificate of refusal can be obtained from the registrar (*d*), and the unsuccessful applicant will retain whatever rights may have been his before the Act. For a mark to have been used before the Act, it is sufficient for a vendible article to have been actually in the market, bearing the mark in question; it is not necessary for this to have been the case for any length of time (*e*).

Appropriation to special classes of goods.

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

Assignment and transmission.

A trade mark is assignable and transmissible, but only in connexion with the goodwill of the business concerned

(*a*) See *Batty* v. *Hill*, *ubi suprà*.

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

(*c*) Which, in the case of new marks, excludes mere words or combinations of letters and numerals: *Ex parte Stephens*, L. R. 3 Ch. D. 659.

(*d*) Section 2 of the Amendment Act.

(*e*) Per Lord Westbury, C., in *McAndrew* v. *Barrett*, 33 L. J. Ch. 561.

(*f*) Trade Marks Act, 1875, § 2.

(*g*) *Hall* v. *Barrows*, 33 L. J. Ch. 204; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518.

with the goods or classes of goods to which it relates (*a*). A trade mark cannot exist in gross and unattached to specific articles (*b*), for, if that could be so, the mark might come to be an instrument of deception, instead of a guarantee of genuineness (*c*). In an assignment of the business and goodwill, the trade mark passes as a matter of course (*d*), or, if specially excepted, must cease to be available by the vendor. On the death of a registered proprietor, his legal personal representative acquires the title to the mark (*e*). Subsequent registered proprietors stand in the same position, under § 4 of the Trade Marks Act of 1875, as if their title were a continuation of the title of the first registered proprietor (*f*).

Bankruptcy.

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

Trade mark lost.

A trade mark may be lost, as by its coming to be commonly applied to a special article, in which case it becomes *publici juris*; thus "Worcestershire sauce," which might at one time have been protected, could no longer be so when it had come into common use (*h*). So, too, if a person abandons a suit which he has undertaken to restrain infringement, he abandons his exclusive right (*i*). No trade mark, however, first used since the passing of the Act of 1875, can consist of a mere word (*k*), nor, there-

(*a*) Trade Marks Act, 1875, § 2; and see *Hall* v. *Barrows*, 33 L. J. Ch. 204; and *Dixon Crucible Co.* v. *Guggenheim*, 2 Brewster, 321; R. Cox, 559.

(*b*) *McAndrew* v. *Barrett*, 33 L. J. Ch. 561; *Leather Cloth Co.* v *American Leather Cloth Co.*, *ib.* 199; 11 H. L. C. 523; *Dixon* v. *Guggenheim*, *ubi supra*.

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

(*d*) *Shipwright* v. *Clements*, 19 W. R. 599.

(*e*) Rule 25.

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

(*g*) *Ex parte Young*; *Re Lemon Hart & Son*, per Mr. Registrar Spring-Rice, sitting as C. J., Feb. 3, 1877; and see *Kelly* v. *Hutton*, L. R. 3 Ch. 703; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; and cases at p. 59, note (*e*).

(*h*) *Lea* v. *Millar*, M. R. July 26, 1876, Seton, 4th ed. 242; and see per Sir G. Mellish, L. J., in *Ford* v. *Foster*, L. R. 7 Ch. 611.

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

(*k*) *Ex parte Stephens*, L. R. 3 Ch. D. 659.

fore, ever become a mere appellation. A registered trade mark may be removed from the register, after five years from registration, if the registered proprietor is not carrying on any business concerned with the goods in respect of which the mark was registered (*a*).

Infringement.

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

Remedies for infringement.

Infringement is criminally punishable under an indictment for obtaining money by false pretences (*f*), or in accordance with the special provisions of the Merchandise

(*a*) Rule 34.

(*b*) See cases collected at p. 103, note (*b*).

(*c*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; and cases at p. 96, notes (*e*) and (*f*).

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

(*e*) *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434—47.

(*f*) See Ch. 5.

Marks Act, 1862 (*a*), expressly enacted to prevent such practices. The Common Law remedy is by an action on the case for damages caused by the offender's fraud (*b*). In Equity, the remedy is by injunction, together with an account, or damages, if preferred. The greater suitability of this form of remedy has occasioned the adjudication in Chancery of the great majority of trade-mark cases, and the carrying into operation of the Trade Marks Registration Acts is now further entrusted to the Chancery Division (*c*).

Fraudulent intention.

At Common Law, at all events until the Judicature Acts, it was necessary to prove knowledge of the plaintiff's rights and intentional deception on the part of the defendant (*d*) to obtain an injunction in Chancery; this has not been required since *Millington* v. *Fox* (*e*), in 1833. It may, however, be material with reference to the extent of the relief to be granted, since a plaintiff is only entitled to an account in respect of such user of his trade mark by the defendant as has been subsequent to the latter becoming aware of the prior ownership, or at least of the prior existence as a trade mark of the mark used by him (*f*).

Plaintiff disentitled to relief.

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

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

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

(*c*) Rule 42.

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

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

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

(*g*) See *Pidding* v. *How*, 8 Sim. 477; *Perry* v. *Truefitt*, 6 Beav. 66; and other cases at p. 127.

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

When not disentitled.

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

Unauthorized use of word "patent," &c.

Distinction between trade mark and patent.

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

As a trade mark is not the same thing as a patent, so it

(*a*) *Ford* v. *Foster*, *ubi suprà*.

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

(*c*) This is quite clear in America as well as in this country. See *Thomson* v. *Winchester*, 19 Pick. 214; R. Cox, 7; *Coffeen* v. *Brunton*, 4 McLean, 516; R. Cox, 82; *Davis* v. *Kendall*, 2 R. I. 566; R. Cox, 112; *Comstock* v. *White*, 18 How. Pr. R. 421; R. Cox, 232; *Phalon* v. *Wright*, 5 Phila. 464; R. Cox, 307; *Falkinburg* v. *Lucy*, 35 Cal. 52; R. Cox, 448.

(*d*) *Cheavin* v. *Walker*, L. R. 5 Ch. D. 850—63.

(*e*) See per Sir G. Mellish, L J., in *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434—56.

is not the same as a copyright (*a*). A copyright, like a patent, relates to the substance of an article, but differs in that it has reference to a literary instead of a material production. A trade mark does not protect the substance of the article to which it is attached from being imitated, but it identifies an article and indicates the source to which that article is to be attributed. Trade mark not being copyright, registration of a trade mark, or, what comes to be much the same thing, a title of a book or paper, under the Copyright Acts, is unnecessary and useless (*b*).

Trade mark distinguished from copyright.

Since trade marks are recognised throughout the world, and not merely in the manufacturer's own country, as indicative of his goods, so that the subjects of any country are liable to be defrauded by goods bearing an imitation of a foreign trade mark, and any manufacturer is liable to suffer by the forgery of his marks abroad, the right of property in a trade mark is not limited by territorial bounds (*c*), and aliens' marks are protected in the English Court in precisely the same manner as if they belonged to British subjects (*d*). The same is the case in the United States (*e*).

Trade marks of aliens protected.

No conflict of laws has as yet arisen in the English Courts with respect to trade marks, though on two occasions such appeared likely to be the case. In *Farina* v. *Cathery* (*f*) the question was raised whether a Prussian manufacturer could be punished in this country for using a trade mark which he was entitled to use under Prussian law. It was held, however, that the mark was not identical with that to which a right had been acquired in Prussia.

Conflict of laws.

(*a*) *Farina* v. *Silverlock*, 6 De G. M. & G. 214; *Collins Co.* v. *Cowen*, 3 K. & J. 428; *Correspondent Newspaper Co.* v. *Saunders*, 11 Jur. N. S. 540; *Kelly* v. *Hutton*, L. R. 3 Ch. 708; *Taylor* v. *Carpenter*, 11 Paige, 292; 2 Sandf. 603; R. Cox, 45; *Wolfe* v. *Barnett*, 24 La. Ann. 97; 13 Amer. Rep. 111.

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

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

(*d*) *Collins Co.* v. *Cowen*, 3 K. & J. 428; and cases at p. 48, note (*a*).

(*e*) *Taylor* v. *Carpenter*, 3 Story, 458; R. Cox, 14; and cases at p. 48, note (*a*).

(*f*) L. J. Notes of Cases, 1867, p. 134.

In *Compagnie Laferme* v. *Hendrickx* (*a*) there was a question whether a German manufacturer could acquire a right in England to the exclusive use of a trade mark consisting of the word "Laferme," a mere word not being allowed in Germany to constitute a trade mark; but as the plaintiff failed to satisfy the Court that he had been the first to use the word in Germany, no decision was given on the point.

Cases analogous to trade-mark cases.

Besides cases of infringement of trade marks proper, there are some other classes of cases nearly akin to the former, but differing from them in some important particulars, which yet require notice in connexion with the subject of trade marks, as where there is an unfair competition in trade contrived, not by imitation of trade marks, but by other forms of representation that one man's goods are another's. In such cases there is no room, as in trade-mark cases proper, for punishable, though innocent, infringement, there must be actual, wilful fraud, without which being proved a plaintiff must fail (*b*).

Trade names.

In imitations of trade names, again, used as such and not as trade marks on goods, there is a difference from trade-mark cases proper; there is a false representation, but it is a representation, not that certain goods are certain other goods, but that a certain establishment is a certain other establishment, the object being that the one establishment should obtain custom intended for the other. Such cases are not cases of trade mark, not being concerned with marks placed on vendible articles in the market (*c*), but still the Court has to proceed on much the same lines.

Goodwill.

All such cases, whether of trade mark, or trade name, or other unfair use of another's reputation, are concerned with an injurious attack upon the goodwill of a rival business; customers are diverted from one trader to another, and

(*a*) M. R., July 20, 1876.
(*b*) *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434.
(*c*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.

orders intended for one find their way to the other. Trade marks are really a branch of the goodwill of the business with which they are connected, representing it in the market, while the trade name over the shop represents it to the passer-by. It is by the devolution of the goodwill that that of the trade marks is regulated (*a*), they are in fact included in, and valued as part of, the goodwill (*b*); severed from it they cannot exist.

(*a*) § 2 of Trade Marks Act, 1875; and see Rule 27 and Forms E & F in the 3rd Schedule to the Rules.

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

CHAPTER II.

WHAT IS A TRADE MARK?

What is a trade mark?

THE first point which has to be considered in regard to the law of trade marks is, "What is a trade mark?" with what class of objects is this branch of law concerned? On the answer to this question must necessarily depend the principles to be applied in any given case, the most important point perhaps consisting in this, that in a case of alleged infringement of a true trade mark the plaintiff "has nothing more to do than to show that the trade mark has been taken" (*a*), while in a case of false representation, which does not amount to the infringement of a trade mark proper, "there, as in every other case of fraud—for it must be fraud—the case must be proved" (*b*).

A true trade mark must be affixed to the article.

The most important criterion by which a case of trade mark may be distinguished from a case of false representation not amounting to an infringement of trade mark, was thus described by Sir G. Jessel, M. R. (*c*): "The classes which have come before the Courts may, I think, be conveniently divided into two classes. The first class, which is the most numerous, consists of cases where the goods manufactured are distinguished by some description or device in some way or other affixed to the article sold. It may be description—that is, it may consist of a name or names or a lengthy description consisting of names

(*a*) Per Sir G. Jessel, M. R., in *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434—442.

(*b*) *Ib.* 444.

(*c*) *Ib.* 440.

with superadded words and that description may be either affixed to, or impressed upon, the goods themselves by means of a stamp or an adhesive label, or it may be made to accompany the goods by being impressed or made to adhere to an envelope or case containing the goods.

"An illustration of the first class would be the common trade mark, which is either the name or the image of some known or unknown thing, actually impressed upon, or worked into, the material, or made to adhere to the surface of the material, or it may be not what is commonly known as a trade mark, a distinguishing mark which, perhaps, to a legal mind would be a trade mark, but some form of the material itself." His Lordship then instanced a case recently before him in which the trade mark consisted of certain lines woven into the fringe of a certain make of cloth and continued—

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

As to the second class, his lordship said that "they are always cases of fraud. They are cases where the defendant, without putting any trade mark at all on his goods, or putting a trade mark which is admittedly different in substance from the trade mark, if any, of the plaintiff on

the goods, has represented the goods as being goods manufactured by the plaintiff. Here, again, the Court has to try the question of representation. What the defendant has said or has done must amount to a representation that the goods to be sold are the goods of the plaintiff, or that they are manufactured by the plaintiff. What amount of representation will be sufficient for that purpose must again depend, of course, on the facts of each particular case."

Singer v. *Wilson.*

In the case in question the trade mark actually affixed to their goods by the plaintiffs had not been copied, no positive fraud was proved, and the bill was accordingly dismissed with costs. The Court of Appeal affirmed the decision, and endorsed the distinction drawn by the Master of the Rolls, Sir W. M. James, L. J., remarking that in a case not purely and simply of trade mark "actual fraud must be proved" (*a*).

Registration equivalent to public use.

For a trade mark to be protected, it must therefore not only be applicable, but be actually applied to a "vendible article" (*b*) in the market; the registration, however, of a trade mark under the Acts of 1875–77 (*c*) is equivalent to public use of the same (*d*).

Not every mark applied can be a trade mark.

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

Definition of trade mark in

For the purposes of the Merchandise Marks Act, 1862 (*f*),

(*a*) L. R. 2 Ch. D. 452.

(*b*) See per Lord Westbury, C., in *McAndrew* v. *Bassett*, 33 L. J. Ch. 561-566.

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

(*d*) § 2 of Act of 1875.

(*e*) Cf. *Raggett* v. *Findlater* L. R. 17 Eq. 29; *Braham* v. *Bustard*, 1 H. & M. 447. As to trade marks composed of an essential particular with an addition varied to indicate different qualities, and how such marks should be registered, see *In re Barrows*, L. R. 5 Ch. D. 353.

(*f*) 25 & 26 Vict. c. 88, § 1.

a very wide definition was adopted for the word "trade mark," a definition too little precise to be of much practical use outside of that Act.

Merchandise Marks Act, 1862

The Trade Marks Registration Act of 1875 (*a*), however, contains a definition, which is not only valuable in itself, but is of great practical importance, qualifying, as it does, for registration and the accompanying advantages, all marks which satisfy its requirements.

Definition in Trade Marks Registration Act, 1875.

The definition in question is as follows :

"For the purposes of this Act a trade mark consists of one or more of the following essential particulars; that is to say—

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

A written signature or copy of a written signature of an individual or firm; or

A distinctive device, mark, heading, label, or ticket (*b*) ;

And there may be added to any one or more of the said particulars any letters, words, or figures (*c*), or combination of letters, words, or figures ; also

Any special and distinctive word or words, or combination of figures or letters used as a trade mark before the passing of this Act may be registered as such under this Act."

Effect of this definition.

The effect of this definition is to greatly restrict the variety of marks now capable of adoption for the first time by a manufacturer, for he will be unable to register or obtain protection under the Act for a new mark which does not comply with this definition by containing some one of the three first mentioned essential particulars, although

(*a*) § 10.

(*b*) This does not include a mere word or combination of letters: *Ex parte Stephens*, L. R. 3 Ch. D. 659.

(*c*) "Figures" means "numerals:" *Ex parte Stephens, ubi suprà.*

previously to the Act it would have been perfectly good. However, a manufacturer is entitled under § 10 to register any distinctive mark used as such *before* the passing of the Act (*a*), so obtaining for it the benefits of the Act, or, in case of registration being refused, to demand a certificate of such refusal (*b*), the possession of which will place him in a position to exercise whatever rights he may have had before and independently of the Acts.

Its advantages.

But while valid existing trade marks are properly preserved, the effect of this definition in the future will be beneficial, since all new trade marks will necessarily possess distinctive features, and, in particular, the public will be free to apply to goods made after an unpatented model their appropriate name (*c*), though given them by the first inventor, and by which not the manufacturer, but the composition or principle has become known (*d*).

First class of trade marks.—A name.

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

How names differ from other trade marks.

There is between a name of an individual or firm used as a trade mark, and a fancy name or arbitrary symbol used for the same purpose, a broad distinction, which was early perceived, and which caused some difficulty in the universal acceptance of a name as an efficacious trade mark. This difference is that a name is in its very nature

(*a*) *In re Mitchell*, V.-C. Hall decided (August 2, 1877) that a single letter could not be registered as a trade mark on pens, though long used as such, the wording of the Act being opposed to registration of a single letter not in combination.

(*b*) See the Amendment Act, 39 & 40 Vict. c. 33.

(*c*) In *Ex parte Stephens*, L. R. 3 Ch. D. 659, it was decided by the Master of the Rolls that a mere word or combination of letters was not within the Act.

(*d*) Cf. *Browne* v. *Freeman*, 12 W. R. 305 (Chlorodyne); *Lazenby* v. *Lazenby*, Seton, 4th ed. 237 (Harvey's Sauce); *Wheeler & Wilson* v. *Shakespeare*, 39 L. J. Ch. 36 (Wheeler and Wilson Sewing Machines); *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434 (Singer Sewing Machines).

generic, and is properly applied to designate, not one individual in the world, but, it may be, many thousands, to all of whom it is equally appropriate. The addition of the Christian to the surname does, indeed, diminish the number of persons to whom the appellation belongs; but the Christian name is commonly abbreviated to an initial letter, and, in any case, the surname is the important part of the name, beyond which many persons do not care to investigate.

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

The impossibility of a single manufacturer being allowed to arrogate to himself the exclusive use of a name which he shares in common with many other persons is apparent; and from this circumstance the rule was deduced that, while, as against persons bearing a different name, a manufacturer's right in his name trade mark is absolute and exclusive, as against persons bearing the same name no such exclusive right can be set up (*a*). This rule must, however, be qualified by the statement that where a person uses his own name for the purpose of fraud, and satisfactory evidence of fraudulent intention can be produced, such unfair conduct will be restrained, even though the free use of the man's own name may be thereby hindered (*b*). And the Criminal Law also admits of the punishment of such fraudulent user of a man's own name (*c*).

Holloway v. *Holloway*.

In *Holloway* v. *Holloway* (*d*) the defendant, Henry Holloway, sold pills and ointment in packets and pots similar to those in which his brother, the plaintiff, Thos. Holloway, sold his, and the defendant also affixed to his packets and pots similar labels and wrappers, but with

(*a*) *Burgess* v. *Burgess*, 3 De G. M. & G. 89, and *infra*, p. 20; *Faber* v. *Faber*, 49 Barb. 357; R. Cox, 401; *Meneely* v. *Meneely*, 17 Sickels, 427. See *Howe* v. *Howe Machine Co.*, 50 Barb. 236; R. Cox, 421.

(*b*) *Holloway* v. *Holloway*, 13 Beav. 209, and *infra*; *Rodgers* v. *Nowill*, 6 Hare, 325; 5 C. B. 109; *Taylor* v. *Taylor*, 23 L. J. Ch. 255; *James* v. *James*, L. R. 13 Eq. 421; *Fullwood* v. *Fullwood*, W. N. 1873, p. 93-185; *Gillis* v. *Hall*, R. Cox, 596; *Stonebreaker* v. *Stonebreaker*, 33 Maryland, 252.

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

(*d*) 13 Beav. 209.

"H. Holloway," instead of simply "Holloway." Thomas Holloway having filed a bill for an injunction, Lord Langdale, M.R., granted the injunction, saying, on the evidence, that it was as clear and as plainly avowed a fraud as he ever knew. He, however, expressly stated that "the defendant's name being Holloway, he had a right to constitute himself a vendor of Holloway's pills and ointment, and that he, the M.R., "did not intend to say anything tending to abridge such right;" the defendant had, nevertheless, no right to do so with such additions to his own name as to deceive the public and make them believe that he was selling the plaintiff's pills and ointment.

Burgess v. *Burgess.*

The case of *Burgess* v. *Burgess* (*a*) was somewhat similar. There the plaintiff's father, to whose business the plaintiff had succeeded, had invented "Burgess' Essence of Anchovies." He employed his two sons as his assistants, and the business was conducted by him and them at 107, Strand. After a time one of the sons, W. H. Burgess, took a house in King William Street, and setting up for himself, put on his shop front, "W. H. Burgess, late of 107, Strand." He also headed his labels, "36, King William Street, City, London (Royal Arms), late of 107, Strand, Burgess' Essence of Anchovies;" plaintiff's labels being headed, "107 (Royal Arms), Strand, corner of the Savoy Steps, John Burgess and Son, Original and superior Essence of Anchovies." Sir R. T. Kindersley, V.-C., granted an injunction as to "late of 107, Strand," and the continuance on the sides of the defendant's shop door of a plate with the words "Burgess' Fish Sauce Warehouse, late of 107, Strand;" but the part of the motion which referred to the use of the words "Burgess' Essence of Anchovies" being refused, the plaintiff appealed, and the Lords Justices then distinctly refused to deny a man the use of his own name. Sir J. L. Knight-Bruce, L.J., said, "all the Queen's subjects have a right to sell their articles in their own names,

(*a*) 3 De G. M. & G. 89.

and not the less so that they bear the same name as their fathers. The defendant carries on business in his own name, and sells his essence of anchovies as 'Burgess' Essence of Anchovies,' which, in truth, it is;" and Sir G. Turner, L.J., added that, "where a person was selling goods under a particular name, and another person, not having that name, was using it, it might be presumed that he so used it to represent the goods sold by himself as the goods of the person whose name he used; but that where the defendant sold goods under his own name, and it did happen that the plaintiff had the same name, it did not follow that the defendant was selling his goods as the goods of the plaintiff;" if, however, a fraudulent intention had been proved, both judges agreed that the case would have been different.

Ainsworth v. Walmsley.

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

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

because there might be several other manufacturers of the same name."

A name may be a true trade mark.

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

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

That inconvenience has now been removed by the Trade Marks Registration Act, 1875, § 10, which requires that the name to be registered and treated as a trade mark shall be "printed, impressed, or woven in some particular or distinctive manner." For the future, a trade mark consisting of a name will be available against all the world, without exception, for with the mere collocation of letters there is to be combined some further element, in respect of colour, pattern, or some other such differentia, which shall effectually distinguish the trade mark from even a similar succession of letters from which that further characteristic shall be absent (*b*). The effect of this provision is to render necessary for the future a precaution which many manufacturers have already voluntarily adopted, and the employment of a mode of printing, the imitation of which would furnish an almost irrefutable presumption of fraud, may be instanced from *Stephens* v. *Peel* (*c*), before Sir W. P. Wood, V.-C., in which case the labels on the bottles containing the plaintiff's ink were printed in letters which are described as being in part white on a red ground, in part white on a blue ground, and in part blue on a white ground.

The name need not be that of the

There is no provision in the Act which requires that the name selected as the trade mark shall be the name of

(*a*) See per Lord Kingsdown, in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523, where he treats a name as a good trade mark.

(*b*) In the same way, by the United States Statute of 1870, § 79, it is provided that the Commissioner of Patents shall not receive and record any proposed trade mark which is merely the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the same name where used by other persons.

(*c*) 16 L. T. N. S. 145.

the individual or firm by whom the goods to which the trade mark is to be attached are actually manufactured. Neither was this the case before the passing of the Act. In many instances, it is true, the name was that of the actual manufacturer; thus, the words "Ainsworth's Thread" (*a*) and "Taylor's Persian Thread" (*b*) were used as trade marks on thread produced by those makers, "Ramsay" was used on bricks by G. H. Ramsay (*c*), Thomas Holloway placed "Holloway's Pills" and "Holloway's Ointment" on his boxes and pots (*d*), and so in many cases more (*e*).

actual manufacturer.

But where a name has once become a trade mark, by registration, or, if used before the passing of the Trade Marks Registration Act of 1875, by actual user on a vendible article (*f*), since followed by registration or the procurement of a certificate of refusal to register (*g*), it is assignable (*h*), subject to a connexion with the goodwill of the business (*i*), and may easily pass to and become the property of a person or firm whose own name is widely different. Thus, the trade mark "William Ash," in *Bury* v. *Bedford* (*k*), "1847, Rogers Bros. A 1," in *Meriden Britannia Co.* v. *Parker* (*l*).

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

Among trade marks used before the passing of the Trade Marks Act of 1875, instances are not unusual of marks consisting of a name which neither is nor ever has been borne by the present or any past manufacturer, but which either belongs to some person who actually exists

Names of fancy personages.

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

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

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

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

(*e*) *Burgess* v. *Burgess*, 3 De G. M. & G. 89; *Wedgwood* v. *Smith* (Jewitt's "Wedgwoods"), 385; *Collins Co.* v. *Brown*, 3 K. & J. 423; *Stephens* v. *Peel*, 16 L. T. N. S. 145, &c.

(*f*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.

(*g*) Amendment Act of 1876.

(*h*) *Hall* v. *Barrows*, 33 L. J. Ch. 204; *The Leather Cloth Companies' case*, 1 H. & M. 271 (V.-C. Wood); and 11 H. L. C. 523 (Lords Cranworth and Kingsdown).

(*i*) Trade Marks Registration Act, 1875, § 2.

(*k*) 32 L. J. Ch. 741, and 33 L. J. Ch. 465.

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

or has existed, or to some imaginary or symbolical personage, or character from a book. Thus, the names "Victoria," "Albert," &c., are very commonly used on a great variety of articles; thus "Bismarck" denoted paper collars (*a*), and "Roger Williams" long cloth (*b*), so too "Britannia," "Dolly Varden," &c. All such names, whether of real or fictitious characters, must, however, be treated as fancy names, and cannot therefore be registered unless in actual use before the passing of the Act (*c*). If used before the Act, they will be registered under the latter part of § 10, expressly framed to meet such cases.

Name sometimes used alone.

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

Sometimes in combinations.

In other cases the name is used in combination with other letters, words, or figures, or combinations of letters, words, or figures; thus "Collins & Co. Hartford Cast Steel, Warranted" (*l*), "Taylor's Persian Thread" (*m*), "Stephens' Blue Black Writing Fluid" (*n*), "Coe's Superphosphate of Lime" (*o*), "Wolfe's Aromatic Schiedam Schnapps" (*p*), "Mrs. Winslow's Soothing Syrup" (*q*),

(*a*) *Messerole* v. *Tynberg*, 4 Abb. Pr. R. N. S. 410; R. Cox, 479.

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

(*c*) See *Ex parte Stephens*, 24 W. R. 819.

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

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

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

(*g*) Jewitt's "Wedgwoods," 238.

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

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

(*k*) 49 Barb. 357; R. Cox, 401. And see *Richards* v. *Williamson*, 30 L. T. N. S. 746; *Fullwood* v. *Fullwood*, W. N. 1873, p. 93—185; *Tonge* v. *Ward*, 21 L. T. N. S. 480.

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

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

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

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

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

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

"1847, Rogers, Bros., A 1" (*a*), "Meneely's West Troy, N. Y." (*b*). Again, "J. Rodgers & Sons" was coupled with a crown between the initials of the sovereign (*c*), and "Ransomes & Co." was followed by "H. H. 6" (*d*).

Second-class of trade marks.—A signature.

The second class of trade marks to which the Act allows registration is really little else than a subdivision of the first class, consisting, as it does, of "a written signature, or copy of a written signature of an individual or firm," to which there may be added, as before, "any letters, words, or figures, or combination of letters, words, or figures." The signature of an individual or firm is in fact the name of the individual or firm printed or written in a "particular and distinctive manner," and as such, even before the late Act, necessarily exhibited characteristics which could hardly be copied without the presumption being irresistible that the imitation was fraudulent and intended to invade the rights of the person whose signature was in question. In the cases of *Farina* v. *Silverlock* (*e*) and *Welch* v. *Knott* (*f*), the signature formed an important part of the trade mark concerned, and in America the signatures of individuals and firms have been admitted to registration on the same principle. For the future, when the signature is once registered as a trade mark, whether with or without additions, it will descend and be assignable just as any other trade mark, without its new owner being liable to any imputation of representing the person whose signature is employed to be still in charge of the business, although formerly the use of a mark of this description might not improbably have been held to convey some such repre-

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

(*b*) *Meneely* v. *Meneely*, 17 Sickles, 427.

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

(*d*) *Ransome* v. *Bentall*, 3 L. J. Ch. 161. And see *Green* v. *Folgham*, 1 S. & S. 398; *James* v. *James*, L. R. 13 Eq. 421; *Lazenby* v. *Lazenby*, Seton, 4th ed. 237; *Gillis* v. *Hall*, R. Cox, 596.

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

(*f*) 4 K. & J. 747. See *Massam* v. *Thorley's Cattle Food Co.*, W. N. 1877, p. 152.

sentation to the public. To a case of this description Lord Cranworth's observations very directly apply, when, speaking of a buyer of a business using the name of a former maker, he said (*a*), "the question in every such case must be whether the purchaser in continuing the use of the original trade mark would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade mark. In such a case I see nothing to make it improper for the purchaser to use the old trade mark, as the mark would in such a case indicate only that the goods so marked were made at the manufactory which he had purchased." The provision in the Act of 1875 (*b*) that a trade mark "shall be assigned and transmitted only in connexion with the goodwill of the business" will enable the purchaser to use the trade mark so acquired by him without his motives being open to question, and will at the same time ensure that marked goods purchased by the public shall, except in cases of punishable infringement, be produced at the works from which they purport to have come.

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

The third class of marks comprises "a distinctive device, mark, heading, label, or ticket," to which again may be added "any letters, words, or figures, or combination of letters, words, or figures."

Distinctiveness required.

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

Composition of trade mark,

Of the words "device, mark, heading, label, or ticket,"

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

(*b*) § 2.

some point more directly to the matter of which the trade mark is composed, others to the manner in which it is affixed to the vendible article. and manner of use alluded to.

"Device" and "mark" seem, at first sight, wide enough to include any of the symbols or combinations of which a trade mark could consist. It has, however, been held that they do not include a mere word, or collocation of letters, however strangely combined, or singular in their application (*a*), so that for the future it will be impossible to introduce as new trade marks fancy names such as have filled so large a space in the reports of trade-mark cases. "Device" and "mark."

When used as indicative of the mode of application of the trade mark, these words will include such cases as where the mark is stamped on iron (*b*), or branded on casks of wine (*c*), or imprinted on sticks of liquorice (*d*), and, generally, any cases which do not come within the remaining and more exact terms. Mode of application indicated by them.

"Heading" applies to cases where, in addition to the ordinary label on the goods, there is a separate label affixed above it, on which the special mark is exhibited (*e*). It also applies to the kind of marks specially applicable to the case of textile fabrics, in which a heading of special pattern is inwoven into the edge of the goods (*f*). "Heading."

"Label" indicates an impression of a trade mark upon a piece of paper, or some other thin substance, which is made to adhere to the goods to which it is applied, or to the vessel containing them. Thus, in *Wotherspoon* v. *Currie* (*g*), the label was affixed to packets of starch; in "Label."

(*a*) *Ex parte Stephens*, L. R. 3 Ch. D. 659.

(*b*) *Motley* v. *Downman*, 3 My. & Cr. 1; *Millington* v. *Fox*, *ib.* 338; *Crawshay* v. *Thompson*, 4 M. & G. 357; *Hall* v. *Barrows*, 32 L. J. Ch. 548; and 33 L. J. Ch. 204, &c.

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

(*d*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.

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

(*f*) *Harter* v. *Souvazoglu*, W. N. 1875, pp. 11–101; and see per Sir G. Jessel, M. R., in *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434.

(*g*) L. R. 5 H. L. 508.

Bass v. *Dawber* (*a*) to bottles of beer; in *Blackwell* v. *Crabb* (*b*), *Cocks* v. *Chandler* (*c*), *Cotton* v. *Gillard* (*d*), and other cases, to bottles of pickle.

"Ticket." "Ticket" points to a mark also impressed upon a separate material, but only loosely attached to the goods the make of which it indicates. Thus the trade mark of a wire manufacturer consisted of an anchor stamped on the tallies, or metal labels, attached to the bundles of his wire (*e*); the trade mark of a clothier was imprinted on a ticket pinned on to his wares (*f*).

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

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

Examples. Such marks are still frequently employed, and this clause specially includes them. To this class belong the marks of an anchor (*g*), an eagle (*h*), a lion (*i*), an elephant (*i*), a cross (*k*), a pyramid (*l*), a bell (*m*), a hand (*n*), or a cock (*o*).

(*a*) 19 L. T. N. S. 626.
(*b*) 36 L. J. Ch. 504.
(*c*) L. R. 11 Eq. 446.
(*d*) 44 L. J. Ch. 90.
(*e*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.
(*f*) *Hirst* v. *Denham*, L. R. 14 Eq. 542.
(*g*) *Edelsten* v. *Edelsten*, *ubi suprà*.
(*h*) *Standish* v. *Whitwell*, 14 W. R. 512.
(*i*) *Henderson* v. *Jorss*, Lloyd on Trade Marks, 2nd ed. 54; Seton, 4th ed. 236.
(*k*) *Cartier* v. *Carlile*, 31 Beav. 292.
(*l*) *Bass* v. *Dawber*, 19 L. T. N. S. 626.
(*m*) *Bell* v. *Bell*, V.-C. B., August 1, 1876.
(*n*) *Allsopp* v. *Walker*, M. R., April 10, 1877.
(*o*) *In re Walkden Aerated Waters Co.*, M. R., June 8, 1877.

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

In *Standish* v. *Whitwell* (*c*) an injunction was granted restraining the defendant from stamping what he alleged to be his own crest—an eagle—on his iron, the plaintiff having previously adopted an eagle as his trade mark on the same substance. *Standish* v. *Whitwell.*

It does not seem quite certain how far initials may compose a trade mark capable of registration and protection in this class of marks. Before the Trade Marks Act of 1875 a trade mark might consist of initials, either alone, or in combination with other ingredients (*d*). Now, however, it would be difficult to assert that initials alone, printed in the usual manner, and without any distinguishing peculiarities of shape, colour, &c., could be described as "a distinctive device, mark, heading, label, or ticket." Where the letters are combined together into the form of a monogram, or enclosed within a distinctive border, or are in any other way used in such a combination as to be distinguishable from the same letters used in the plain, ordinary way, there can be no objection to their recognition as a valid trade mark. Initials.

In *Harter* v. *Souvazoglu* (*e*) the trade mark consisted of a certain combination of purple, pink, and green threads, nine stripes in three gradations, which were woven as a heading into cotton goods, which were forwarded to the markets of *Harter* v. *Souvazoglu*, "Heading."

(*a*) In *Steinthal* v. *Samson*, C. A., April 17, 1877, the trade mark consisted of the crest, arms, and motto of the plaintiff's family. See Instructions as to royal, national, municipal, &c., arms.

(*b*) 13 L. T. N. S. 746.

(*c*) 14 W. R. 512.

(*d*) See p. 44, *infra*.

(*e*) W. N., 1875, pp. 11–101.

Turkey and the Levant. The owners of this mark having filed a bill for an injunction against a rival trader who had copied the mark, Sir C. Hall, V.-C., held "that a heading could be the subject of a trade mark, that the evidence in the case showed that this heading was distinguished from others in Turkey, and that it had become a trade mark, although it was sometimes associated with stamps on the goods, of the lion and the sun, and other devices. Customers had bought goods because of this particular heading, and he therefore considered that the plaintiffs who had adopted it were entitled to the protection they asked, and that no other persons could use it"(*a*).

Fourth class of trade marks.—Old marks.

The fourth class of trade marks allowed to be registered under the Trade Marks Acts consists of "any special and distinctive word or words, or combination of figures or letters used as a trade mark before the passing of the Act of 1875."

What this class includes.

This clause is designed to extend the benefits conferred by registration under the new Acts to trade marks which, though protected by the Courts as such before the passing of those Acts, yet do not come within the more restricted definition which it has been thought right to apply to marks adopted and used for the first time since that date. The class of existing trade marks whose registration this clause is intended to permit is to be composed of marks consisting of a word or words, or a combination of figures (*i.e.* numerals) (*b*) and letters. Other existing trade marks can be registered under some one of the former heads.

Fancy names.

The principal class of trade marks intended by this consists of fancy names, which are peculiar in their application to the goods manufactured at a certain establishment, and which are understood by the public as ascribing the article to which they are applied to the manufacture of that

(*a*) And see per Sir G. Jessel, M. R., in *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434.

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

establishment, and that only. Whether, however, a name selected for this purpose is really and truly a fancy name is often a question of extreme nicety.

The word may be purely descriptive, that is to say, it may express accurately and appropriately the material or mode of composition of the goods to which it is affixed, and unless the exclusive manufacture of such goods is protected by a patent, and the same result cannot be attained without infringement of the patent, all the world has the right to make and sell such goods; and further, when the goods are manufactured and in course of sale, not only has the right, but is in duty bound to describe them, for the proper information and protection of the public, in such manner as will convey the most correct idea. Hence the original maker can claim no exclusive right in the properly descriptive name. Descriptive names.

The reasoning of Sir W. P. Wood, V.-C., *Young* v. *Macrae* (*a*), affords a good example of the just way of considering cases of this description. In that case the plaintiffs, who held a patent for manufacturing a kind of oil which they called "Paraffin oil," filed a bill against the defendant, who sold a substance which he styled "Kerosene oil," or "American Paraffin Oil." The case coming on on motion for injunction, the Vice-Chancellor said, "In the patent the process is described as 'a distillation of coal so as to obtain oil containing paraffin, and from this oil I obtain paraffin.' So he calls it paraffin oil because it contains paraffin. Here is a well-known substance called 'paraffin.' A chemist discovers that by the same process by which paraffin is produced, an oil containing paraffin, and from which paraffin can again be produced, is obtainable. Therefore, it being an oil containing paraffin, and producing paraffin, he calls it 'paraffin oil.' It is not a fanciful or whimsical name, but it describes the thing which he has produced. A man cannot take out a patent for a natural substance, but he *Young* v. *Macrae*.

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

can take out a patent for arriving at that natural substance, and he may christen it, putting aside all other people, having called it by that name." The Vice-Chancellor then put the case of a man extracting sugar from beet-root by a patented process, and calling the extract "beet-root sugar" for a period of ten years. In such a case, when beet-root sugar was asked for, it would be known that his was meant, because he was the only man who made it. "The name," the Vice-Chancellor said, "does not become a trade mark, but it gets fixed to his sugar simply because nobody else could make it. Then, suppose that another man found out another method of making sugar from beet-root, and so extracted it, not wanting to patent it, and, described it as 'beet-root sugar, may he not call it 'beet-root sugar' because the other gentleman for ten years has been the manufacturer of it, and sold it as such? I think the question of the fancifulness of the name is a question whether it is taken by way of trade mark or not. All he (*i.e.* the plaintiff) has done here is this, he has found out an article which is a natural product, and he has given that natural product a name." "This is not like the case of the 'Medicated Mexican Balm,' which is a name extravagantly ridiculous. I therefore should not assume *mala fides* against a person who calls the thing what it is. It is paraffin and it is oil, therefore paraffin oil. There is paraffin in it, and paraffin to be obtained from it, and it is American." Injunction refused.

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

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

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

Name become *publici juris*.

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

Effect of registration.

The registration as a trade mark of a name of this description will somewhat complicate the question, as such registration is to be *primâ facie* evidence, and after five years' registration, conclusive evidence of the right of the registered owner to the exclusive use of such trade mark (*a*); but this enactment does not preclude a defence on the ground that the name so registered is in fact no trade mark, and was registered, or is continued on the register by error, and the remarks of Sir G. Mellish, L. J., in *Ford* v. *Foster* (*b*), appear to be equally applicable since the Act as before it. "There is no doubt, I think, that a word which was originally a trade mark, to the exclusive use of which a particular trader, or his successor in trade, may have been entitled, may subsequently become *publici juris*, as in the case which has been instanced of Harvey's sauce (*c*). Then, what is the test by which a decision is to be arrived at whether a word which was originally a trade mark has become *publici juris*? I think the test must be, whether the use of it by other persons is still

(*a*) Trade Marks Act, 1875, § 3.
(*b*) L. R. 7 Ch. 611.
(*c*) With respect to this example, an injunction appears to have been granted by Sir J. Romilly, M. R., in 1858, to restrain the infringment of this designation. See *Lazenby* v. *Lazenby*, Seton, 4th ed. 237.

calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, or can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent a trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone" (*a*).

Name indicative of a principle of construction.

In the case of *The Wheeler & Wilson Manufacturing Co.* v. *Shakespeare* (*b*), Sir W. M. James, V.-C., and in *The Singer Manufacturing Co.* v. *Wilson* (*c*), Sir G. Jessel, M.R. (affirmed by the Court of Appeal), refused to grant an injunction to restrain the use in connexion with sewing machines in the one case of the words "Wheeler and Wilson," in the other case of the word "Singer," the Court holding in each case that the name had become descriptive of the principle on which the machines were respectively constructed, and that the Court would not assist an attempt at continuing the monopoly in the articles in question after the expiration of the patent, by a claim to the exclusive use, by way of trade mark, of the name by which the peculiar principle of construction had come to be generally known.

Actual fraud.

Of course, in either of these cases, any element of actual intentional fraud will be taken into consideration, and the

(*a*) Thus, the marks of the crown and horseshoe were proved to be common to the iron trade: in *In re Barrows*, L. R. 5 Ch. D. 353; and see § 9 of the Merchandise Marks Act, 1862.

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

(*c*) L. R. 2 Ch. D. 434. In this case, however, the name was not placed by the defendant upon his machines. The Court of Appeal decided in the same sense in *Cheavin* v. *Walker* (Cheavin's filters) reversing the decision of V.-C. Bacon, L. R. 5 Ch. D. 850.

Court will, in the exercise of its general jurisdiction for the repression of fraud, award an injunction or damages in a case in which, but for the fraud, no remedy would have been given. Thus, for instance, in a case in which the infringer might have taken with impunity the name of an article invented by another, but not content with so doing, described his own manufacture as "the original" article, he was restrained by injunction from the use of that misleading epithet. (*a*).

Name purely descriptive cannot be protected.

The general principle, however, is that where a name used by way of a trade mark either was originally, or has since come to be, purely descriptive of the article to which it is attached, so that while serving to indicate what the article is, it does not serve to connect it with any particular manufacturer or manufacturing establishment, that name cannot be protected as a trade mark (*b*), or registered as special and distinctive.

Name not distinctive.

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

(*a*) *Cocks* v. *Chandler*, L. R. 11 Eq. 446. The presumption of fraud may, however, be refuted, as by a fair statement of the maker's own name: *Browne* v. *Freeman*, 12 W. R. 305.

(*b*) Among the American cases, see *Corwin* v. *Daly*, 7 Bos. 222; R. Cox, 265 ("Club House Gin"); *Phalon* v. *Wright*, 5 Phila. 464; R. Cox, 307 ("Extract of Night Blooming Cereus"); *Binninger* v. *Wattles*, 28 How. Pr. R. 206; R. Cox, 318 ("Old London Dock Gin"); *Caswell* v. *Davis*, 13 Sickels, 223 ("Ferrophosphorated Elixir of Calisaya Bark"); *Town* v. *Stetson*, 5 Abb. Pr. R. N. S. 218; R. Cox, 514 ("Desiccated Codfish"); also *Thomson* v. *Winchester*, 19 Pick. 214; R. Cox, 7; *Gillott* v. *Esterbrook*, 47 Barb. 455; R. Cox, 340; *Fetridge* v. *Merchant*, 4 Abb. Pr. R. 156; R. Cox, 194; *Wolfe* v. *Goulard*, 18 How. Pr. R. 64; R. Cox, 226; and *Burke* v. *Cassin*, 45 Cal. 467, 13 Amer. Rep. 204.

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

(*d*) *Taylor* v. *Gillies*, 14 Sickels, 331.

(*e*) *Dent* v. *Turpin*, 2 J. & H. 139. And see p. 61, note (*f*).

Adjective denoting quality only, no trade mark.

Again, an ordinary adjective in the common language of the country, descriptive of the quality of the article, and not designating it to be of the manufacture of a certain individual or establishment, as "superior" (*a*), "superfine" (*a*), "nourishing" (*b*), cannot be exclusively appropriated as a trade mark. And the same is the case with a word or symbol which is understood generally, or in the trade, to indicate quality and not a special manufacturer. Thus "A, No. 1," "A X, No. 1" (*c*).

Fraudulent trade mark.

Again, a trade mark which contains false representations, so as to deceive the public, will not be protected in equity as a valid trade mark (*d*), and cannot be registered as such under the Registration Act of 1875 (*e*). But mere collateral misrepresentations do not disqualify (*f*).

Extravagance an advantage in fancy names.

It may be stated as a general rule that the more extraordinary and extravagant the name that is adopted by way of trade mark, the better will the object be attained, and the protection of the Courts and of the Registration Office secured, for the more uncommon the designation is, the less obnoxious is the exclusive claim of the manufacturer, and the more conclusive the evidence of fraud supplied by an infringement. Thus, Sir W. P. Wood, V.-C., said, "I have not the least doubt that if the plaintiff (if I doubted I should be going quite contrary to the Mexican Balm case and other cases in which ridiculous names have been used) had invented a fanciful and ridiculous name—and the more ridiculous, the better it is for his purpose—and has used it for eight or ten years in his trade, that the Court would

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

(*b*) *Raggett* v. *Findlater*, L. R. 17 Eq. 29.

(*c*) *Candee, Swan & Co.* v. *Deere & Co.*, 54 Ill. 439; 5 Amer. Rep. 125; and see *The Amoskeag Manufacturing Co.* v. *Spear*, 2 Sand. S. C. 599; R. Cox, 87; *Burke* v. *Cassin*, 45 Cal. 467; 13 Amer. Rep. 204; and *Stokes* v. *Landgraff*, 17 Barb. 608; R. Cox, 137; with which last compare *Hirst* v. *Denham*, L. R. 14 Eq. 542.

(*d*) *Pidding* v. *How*, 8 Sim. 477; *Perry* v. *Truefitt*, 6 Beav. 66; *Flavel* v. *Harrison*, 10 Hare, 467; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 33 L. J. Ch. 199; *Morgan* v. *McAdam*, 36 L. J. Ch. 228.

(*e*) See § 6.

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

take care that nobody else should use that absurd name; for such user could only be a user for the express purpose of imitating the plaintiff's, and so defrauding the plaintiff, by representing goods manufactured by one person to be goods manufactured by another" (*a*).

Fancy names specially invented.

In many cases the fancy name used as a trade mark is an entirely new word, invented for the occasion by the manufacturer of the material or composition to which it is applied, and such a name may be registered and otherwise treated as a valid trade mark, if invented and used before the passing of the Act of 1875 (*b*).

Examples.

Thus "Pectorine" (*c*) and "Lactopeptine" (*d*) were protected as names for medical compounds; "Cocoaine" (*e*) and "Bovilene" (*f*) for pomades. "Chlorodyne" (*g*) was only not protected because the proprietor, on a mistaken view of his rights, consented to have his bill for an injunction dismissed with costs (*h*).

Existing words composing a fancy name.

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

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

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

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

(*d*) *Carnrick* v. *Morson*, L. J. Notes of Cases, 1877, p. 71.

(*e*) *Burnett* v. *Phalon*, 9 Bos. 192; R. Cox, 376.

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

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

(*h*) And see *Young* v. *Macrae*, 9 Jur. N. S. 322, in which "Paraffin Oil," *Lamplough* v. *Balmer*, W. N. 1867, p. 293, in which "Pyretic Saline," and *Wolfe* v. *Goulard*, 18 How. Pr. R. 64, R. Cox, 555, in which "Schiedam Schnapps," was not protected for special reasons only.

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

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

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

Inscriptions or advertisements.

Occasionally it has been sought to protect as a trade mark, and to claim exclusive rights in, an inscription or advertisement composed of ordinary English words, used in their ordinary sense, and only peculiar from the length of the sequence. Usually, indeed, there is in such cases some feature which might be really distinctive, but of which the plaintiff, for some reason or other, is unable to avail himself; this failing, the whole inscription is claimed. Such cases, however, are in fact "advertisements of the character and quality of the goods" (*g*), in which advertisements no exclusive rights can be claimed, as was expressly decided by the Court of Appeal in *Cheavin* v. *Walker* (*h*), where the inscription was "G. Cheavin's improved patent, gold-medal, self-cleaning, rapid water filter, Boston, England," the name Cheavin having become indicative of a principle of construction. In *Shrimpton* v. *Laight* (*i*), the use of the words "graduated, grooveless, drill-eyed, ground-down" needles was also accompanied by that of the maker's name, and this being obviously imitated by the defendant, the injunction was granted.

Words taken from the dead languages.

Sometimes a word taken from a dead language has been applied to goods and protected as a valid trade mark, as

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

(*b*) *Field* v. *Lewis*, Seton, 4th ed. 237.

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

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

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

(*f*) *Filley* v. *Fassett*, 44 Mo. 173; R. Cox, 530.

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

(*h*) V.-C. B. 35 L. T. N. S. 757; Ct. of App. May 9, 1877. And see *Blackwell* v. *Crabb*, 36 L. J. Ch. 504.

(*i*) 18 Beav. 164. And see *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402; R. Cox, 490, where an injunction was given.

the Latin word "Excelsior" in respect of soap (*a*), or the Greek word "Eureka" on shirts (*b*).

Or from modern foreign languages.

In some instances words taken from modern foreign languages have been protected, though the precise extent to which trade marks so composed will be acknowledged has not yet been authoritatively decided. Where the name employed is a fancy name which happens to be in a foreign language, or framed in imitation of the forms of a foreign language, there is no doubt that there is just as good a trade mark as if it had been in English or framed on English forms, thus, "Flor Fina Prairie Superior Tabac" (*c*) was allowed to be a good trade mark, though the defendant was held not to have infringed, and "Tamar Indien" (*d*) was actually protected.

Foreign words in their ordinary signification.

Gout v. *Aleploglu*.

When, however, the foreign words are used in their ordinary sense, or in a sense not widely remote therefrom, the case is different. In *Gout* v. *Aleploglu* (*e*), the plaintiff was a maker of watches for the Turkish market. These watches he marked in Turkish with his own name (Ralph Gout) with the word "Pessendede" ("warranted"), with his initials "R. G." and a crescent, and also with a sprig and crescent. The defendant procured watches to be made, in which the minor features of the marks used by the plaintiff were omitted, but in which the main characteristics, the name ("Ralph Gout") and the word "Pessendede," in Turkish characters, were reproduced, the style of engraving being copied. Such watches were then sent by the defendant to Constantinople, and there sold, to the prejudice of the plaintiff's business. This was a clear case of fraud, and so it was held to be by the Vice-Chancellor of England, Sir L. Shadwell, who, however, did express an opinion that the plaintiff had acquired an exclusive right in the word "Pessendede" (*f*). But the point that had to

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

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

(*c*) *Cope* v. *Evans*, L. R. 18 Ex. 138.

(*d*) *Grillon* v. *Guénin*, W. N. 1877, p. 14.

(*e*) 6 Beav. 69; 5 Leg. Obs. 496.

(*f*) 5 Leg. Obs. 496.

be decided was not simply whether the word "warranted," in Turkish, could be protected, and indeed, when it is considered that the watches were to be sold in Turkey, the case does seem to be just the same as if the word had been engraved in English on watches to be sold in this country, when such a proposition would be clearly untenable. But not only the word, but the manner of engraving it was copied, and not only that word, but the name of the maker; and what the Vice-Chancellor actually decided was that here there was a clear case of attempted fraud, which was quite sufficient ground for the issue of an injunction, without its being necessary to consider whether the imitation of one single feature would have been sufficient to entitle the plaintiff to that remedy. The use of the name "Ralph Gout" alone by the defendant, whose own name was entirely different, would indeed have been sufficient to entitle the plaintiff to an injunction (*a*), but the case with respect to "Pessendede" was different.

Broadhurst v. *Barlow.*

In *Broadhurst* v. *Barlow* (*b*), the case was again a far more complicated one than that of a single foreign word, or even a succession of words taken from the same foreign language. Here the plaintiffs were spinners and manufacturers at Manchester and Bolton, who exported to the East large quantities of pieces of Spanish shirting, which they marked with their proper trade mark, a lion in a border, and with the words "Spanish shirting" in a scroll, and "No. 120." To this they had added "exactly 12 yards," in Turkish, Armenian, and Greek, the same statement being repeated in the three languages, placed one below the other (*c*). The defendants were discovered to be preparing Spanish shirting for export, similarly marked, except that there were five lines instead of four, and that

(*a*) See per Sir G. Turner, L. J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 89.

(*b*) W. N. 1872, p. 212; and L. J. Notes of Cases, 1872, p. 183.

(*c*) In *Curtis* v. *Bryan*, 2 Daly, 212; R. Cox, 434; a label was used, with an inscription in English, French, German, and Spanish.

an elephant was used in place of the lion. Sir J. Wickens, V.-C., held that "though an elephant was used by the defendants, the three sentences in the same languages in the same order was an *infringement of the plaintiffs'* rights," and he therefore granted the injunction to restrain the use of the words in the three languages in the order used by the plaintiffs.

Conclusion.

The true principle appears to be that, while foreign words employed in their ordinary signification may, even when used on goods intended for consumption in the country where that foreign language is spoken, form a part of a combination trade mark, the infringement of which will be restrained, the exclusive use of such words themselves, apart from fraud, will not be protected in this country, any more than that of an ordinary English adjective. Actual fraud will always be restrained.

Geographical names.

Under the head of "Fancy Names" should properly be included trade marks consisting of geographical names. When such names are used as trade marks they are in that application to be understood, not as ascribing the goods to which they are affixed to any special section of the earth's surface, but as expressing the works at which, or the manufacturer by whom, those goods have been produced. So Sir W. P. Wood, V.-C., in the "Anatolia" liquorice case (*a*), said that "the plaintiffs had established beyond all doubt the connexion of their name with that mark, that was beyond dispute," and that "he could not treat the word as being otherwise than a designation mark, which the plaintiffs had caused to be attached to that particular article of liquorice which they so manufactured, and which they had a right to consider, in that qualified sense, property." Lord Westbury, C., in that case (*b*) strongly confirmed the opinion of the Vice-Chancellor; and in the later case of *Wotherspoon* v. *Currie* (*c*),

(*a*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.
(*b*) *Ib.* 566.
(*c*) L. R. 5 H. L. 508.

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

Rules as to geographical names.

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

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

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

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

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

(*e*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.

(*f*) *Radde* v. *Norman*, L. R. 14 Eq. 348; and see *Apollinaris Co.* v. *Edwards*, Seton, 4th ed. 237; and *Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 342 (Apollinaris Water); *Congress and Empire Spring Co.* v. *High Rock Congress Spring Co.* 57 Barb. 526, R. Cox, 599 (Congress Spring Water); *Amoskeag Manufacturing Co.* v. *Garner*, 55 Barb. 151; R. Cox, 541 (Amoskeag); *Newman* v. *Alford*, 6 Sickels, 189 (Akron); *Lea* v. *Millar*, Seton, 4th ed. 242 (Worcestershire Sauce); and *Powell* v. *McNulty*, V.-C. B. Nov. 27, 1876 (Yorkshire Relish).

(*g*) "Property in the word for all purposes cannot exist," per Lord Westbury, C., *McAndrew* v. *Bassett*, 33 L. J. Ch. 566.

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

McAndrew v. *Bassett*.

Again, in *McAndrew* v. *Bassett* (*c*), Lord Westbury, C., said, "I am told that the word 'Anatolia,' being a general geographical expression—being, in point of fact, the geographical designation of a whole country—is a word common to all, and that in it, therefore, there can be no property. That is nothing in the world more than a

(*a*) Though this is the English rule, the Supreme Court of the United States, in *The Canal Co.* v. *Clark*, 13 Wallace, 311, in 1871, held that the defendants might use the name "Lackawanna" on coal produced in that district, though the plaintiffs had previously so used it; and in *Candee, Swan & Co.* v. *Deere*, 54 Ill. 439, 5 Amer. Rep. 125, the Supreme Court of Illinois refused to prohibit the *bonâ fide* use of the name "Moline" on goods from that place, though it had been already occupied. And see *Glendon Iron Co.* v. *Uhler*, 75 Penn. St. 467; 15 Amer. Rep. 599.

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

(*c*) 33 L. J. Ch. 566.

repetition of the fallacy which I have frequently had occasion to expose. Property in the word for all purposes cannot exist; but property in that word, as applied by way of stamp upon a stick of liquorice, does exist the moment the liquorice goes into the market so stamped, and obtains acceptance and reputation in the market, whereby the stamp gets currency as an indication of superior quality, or of some other circumstances that render the article so stamped acceptable to the public."

Initials.

In some cases initials, either with or without additions, have been treated as trade marks. Among the earliest of these cases are *Motley* v. *Downman* (*a*) and *Millington* v. *Fox* (*b*); in the first of which cases "M. C.," and in the second "J. H." was branded on iron. Still earlier than these cases, in the year 1834, "H. H. 6" formed part of a trade mark protected by injunction (*c*). In *Crawshay* v. *Thompson* (*d*), "W. O." in an oval was employed, and infringement being alleged through the use of "W. O." in a similar oval, a verdict was given by the jury for the defendants. The question of whether initial letters could form a trade mark, alone or in conjunction with other symbols, was definitely raised before the Lord Chancellor of Ireland, in *Kinahan* v. *Bolton* (*e*). In that case the alleged trade mark consisted of the letters "L L" (standing for "Lord Lieutenant"), with a ducal coronet, which mark, it was alleged, had been adopted at a time when there was a ducal Lord Lieutenant of Ireland. The case of the defendants was that "L L" could no more compose a trade mark than "X X," but was a mere mark of quality. The Lord Chancellor, saying that there was no doubt as to this mark being a trade mark "in the strictest sense," went on to observe: "A most competent witness says that this whisky, under the name of 'L L,' is a well-known

(*a*) 3 My. & Cr. 1.
(*b*) 3 My. & Cr. 338.
(*c*) *Ransome* v. *Bentall*, 3 L. J. Ch. 161.
(*d*) 4 M. & G. 357.
(*e*) 15 Ir. Ch. 75.

article of commerce, that it has no other name than 'L L,' that under this name it has acquired a special reputation, and that for the long period of forty years this name has been applied to it. What is a trade mark more than that? It is proved that these two letters designate this whisky. The letters of themselves mean nothing; no one *d priori* could know the meaning of such a trade mark: it is merely like a diamond, an anchor, or a crown, stamped on any article, the mark by which the vendor enables the public to recognise his wares."—"There can be no doubt, and indeed it is not disputed, that two letters may constitute a trade mark." Reference was then made to the cases of *Motley* v. *Downman* (*a*) and *Millington* v. *Fox* (*b*), and the injunction was granted. Since that time "S. and H." with a crown (*c*), "B. B. H." with a crown (*d*), or in any other combination (*e*), "C. B." with a cross (*f*), "M. and C." in a circle (*g*), and "L. H. and S." (*h*) have been treated as undoubted trade marks. The letter F inclosed in circular lines, which was not protected in *Ferguson* v. *Davol Mills* (*i*), has since been registered in America.

Conclusion.

In the result, while initials used as a trade mark for the first time since the Act of 1875 must be combined with some distinctive feature, it seems clear that, if used as such before the Act, they will, even standing alone, be entitled to protection, though probably not as against persons having the same initials and using them withou fraud (*k*).

Single letters.

That single letters, though long used as trade marks prior to the Act of 1875, cannot be registered or protected

(*a*) 3 My. & Cr. 1.
(*b*) 3 My. & Cr. 338.
(*c*) *Hopkins* v. *Hitchcock*, 32 L. J. C. P. 154.
(*d*) *Hall* v. *Barrows*, 32 L. J. Ch. 548.
(*e*) *Re Barrows*, L. R. 5 Ch. D. 353.
(*f*) *Cartier* v. *Carlile*, 31 Beav. 292.
(*g*) *Moet* v. *Clybouw*, M. R. Jan. 19, 1877.
(*h*) *Ex parte Young*, Court of Bankruptcy, Feb. 3, 1877.
(*i*) 2 Brewster, 314; R. Cox, 526.
(*k*) The case is much the same as that of a maker's name. See *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518.

under that Act, was decided by Sir C. Hall, V.-C., in *Re Mitchell*, Aug. 2, 1877.

Numerical figures.

With respect to numerals, they can only be registered in connexion with a new mark, when combined with some essential particular (*a*), and although there have been cases in which the imitation of numerals placed on goods has been restrained (*b*), those cases involve actual fraud, and cannot support a claim to treat numerals alone as a trade mark, independently of the Acts.

(*a*) See Trade Marks Act, 1875, § 10.

(*b*) *Gillott* v. *Kettle*, 3 Duer. 624; R. Cox 148; *Gillott* v. *Esterbrook*, 3 Sickels, 374; *Boardman* v. *Meriden Britannia Co.*, 35 Com. 402; R.Cox, 490.

CHAPTER III.

ACQUISITION, TRANSFER, AND DISCONTINUANCE OF TRADE MARKS.

1. *Acquisition.*

Who may acquire.

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

Aliens.

A question has, however, been raised as to whether an alien was capable of acquiring a right to a trade mark, but when raised was at once finally decided by Sir W. P. Wood, V.-C., in accordance alike with justice and expediency. The plaintiffs in *The Collins Co.* v. *Cowen* (*a*), were an American firm of edge-tool manufacturers, whose trade marks appear to have been systematically infringed by English rivals. In the case in question the defendants, who had copied the plaintiffs' stamp of "Collins & Co., Hartford, cast steel, warranted," demurred. The Vice-Chancellor overruled the demurrer, and observed in the course of his judgment, "I apprehend that every subject of every country, not being an alien enemy—and even to an alien enemy the Court has extended relief in cases of fraud—has a right to apply to this Court to have a fraudulent injury to his property arrested. And here the plaintiffs have the right, a right recognised, I imagine, everywhere in the world, or at least in every civilized community, of saying, 'We, being the manufacturers of certain goods, claim that another man shall not manufacture goods and

(*a*) 3 K. & J. 428.

put upon them our trade mark, and then pass them off as manufactured by us.' It would be most grievous if any Court should hold that there was an incapacity of affording relief in a case where a fraud has been committed upon a subject of any country. I speak, of course, of a fraud so far connected with property as to be not a shadowy but a substantial injury. If you use the name of another for the purpose of securing to yourself, in the disposition of property, advantages which belong to him, the fraud is complete, and the remedy ought to be complete, as in the case of a libel, where the action is allowed to a foreigner. I cannot in my own mind entertain the slightest misgiving in this case, whether it be new or not" (*a*).

It is true that in the above case the Vice-Chancellor was not viewing the matter in the light of an acquisition of property by an alien; but at all events no question can now arise on this point, since the rules under the Trade Marks Registration Act, 1875, distinctly provide for the registration of his trade mark by any person, whether a British subject or an alien (*b*).

Length of user formerly required.

There was for some time a doubt as to the circumstances under which one person could acquire a sufficient right to a trade mark to be entitled to restrain another from infringing it. The right to redress being treated as founded on the defendant's intentional fraud, it was thought that a plaintiff who claimed an injunction against a defendant ought to show that he (the plaintiff) had acquired for the mark indicating his manufacture such a reputation (*c*) as would raise a presumption that the defendant

(*a*) See also *Collins Co.* v. *Brown*, 3 K. & J. 423; *Collins Co.* v. *Walker*, 7 W. R. 222; *Collins Co.* v. *Reeves*, 28 L. J. Ch. 56; *Howe* v. *McKernan*, 30 Beav. 547. The same rule obtains in America: *Taylor* v. *Carpenter*, 3 Story, 458; R. Cox, 14; Same *v.* Same, 2 Wood. & M. 1, R. Con. 32; Same *v.* Same, 11 Paige, 292; R. Cox, 45; *Coats* v. *Holbrook*, 2 Sandf. Ch. R. 586; R. Cox, 20; and *Lemoine* v. *Ganton*, 2 E. D. Smith, 343; R. Cox, 142.

(*b*) See Rule 5. Compare Merchandise Marks Act, 1862, § 1.

(*c*) In *Hine* v. *Lart*, 10 Jur. 106, Sir L. Shadwell, V.-C. of Eng., thought that the imitation by a defendant of a plaintiff's trade mark afforded a presumption of that mark having

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

Latterly considered unnecessary.

But when it came to be recognised that there was a right of property in a trade mark, intentional fraud being unnecessary to justify restraint, it was at once seen that, as was stated by Sir J. Romilly, M.R., "the interference of a Court of Equity could not depend on the length of time the manufacturers had used it" (*b*), but that, "from the time of their commencing the user of their trade mark they became entitled to the protection of the Court against any other persons using the same, so that purchasers might be induced to purchase the goods of other persons as theirs" (*c*).

How property in a trade mark acquired.

Lord Westbury, C., said, in *McAndrew* v. *Bassett* (*d*), that the elements of the right to property in a trade mark might be represented as being the fact of the article being in the market as a vendible article with that stamp or trade mark at the time when the defendants imitated it; and he went on: "The essential qualities for constituting that property 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) (*e*); secondly, that the article so marked is actually a vendible article in the market; and thirdly, that the defendants knowing that to

acquired a reputation; and see *Dixon* v. *Jackson*, Court of Session Cases, 3rd Series V. 326, per the Lord Justice Clerk.

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

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

(*c*) Per Sir C. Hall, V.-C., in *Cope* v. *Evans*, L. R. 18 Eq. 138.

(*d*) 33 L. J. Ch. 566.

(*e*) Compare the latter part of § 6 of the Trade Marks Act, 1875.

be so, have imitated the mark for the purpose of passing off in the market other articles of a similar description "(*a*).

The mark must be on a vendible article.

From this judgment it follows, and it was expressly recognised in *Maxwell* v. *Hogg* (*b*), that no property could be acquired in a trade mark, except through the process of sale, or offering for sale, in the market, of the article to which the trade mark was affixed (*c*). And in the last-mentioned case it was held that no expenditure during the course of manufacture in advertisements or other announcements to the public of the article so in course of manufacture could give any right in the mark or name by which it was intended that the article should be known when completed and in the market.

Acquisition by *registration.*

By the Trade Marks Registration Act, 1875, a new manner of acquiring a right to a trade mark is introduced (*d*), and with respect to new marks (*e*), substituted for the earlier method, without registration no infringement of a new trade mark can now be restrained (*f*), but such registration, when effected, is *primâ facie* evidence of the right of the registered proprietor to the exclusive use of the trade mark, and is, after the expiration of five years from the date of registration, to be conclusive evidence of his right (*g*).

Goods classified.

A trade mark must be registered as belonging to particular goods or classes of goods (*h*), as arranged in the First Schedule to the Rules; the class to which the goods belong being determined, in case of doubt, by the registrar (*i*). This requirement is no alteration of the rules of the existing law, but is merely a statement of one of those rules as bearing upon registration under the Act. It had

(*a*) Compare remarks of Lord Kingsdown in the *Leather Cloth Companies' case*, 11 H. L. C. 523.

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

(*c*) And see *Rowley* v. *Houghton*, 2 Brewster, 303; R. Cox, 486.

(*d*) § 1.

(*e*) As to old ones see the Amendment Act, 1876

(*f*) § 1 of Acts of 1875-6-7.

(*g*) § 3. This is, however, subject to the provisions of the Act as to the connexion of the trade mark with the goodwill of the business. See § 2.

(*h*) § 2 of Act of 1875.

(*i*) Rule 3.

been already fully recognised that a particular trade mark could be protected as such only in connexion with particular goods or classes of goods. Thus, Lord Westbury, C., says, "Property in a trade mark is the right to the exclusive use of some mark, name, or symbol, in connexion with a particular manufacture or vendible commodity; consequently, the use of the same mark in connexion with a different article is not an infringement of such a right of property" (*a*). And again, "An ironfounder who uses a particular mark for his manufactures in iron could not restrain the use of the same mark when impressed upon cotton or woollen goods; for the property in a trade mark consists in the exclusive right to the use of that mark as applied to some particular manufacture" (*b*). And V.-C. Wood similarly says, that "This Court has taken upon itself to protect a man in the use of a certain trade mark as applied to a particular description of article. He has no property in that mark, *per se*, any more than in any other fanciful denomination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them," his right to the mark so applied will be protected (*c*).

Provisions in the Registration Acts and Rules.

The requirement that a trade mark shall be registered as belonging to particular goods or classes of goods is followed up by the provision contained in § 6 of the Act of 1875, by which the registration of a mark identical

(*a*) *Leather Cloth Co.* v. *American Leather Cloth Co.*, 33 L. J. Ch. 199.

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

(*c*) *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; and see *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434—43; *Colladay* v. *Baird*, 4 Phila. 139; R. Cox, 257; *Rowley* v. *Houghton*, 2 Brewster, 303; R. Cox, 486; *Amoskeag Manufacturing Co.* v. *Garner*, 55 Barb. 151; R. Cox, 511.

with, or nearly similar to a mark already registered, is prohibited, not generally, but in connexion with such goods or classes of goods as those in respect of which the mark already on the register is registered (*a*). And, with a view to the protection of the public, this prohibition is extended over a period of five years after the removal of the mark once registered from the register for non-payment of a continuance fee, during which period of five years the renewed mark in question is to be still deemed to be registered for this purpose only (*b*).

Steps necessary to obtain registration.

A person desirous of having his trade mark registered must make an application to the registrar in the prescribed form, by sending to him a statement (*c*), dated, signed, and in the required shape (*d*), together with a declaration (*e*), verifying the statement, and declaring that, to the best of the applicant's knowledge and belief, he is lawfully entitled to use the trade mark (*f*); and also the prescribed fee (*g*).

The statement.

The statement has to contain the following particulars :

A. The name, address, and calling of the applicant; and

B. The description or reference to a description of the trade mark to be registered (*h*) ; and

C. The class or classes of goods (being some one or more of the classes mentioned in the First Schedule), and the particular description or descriptions of goods in such class or classes, with respect to which he desires the trade mark to be registered ; and

D. In the case of a trade mark used before the passing of the Act, a description of the goods in respect of which it has been used, and the length of time during which it has been so used (*i*).

(*a*) And see Rule 19, and the original Rule 19 now cancelled.

(*b*) Rule 33.

(*c*) Rule 5.

(*d*) Rules 6 and 7; and see Forms A and B in the Third Schedule to the Rules.

(*e*) See Forms C and D in the Third Schedule.

(*f*) Rule 9.

(*g*) See Scale of Fees in Second Schedule

(*h*) As to mode of description, see Rule 8.

(*i*) And see Forms A and B in Third Schedule.

Where the application is made on behalf of a corporate or quasi-corporate body, the statement and declaration are to be made by the secretary or other principal officer, and evidence of his authorization may be required by the registrar (*a*).

Where the application is made on behalf of a firm or partnership, the statement and declaration may be made by any one member of the firm or partnership, or by any person authorized, the registrar being entitled to require proof of due authorization (*b*).

Advertisement, &c.

All that remains to be done by the applicant for registration, after sending in his application, is to await an acknowledgment of its receipt by the registrar (*c*), and then to insert in the *Trade Marks Journal* an advertisement during such time and in such form and manner as the registrar shall require, and distinguishing whether the mark was or was not used before August 13, 1875 (*d*).

Registration.

At the expiration of three months from the date of the first advertisement in the *Trade Marks Journal* the registrar *may*, if satisfied of the applicant's title, register the trade mark (*e*) as from the date of the receipt of the application for registration (*f*), and upon registration is to send notice thereof to the registered proprietor, with a reference, where practicable, to the *Trade Marks Journal* (*g*).

Cotton marks.

Marks on cotton goods, or "cotton marks," are governed by special rules (*h*), under which a Manchester office is appointed, to which representations of the mark have to be sent. Cotton marks may be registered at the expiration of three weeks from their first advertisement.

Marks on cutlery.

There are also special rules for marks to be registered in respect of goods within the Cutlers' Company Acts (*i*).

(*a*) Rule 10.
(*b*) Rule 11.
(*c*) Rule 12.
(*d*) Rules 13, 14, 15.
(*e*) Rule 17.
(*f*) Rule 20.
(*g*) Rule 21.
(*h*) Rules 57—63, and Additional Rules of Feb. 1877.
(*i*) Rules 46—56.

When opposition is made.

If notice of opposition has been sent to the registrar, the applicant may send in a counter-statement within three weeks, or such time as the registrar may allow. If no such counter-statement is sent, the application is deemed to be withdrawn; if it is sent, the person giving notice of opposition will be required to give security for costs, which if he does not do within fourteen days the opposition is deemed to be withdrawn. If he does give the required security, the registrar is to send him a copy of the counter-statement of the applicant for registration, and thereupon the case stands for the determination of the Court (*a*), *i. e.* the Chancery Division. That determination will properly be given upon an application by the applicant in the shape of a motion to rectify the register by the insertion of the trade mark in dispute (*b*).

Conflicting claims.

And where each of several persons claims the same trade mark in respect of the same goods or class of goods, the registrar may register all or any of the marks, and with or without conditions, at his discretion, or may submit or require the claimants to submit their rights to the Court (*c*) in the form (unless the Court shall otherwise order) of a special case (*d*), agreed to by the parties, or, in case of difference, settled by the registrar (*e*).

Issue may be directed.

The Court may direct an issue to be tried for the decision of any question of fact which may require to be decided for the purposes of these proceedings (*f*).

Alteration of registered trade mark.

Subsequently to registration, the proprietor of a trade mark may, by leave of the Court, alter his trade mark and procure an alteration of the register accordingly, but the alteration must not extend to any of the "essential particulars" of the trade mark (*g*).

(*a*) Rule 16.

(*b*) Rule 43, and § 5 of the Act of 1875. And see *Ex parte Stephens*, 24 W. R. 819.

(*c*) Act of 1875, § 5, and Rule 18.

(*d*) Rule 44; and see *Ex parte Grimshaw*, W. N. 1877, p. 26.

(*e*) Rule 45.

(*f*) Act of 1875, § 5.

(*g*) Rule 35; and as to what are "essential particulars" see Act, § 10.

No notice of any trust, expressed, implied, or construc- No . .st entered on register.
tive, can be received by the registrar, or entered in the register (*a*).

2. *Transfer.*

A trade mark is capable of being assigned during the Assignment and transmission.
life of its proprietor, and of being transmitted at his death; but it can be assigned and transmitted only in connexion with the goodwill of the business concerned with the particular goods or classes of goods in respect of which it has been registered (*b*).

Even apart from the Act there is no doubt that the Trade mark cannot be severed from goodwill.
trade mark cannot be severed from and used independently of the goodwill. If that could be done, the *indicium* of genuineness might only serve to mislead. This view was clearly put by Lord Westbury, C., in the *Leather Cloth Companies' case* (*c*), when he suggested the case of a firm of clothiers in Wiltshire, trading as A. B. & Co., for fifty years, and acquiring a great reputation for their broad cloth marked "A. B. & Co. Wilts"; then, he asked, supposing A. B. & Co. to discontinue their business, and to sell the right to use the mark to C. D. & Co., clothiers in Yorkshire, would the latter be protected in Equity in their claim to the exclusive use of the mark? and he answered the question in the negative.

To such an extent is a trade mark an accessory of the Trade mark passes with goodwill.
goodwill, that in *Shipwright* v. *Clements* (*d*), Sir R. Malins, V.-C., held that in the sale of the latter the trade mark would pass, whether specially mentioned or not (*e*).

In a case before the New York Court of Appeal (*f*), the Same principle adopted in America.
expression was adopted that "a property in trade mark might be obtained by transfer from him who had made the primary acquisition, though it was essential that the

(*a*) Rule 22.

(*b*) Act of 1875, § 2; and as to declaration to be made by assignee or transmittee on applying to be registered, see Rule 27, and Forms E and F in Third Schedule to Rules.

(*c*) 33 L. J. Ch. 199; and see *Cotton* v. *Gillard*, 44 L. J. Ch. 90.

(*d*) 19 W. R. 599.

(*e*) And see *Churton* v. *Douglas*, Johns. 174.

(*f*) *Congress & Empire Spring Co.* v. *High Rock Congress Spring Co.*, 57 Barb. 526; R. Cox, 99.

transferee should be possessed of the right either to manufacture or sell the merchandise to which the trade mark had been attached." And in another American case (*a*), the statement that the "property or right to a trade mark might pass by an assignment or by operation of law," was followed by this limitation, "to any one who took at the same time the right to manufacture or sell the particular merchandise to which the trade mark had been attached."

Personal trade mark.

It is possible that occasionally, though rarely, a trade mark may be so framed as not to be merely a simple indication of quality, or a guide to the place of manufacture, but to have the effect of ascribing the article to which it is attached to the personal skill or supervision of an individual. In such a case the question arises whether the trade mark which, when originally adopted, contained no assertion which was incorrect, is capable of transfer to another person so as to enable him to apply it to his own goods and to prevent a similar use of it by others, the personal skill and supervision of its former proprietor having ceased to be applied.

Name of former proprietor.

It is, indeed, settled that the mere fact of the trade mark consisting of or containing the name of its former proprietor, who originally conducted the business with which the trade mark is connected, is not of itself sufficient to disentitle the transmittee or assignee of the business to continue to use the mark, since the mere name of the maker will be deemed to be indicative rather of a business, in whosever hands it may be, than of an individual proprietor of it (*b*).

When trade mark is personal.

It is, however, conceivable that a trade mark may be "so completely personal as of necessity to import that the

(*a*) *Dixon Crucible Co.* v. *Guggenheim*, 2 Brewster, 321; R. Cox, 559; and see *Walton* v. *Crowley*, 3 Bl. C. C. 440; R. Cox, 166; and *Derringer* v. *Plate*, 29 Cal. 292; and R. Cox, 325.

(*b*) *Bury* v. *Bedford*, 33 L. J. Ch. 465; *Churton* v. *Douglas*, Johns. 174; *Hall* v. *Barrows*, 33 L. J. Ch. 204; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; 33 L. J. Ch. 199; 11 H. L. C. 523.

goods sold under it have been manufactured by a particular individual" (*a*), as if it contains not only the name of the proprietor, but also some reference to his personal qualifications, or an allusion to particular workmen in his employ (*b*), in which case the mark will already become deceptive even while the business remains in the same hands, if the proprietor should cease to give his personal attention, or to employ the same workmen.

No protection of deceptive marks.

In such a case, independently of the Registration Acts of 1875-6-7, it is clear that no protection will be given to a mark become deceptive. Thus, Lord Westbury, C., was of opinion that the Court would not sell and transfer the right to use a mark of personal character simply and without alteration (*c*).

The Registration Acts.

The objection to the use of a trade mark become deceptive, which, independently of the Acts, applied rather to the use of the mark assigned than to the power of assigning it (*d*), should now, as it appears, more properly apply to the registration of the assignee or transmittee, by which the latter acquires, at least, a *primâ facie* right to practise deceit. The Act of 1875, indeed, contains no provision expressly directed to meet a case of this kind, the sixth section being only aimed at an attempted registration of a mark disentitled from the beginning to protection, by reason of being calculated to deceive, and not to a registration of a subsequent proprietor of a mark which has lost its right to protection through a change of circumstances. The spirit of the Act is, however, to favour the general assignability of trade marks together with the goodwill to which they are attached,

(*a*) Per Sir G. Turner, L. J., in *Bury* v. *Bedford*, 33 L. J. Ch. 465.

(*b*) And compare the reference by Lord Kingsdown to an artist's special skill, in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523.

(*c*) *Hall* v. *Barrows*, 33 L. J. Ch. 204. See, too, the *Clothiers' case*, suggested by him in the *Leather Cloth Cos.' case*, 33 L. J. Ch. 199; and the remarks of Lord Cranworth in that case in the House of Lords, 11 H. L. C. 523; and those of the L. JJ. in *Bury* v. *Bedford*, 33 L. J. Ch. 465.

(*d*) Per L. J. Turner, *Bury* v. *Bedford*, 33 L. J. Ch. 465.

and it may be expected that such elements in a trade mark as would impede this assignability will very rarely, *if ever, survive the original process of registration now* necessary.

Trade marks generally transferable.

Subject only to the provision prohibiting the severance of a trade mark from the goodwill of the business with which it is connected, the trade mark is freely assignable. "The right to a trade mark may, in general, treating it as property, or an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser" (*a*). If this were not so the value of a very valuable and important part of the goodwill of the business carried on by a person (*b*) would be seriously diminished. And for a similar reason, and in the interest alike of the owner of a trade mark himself and of his assignee, the original owner will, subquently to assignment, be restrained from the use of his former trade mark, equally with persons who have never had an interest in it (*c*). The same will be the case if the sale has been made, not by the owner himself, but by his trustee in bankruptcy (*d*). Any transmittee may assign his interest in a registered mark, though he has never been registered as proprietor of it (*e*); and in the sale of a business a trade mark will pass to the purchaser without special mention (*f*).

Steps necessary for assignment of

A person claiming to be registered as an assignee is required to send to the registrar, with his application, an

(*a*) Per Lord Cranworth in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523; and see per V.-C. Wood in *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; also *Hall* v. *Barrows*, 33 L. J. Ch. 204; and *Hudson* v. *Osborne*, 39 L. J. Ch. 79.

(*b*) Compare the observations of Sir W. P. Wood, V.-C., as to the sale of a trade name, involving the same considerations, in *Churton* v. *Douglas*, Johns. 174.

(*c*) *Bury* v. *Bedford*, 33 L. J. Ch. 465; and see *Churton* v. *Douglas*, Johns. 174.

(*d*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79.

(*e*) Rule 25.

(*f*) *Shipwright* v. *Clements*, 19 W. R. 599.

registered trade marks.

assignment by deed (*a*), executed both by assignor and assignee, or a certified copy of such assignment, and a declaration verifying the fact of such assignment having been made (*b*), and stating the name and address of the applicant, and that he is entitled to the goodwill of the business, or some part of it (*c*). If the application is made in the form suggested in the Instructions (*d*), the declaration will be in accordance with Form D, omitting paragraphs (2) and (3).

Transmission on bankruptcy.

On the owner of a trade mark becoming bankrupt, his trade mark is transmitted with his business to his trustee in bankruptcy, and will, together with the business and goodwill, be dealt with by him (*e*). A person claiming to be registered as transmittee under a bankruptcy must send to the registrar, together with his application, a statement of the manner in which the trade mark has been transmitted, and a declaration verifying such statement (*f*). The declaration must state the same matters as that made by an assignee (*g*).

Trade mark of woman.

In cases in which a trade mark belonging to a woman passes with her other personalty on marriage to her husband, the latter must, on applying for registration, send to the registrar a similar statement and declaration (*h*).

Formation of partnership.

Upon the formation of a partnership, one member of which is the proprietor of a trade mark, the trade mark will, in the absence of express provisions, pass into and become part of the partnership assets, for the trade mark is but an element of the trade (*i*). In that case it seems that the partner who has newly acquired an interest in the

(*a*) See Form E, in Third Schedule to Rules.

(*b*) Rule 24.

(*c*) Rule 27.

(*d*) Instructions, *infrd.*

(*e*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *Bury* v. *Bedford*, 33 L. J. Ch. 465; *Ex parte Young*, Court of Bankruptcy, Feb. 3, 1877. And see *Longman* v. *Tripp*, 2 Ros. & P. N. R. 67; and *Ex parte Foss*, 2 De G. & J. 230.

(*f*) Rule 25. And see Form F, in the Third Schedule to the Rules.

(*g*) Rule 27. As to evidence, see Rule 26—(1)—C.

(*h*) Rules 25 and 27, and Form F, in the Third Schedule. As to evidence, see Rule 26—(1)—B.

(*i*) *Bury* v. *Bedford*, 33 L. J. Ch. 465, per Sir G. Turner, L. J.

trade mark will be entitled to registration as joint-proprietor with his partner who is already on the register (*a*).

Dissolution of partnership.

Upon the dissolution of a partnership among whose property a trade mark is included, whether that dissolution be brought about by the mutual agreement of the partners, or by the death of one of them, the trade mark, as forming part of the partnership assets, and also on account of its close connexion with the goodwill of the business, must be treated in the same way as the business and goodwill are treated, unless there is an express agreement for its discontinuance. If the business and goodwill are sold, the trade mark will be included in the sale (*b*); if the share of the retiring or deceased partner is, by arrangement, taken over by the continuing or surviving partner or partners, the retiring or deceased partner's interest in the trade mark must be included in the valuation of his share of the business (*c*); if the partners merely agree to divide the partnership assets, so that each in effect carries on the same business, though they carry it on severally instead of jointly, then each is at liberty to use the mark as he did before (*d*).

Registered proprietors alone recognised.

By Rule 28, where two or more persons are registered as joint proprietors of the same registered trade mark, those proprietors, or the survivors or survivor of them, or their or his assignee or transmittee, are alone to be recognised by the registrar as having any title to the mark. This does not take away from other persons any rights which they might have independently of the statute, but aims at keeping the register free from complicated questions, just as trusts are forbidden to be entered therein (*e*).

(*a*) See Rule 28. As to the evidence, see Rule 26—(1)—C.

(*b*) *Bradbury* v. *Dickens*, 27 Beav. 53; *Hall* v. *Barrows*, 33 L. J. Ch. 204; *Banks* v. *Gibson*, 34 Beav. 566.

(*c*) *Banks* v. *Gibson*, 34 Beav. 566; *Hall* v. *Barrows*, 33 L. J. Ch. 204.

(*d*) *Banks* v. *Gibson*, 34 Beav. 566. And see *Bond* v. *Millbourn*, 20 W. R. 197.

(*e*) Rule 22.

Transmission on death.

By Rule 25, where a trade mark has been transmitted by the death of the registered proprietor, his legal personal representative shall be recognised as having the title to the mark. So long since as the reign of King George II., Lord Hardwicke, C., decided (*a*) that shares in the goodwill of a newspaper, entitled *The St. James's Evening Post*, were to be considered as part of the personal property of the proprietor; and that, on the death of the proprietor, his trade mark passes to his personal representative with the remainder of his personal property has never been questioned (*b*).

Registration of personal representative.

In order to obtain registration, the legal personal representative of a deceased proprietor has to make such a declaration as is contained in Form F, in the Third Schedule to the Rules (*c*).

Bequest of trade mark.

The proprietor of a trade mark may bequeath it according to pleasure (*d*), but this is subject to the provision prohibiting its transmission otherwise than in connexion with the goodwill of his business (*e*).

Several proprietors.

By means of bequest, dissolution of partnership, &c., it is possible for more than one person to become severally entitled to the same trade mark at the same time (*f*), and in a case where divers persons so claim, such persons, or any of them, may, if they all consent thereto, and on the production of the proper evidence, and on payment of the prescribed fee, be registered separately as separate proprietors of such trade mark (*g*). But, if all of such persons so entitled do not so consent, the registrar shall not,

(*a*) *Giblett* v. *Read*, 9 Mod. 459.

(*b*) Thus, in *Croft* v. *Day*, 7 Beav. 84, 28 Leg. Obs. 378, the successful plaintiffs were the executors of the former proprietor of the business and trade mark.

(*c*) By way of evidence he must produce the probate of the will of the deceased proprietor, or the letters of administration to his estate, or an official extract therefrom. Rule 26—(1)—A.

(*d*) *Dent* v. *Turpin*, 2 J. & H. 139.

(*e*) Act of 1875, § 2.

(*f*) *Hine* v. *Lart*, 10 Jur. 106; *Dent* v. *Turpin*, 2 J. & H. 139; *Banks* v. *Gibson*, 34 Beav. 566; and see *Southorn* v. *Reynolds*, 12 L. T. N. S. 75.

(*g*) Rule 29.

without the leave of the Court (*a*), register any of them as separate proprietors of such trade mark (*b*).

Position of subsequent proprietors.

By the 4th section of the Act of 1875, every proprietor registered in respect of a trade mark subsequently to the first registered proprietor is, as respects his title to that trade mark, to stand in the same position as if his title were a continuation of the title of the first registered proprietor (*c*).

When opposition.

In case of opposition being offered to the registration of any assignee or transmittee (*d*), the person opposing must send notice of his intention to the registrar, with the prescribed fee. The registrar has then to give notice to the applicant for registration, and may, if he thinks fit, require security for costs from the opponent. Finally, he may, if he thinks fit, require the parties interested to submit their claims to the Court (*e*).

3. *Discontinuance.*

When trade mark protected.

In order for a trade mark to be entitled to protection, it is now necessary either that the trade mark shall be registered under the Registration Acts (*f*), or that, if an old mark is in question, a certificate of refusal to register shall have been obtained under the Amendment Act of 1876 (*g*). The protection of a mark once registered terminates, therefore, with the cessation of registration.

Duration of registration.

The original registration of a trade mark is for a period of fourteen years, and unless previously to the expiration of that period the fee (*h*) for continuance is paid, the registrar may, after the end of three months from such expiration, remove the mark from the register, and in the same way from time to time at the expiration of every fresh period of fourteer years (*i*). No difficulty need in ordinary

(*a*) Obtained on application to rectify the register, under Rule 43.

(*b*) Rule 29.

(*c*) Compare *Hovenden* v. *Lloyd*, 18 W. R. 1132.

(*d*) Rule 38.

(*e*) See Rule 44, as to the method.

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

(*g*) See § 1 of Act of 1876.

(*h*) £2. See Second Schedule to Rules.

(*i*) Rule 30.

cases be apprehended in the prolongation of registration, for the exclusive use of a trade mark is no injury or deprivation to the public, but a protection against fraud.

If subsequently to the expiration of the fourteen years, but before the expiration of the additional three months, the proprietor pays the increased fee (*a*), the registrar may accept the fee as if paid before the expiration of the fourteen years, and allow the mark to remain on the register (*b*).

Restoration to register.

Even after the removal from the register for non-payment of the fee, the mark may be restored to the register by the Commissioners of Patents, or one of them, if they are satisfied that it is just, on payment of an additional fee (*c*) and compliance with conditions prescribed by the Commissioners (*d*).

Must be a vendible article with trademark attached.

Independently of the Trade Marks Registration Acts, no trade mark can exist as such unless there is actually existent in the market a vendible article to which the mark is in some way affixed or attached (*e*).

Registration now equivalent to public use.

The necessity of proving the existence of such an article so marked, in the case of registered marks, now no longer exists, since, subject to the connexion with the goodwill of the business, registration is to be deemed to be equivalent to public use (*f*).

Removal on ground of non-user.

In order, therefore, to prevent the continuance of restrictions which no longer serve any useful purpose, it is provided by the 34th Rule that the Court, *i. e.* the Chancery Division, may, on the application of any person aggrieved, remove any trade mark from the register, on

(*a*) £1 in addition. See Second Schedule to Rules.

(*b*) Rule 31.

(*c*) £2 in addition. See Second Schedule to Rules.

(*d*) Rule 32.

(*e*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307. And see *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434. In *Cotton* v. *Gillard*, 44 L. J. Ch. 90, the plaintiffs had bought from the trustee in bankruptcy the interest of the bankrupt in a certain sauce and in his trade mark, but the sauce being compounded according to a secret which the trustee could not communicate, Sir G. Jessel, M. R., held that the plaintiff could not use or protect the trade mark.

(*f*) § 2 of the Act of 1875.

the ground, after the expiration of five years from the registration, that the registered proprietor is not engaged in any business concerned in the goods with respect to which the trade mark is registered; that is to say, that there is in the market no vendible article of the proprietor of the trade mark marked therewith.

Old marks become descriptive.

Under the law of trade marks previously to the Registration Acts, a trade mark might be composed in a manner not now admissible for new marks: for instance, it might consist of a fancy word or words. Such marks may now be registered under the Registration Acts, but only in cases in which they have been used as trade marks previously to the Act of 1875 (*a*). With respect to such trade marks it has occasionally happened that they have ceased to denote the manufacture of any particular person, and have become simply descriptive of a certain article or a certain principle of manufacture. When that has become the case, such words have ceased to be capable of protection as trade marks, having become *publici juris*, open to the use of all (*b*). Where a name, which it has been attempted to appropriate as a trade mark, has been in fact descriptive throughout, the case can hardly be said to have arisen of a discontinuance of a trade mark, inasmuch as it was invalid throughout (*c*).

Trade mark not abandoned by habitual user in combination with name.

In *Braham* v. *Bustard* (*d*), and *Ford* v. *Foster* (*e*), it was held that the habitual use of the manufacturer's name (which was alone a sufficient trade mark), before the special and distinctive appellation of "Excelsior" in the one case, and "Eureka" in the other, did not amount to an

(*a*) § 10 of Act of 1875.

(*b*) Per Sir G. Mellish, L. J., in *Ford* v. *Foster*, L. R. 7 Ch. 611. And see *Wheeler & Wilson Manufacturing Co.* v. *Shakespeare*, 39 L. J. Ch. 86: *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298; *Browne* v. *Freeman*, W. N. 1873, p. 178; *Lea* v. *Millar*, M.R., July 26, 1876; and Seton, 4th ed. 242; *Wolfe* v. *Goulard*, 18 How. Pr. R. 64; R. Cox, 226; *Burke* v. *Cassin*, 45 Cal. 467; 13 Amer. Rep. 204. See also the Merchandise Marks Act, 1862, § 9.

(*c*) *Young* v. *Macrae*, 9 Jur. N. S. 322; *Raggett* v. *Findlater* L. R. 17 Eq. 29.

(*d*) 1 H. & M. 447.

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

abandonment of the manufacturer's right in those appellations when used without the name, but that the manufacturer remained entitled to his essential mark.

Marks new since the Registration Acts incapable of becoming descriptive.

Under the Registration Acts, a new trade mark cannot now well become *publici juris*, for since "the distinctive device, mark, heading, label, or ticket" (*a*), does not include special and distinctive words not used as a trade mark before the Act (*b*), such a symbolical device as will generally be employed cannot well become descriptive, or *publici juris*, though such phrases as "anchor-brand wire" (*c*), "cross cotton" (*d*), may possibly be employed. If the name of the manufacturer is used, it will only constitute a trade mark when in the form of a signature or some other particular and distinctive shape (*e*), so that the trade mark will not be infringed unless, not only the name, but the mode of printing, &c., be imitated. In short, from the framing of § 10 of the Act of 1875, a mere word cannot be registered as a new trade mark, and consequently no new trade mark will be of such a nature as to be capable of innocent common user. Whether or not distinct evidence of fraudulent intentions and representations, apart from strict trade mark law, can be produced, is of course another question.

Abandonment by dismissal of suit.

In *Browne* v. *Freeman* (*f*), it was held that the plaintiff having previously commenced a suit against an infringer of his trade mark, and then having got his bill dismissed with costs, in consequence of being advised that his right was doubtful, had lost all rights in the trade mark. Under the Registration Acts such a loss of trade mark can hardly occur except in the case of unregistered though certified marks, since the rights of a proprietor of a registered mark are such that it is impossible to suppose that such a

(*a*) § 10 of Act of 1875.
(*b*) *In re Stevens*, L. R. 3 Ch. D. 659.
(*c*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.
(*d*) *Cartier* v. *Carlile*, 31 Beav. 292.
(*e*) § 10 of Act of 1875.
(*f*) 12 W. R. 305; and see W. N. 1873, p. 178.

proprietor would resign his claims without a struggle. With respect to marks unregistered, or even uncertified, there does not appear to be anything in the Act to prevent proof of the imitation of such marks being given in support of an action for unfair competition in trade carried on by means of actual intentional fraud, and not depending solely on the similarity of the marks (*a*).

Abandonment of registered marks not to be anticipated.

On the whole, it may be expected that, while with respect to unregistered marks things will remain much as they were, with respect to registered ones there will be in the future no discontinuance or abandonment, except where registration has been discontinued, in consequence of non-compliance on the part of the registered proprietor with the requirements of the Act with respect to prolonged registration.

Infringement of disused mark.

In *Lemoine* v. *Ganton* (*b*), a plaintiff was allowed to recover nominal damages for the infringement by the defendant of a trade mark which the plaintiff had formerly used, but had ceased to use for a year. By Rule 33, a registered trade mark removed from the register is to be deemed for five years after such removal to be a trade mark already registered, so far as is necessary in order to prevent the registration for that period by another person of the same or a similar mark for goods in the same class.

(*a*) Compare the remarks on the second class of cases by Sir G. Jessel, M.R., in *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 443.

(*b*) 2 E. D. Smith, 343; R. Cox, 142.

CHAPTER IV.

INFRINGEMENT.

Requisites for infringement.

WHEN an action has been commenced, having for its object the restraint of an unfair competition in trade, carried on by means of an employment by the defendant of a trade mark identical, or nearly identical, with the plaintiff's, there must be established, in order for the action to be successful, the existence of the trade mark, the plaintiff's exclusive right therein, the fact of an imitation, and the absence of licence or acquiescence on the part of the plaintiff (*a*).

Fact of infringement.

Assuming, then, the validity of the trade mark and the rights of the plaintiff therein to be established, the next and most important point for the plaintiff to prove is the fact of infringement. The plaintiff has no right to say that the defendant shall not sell exactly the same article, better or worse, or an article looking exactly like his own unpatented article, but he has a right to say that the defendant shall not sell such article in such a way as to steal (so to call it) the plaintiff's trade mark, and make purchasers believe that it is the manufacturer to which that trade mark was originally applied (*b*). In the language of the Common Law, the defendant has no right to sell his goods "as and for" those of the plaintiff (*c*).

(*a*) See *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; and *Leather Cloth Co.* v. *American Leather Cloth Co.*, 33 L. J. Ch. 199.

(*b*) See per Lord Cranworth, C., in *Farina* v. *Silverlock*, 6 De G. M. & G. 214; and per Lord Langdale, M.R., in *Franks* v. *Weaver*, 10 Beav. 297.

(*c*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; *Morison* v. *Salmon*, 2 Man. & G. 385; *Crawshay* v. *Thompson*, 4 Man. & G. 357.

Fraudulent intention.

The question of how far a fraudulent intention in the mind of the defendant was necessary to entitle the plaintiff to obtain redress from him long remained a subject of discussion in connexion with trade marks. The doctrine of the Common Law was that, inasmuch as the only manner in which the Common Law could be set in motion to repair the wrongful proceedings of an infringer was by the institution of an action on the case (*a*), an allegation of intentional fraud (*b*), supported by evidence, was necessary to enable the plaintiff to bring his action to a successful conclusion (*c*).

First purchaser not deceived.

While, however, it was necessary at Common Law for a fraudulent intention to be proved, it was not required that the defendant should have represented to his immediate purchaser that the goods marked were of the plaintiff's manufacture, it was sufficient to bring the case within the reach of the law if he had sold the goods for the purpose of their being resold as and for goods of the plaintiff's manufacture, which object the mark attached to them by the defendant would be calculated to facilitate (*d*).

Early doctrine in Chancery.

When plaintiffs in trade-mark cases began to seek redress in the Court of Chancery, desirous of obtaining the more convenient remedy by way of injunction and account, which was superior to the damages to be gained at Common Law alike in the compensation for the past and in the security for the future, the Chancery judges held that the Courts in which they presided could act only in aid of, and as ancillary to the legal right (*e*). And acting upon this same principle, they held that the rules by which they had to judge of infringement must be identical with those of the Commou Law, the plaintiff's right to his remedy

(*a*) See *Crawshay* v. *Thompson*, 4 Man. & G. 357.

(*b*) *I.e.* that the defendant had acted knowingly—*scienter*.

(*c*) *Singleton* v. *Bolton*, 3 Doug. 293; *Morison* v. *Salmon*, 2 Man & G. 385; *Crawshay* v. *Thompson*, 4 Man. & G. 357; *Rodgers* v. *Nowill*, 5 C. B. 109; and *Myers* v. *Baker*, 3 H. & N. 802. See, too, per Parke, B., in *Taylor* v. *Ashton*, 11 M. & W. 415.

(*d*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; and see *Chappell* v. *Davidson*, 2 K. & J. 123.

(*e*) See per Lord Cottenham, C., in *Motley* v. *Downman*, 3 My. & Cr. 1.

being considered to be based, not on any right of property in him, but on the fraudulent proceedings of the defendant (*a*). The cases which were frequently sent by Chancery judges to be tried at Common Law by a jury were, of course, tried in accordance with Common Law principles (*b*).

Same injury caused, whether actual fraud or not.

It is however, apparent that the seriousness of the injury inflicted on the manufacturer who has acquired a reputation for excellence in a particular class of goods, denoted by a special trade mark, by the offering for sale in the market of other goods, side by side with his, bearing the same mark, is not affected by the question whether such rival goods are made and marked by a person who is aware of the reputation of the original goods and desirous of attracting to himself some of the profits of that reputation, or by one who is actuated by no such motives and is even ignorant of the prior use of the mark. The first maker is defrauded, even though his rival's conduct be not intentionally fraudulent.

Later doctrine in Chancery.

In 1838, Lord Cottenham, C., awarded a perpetual injunction in a case in which he rejected any imputation of intentional fraud (*c*), and this is not now necessary to obtain redress in Equity. The principles in accordance with which relief will be given in Equity were summed up as follows by Lord Westbury, C.:—"At Law the proper remedy is by an action on the case for deceit, and proof of fraud on the part of the defendant is of the essence of the action; but the Court will act on the principle of protecting property alone, and it is not necessary for the injunction to prove fraud in the defendant, or that the credit of the

(*a*) *Blanchard* v. *Hill*, 2 Atk. 484; *Canham* v. *Jones*, 2 V. & B. 218; *Perry* v. *Truefitt*, 6 Beav. 66; *Croft* v. *Day*, 7 Beav. 84; and see the observations of V.-C. Wood in *Edelsten* v. *Vick*, 11 Hare, 78; *Collins Co.* v. *Cowen*, 3 K. & J. 428; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; *Hall* v. *Barrows*, 32 L. J. Ch. 548; and *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.

(*b*) *E.g.*, *Rogers* v. *Nowill*, 5 C. B. 109.

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

plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by loss of custom is sufficient to support his title to relief. Neither will the plaintiff be deprived of remedy in Equity, even if it be shown by the defendant that all the persons who bought from him goods bearing the plaintiff's trade mark were well aware that they were not of the plaintiff's manufacture. If the goods were so supplied by the defendants for the purpose of being sold again in the market the injury to the plaintiff is sufficient. Again, it is not necessary for relief in Equity that proof should be given of persons having been actually deceived, and having bought goods with the defendant's mark, under the belief that they were of the manufacture of the plaintiff, provided that the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other" (*a*). It is not necessary for the plaintiff to show that the defendant knew whose trade mark his resembled (*b*), nor, in fact, to show that the defendant knew that his trade mark resembled any existing mark (*c*). In short, "the absence of fraudulent intention is no defence against an application to the Court for an injunction by the person whose property has been injured" (*d*).

Indulgence to innocent offender.

It was, however, suggested by Lord Romilly, M.R., that the Court would not require a person to completely change a trade mark which he had taken *bonâ fide*, and without any intention of deception, but which did in point of fact resemble the trade mark of another person, since the complete change of trade mark might be of so serious consequence to the unintentional offender (*e*).

(*a*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185. That the rule of the Court of Chancery was as here stated, was recognised by the Court of Queen's Bench in *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537.

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

(*c*) *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Burgess* v. *Hills*, 26 Beav. 244; *Harrison* v. *Taylor*, 11 Jur. N. S. 408.

(*d*) Per Sir J. Stuart, V.-C., in *Clement* v. *Maddick*, 1 Giff. 98.

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

Fraudulent intention, as affecting account.

It is also important to prove the fact of fraudulent intention, having regard to the account to be obtained, which may not be given in respect of sales by the defendant during such time as he continued in ignorance that he was infringing the plaintiffs' rights (*a*).

Fraudulent intention in case of delay.

Again, in *Rodgers* v. *Rodgers* (*b*), Sir G. Mellish, L.J., expressed an opinion that, in a case in which the application for an injunction would, in the absence of proof of actual fraud, have to be rejected on the ground of long user by the defendants without assertion by the plaintiffs of their right, yet if it were clearly made out that the use of the trade mark by the defendants was fraudulent, and that it had the practical effect of deceiving the public, then that in such a case the intentional fraud would operate to prevent the application for the injunction from being defeated on the ground of lapse of time.

In other respects.

Further, in *Radde* v. *Norman* (*c*), it was held by Sir J. Wickens, V.-C., to be quite obvious that much less absolute proof of the plaintiffs' title would be required where there was reason to doubt the defendants' good faith; and in *Cope* v. *Evans* (*d*), Sir C. Hall, V.-C., said that where fraudulent intention was proved, the Court would restrain the defendants without further enquiry.

Circumstances pointing to fraudulent intention.

In default of direct proof of fraudulent intention, there are various circumstances which may serve to point to the conclusion that such intention has existed: thus, the exact imitation of peculiar characteristics (*e*); the addition to an existing mark of a feature taken from the plaintiff's mark (*f*); the removal, one by one, of points of difference, which originally served to distinguish the defendant's mark from the plaintiff's (*g*); the marking goods in obedience to an order to imitate the plaintiff's

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

(*b*) 31 L. T. N. S. 285.

(*c*) L. R. 14 Eq. 348.

(*d*) L. R. 18 Eq. 138. And see *Mitchell* v. *Condy*, W.N. 1877, p. 153.

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

(*f*) *Dixon* v. *Jackson*, Court of Session Cases, 3rd series, V. 326 (a star added).

(*g*) *Farina* v. *Cathery*, L. J. Notes of Cases, 1867, p. 134.

mark (*a*); the adoption of an essential part of the plaintiff's mark, with a trifling and colourable alteration (*b*); the use by the defendant of a name not his own (*c*), possibly under the authority of some person who bore the same name as the plaintiff (*d*); and the formation of a partnership with another person, whose name or initial was such as to enable the defendant to imitate the plaintiff's mark with some specious pretence of legality (*e*)—have all been held to afford ground for reasonable suspicion of the presence of an *animus fraudandi*.

Circumstances pointing to absence of fraud.

On the other hand, if the defendant uses, on the goods which he is alleged to be endeavouring to pass off as the plaintiff's, a distinct and obvious trade mark of his own, or if he states plainly and in fair sized and clear type that such goods are in fact manufactured by himself, there is a strong indication that the defendant has no intention of attempting deception (*f*).

Fraudulent intention in user of name.

With respect to trade marks used before the passing of the Trade Marks Registration Act, 1875 (*g*), and consisting of a name printed or stamped in ordinary characters, which might be the case independently of the Act, it has been held that it is not necessary, in order to obtain an injunction, to prove the *scienter* where the infringer does not bear the name he has assumed (*h*), but that on the other hand, where he does bear that name, such evidence must be produced (*i*).

Infringement of new registered marks.

With respect to names first used as trade marks after

(*a*) *Woollam* v. *Ratcliff*, 1 H. & M. 259.

(*b*) *Radde* v. *Norman*, L. R. 14 Eq. 348 ("Leopoldsalt," for "Leopoldshall").

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

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

(*e*) *Croft* v. *Day*, 7 Beav. 84 (Day & Martin); *Moet* v. *Clybouw*, M. R., Jan. 19, 1877 (M. & C.). And see *Schweitzer* v. *Atkins*, 37 L. J. Ch. 847.

(*f*) *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434—444; so, too, in *Cheavin* v. *Walker*, L. R. 5 Ch. D. 850, where the goods were stated to be manufactured by the defendants.

(*g*) 38 & 39 Vict. c. 91.

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

(*i*) *Burgess* v. *Burgess*, 3 De G. M. & G. 89.

the passing of the Act, the requirement that they shall be "printed, impressed, or woven, in some particular and distinctive manner" (*a*), renders the mere use of the same name no infringement, unless the particular and distinctive manner is also copied, in which case evidence of actual intentional fraud will be unnecessary, whatever may be the name of the infringer.

When no trade mark, infringement must be fraudulent.

"When it is not a case pure and simple of trade mark, it must depend upon actual fraud; that is, the defendant must be shown to have said or done something which, as between him and the person with whom he was dealing, amounted to a fraudulent representation that his goods were the goods of the person who is complaining of his act or word. Actual fraud must be proved" (*b*), and "if nobody is deceived, no wrongful act is committed" (*c*). This is so, whether the defendant in such a case of quasi-trade mark has imitated something which might have been a trade mark if used as such (*d*), or has simulated any other appearances which have had the effect of gaining for him the custom which the public intended for the plaintiff (*e*).

Infringement of registered trade mark without actual fraud.

That a registered trade mark is property, and evidence of fraudulent intention unnecessary, is now established by the Registration Act, 1875, § 3, in accordance with which the registration of a person as first proprietor of a trade mark is *primâ facie* evidence of his right to the *exclusive use* of such trade mark, and shall, after the expiration of five years from the date of such registration, be conclusive evidence of his right to the exclusive

(*a*) § 10 of the Act.

(*b*) Per James, L.J., *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434—52.

(*c*) Per Mellish, L.J., *ib.* 455.

(*d*) Thus, where the possible mark has not been applied to a vendible article in the market.

(*e*) In such cases, for instance, as *Knott* v. *Morgan*, 2 Keen, 213, where a variety of circumstances were imitated, so as to produce in the defendant's omnibus a similarity to the plaintiff's; *Hogg* v. *Kirby*, 8 Ves. 215, where the question had reference to the general appearance and contents of a magazine; or *Spottiswoode* v. *Clarke*, 2 Ph. 154, where it related to the arrangement of the title-page of an almanac.

use of such trade mark, subject to the provisions of the Act as to its connexion with the goodwill of a business. And by § 4 the title of a subsequent proprietor is to be treated as a continuation of the title of the first registered proprietor.

What is infringement.

The real question which the Court has to try in a case of alleged infringement of trade mark, is whether what the defendant has done is calculated to deceive, whether there is so much imitation that goods bearing the one mark may be readily mistaken for goods bearing the other.

Croft v. *Day.*

In *Croft* v. *Day* (*a*), it was remarked by Lord Langdale, M.R., that two things were necessary for the accomplishment of a fraud such as was there contemplated: "First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; and, secondly, a sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance was calculated to produce. To have a copy of the thing would not do, for, though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which was improperly sought to be sold. For the accomplishment of such a fraud, it was necessary in the first instance to mislead the public, and in the next place to secure a benefit to the party practising the deception by preserving his own individuality" (*b*). In that case, however, a deliberate attempt was made to represent the defendant's establishment as the plaintiff's, and the injury done to the plaintiff by the sale of goods bearing the spurious marks instead of his genuine goods is ordinarily sufficient to entitle him to his remedy, independently of any habit induced in the customer to resort to the defendant instead of to the plaintiff.

(*a*) 7 Beav. 84.
(*b*) And see *Rowley* v. *Houghton*, 2 Brewster, 303; R. Cox, 486.

Tests of infringement.

By what test, then, has it to be determined whether there is such a degree of similarity as to require the interference of the Court?

Actual deception.

In the first place, where one person has adopted the trade mark of another, or a mark nearly resembling it, and there is evidence of actual deception; that is to say, "that any one has in fact been thereby induced to buy the defendant's goods as being the goods of the plaintiff," the Court will restrain the defendant without further enquiry (*a*). The question of resemblance has been decided by the test of facts. It is not, indeed, necessary that there shall have been actual deception (*b*); but since, unless that can be proved, the case which the Court has to try is a hypothetical case, in which honest evidence as to probability of deception can be procured on both sides, it is always safer for a plaintiff to obtain proof of actual deception if possible, and a certain degree of delay to enable him to obtain such proof will be excused (*c*).

Probable deception.

In most cases, however, there is not produced any evidence of actual deception, and the plaintiff then has to satisfy the Court or jury that the defendant has used a mark either identical with, or only colourably differing from his own (*d*). It is not sufficient for the plaintiff to produce evidence tending to show that in the opinion of the witnesses deception may occur: he has to convince the Court or jury that there is such reasonable probability of deception as to justify interference with the defendant (*e*).

(*a*) *Cope* v. *Evans*, L. R. 18 Eq. 138; and see *Woollam* v. *Ratcliff*, 1 H. & M. 259.

(*b*) *Abbott* v. *Bakers and Confectioners' Tea Association*, W.N. 1871, p. 207; and see *Filley* v. *Fassett*, 44 Mo. 173; R. Cox, 530; and *Dixon Crucible Co.* v. *Guggenheim*, 2 Brews. 321; R. Cox, 559.

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

(*d*) See *Cartier* v. *Carlile*, 31 Beav. 292; and *Cope* v. *Evans*, L. R. 18 Eq. 138.

(*e*) *Blackwell* v. *Crabb*, 36 L. J. Ch. 504; *Bass* v. *Dawber*, 19 L. T. N. S. 626; *Cope* v. *Evans*, L. R. 18 Eq. 138; *Snowden* v. *Noah*, Hopk. 347; R. Cox, 1; *Colladay* v. *Baird*, 4 Phila. 139; R. Cox, 257; *Colton* v. *Thomas*, 2 Brewster 308; R. Cox, 507; *Falkinburg* v. *Lucy*, 35 Cal. 52; R. Cox, 448; *Bell* v. *Locke*, 8 Paige, 75; R. Cox, 11; *Ledger* v. *Ray*, Court of Appeal, May 3, 1877; *Stevens* v. *De Conto*, 7 Robertson, 343; R. Cox, 442; *Wylam* v. *Clarke*, W. N. 1876, p. 68.

When is deception probable.

It is obvious that in these cases questions of considerable nicety may arise; and, in the language of Lord Cranworth, C., in *Siexo* v. *Provezende* (*a*), "it is hardly necessary to say that, in order to entitle a party to relief, it is by no means necessary that there should be absolute identity (*b*). What degree of resemblance is necessary, is, from the nature of things, a matter incapable of definition *d priori*. All that Courts of Justice can do is to say that no trader can adopt a trade mark so resembling that of a rival as that *ordinary purchasers, purchasing with ordinary caution*, are likely to be misled (*c*).

"It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use. If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go farther. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any

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

(*b*) As to this, see per Lord Chelmsford in *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; and per Sir R. Malins, V.-C., in *Anglo-Swiss Condensed Milk Co.* v. *Swiss Condensed Milk Co.*, W. N. 1871, p. 163.

(*c*) As to this criterion, see *Archbold* v. *Sweet*, 1 Mo. & Rob. 162; *Shrimpton* v. *Laight*, 18 Beav. 164; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523 (per Lord Cranworth); *Barnard* v. *Pillow*, W. N. 1868, p. 94; *Anglo-Swiss Condensed Milk Co.* v. *Swiss Condensed Milk Co.*, W. N. 1871, p. 163; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Mitchell* v. *Condy*, W. N. 1877, p. 153; *Partridge* v. *Menck*, 1 How. App. Cas. 558; R. Cox, 72; *Walton* v. *Crowley*, 3 Bl. C. C. 440; R. Cox, 166; *Clark* v. *Clark*, 25 Barb. 76; R. Cox, 206; *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416; R. Cox, 210; *Swift* v. *Dey*, 4 Robertson, 611; R. Cox, 319; *Rowley* v. *Houghton*, 2 Brewster 303; R. Cox, 486; *Colton* v. *Thomas*, 2 Brewster, 308; R. Cox, 507; *Lockwood* v. *Bostwick*, 2 Daly, 521; R. Cox, 555; *Dixon Crucible Co.* v. *Guggenheim*, 2 Brewster, 321; R. Cox, 559.

mark which will cause his goods to bear the same name in the market (*a*), may be as much a violation of the rights of that rival as the actual copy of his device."

Infringement of essential part.

The infringement may consist in the adoption of the essential part of the plaintiff's trade mark by the defendant, as the word "Eureka" (*b*), or "Glenfield" (*c*), or "Apollinaris" (*d*), or in the imitation of the general appearance of the plaintiff's mark. Where both trade marks are of a composite character, it is possible that, though no one particular mark has been exactly imitated, the combination may be very similar and likely to deceive, and will therefore be restrained by injunction (*e*).

Infringer's mark need not be identical with mark infringed. Colourable differences.

"For the purpose of establishing a case of infringement it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as, not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade mark belongs" (*f*). It is seldom that the mark employed by the infringer does correspond in all respects with that of the person whose rights he is attacking; the usual practice is to introduce some colourable variation, which may supply the infringer with a plausible excuse for his

(*a*) Thus, if in *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185, the defendant had called his wire "Anchor Wire," without using the figure of an anchor, the plaintiff's wire having acquired the name of "Anchor Wire" because of the trade mark being an anchor. In the U. S. Patent Office there was held to be a fatal conflict between two trade marks for hams, of which the one consisted of the word "Bouquet," the other of a bouquet of flowers: *Schrauder* v. *Beresford & Co.*, U. S. Patent Office, June 27, 1872.

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

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

(*d*) *Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 242; and see *Walton* v. *Crowley*, 3 Bl. C. C. 440; R. Cox, 166; *Binninger* v. *Wattles*, 28 How. Pr. R. 206; R. Cox, 318; and *Filley* v. *Fussett*, 44 Mo. 173; R. Cox, 530.

(*e*) *Abbott* v. *Bakers and Confectioners' Tea Association*, W. N. 1871, p. 207; but see *Blackwell* v. *Crabb*, 36 L. J. Ch. 504.

(*f*) Per Lord Chelmsford, in *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508.

fraud. "In every case," however, "the Court must ascertain whether the differences are made *bonâ fide* in order to distinguish the one article from the other; whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colourable, and the resemblances are such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance which is of primary importance for the Court to consider, because if the Court finds, as it almost invariably does find in such cases as this, that there is no reason for the resemblance, excepting for the purpose of misleading, it will infer that the resemblance is adopted for the purpose of misleading" (*a*).

Examples.

Thus, it was held that "Cacaotine" was a colourable imitation of "Cocoatina" (*b*), "Steel pens" of "Stephens" (*c*), "Tung's" of "Tonge's" (*d*), "Leopoldsalt" of "Leopoldshall" (*e*), "Lactopepsine" of "Lactopeptine" (*f*), "Cocoine" of "Cocoaine" (*g*), "Bovina" of "Bovilene" (*h*). Again, a beehive was held to be a colourable imitation of a bell of a similar shape, similarly printed on a label (*i*).

Seixo v. *Provezende.*

In *Seixo* v. *Provezende* (*k*) the plaintiff, a Portuguese nobleman and wine grower, sold his wine in casks branded on the head with a crown and eagle, and the letters "B. S.," and also at the bung-hole with a crown,

(*a*) Per Sir W. P. Wood, V.-C., *Taylor* v. *Taylor*, 23 L. J. Ch. 255; and in the case of a prosecution for obtaining money by false pretences, see per Erle, J. in *R.* v. *Dundas*, 6 Cox, 380.

(*b*) *Schweitzer* v. *Atkins*, 37 L. J. Ch. 847.

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

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

(*e*) *Radde* v. *Norman*, L. R. 14 Eq. 348.

(*f*) *Carnrick* v. *Morson*, V.-C. B., March 22, 1877; L. J., Notes of Cases, 1877, p. 71.

(*g*) *Burnett* v. *Phalon*, 9 Bos. 192; R. Cox, 376.

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

(*i*) *Bell* v. *Bell*, V.-C. B., August 1, 1876.

(*k*) L. R. 1 h. 192

the word "Seixo," and the year of vintage. This wine had acquired a reputation as "Crown Seixo Wine," when the defendant began to sell wine which he called "Seixo do Cima," and placed in casks branded in a somewhat similar manner to the plaintiff's. The injunction was granted and affirmed, although the defendants contended that parts of their own vineyards were called "Seixo," and that the name was an ordinary Portuguese adjective, signifying "stony."

Wotherspoon v. Currie.

In *Wotherspoon* v. *Currie* (*a*), the plaintiffs manufactured starch, which, under the name of "Glenfield Starch"—a name derived from a small place near Paisley, where it was made—acquired a great reputation. They subsequently removed their works to Paisley, and there continued to make "Glenfield Starch." The defendants, also starch manufacturers at Paisley, bought a small plot of land at Glenfield, and began selling "Glenfield Starch." It was held by V.-C. Malins and the House of Lords that the use of the word "Glenfield" in connexion with starch had the effect of inducing people to buy the defendants' manufacture, under the impression that it was the plaintiffs', and that there was a colourable imitation of the mark to which the plaintiffs were entitled (*b*).

Similarity of packing.

Where the goods of one manufacturer are so packed or arranged as externally to resemble those of others engaged in the same trade, as where starch was put up commonly in the trade in packets of a certain colour and appearance, the similarity common to all does not of itself expose the manufacturer to an action, but it makes it incumbent

(*a*) L. R. 5 H. L. 508.

(*b*) See also the American cases, *Coffeen* v. *Brunton*, 4 McLean, 516, R. Cox, 82; *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sand. S. C. 599, R. Cox, 87; *Davis* v. *Kendall*, 2 R. I. 566, R. Cox, 112; *Williams* v. *Johnson*, 2 Bos. 1, R. Cox, 214; *Bradley* v. *Norton*, 33 Conn. 157, R. Cox, 331; *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402, R. Cox, 490; *Gillis* v. *Hall*, R. Cox 596; *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450, 12 Amer. Rep. 401; *Burke* v. *Cdssin*, 45 Cal. 467, 13 Amer. Rep. 204.

upon him to take care that his distinguishing mark is really distinguishing (*a*).

Not conclusive.

However, where a defendant had, in obedience to express directions, put up his silk in imitation of the plaintiff's bundles, his execution of the order was held not to be conclusive against him (*b*). So, too, where a defendant packed inferior brandy in the plaintiff's cases at the express request of an agent of the plaintiff, who was seeking to entrap him, Sir R. Malins, V.-C., refused the injunction with costs (*c*).

Infringement must be by use on same class of goods.

The use by one manufacturer of a trade mark resembling or even identical with that used by another, is not an infringement of that other's rights, unless the class of goods on which the two marks are used is the same (*d*).

Infringement of disused mark.

It has been held in America that the use by a manufacturer of a mark previously used by another manufacturer, but discontinued by him for a year, is an infringement of the rights of the latter (*e*).

Infringement by improper use of genuine mark.

It is an infringement to use a genuine trade mark of a manufacturer upon goods to which that manufacturer did not intend it to be applied, even though the goods upon which the infringer uses it are of the make of the owner of the mark (*f*).

Infringement by engraver.

It is an infringement for an engraver to prepare and supply to one person printing blocks engraved with the trade mark, or an important part of the trade mark of another, inasmuch as the piracy would be impossible without the blocks; and Sir L. Shadwell, V.-C. of E., went

(*a*) See per Lord Hatherley, C., *Wotherspoon* v. *Currie*, 5 H. L. 508.

(*b*) *Woollam* v. *Ratcliff*, 1 H. & M. 259.

(*c*) *Hennessy* v. *Kennett*, V.-C. M., May 18, 1877.

(*d*) *Hall* v. *Barrows*, 33 L. J. Ch. 204; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518.

(*e*) *Lemoine* v. *Ganton*, 2 E. D. Smith, 343, R. Cox, 142.

(*f*) *Barnett* v. *Leuchars*, 13 L. T. N. S. 495 (boxes for "Pharaoh's Serpents"); *Richards* v. *Williamson*, 30 L. T. N. S. 746 (gun stamps); *Hennessy* v. *Bohmann*, W. N. 1877, p. 14; *Hennessy* v. *Cooper*, V.-C. M., April 26, 1877; *Hennessy* v. *Kennett*, V.-C. M., May 18, 1877 (cases for brandy); *Gillott* v. *Kettle*, 3 Diier, 624, R. Cox, 148 (labels on pen boxes).

so far as to say that if a thing contained twenty-five parts, and one only was taken, such an imitation would be sufficient to contribute to a deception, and the law would hold those responsible who had contributed to the fraud (*a*.) The principle is the same where the engraver, though retaining the blocks in his own possession, yet facilitates fraud by the dissemination of labels bearing pirated trade marks (*b*). Lord Cranworth, C., thought, however, that a man who had A.'s goods, but none of his labels, might rightfully employ a printer or engraver to supply him with imitated labels, and that A. could have no ground of complaint against the sale of his goods with something on them to represent his trade mark, though not his genuine mark (*c*).

(*a*) *Guinness* v. *Ullmer*, 10 L. T. (Old Series) 127.

(*b*) *Farina* v. *Silverlock*, 1 K. & J. 509; 6 De G. M. & G. 214; 4 K. & J. 650.

(*c*) Ib. 6 De G. M. & G. 214.

CHAPTER V.

THE CRIMINAL PROSECUTION.

Remedies for fraudulent imitations.

"In cases like the present" (*i.e.* in cases of imitation of a wrapper imprinted with a trade mark), "the remedy," said Willes, J., "is well known. The prosecutor may, if he pleases, file a bill in Equity to restrain the defendant from using the wrappers, or he may bring an action at law for damages, or he may indict him for obtaining money under false pretences" (*a*).

Infringement of trade mark not forgery at Common Law.

At Common Law the imitation of a trade mark or of a trade wrapper is not a forgery. "A forgery must be of some document or writing" (*b*); "it is the forging of a false document to represent a genuine document" (*c*). In a case in which the prisoner had imitated the label used on Borwick's baking powder, and was indicted for forgery (*d*), the Court of Crown Cases Reserved, consisting of Pollock, C.B., Willes and Byles, JJ., and Bramwell and Channell, BB., decided that the conviction for forgery was not sustainable, though an indictment for false pretences would have been good. The grounds of the decision are thus stated by Bramwell, B.: "I think that this was not a forgery. Forgery supposes the possibility of a genuine document, and that the false document is not so good as the genuine document, and that the one is not so

(*a*) *R.* v. *John Smith*, D. & B. 566; 8 Cox, 32. This was in 1858, before the Merchandise Marks Act of 1862.

(*b*) Per Cockburn, C.J., *R.* v. *Closs*, D. & B. 460; 7 Cox, 494.

(*c*) Per Willes, J., *R.* v. *John Smith*, *ubi suprà*.

(*d*) *R.* v. *John Smith*, *ubi suprà*.

efficacious for all purposes as the other. In the present case, one of these documents is as good as the other; the one asserts what the other does; the one is as true as the other; but one gets improperly used. But the question is whether the document itself is a false document. It is said that the wrapper is so like one used by somebody else, that it may mislead; but that is not material to the question we have to decide. The prisoner may have committed a gross fraud in using the wrappers for that which was not the genuine powder, and may possibly be indicted for obtaining money by false pretences, but I think he cannot be convicted of forgery" (*a*).

Not even if the mark consists of a signature.

It might be thought that where the trade mark consisted of a signature, an imitation of this would amount to forgery; but this has been decided not to be so, in the case of *R.* v. *Closs* (*b*), in which the prisoner imitated the signature of the artist, J. Linnell, in the corner of a spurious picture. Cockburn, C.J., in delivering the judgment of the Court of Crown Cases Reserved, said that the stamp was merely in the nature of a mark put upon the painting with a view to identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the painting being his, and in the course of the argument he expressed a similar opinion with respect to the imitation of a signature stamped on a gun.

The Merchandise Marks Act, 1862.

Under the Merchandise Marks Act, 1862 (*c*), the forgery of trade marks is now made a misdemeanour, and the Criminal Law made to cover such offences as those committed in *R.* v. *John Smith* (*d*), and *R.* v. *Closs* (*e*).

What offences are punishable

By that Act the following offences are made punishable:

(*a*) Taking the same view, Pollock, C.B., said that the real offence was the enclosing the false powder in the false wrapper; that the issuing of the wrapper without the stuff within it would be no offence; but that the real offence was the issuing them with the fraudulent matter in them.

(*b*) D. & B. 460; 7 Cox, 494.

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

(*d*) D. & B. 566; 8 Cox, 32.

(*e*) D. & B. 460; 7 Cox, 494.

under that Act.

1. Forging or counterfeiting a trade mark, with intent to defraud (*a*).
2. Applying any trade mark, or any forged trade mark (*b*), with intent to defraud, to any article not being the manufacture, &c., of any person denoted or intended to be denoted by such trade mark, or by such forged trade mark, or not being the manufacture, &c., of any person whose trade mark shall be so forged (*a*).
3. Applying any trade mark, or forged trade mark, with intent to defraud, to any article not being the particular or peculiar description of manufacture, &c. (*c*), denoted or intended to be denoted by such trade mark or forged trade mark (*a*).
4. Applying any trade mark, or forged trade mark, with intent to defraud, to any cask, &c., in, on, or with which any article shall be intended to be sold, or shall be sold, or uttered, or exposed for sale, or intended for any purpose of trade or manufacture (*d*).
5. Enclosing or placing, with intent to defraud, any article in, upon, under, or with any cask, &c., to which any trade mark shall have been falsely applied, or to which any forged trade mark shall have been applied (*d*).
6. Applying or attaching, with intent to defraud, to any article, any case, &c., to which any trade mark shall have been falsely applied, or to which any forged trade mark shall have been applied (*d*).
7. Enclosing, placing, or attaching, with intent to defraud, any article in, upon, under, with, or to any cask, &c., having thereon any trade mark of any other person (*d*).
8. Selling, uttering, or exposing, either for sale, or for

(*a*) § 2 of the Merchandise Marks Act.

(*b*) As to what is included in a "forged trade mark," see § 5.

(*c*) See *Barnett* v. *Leuchars*, and cases at p. 80, note *f*.

(*d*) § 3 of the Merchandise Marks Act.

any purpose of trade or manufacture, any article, together with any forged trade mark, which he shall know to be forged, or together with the trade mark of any other person applied or used falsely or wrongfully, or without lawful authority or excuse, knowing such trade mark of another person to have been so applied or used; and that, whether such trade mark or forged trade mark shall be in, upon, about, or with such article, or in, upon, about, or with any cask, &c., in, upon, about, or with which such article shall be so sold, &c. (*a*).

9. Putting, with intent to defraud, or to enable another to defraud, upon any article, or upon any cask, &c., together with which any article shall be intended to be or shall be sold, or uttered, or exposed for sale, or for any purpose of trade or manufacture, or upon any case, &c., in or by means of which any article shall be intended to be or shall be exposed for sale, any false description, statement, or other indication, of or respecting the number, quantity, measure, or weight (*b*) of such article, or any part thereof, or of the place or country in which such article shall have been made, manufactured, or produced (*c*).
10. Putting, with intent to defraud, or to enable another to defraud, upon such article, cask, &c., any word, letter, figure, signature, or mark, for the purpose of falsely indicating such article, or the mode of manufacturing or producing the same, or the ornamentation, shape, or configuration thereof, to be the subject of any existing patent (*d*), privilege, or copyright.
11. Selling, uttering, or exposing for sale, or for any purpose of trade or manufacture, any article upon which shall have been, to the offender's knowledge,

(*a*) § 4 of the Merchandise Marks Act.

(*b*) See *R.* v. *Sherwood*, 7 Cox, 270; *R.* v. *Ragg*, 8 Cox, 265; *R.* v. *Lee*, 9 Cox, 460.

(*c*) § 7.

(*d*) See § 9, and the cases cited in Ch. 7.

put, or upon any cask, &c., together with which such article shall be sold or uttered, or exposed for sale, or other purpose as aforesaid, shall have been so put, or upon any case, &c., used to expose or exhibit such article for sale, shall have been so put, any false description, statement, or other indication of or respecting the number, quantity, measure, or weight, of such article or any part thereof, or the place or country in which such article shall have been made, manufactured, or produced (*a*).

13. Aiding, abetting, counselling, or procuring the commission of any offence made a misdemeanour by the Merchandise Marks Act (*b*).

Intention of defrauding a particular person not necessary.

By sect. 12, there is no necessity to allege in the indictment, or to prove any intention to defraud any particular person. In the same way it seems that on the principle that "the making of any false instrument which is the subject of forgery, with a fraudulent intent, although in the name of a non-existing person, is as much a forgery as if it had been made in the name of one who was known to exist, and to whom credit was due" (*c*); the making and using a fictitious trade mark, with intent to defraud, by representing it to be the known trade mark of a person of established reputation, would be punishable.

Fraudulent additions to and alterations of marks.

By sect. 5, fraudulent *additions to* and *alterations* of a trade mark are made forged trade marks within the Act. At Common Law "it is forgery to alter a material part of a true instrument" (*d*). Thus, where in a bill of exchange "0" was added to "£8," and "y" to "eight," so as to make it appear to be for £80 (*e*).

Expressions generally

It is not an offence for persons to use any name, word,

(*a*) § 8

(*b*) § 13.

(*c*) 2 East Pleas of the Crown, 957; and see *R.* v. *Lewis*, Foster, Cr. Cas. 116; *R.* v. *Avery*, 8 C. & P. 576; *R* v. *White*, 72 C. C. C. Sessions Papers, 222.

(*d*) 2 East, Pleas of the Crown, 978.

(*e*) *R.* v. *Elsworth*, 2 East, P. C. 986.

or expression generally used for indicating the article with which it is used to be of some particular class or description of manufacture only (*a*). Thus, patent leather, patent thread (*b*), patent pins (*c*). understood may be employed.

A conviction under this Act does not take away or affect any civil remedy of the person aggrieved (*d*). Civil remedy not affected by conviction.

"An exact resemblance, or facsimile, is not required to constitute the crime of forgery, for if there be a sufficient resemblance to show that a false making was intended, and that the false stamp is so made as to have an aptitude to deceive, that is sufficient" (*e*). Exact facsimile not required.

While, apart from the Merchandise Marks Act, the fraudulent imitation of a trade mark is not forgery, such an imitation, when it has been intended to be and has been the means of inducing persons to part with their money, in the belief that they were buying one thing, when in fact they were buying another, is sufficient to support a conviction on an indictment for obtaining money by false pretences. This affords sufficient protection to the innocent purchaser of goods falsely marked; the Act gives protection to the manufacturer who has suffered in his custom and in his reputation by piracies. Where deception succeeds, indictment for false pretences will lie.

"There is no difference in principle between a misrepresentation of a mark, and one that an acceptance was the acceptance of John Jones or any other person" (*f*); and it is established that the fraudulent imitation of a trade mark will be punished in the same way, where the necessary circumstances exist. Thus, in *R.* v. *Dundas* (*g*), the prisoner, who asserted his own name to be Everett, sold blacking in bottles labelled "Everett's Premier," in a similar manner, with only trifling variations, to the bottles of a well-known manufacturer of that name. Convictions.

(*a*) § 9.
(*b*) *Marshall* v. *Ross*, L. R. 8 Eq. 651.
(*c*) *Edelsten* v. *Vick*, 11 Hare, 78.
(*d*) § 11.
(*e*) Per Grose, J., in *R.* v. *Collicott*, 2 Leach, 1048, a Stamp case.
(*f*) Per Kelly, C.B., in *R.* v. *Suter & Coulson*, 10 Cox, 577
(*g*) 6 Cox, 380.

Erle, J., told the jury that "with respect to the difference between the labels, the jury should consider whether it was a small and colourable difference only, and intended to deceive. It was of little consequence whether the man's name was Everett, as he had stated, or not, for even if it were, and he went about the country and offered blacking for sale as 'Everett's Premier,' representing it to be the well-known article of that name, knowing that it was not so, and intending to cheat the prosecutor by passing upon him a spurious article as the true one, his conduct was equally fraudulent." The prisoner was convicted. In *R.* v. *Smith* (*a*), the conviction for forgery being quashed, the prisoner afterwards pleaded guilty to an indictment for false pretences (*b*). In *R.* v. *Suter & Coulson* (*c*), it was held by the Court of Crown Cases Reserved that a representation that a mark of "18" on a watch was a genuine hall-mark of the Goldsmiths' Company was clearly a false pretence within the statute (*d*).

R. v. *Bryan.* Question as to misrepresentation of quality.

The case of *R.* v. *Bryan* (*e*) gave rise to some differences of opinion in respect to the Law of False Pretences. The prisoner in that case was found by the jury to have obtained money from pawnbrokers on spoons which he had fraudulently represented to have as much silver on them as Elkington's "A" spoons. They also found that he had represented the foundations to be of the best material, knowing that to be untrue, and that in consequence of this he obtained the moneys mentioned in the indictment. The Recorder of London reserved the case for the consideration of the Court of Crown Cases Reserved. Twelve judges heard the case, and of these ten held that

(*a*) D. & R. 566; 8 Cox, 32.

(*b*) 8 Cox, 37; and 48 C. C. C. Sessions Papers, 8.

(*c*) 10 Cox, 577.

(*d*) And in *R.* v. *Gray & Gosling*, referred to in Lloyd on Trade Marks, at p. 11, the imitation of Messrs. Allsopp's labels was punished; and in *R.* v. *S. Jones*, referred to at the same place, and also in Poland, on the Merchandise Marks Act, at p. 33, the imitation of Mr. Borwick's wrappers. See, too, *R.* v. *Close*, D. & B. 460; 7 Cox, 494.

(*e*) D. & B. 265; 7 Cox, 312.

the conviction must be quashed, Willes, J. and Bramwell, B., dissenting. The language employed by some of the judges on that occasion, and in particular by Lord Campbell, C. J. (*a*), led to an impression that in the opinion of the judges it was impossible to convict under the Statutes of False Pretences, when the misrepresentation had reference only to quality and not to substance; that is to say, that where, for instance, an infinitesimal quantity of gold was found in a ring represented to be of eighteen carat gold, the presenee of that infinitesimal quantity of gold prevented the false representations from supporting a criminal charge (*b*). Where the jewellery contained no metal of the kind specified, the prisoner was convicted (*c*). Anticipating such a result, Bramwell, B., said (*d*) that the result of the decision would be that the prisoner would be indictable if Elkington's spoons had half an ounce of silver, and his none, but not if Elkington's had one ounce and his a quarter of an ounce.

The interpretation thus put upon the decision in *R.* v. *Bryan* was unfortunate, tending, as it did, to encourage an idea of fraud being possible with impunity; and some of the judges who had decided *R.* v. *Bryan* (*e*) took opportunities of explaining what the real principle of the judgment was (*f*). It was also difficult to reconcile such a conclusion with such cases as those in which the prisoner

(*a*) He said, for instance, that the conviction proceeded upon "a mere misrepresentation, during the bargaining for the purchase of a commodity, of the quality of that commodity." "If the seller were criminally liable for unduly exaggerating the value of the article, the buyer would be for unduly depreciating." He "found no case in which a mere misrepresentation at the time of sale of the quality of the goods had been held to be an indictable offence."

(*b*) *R.* v. *Suter & Coulson*, 10 Cox, 577; and see *R.* v. *Lee*, 8 Cox, 233; *R.* v. *Levine & Wood*, 10 Cox, 374. Previously to *R.* v. *Bryan*, D. & B. 265, 7 Cox, 312, in *R.* v. *Hall*, 45 C. C. C. Sessions Papers 451, the prisoner was convicted, though there was a minute quantity of gold.

(*c*) *R.* v. *Roebuck*, 7 Cox, 126; D. & B. 24; and see *R.* v. *Ball*, C. & M. 249; *R.* v. *Stevens*, 1 Cox, 33; and *R.* v. *Priestley*, 63 C. C. C. Sessions Papers, 541.

(*d*) *R.* v. *Bryan*, D. & B. 265, 7 Cox, 312.

(*e*) D. & B. 265; 7 Cox, 312.

(*f*) See, for instance, per Erle, C. J., in *R.* v. *Goss*, Bell, 208; 8 Cox, 262; and per Willes, J., in *R.* v. *Suter & Coulson*, 10 Cox, 577.

sold a cheese, by means of the representation that a taster taken from a cheese of superior quality was in fact taken from the one in question (*a*). There was, indeed, in those cases, a certain misrepresentation as to substance, but the real grievance was that a cheese was sold as being of one quality, when it was in fact of another (*b*).

R. v. *Ardley.*

The whole question is now fully explained and set at rest by the judgment in *R.* v. *Ardley* (*c*). There the prisoner obtained money for a watch chain which he represented to be of fifteen carat gold, stamped on every link, but which representation was untrue. In giving judgment, Bovill, C.J., said: "The case which has been most pressed upon us is *R.* v. *Bryan* (*d*). The representation in that case was that certain plated spoons were 'equal to Elkington's A.' *Primâ facie* that representation would seem to be a mere matter of opinion, and the Court held that it was not sufficient to support the conviction. But many of the judges expressed the opinion that there might well be cases in which misrepresentations, though as to quality, would be within the statute. Cockburn, C.J., says, 'If the prisoner had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be an entirely different thing.' Pollock, C.B., says, 'I think if a tradesman or a merchant were to concoct an article of merchandise expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, the statute would apply.' It is plain that these learned judges considered that a specific representation of quality, if known to be false, would be within the statute. Coleridge, J., expressly concurs in the observations of

(*a*) *R.* v. *Abbott*, 1 Den. 273; *R.* v. *Dark*, 1 Den. 276; *R.* v. *Garlick*, 1 Den. 276; *R.* v. *Goss*, Bell, 208; 8 Cox, 262.

(*b*) And on this ground Lord Campbell, C. J., in *R.* v. *Roebuck*, 7 Cox, 126, D. & B. 24, dissented from *R.* v. *Abbott*.

(*c*) L. R. 1 C. C. R. 301, 12 Cox 23.

(*d*) D. & B. 265; 7 Cox, 312.

Pollock, C.B. Erle, J., at the close of his judgment says, 'No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and the present case appears to me not to support a conviction, upon the ground that there is no affirmation of a definite triable fact in saying the goods were equal to Elkington's "A," but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale, where the vendor has in substance the article contracted for, namely, plated spoons.' Crompton, J., also considered that the statute applies 'where the thing sold is of an entirely different description from what it is represented to be.' Willes, J., who dissented from the judgment of the Court, goes the whole length of saying that a representation as to quality, if known to be false, is enough to support a conviction. And Bramwell, B., leans to the same opinion.

"Applying these observations to the present case, the statement here made is not in form an expression of opinion or mere praise. It is a distinct statement, accompanied by other circumstances, that the chain was fifteen carat gold. That statement was untrue, was known to be untrue, and was made with intent to defraud. How does that differ from the case of a man who makes a chain of one material and fraudulently represents it to be of another? Therefore, whether we look at the whole of the evidence, or only at that which goes to the quality of the chain, the conviction is good. The case differs from *R.* v. *Bryan* (*a*), because here there was a statement as to a specific fact within the actual knowledge of the prisoner, namely, the proportion of pure gold in the chain."

From this case it follows that where a person has made a false statement in regard to a specific question of fact, knowing that statement to be false, with intent to defraud, **Intentional misstatement as to fact punishable.**

(*a*) D. & B. 265; 7 Cox, 312.

and he does defraud by means of that statement, then, even though the statement have reference to the quality of the article, he will be liable to be convicted.

Wrongful user of trade marks.

Placing a forged trade mark on goods not the make of the manufacturer whom the trade mark denotes will amount to such a statement, and it seems that the shifting a genuine label from goods of superior quality to goods of inferior quality, though of the same maker, will also come within the principle of *R.* v. *Ardley* (*a*).

False pretences as to weight.

In the sale of goods by weight, if money is obtained by representing the weight sold to be greater than it really is, an indictment for false pretences will be good, and it will make no difference that the goods were sold as a whole, for instance, by the load, if the price was calculated on the assumption that the load was of the weight represented by the prisoner (*b*).

Words are not necessary to constitute the false representation. Thus, where hewers at a colliery placed in their tubs of coal tokens to represent a greater weight of coal than they had in fact worked, it was held that they were properly convicted (*c*).

(*a*) L. R. 1 C. C. R. 301 ; 12 Cox, 23.

(*b*) *R.* v. *Sherwood*, 7 Cox, 270 ; *R.* v. *Ridgway*, 3 F. & F. 838 ; *R.* v. *Ragg*, 8 Cox, 265 ; *R.* v. *Lee*, 9 Cox, 460.

(*c*) *R.* v. *Hunter*, 10 Cox, 642 ; *R.* v. *Carter*, *ib.*

CHAPTER VI.

THE CIVIL REMEDY. I.

THE proper remedy at Common Law for a fraud committed by means of the infringement of a trade mark belonging to a rival trader is by an action on the case for deceit. The manner in which that form of action was made applicable to cases of trade mark and developed to meet the necessities of such cases, which in some respects differ from other cases of fraudulent misrepresentation, may be well stated in the language employed by Sir G. Mellish, L.J., who says (*a*), "In my opinion, all actions of this nature must be founded upon false representations. Originally, I apprehend, the right to bring an action in respect of the improper use of a trade mark arose out of the Common Law right to bring an action for a false representation, which, of course, must be a false representation made fraudulently. It differed from an ordinary action for false representation in this respect, that an action for false representation is generally brought by the person to whom the false representation is made; but in the case of the improper use of a trade mark, the Common Law Courts noticed that the false representation which is made by putting another man's trade mark, or the trade name of another manufacturer, on the goods which the wrongdoer sells, is calculated to do an injury, not only to the person to whom the false or fraudulent representation is made, Common Law.

(*a*) *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434—53.

but to the manufacturer whose trade mark is imitated; and, therefore, the Common Law Courts held that such a manufacturer had a right of action for the improper use of his trade mark. Then the Common Law Courts extended that doctrine one step farther; first, if I recollect rightly, in the case of *Sykes* v. *Sykes* (*a*). There it was held that, although the representation was perfectly true as between the original vendor and the original purchaser, in this sense, that the original purchaser knew perfectly well who was the real manufacturer of the goods, and therefore was not deceived into believing that he had bought goods manufactured by another person; yet if the trade mark was put on the goods for the purpose of enabling that purchaser, when he came to resell the goods, to deceive any one of the public into thinking that he was purchasing the goods of the manufacturer to whom the trade mark properly belonged, then that was equally a deception, a selling of goods with a false representation, which would give the original user of the trade mark a right of action. That was the Common Law right."

Action may be brought by manufacturer defrauded.

An action on the case for deceit at Common Law may then be brought not only by the person who has been induced to purchase goods manufactured by one maker in the faith that they have been manufactured by another, but also by the maker of whose manufacture the goods in question have falsely been represented to be. It seems at least probable that this principle was recognised as early as the reign of Queen Elizabeth. In *Southern* v. *Howe* (*b*) a case was quoted by Doderidge, J., in which, in that reign, a clothier of Gloucester, who manufactured better cloth than any other person in the trade, had invented and applied to his cloth a special mark to denote his manufacture. Another clothier then pirated this mark and applied it to his own inferior cloth, and it was held

(*a*) 3 B. & Cr. 541.

(*b*) 3 Cro. 47; Poph. 144; 2 Rolle, 28.

in the Court of Common Pleas that an action on the case for deceit would lie against the fraudulent clothier. Whether the action was brought by the buyer of the cloth or by the rival clothier cannot be determined, since the reporters differ on this point; but this much is clear, that Chief Justice Popham reported the case as establishing the right of the defrauded clothier to compensation for the injury done him.

Right to redress.

Whatever the circumstances in that particular case may have been, the principle that a person who has suffered by reason of his trade mark being intentionally imitated by another has a right at Common Law to redress from the infringer has been repeatedly acted on, and is thus clearly stated by Coltman, J., in *Rodgers* v. *Nowill* (*a*), where, after expressing his agreement with the law laid down by Williams, J., that no man had a right to sell goods of his own manufacture upon a false and deceitful representation that they were of the manufacture of another, he says: "To this I would add that an action is clearly maintainable by the party whose name is so fraudulently used, if any damage results to him from the false representation."

At Common Law, fraudulent intention must be proved.

According to the strict principles of the Common Law, for an action in respect of a trade mark to be successful, it must be proved that the defendant acted with fraudulent intention. "Proof of fraud on the part of the defendant," says Lord Westbury, C., "is of the essence of the action" (*b*). The general law on the subject of false representations is summed up by Parke, B., in *Taylor* v. *Ashton* (*c*), as being that, independently of any contract between the parties, no one can be made responsible for a representation of such kind as there was in that case (*i.e.*, a false representation of the flourishing state of a bank, which had induced the plaintiff to take shares), unless it be fraudulently made. The law so enunciated was applied in a succession

(*a*) 5 C. B. 109.
(*b*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.
(*c*) 11 M. & W. 415.

of trade mark cases at Common Law (*a*), the effect of which was stated by Lord Westbury as above.

Defendant must have expected deception.

It has been held that intentional fraud cannot be inferred from the fact alone that the plaintiff has informed the defendant that in his opinion the defendant was using a trade mark calculated to deceive, nor even from the fact being that the trade mark so used is really calculated to deceive; there must be evidence that the defendant believed such deception to be probable (*b*); in other words, that the defendant has sold his goods "as and for" the plaintiff's goods (*c*).

Deception of first purchaser not necessary.

It is not necessary, in order for the plaintiffs to recover, for them to show that the defendants made fraudulent representations directly to the persons to whom they sold the goods, "although they did not themselves sell them as goods of the plaintiffs' manufacture, yet if they sold them to retail dealers for the express purpose of being resold as goods of the plaintiffs' manufacture" (*d*), thus "scattering over the world the means of enabling parties to commit frauds upon the plaintiffs" (*e*), proof of that would be sufficient for the plaintiffs' case (*f*).

(*a*) See, among other cases, *Singleton* v. *Bolton*, 3 Doug. 293; *Crawshay* v. *Thompson*, 4 Man. & G. 357; *Rodgers* v. *Nowill*, 5 C. B. 109; *Myers* v. *Baker*, 3 H. & N. 802. In *Crawshay* v. *Thompson*, Coltman, J., expressed himself thus: "It appears to me that an intention to deceive is a necessary ingredient in this case. The intention is for the jury; and fraud must be made out by proof of an intention existing in the mind of the party that the iron should pass as the iron of the plaintiff."

(*b*) *Crawshay* v. *Thompson*, 4 Man. & G. 357.

(*c*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; *Morison* v. *Salmon*, 2 Scott, N. R. 449, 2 Man. & G. 385; *Crawshay* v. *Thompson*, *ubi suprà*. In Equity, it is not necessary to prove fraudulent intention, otherwise than by proving that the defendant has used a mark which is, in fact, calculated to deceive, and this was recognised by the Court of Queen's Bench in *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537. Since by the Judicature Act of 1873, § 25, the rules of Equity are to prevail where they conflict with those of the Common Law, it appears that at least nominal damages should be recoverable in the Common Law Divisions on proof of such facts as would be satisfactory to a Court of Equity.

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

(*e*) Per Sir W. P. Wood, V.-C., in *Farina* v. *Silverlock*, 1 K. & J. 509.

(*f*) Compare the language of the Court of King's Bench in *Polhill* v. *Walter*, 3 B. & Ad. 114; and see *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434—42—51—53.

Merchandise Marks Act.

In proceedings under the Merchandise Marks Act, 1862, where it is necessary to allege or mention an intent to defraud, or to enable another to defraud, it is sufficient to allege or mention that the defendant acted with intent to defraud or to enable some other person to defraud, without alleging an intention hostile to any particular person (*a*).

Questions for jury.

The question of fraudulent intention is for the jury, with whom it rests to say whether or not such intention is proved by the evidence before them (*b*). And the plaintiff's pleadings must allege with sufficient distinctness a false representation on the part of the defendant (*c*), when it will be left to the jury to say whether the defendant has adopted the particular mode of deceit charged (*d*).

Plaintiff must be injured.

In order to entitle the plaintiff to recover, it must be shown that the defendant's conduct has injuriously affected the plaintiff, and the plaintiff's pleadings must be so framed as to disclose a sufficient cause of action, so that where a banking business was established in London under the same name as a previously existing bank, it was held that the proprietor of the earlier bank could not recover, since he had not averred that he was a banker or had ever carried on a banking business (*e*). This case was decided on the same principle on which it was held in the Court of Chancery, that there was no infringement of trade mark unless there was actually in the market a vendible article to which the mark was in some way attached, and that no right to an injunction existed before the article had in fact been produced, even though it had been repeatedly advertised, and considerable outlay so incurred (*f*).

Merchandise Marks Act.

By section 22 of the Merchandise Marks Act, 1862, "every person aggrieved" by the forgery of a trade mark,

(*a*) 25 & 26 Vict. c. 88, § 12.

(*b*) *Crawshay* v. *Thompson*, 4 Man. & G. 357; *Rodgers* v. *Nowill*, 5 C. B. 109.

(*c*) *Morison* v. *Salmon*, 2 Scott, N. R. 449; 2 Man. & G. 385.

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

(*e*) *Lawson* v. *Bank of London*, 18 C. B. 84.

(*f*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307.

or use of a forged trade mark, is entitled to maintain an action for damages for the injury done him by the wrongful act, and for an injunction to prevent the repetition or continuance of the same or a similar act.

Costs incurred by defendant's fraud recovered from him.

Where A. ordered from B. a quantity of fire-bricks, marked with the name of C., who used it as his own trade mark, and the order was being executed by B. in ignorance of C.'s rights, C. filed a bill in Chancery to restrain B., who compromised the matter on paying a sum amounting in all, including costs, to over £200. On B. bringing an action against A. to recover the sum which he had so been compelled to pay, it was held by the Court of Queen's Bench that he was entitled to recover that sum, C. being entitled to an injunction in Equity on mere proof of the imitation, though at Common Law he would have had to prove fraud on the part of B. (*a*).

Innocent vendor of goods falsely marked.

It has been held in America that an innocent vendor of goods falsely marked, the genuineness of which he has not warranted, is entitled to maintain an action to recover the price of the goods from a person to whom he has sold them (*b*).

Damages.

Although it cannot be assumed by the Court, in default of evidence, that the same quantity of goods which a defendant has sold under a trade mark imitated from that of the plaintiff would have been sold by the plaintiff, but for the defendant's unfair competition (*c*), yet, where the whole profit made by an infringer upon the sale of the goods wrongfully marked was awarded by the jury as damages, the American Court held that this was not excessive, and said that the fact that it was impossible to apportion the profit, rendered it just that the infringer should lose the whole (*d*). And in *Taylor* v. *Carpenter* (*e*), when the defendant, against whom a verdict had been

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

(*b*) *Ruddcrow* v. *Huntington*, 3 Sand. S. C. 252, R. Cox, 106.

(*c*) *Leather Cloth Co.* v. *Hirschfeld*, L. R. 1 Eq. 299.

(*d*) *Graham* v. *Plate*, 40 Cal. 593, 6 Amer. Rep. 639.

(*e*) 2 Wood. & M. 1; 9 L. T. (Old Series) 514; R. Cox, 32–42.

found with substantial damages, moved for a new trial, urging, among other arguments, that the jury should have been told that if the defendant's goods were not inferior to the plaintiffs', the latter could not recover, or at all events could recover only nominal damages, it was held that the plaintiffs were not only not debarred from recovering at all, but that they could recover substantial damages, "since the actual damage suffered by loss of sales by the plaintiffs, which was the ground of recovery, was just as great as if the thread had been inferior, though the credit of their mark and thread might not suffer as much thereby, if it did at all."

Nominal damages where right infringed.

That a plaintiff is entitled to recover some damages where his trade mark has been infringed, appears clearly from *Blofeld* v. *Payne* (*a*), in which Lord Denman, C.J., told the jury that even if the defendants' hones were not inferior, the plaintiff was still entitled to some damages, inasmuch as his right had been invaded by the fraudulent act of the defendants. The jury found a verdict for the plaintiff, with a farthing damages, and also found that the defendants' hones were not inferior to the plaintiff's. The verdict was upheld by the Court of King's Bench, Littledale, J., saying that "the act of the defendants was a fraud against the plaintiff, and that even if it occasioned him no specific damage, it was still, to a certain extent, an injury to his right." It is evident that in this case, although the plaintiff did not suffer in reputation by the sale of inferior hones as his, yet he suffered in another way, his custom being diminished to an undetermined extent by goods being sold as his, so as to compete with those really of his make (*b*).

The first recorded case of trade mark brought before the Equity—

(*a*) B. & Ad. 410.

(*b*) See per Erskine, J., in *Morison* v. *Salmon*, 2 Scott, N. R. 449; 2 Man. & G. 385; and per Wilde, C.J., in *Rogers* v. *Nowill*, 5 C. B. 109; also *Coffeen* v. *Brunton*, 4 McLean, 516; R. Cox, 82; *Lemoine* v. *Ganton*, 2 E. D. Smith, 343, R. Cox, 142; *Chappell* v. *Davidson*, 2 K. & J. 123; and *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434—42—51—54.

Blanchard v. *Hill.*

judicial notice of the Court of Chancery was that of *Blanchard* v. *Hill* (*a*), in 1742, which, however, resulted in a statement by Lord Hardwicke, C., that he did not know "any instance of granting an injunction in Chancery to restrain one trader from using the same mark with another," and that he thought "it would be of mischievous consequence to do it."

Growth of jurisdiction of Chancery.

In *Henry* v. *Price* (1831) (*b*), and *Gout v. Aleploglu* (1833) (*c*), however, injunctions were granted to restrain the infringement of the plaintiffs' trade marks, and from this time the steadily increasing number of such cases coming before the Court of Chancery shows the growing favour with which that Court was regarded by suitors, the chief incentive no doubt being the more beneficial character of the remedy awarded, by injunction and account, as compared with the Common Law remedy of damages. By degrees the Court of Chancery absorbed the jurisdiction in trade-mark cases, until such cases were rarely if ever tried in the Common Law Courts, except when they were remitted for trial of the Common Law right by a Chancery judge. That practice was discontinued in consequence of Sir John Rolt's Act (*d*), and the effect has been, notwithstanding the extended power given to the Common Law Courts by the Merchandise Marks Act of the same year (*e*), to confine the consideration of this class of cases more strictly, if possible, than before to the Court of Chancery.

Registration Acts administered by Chancery Division.

This fact has been recognised by the Chancery Division being appointed to administer the Trade Marks Registration Acts (*f*).

Commissioners of Patents.

The registrar appointed under the Acts is, however, subject to the superintendence of the Commissioners of Patents (*g*), the extent of whose jurisdiction is not yet

(*a*) 2 Atk. 484.
(*b*) 1 Leg. Obs. 364.
(*c*) 5 Leg. Obs. 496, and 6 Beav. 69 n.; and see *Day* v. *Binning*, C. P. Cooper, 489; and 1 Leg. Obs. 205.
(*d*) 25 & 26 Vict. c. 27.
(*e*) 25 & 26 Vict. c. 88, § 21.
(*f*) 38 & 39 Vict. c. 91; 39 & 40 Vic. c. 33; and 40 & 41 Vict c. 37. See Rule 42.
(*g*) Rule 68.

clearly ascertained, though it may be presumed that cases of difficulty will be reserved for the consideration of the Court (*a*).

Principles adopted in Equity with respect to trade marks.

The principles on which the Courts of Equity have long acted in cases of true trade mark, *i. e.*, where a valid mark has been affixed to the goods or to wrappers or vessels containing them—principles by which those cases must, as it seems, be governed for the future, before whichever branch of the High Court of Justice they may come (*b*)—are thus explained by Sir G. Jessel, M.R., in *Singer Manufacturing Co.* v. *Wilson* (*c*).

"It is quite immaterial that the maker of the goods to which what I will call, for sake of shortness, the trade mark is affixed, did not know that it was a trade mark, and had not the slightest intention of defrauding anybody. He must not put as a mark on goods, even though he intends to establish it as his own trade mark, that which is the known trade mark of other people, and he would be restrained by injunction, though he thought he himself had invented the trade mark, and *bonâ fide* intended it to designate goods of his own manufacture. And the reason is obvious, because the goods pass from hand to hand, and though he may act with the utmost *bonâ fides*, yet the ultimate purchasers might believe that they were the real goods, that is to say, that they were manufactured by the person entitled to the original trade mark. Therefore, in that case, knowledge that he is doing anything wrong is immaterial, even in the maker.

"Another element which is sometimes imported into these cases has also no material bearing; that is, that if the maker knows that they are not the goods of the person entitled to use the trade mark, and communicates that knowledge to the immediate purchaser, it makes, as I have

(*a*) See *In re Meikle*, 24 W. R. 1067; and *In re Barrows*, L. R. 5 Ch. D. 353.

(*b*) See Judicature Act of 1875, § 25.

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

said, no difference; and even if he does not know it, and tells the immediate purchaser that the goods are of his own manufacture, it will still not save him from an injunction, because, although the immediate purchaser from him is aware that the goods in question are not manufactured by any other person than the vendor, yet, as he passes them on, the representation does not necessarily pass on with them, and therefore the next purchaser, or the following or some other purchaser, or the public at large, who are the ultimate purchasers, would be as much deceived as if no such communication took place. Consequently, whenever you get to a case of the first class (*i. e.* of true trade mark), you have nothing more to do than to show that the trade mark has been taken."

At first, Equity followed the Common Law.

When trade-mark cases were first brought into the Court of Chancery, they were treated on the same principle as they were at Common Law, and redress was refused where actual intentional fraud was not alleged and substantiated. The existence of anything that could be called a right of property in a trade mark was denied, and a fear expressed that, if that should be admitted, a stronger monopoly than even a patent-right would be created (*a*).

***Millington* v. *Fox*.**

In the year 1838, however, when the case of *Millington* v. *Fox* (*b*) came before Lord Cottenham, C., the Lord Chancellor perceived that when goods made by one man were put upon the market bearing the trade mark of another, the same evil effects were produced, whether the mark was so affixed for fraudulent purposes or with innocent intentions, since purchaser's would buy A.'s goods in the belief that they were B.'s, and B. would be deprived of the custom intended for him; so that A., whether by his own contrivance or not, would profit at the expense of B. and the public. In that case it was accordingly held by the Lord Chancellor that the plaintiffs were entitled to an injunction,

(*a*) *Blanchard* v. *Hill*, 2 Atk. 484; *Canham* v. *Jones*, 2 V. & B. 218.

(*b*) 3 My. & Cr. 338; and see the earlier case of *Gout* v. *Aleploglu*, 5 Leg. Obs. 496.

although he stated in express terms that he saw no reason for thinking that there had been any fraudulent user by the defendant of the plaintiffs' mark.

Question as to foundation of jurisdiction.

The decision in this case gave rise to some difference of opinion among the judges, some holding that the jurisdiction of the Court of Chancery in these cases, like that of the Common Law Courts, was founded on intentional fraud, and denying any exclusive right in trade marks (*a*), while others held that, intentional fraud not being necessary for the injunction, the jurisdiction must be held to be founded on the protection of a right of property in the trade mark (*b*).

Deference to Common Law

In *Motley v. Downman* (*c*), it was laid down broadly that the jurisdiction of the Court of Chancery was merely ancillary to that of the Common Law, and that the right to redress must be determined by the rules of the Common Law; and accordingly cases were frequently referred to the Common Law Courts for the determination of the right, before the equitable remedy was awarded (*d*). That

(*a*) *Perry* v. *Truefitt*, 6 Beav. 66; *Croft* v. *Day*, 7 Beav. 84; *Foot* v. *Lea*, 13 Ir. Eq. 490; *Edelsten* v. *Vick*, 11 Hare, 78; *Collins Co.* v. *Brown*, 3 K. & J. 423; *Collins Co.* v. *Cowen*, 3 K. & J. 428; *Leather Cloth Co.* v. *American Cloth Co.*, 1 H. & M. 271; *McAndrew* v. *Bassett*, 33 L. J. Ch. 561; *Walton* v. *Crowley*, 3 Bl. C. C. 440, R. Cox, 166.

(*b*) *Farina* v. *Silverlock*, 6 De G. M. & G. 214; *Burgess* v. *Hills*, 26 Beav. 244; *Clement* v. *Maddick*, 1 Giff. 98; *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217; *Welch* v. *Knott*, 4 K. & J. 747; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Hall* v. *Barrows*, 33 L. J. Ch. 204; *Cartier* v. *Carlile*, 31 Beav. 292; *Moet* v. *Couston*, 33 Beav. 578; *Leather Cloth Co.'s case*, 33 L. J. Ch. 109; 11 H. L. C. 523; *McAndrew* v. *Bassett*, 33 L. J. Ch. 566; *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Barnett* v. *Leuchars*, 13 L. T. N. S. 495; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Bradbury* v. *Beeton*, 39 L. J. Ch. 57; *Radde* v. *Norman*, L. R. 14 Eq. 348; *Collins Co.* v. *Reeves*, 28 L. J. Ch. 56; *Hirst* v. *Denham*, L. R. 14 Eq. 542; *Smith* v. *Mason*, W. N. 1875, p. 62; *Apollinaris Co.* v. *Norris*, 33 L. T. N. S. 242; *Cheavin* v. *Walker*, L. R. 5 Ch. D. 850; *Davis* v. *Kendall*, 2 R. I. 566, R. Cox, 112; *Clark* v. *Clark*, 25 Barb. 76, R. Cox, 206; *Dale* v. *Smithson*, 12 Abb. Pr. R. 237, R. Cox, 282; *Woodward* v. *Lazar*, 21 Cal. 448, R. Cox, 300; *Derringer* v. *Plate*, 29 Cal. 292, R. Cox, 325; *Bradley* v. *Norton*, 33 Conn. 157, R. Cox, 331; *Gillott* v. *Esterbrook*, 47 Barb. 455; R. Cox, 340, 3 Sickels, 374; *Burnett* v. *Phalon*, 9 Bos. 192, R. Cox, 376; *Filley* v. *Fassett*, 44 Mo. 173, R. Cox, 530; *Dixon Crucible Co.*, v. *Guggenheim*, 2 Brewster, 321, R. Cox, 559.

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

(*d*) *Perry* v. *Truefitt*, 6 Beav. 66; *Rodgers* v. *Nowill*, 6 Hare, 325; *Foot* v. *Lea*, 13 Ir. Eq. 490; *Farina* v. *Silverlock*, 1 K. & J. 509; and others.

practice, however, gradually died out as the principle of interference in the absence of intentional fraud came to be recognised, and Sir John Rolt's Act (*a*) finally put an end to it.

Principle of *Millington* v. *Fox* explained by V.-C. Wood.

The explanation given of the decision in *Millington* v. *Fox* (*b*) and other cases in which relief was given without proof of fraudulent user by Sir W. P. Wood, V.-C., was, that it was on the principle "that although a person had used another man's trade mark perfectly innocently, yet if he continued for one moment after he had been told of it to use another man's trade mark, he did so fraudulently, and if he sought to keep in his pocket profits which he had made by representing, however innocently, that his goods were another person's, after he had been told of the fact, it was fraud" (*c*).

By Lord Westbury.

From this view Lord Westbury, C., dissented (*d*), and the view now generally accepted as to the principles governing the action of the Courts of Equity was thus stated by him, in the *Leather Cloth Cos.' case* (*e*): "The representation which the defendant is supposed to make that his goods are the goods of another person is not actually made otherwise than by his appropriating and using the trade mark which such other person has an exclusive right to use in connexion with the sale of some commodity; and if the plaintiff has an exclusive right to use any particular mark or symbol, it becomes his property for the purposes of such application, and the act of the defendant is a violation of such right of property, corresponding with the piracy of copyright or the infringement of a patent. I cannot therefore assent to the dictum that there is no property in a trade mark. It is correct to say that there is no exclusive ownership of the symbols which

(*a*) 25 & 26 Vict. c. 27.
(*b*) 3 My. & Cr. 338.
(*c*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.
(*d*) *Hall* v. *Barrows*, 33 L. J. Ch. 204; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Leather Cloth Cos.' case*, 33 L. J. Ch. 199; *McAndrew* v. *Bassett*, 33 L. J. Ch. 566.
(*e*) 33 L. J. Ch. 199.

constitute a trade mark, apart from the use or application of them, but the word 'trade mark' is the designation of marks or symbols when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called 'property.'" "The true principle, therefore, seems to be that the jurisdiction of the Court in the protection given to trade marks rests upon property; and that the Court interferes by injunction, because that is the only mode by which such property can be effectually protected. The same things are necessary to constitute a title to relief in Equity in the case of the infringement of the right to a trade mark as in the case of the violation of any other kind of property. First, the plaintiff must prove that he has an exclusive right to use some particular mark or symbol in connexion 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."

In what sense fraud is required in Equity

Still, even though it be admitted that the Law of Trade Marks is based upon a right of property, fraud also is necessary to entitle the owner of the trade mark to redress (*a*). But the fraud does not consist in an intention to deceive on the part of the defendant, but in an actual deception, or in the creation of a probability of deception (*b*), independently of any fraudulent intention. "Imposition on the public," says Lord Westbury (*c*), "is indeed necessary for the plaintiff's title; but in this way only, that it is the test of the invasion by the defendant of the plaintiff's right of property; for there is no injury done to the plaintiff if the mark used by the defendant be not such as may be mistaken, or is not likely to be mistaken, by the public for the mark

(*a*) See per Sir G. Mellish, L.J., in *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434—53

(*b*) Compare per Sir C. Hall, V.-C., in *Cope* v. *Evans*, L. R. 18 Eq. 138.

(*c*) *Hall* v. *Barrows*, 33 L.J. Ch. 204; and see per Lord Cranworth, C., in *Farina* v. *Silverlock*, 6 De G. M. & G. 214.

of the plaintiff. But the true ground of the Court's jurisdiction is property."

Intention immaterial in Equity.

The exact language in which the principle on which the Court of Chancery has acted is to be described is really immaterial, and in fact "merely a question of nomenclature" (*a*), since the important and substantial point is completely established, that in cases of true trade mark nothing more has to be done "than to show that the trade mark has been taken" (*b*).

Right of property in registered mark

There can at least be no doubt that the right in a trade mark registered under the Trade Marks Acts is strictly a right of property, the person entitled to it is the proprietor (*c*); he is entitled to the exclusive use of it (*d*); and though his rights in regard to it are in some respects less unlimited than those of owners of other kinds of property, *e. g.*, the inability to transfer it except in connexion with the goodwill of the business (*e*), still, subject to the provisions of the Act, he is entitled to deal with it as he chooses.

Elements necessary to found jurisdiction.

In trade-mark cases, "in order to found the jurisdiction of the Court," says the Lord Chancellor of Ireland (*f*), "there must be established, first, the existence of the trade mark; next, the fact of an imitation, whether a direct imitation, or one with such variations that the Court must regard them as merely colourable; and thirdly, the fact that the imitations were made without licence, or anything that the Court could regard as acquiescence in their use."

Proceedings in Equity.

In order to ensure a full disclosure of the facts bearing upon these points, the Court will grant, if necessary, discovery and inspection, and upon the satisfactory

(*a*) Per Sir W. P. Wood, V.-C., *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.

(*b*) Sir G. Jessel, M.R., in *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434; and see the cases collected at note (*b*) on p. 103 *supra*.

(*c*) §§ 3, 4, 5 of the Act of 1875.

(*d*) *Ibid.* § 3.

(*e*) *Ibid.* § 2.

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

establishment of the plaintiff's case, will award its appropriate remedy of an injunction (*a*), framed in such terms as best to counteract the illicit designs of the infringer. The liability to account for profits is usually, as Sir J. Romilly, M.R., said in *Cartier* v. *Carlile* (*b*), incident to the injunction (*c*), or the plaintiff may, at his option, have an enquiry as to damages in lieu of the account, but not both (*d*). The Court will further, where necessary, order the delivery up and destruction of the spurious labels, cards, or tickets (*e*), or the production of the goods wrongfully marked, for the purpose of the erasure and cancellation of the spurious marks (*f*).

Consideration shown for innocent infringer.

While, however, the Court will give protection where it is required, "it must not be forgotten that such protection by injunction when granted is, or may be, attended with loss to the defendant in rendering useless or depreciating in value articles to which the trade mark has already been affixed, and in compelling him otherwise to vary the mode in which he has been carrying on business" (*g*). And it seems that where it is proved that a defendant has adopted a trade mark in *bonâ fide* ignorance of its infringing the

(*a*) In *Glen & Hall Manufacturing Co.* v. *Hall*, 16 Sickels, 226, a case of the class analogous to trade-mark cases, an injunction was granted against the original plaintiffs, on counter-claim. The injunction will be granted, notwithstanding an offer of submission by the defendants: *Geary* v. *Norton*, 1 De G. & Sm. 9; *Tonge* v. *Ward*, 21 L. T. N. S. 480.

(*b*) 31 Beav. 292.

(*c*) Unless the defendant can prove that he was not aware of the existence of any such trade mark as he is shown to have infringed: *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578.

(*d*) *Neilson* v. *Betts*, L. R. 5 H. L. 1.

(*e*) *Farina* v. *Silverlock*, 1 K. & J. 509, 6 De G. M. & G. 214, 4 K. & J. 650; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Apollinaris Co.* v. *Edwards*, Seton, 4th ed. 237; *Graveley* v. *Winchester*, *ib.* 257.

(*f*) *Dent* v. *Turpin*, 2 J. & H. 139; *Upmann* v. *Elkan*, L. R. 12 Eq. 140, L. R. 7 Ch. 130; *Jurgensen* v. *Alexander*, 24 How. Pr. R. 269, R. Cox, 298. In *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450, 12 Amer. Rep. 401, it was held that goods already stamped might be sold, subject to the remedy at law. See also the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88), § 21, as to the powers thereby given to the Court.

(*g*) *Cope* v. *Evans*, L. R. 18 Eq. 138; and see *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298; and *Bass* v. *Dawber*, 19 L. T. N. S. 626.

plaintiff's rights, the Court will be satisfied with the least amount of alteration of the defendant's mark which will effectually distinguish it from the plaintiff's (*a*).

But innocent infringement checked.

Sufficient distinction must, however, be made; and in the even harder case, where a man has not affixed the spurious mark to his own goods at all, but has bought goods already stamped with a mark which he did not know to belong to any one, he must submit to an injunction, though he will not have to account for profits, if he does not delay his submission (*b*). Where, however, A. has, without notice of fraud, advanced money on goods fraudulently marked, he will not be prevented from asserting his rights by reason of the illicit mark (*c*).

Scandal and impertinence.

In asking for his remedy a plaintiff must not make scandalous and impertinent charges against the defendant. Where such charges were made exceptions for scandal and impertinence were allowed (*d*), and under the present practice the defendant would succeed on a motion to strike out such statements, under Order xxvii., Rule 1.

Interlocutory injunction.

It is usual for the plaintiff in trade-mark cases to apply for an interlocutory injunction at an early period. When such application is to be made, it is the duty of the plaintiff to make it speedily (*e*), and delay on his part in coming to the Court is liable to be construed as signifying that the case is one which he does not consider to be of an urgent nature, and which therefore does not deserve the special favour of the Court (*f*). The plaintiff is, however, entitled to delay long enough to secure the necessary evidence to establish his case (*g*); and even if no interlocutory injunction is asked for, as, for instance, where it is

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

(*b*) *Moet* v. *Couston*, 33 Beav. 578.

(*c*) *Ponsardin* v. *Peto*, 33 Beav. 642. See *Ruddlerow* v. *Huntington*, 3 Sand. S. C. 252; R. Cox, 106

(*d*) *Christie* v. *Christie*, W. N. 1873, pp. 8—70.

(*e*) Per Sir J. Romilly, M.R., in *Chubb* v. *Griffiths*, 35 Beav. 127.

(*f*) *Pickford* v. *Grand Junction Railway Co.*, 8 Railway Cas. 538; *Flavel* v. *Harrison*, 10 Hare, 467; *Isaacson* v. *Thompson*, 20 W. R. 196.

(*g*) *Lee* v. *Haley*, L. R. 5 Ch. 135.

rendered unnecessary by reason of the defendant having discontinued the acts of which the plaintiff is complaining, the plaintiff is not precluded from his right to a perpetual injunction, if in other respects he has such a right (*a*).

When granted

In the older cases (*b*), the tendency of the Court was to refuse to grant an injunction on an interlocutory application, unless the clearest evidence of the plaintiff's right was producible, but rather to send that right to be tested at Common Law. That course of proceeding being now extinct (*c*), some relaxation has taken place, and, in particular, where there is reason to suspect intentional deceit on the part of the defendant, much less absolute proof of the plaintiff's title is required (*d*). The interlocutory injunction will, however, not be granted where there is any considerable conflict (*e*), nor yet in a case where the Court is without the means of testing the obedience given to its orders (*f*).

Liberty given to move to dissolve.

Where an injunction was granted on motion, but the defendant alleged that he had not had sufficient time to answer the affidavits on the other side, Lord Langdale, M.R., directed that the order should be prefaced by a

(*a*) *Collins Co.* v. *Walker*, 7 W. R. 222.

(*b*) *E. g. Spottiswoode* v. *Clarke*, 2 Ph. 154; *Stevens* v. *Keating*, 2 Ph. 333; *Motley* v. *Downman*, 3 My. & Cr. 1.

(*c*) Since Sir John Rolt's Act, 25 & 26 Vict. c. 27.

(*d*) *Radde* v. *Norman*, L. R. 14 Eq. 348.

(*e*) *Green* v. *Rooke*, W. N. 1872, p. 49, L. J. Notes of Cases, 1872, p. 54; *Farina* v. *Cathery*, L. J. Notes of Cases, 1867, p. 134; *Hennessy* v. *Bohmann*, W. N. 1877, p. 14; *Linoleum Manufacturing Co.* v. *Nairn*, V.-C. H. Feb. 2, 1877, and other cases. If an interlocutory injunction is asked for on the ground that the defendant claims a right to use the plaintiff's trade mark, but there is no evidence that he is in fact using the mark or threatening an immediate exercise of his alleged right of user, the motion will be refused, with costs, as in *Davis* v. *Tylor*, M.R. July 27, 1877 ("*Ferndale*" *coal*).

(*f*) *Cox* v. *The Land and Water Journal Co.*, L. R. 9 Eq. 324. In the Scotch case of *Green* v. *Shepherd*, Court of Session Cases, Third Series, IV. 1028, the plaintiff having by his summons asked for damages and an interdict, the Court refused a motion for an interim interdict, on the ground that the summons was framed on the footing that there was no case for an interim interdict, and that the plaintiff must first establish his right by recovering damages.

statement to that effect, and giving the defendant leave to move to dissolve the injunction (*a*).

Appeal.

In the case of an appeal delay is no less fatal than in the proceedings in the Court below (*b*).

Committal for contempt.

Where a defendant in a trade-mark action continues to use the prohibited mark after an injunction has been issued against him, he renders himself liable to committal (*c*). In order to support the motion to commit, "it should appear clearly that the ordinary mass of customers, paying that attention which persons usually do in buying the article in question, would be easily deceived" (*d*). It was said by Lord Langdale, M.R., in *Croft* v. *Day* (*e*), that "if the defendants were willing to make a proper distinction, and the plaintiffs refused to attend to their proposal, the Court would itself determine whether the proposed distinction was sufficient." If the defendant sets up acquiescence on the part of the plaintiff, he must make out a case amounting almost to such a licence as to entitle him to proceed against other infringers, such acquiescence, in fact, as to create a new right in him; and in default of such a licence, the order for committal will be made, unless the defendant satisfies the Court of his intention to use a trade mark which will not interfere with the plaintiff's rights (*f*). Where by a series of ingenious devices the defendants contrived to secure the benefit of the fraud, and yet avoided committing a breach of the injunction, V.-C. Wood enlarged the terms of the injunction, so as to effectually put a stop to the fraud (*g*).

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

(*b*) See per Sir J. L. Knight-Bruce, L.J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 89.

(*c*) *Rodgers* v. *Nowill*, 3 De G. M. & G. 614; *Gillis* v. *Hall*, R. Cox, 596. On August 8, 1877, V.-C. Malins made an order to commit the defendant in *Dence* v. *Mason* (W. N. 1877, p. 23), who had, notwithstanding the injunction, continued to sell goods and issue labels using the name "Brande" thus—"Frank Mason & Co.'s ('Brande's') Essence of Beef," and so on.

(*d*) *Swift* v. *Dey*, 4 Robertson, 611, R. Cox, 319–24; and see per Lord Langdale, M.R., in *Croft* v. *Day*, 28 Leg. Obs. 378.

(*e*) *Ubi supra.*

(*f*) *Rodgers* v. *Nowill*, 3 De G. M. & G. 614.

(*g*) *Cartier* v. *May*, V.-C. W. July 12, 1861, cited in Lloyd on Trade Marks, 2nd ed. pp. 55—77.

Where two marks used.

It has sometimes happened that more marks than one have been used by a person on his goods, the infringement of either of which would be visited by the Court with the penalties at its command. Thus, where A.'s soft soap was denoted, not only by a specific device, but also by the name "Excelsior," it was held that the infringement of the latter alone was punishable by the Court, the Vice-Chancellor remarking that he could not hold it to be any justification for a defendant to say that the plaintiff had two ways of identifying the goods, and he (the defendant) had only stolen one (*a*).

Name used with trade mark.

Moreover, the habitual use of his own name in combination with his verbal trade mark by the manufacturer of the "Eureka" shirts was held not to disentitle him to relief against defendants who had made use of the word "Eureka," though in combination with the name of their own firm (*b*).

Singer v. *Wilson.*

Where, however, a manufacturing company affixed their special device to their machines, and also their name, the Master of the Rolls declined to restrain another company who manufactured similar goods bearing their own mark and name, but did not affix to them the plaintiff's name, from using the plaintiff's name as descriptive of the principle on which the machines were constructed (*c*).

Questions of title to trade marks.

Courts of Equity have sometimes had to decide somewhat nice questions as to who should be recognised as having a right to protection in Equity in respect of a trade mark, such questions being usually raised by the right of the plaintiff in an action to restrain infringement being contested.

Between landlord and

In *Motley* v. *Downman* (*d*), Lord Cottenham, C., was of opinion that a trade mark habitually applied to the iron

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

(*b*) *Ford* v. *Foster*, L.R. 7 Ch. 611. In Scotland, on the contrary, it was held that the fact that one firm called their goods "Wotherspoon's Victoria Lozenges," could not prevent another firm from styling theirs "Gray's Victoria Lozenges:" *Wotherspoon* v. *Gray*, Court of Session Cases, 3rd Series II. 38.

(*c*) *Singer Manufacturing Co.* v. *Wilson*, L.R. 2 Ch. D. 234.

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

tenant of iron works.

manufactured at certain works, could not be sold with the business by the tenants of the works, so as to give the purchasers an exclusive right as against the landlord of the works, or as against tenants of the works who had leased them after the purchasers of the business and trade mark had removed from those works, and gone elsewhere.

Successive lessees of brick works.

In another case (*a*) A., having for some time leased certain brick works, and also certain mines, from which fire-clay was taken for manufacture at the works, removed his business elsewhere, whereupon B. commenced business at the brick works in question, but did not lease the same mines. A. having filed a bill against B., as fraudulently representing (in effect) that the latter had succeeded to his business, Vice-Chancellor Wood, in the course of his judgment in favour of the plaintiff, took occasion to intimate that it would have been almost a matter of course to have granted an injunction to the owner of the mines of fire-clay used by A. but not by B., if he had made application for it. This was, indeed, rather a case of fraudulent misrepresentation than of trade mark.

Manufacturer and printer of cotton cloths.

Where manufacturers of cotton cloths which were afterwards printed elsewhere sought to restrain other manufacturers who made and printed similar cloths, and marked them similarly to the goods made by the plaintiffs, it was held that the mark on the plaintiffs' goods were indicative of the printer and not of the manufacturer (*b*).

Principal and agent.

Where a London tradesman, who dealt in goods supplied to him by a foreign manufacturer, had invented a trade mark for those goods which stated the name of the foreign manufacturer, but made no reference to the London vendor, it was held by the Master of the Rolls that the latter could not restrain the use of the mark by a subsequent consignee of the same goods, though if the trade

(*a*) *Harper* v. *Pearson*, 3 L. T. N. S. 547.

(*b*) *Amoskeag Manufacturing Co.* v. *Garner*, 55 Barb. 151, R. Cox, 541.

mark had referred to the goods having been of his selection, the case might have been different (*a*).

Secret recipe.

Again, in *Cotton* v. *Gillard* (*b*), it was decided by the same learned judge that a man had no right to use a trade mark applied to a sauce with the composition of which he was unacquainted, even though he had, as he believed, bought that right from the person entitled to the same; it followed that he could not prevent its use by the person acquainted with the secret, of which he had in fact been the inventor.

Registered trade marks.

With respect to registered trade marks, such difficulties can hardly arise in the future, since it is the registered proprietor who is to have, *primâ facie*, the exclusive right to the mark, and after five years to have that right conclusively (*c*).

More than one proprietor.

It occasionally happens that a trade mark becomes vested in more than one person. The question then arises whether either of these is entitled to succeed in a suit against an infringer, to which the other person entitled is not a party. In a case of this description, Sir L. Shadwell, V.-C., gave it as his opinion, that whether the plaintiff had the right in himself, or jointly with some other persons, he still had sufficient right to bring forward the case (*d*). In *Dent* v. *Turpin* (*e*), Sir W. P. Wood, V.-C., decided in accordance with this view, saying that the plaintiff had a clear right to an injunction and the erasure of the spurious marks, without making the other person interested a party, while as to the account, only the plaintiff's share having been prayed for, that, though it might be difficult to ascertain, was yet ascertainable. In any case, the wrong-doer had no right to complain of any technical difficulty arising from his own wrongful act, though the result was to involve him in two suits

(*a*) *Hirsch* v. *Jonas*, L. R. 3 Ch. D. 584.

(*b*) 44 L. J. Ch. 90. Compare *Coffeen* v. *Brunton*, 5 McLean, 256, R. Cox, 132.

(*c*) 38 & 39 Vict. c. 91, § 3.

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

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

instead of one. In *Southorn* v. *Reynolds* (*a*), he decided in the same way, saying that his previous decision had not been interfered with (*b*).

Delondre v. Shaw.

In *Delondre* v. *Shaw* (*c*), it was held that, inasmuch as one of the plaintiffs had no interest in the account (*d*), he was improperly joined as a co-plaintiff, the injunction being thus made ancillary to the account. In *Farina* v. *Silverlock* (*e*), the same question was raised, but without success, and no such objection would prevail at the present day (*f*).

Prize medallist.

In *Batty* v. *Hill* (*g*), an attempt was made by a prize medallist at the Exhibition of 1862, to restrain the use by the defendant, who had not been awarded a medal, of a label which had been prepared before the award, bearing the words "Prize Medal, 1862." The Vice-Chancellor was, however, of opinion that he could not interfere merely on the ground of a misrepresentation, and that the plaintiff was not entitled to claim the label as a trade mark for various reasons, among which was the fact that whatever rights the plaintiff could have must be shared with all those who had been awarded medals (*h*).

Infringement by servants.

The person sought to be enjoined in a trade-mark case is commonly a rival manufacturer, who is using the spurious

(*a*) 12 L. T. N. S. 75.

(*b*) And see *Newman* v. *Alcord*, 49 Barb. 588; R. Cox, 404; 6 Sickels, 189.

(*c*) 2 Sim. 237; and see *Page* v. *Townsend*, 5 Sim. 395.

(*d*) It should be observed that the reason given by Mr. Bickersteth (afterwards Lord Langdale and M.R.), who argued the case, for the joinder of Pelletier as a co-plaintiff, was that though having no interest in the medicine, he yet was entitled to prevent his name being used. It is further to be observed, that the subsequent decision of Lord Langdale, in *Clark* v. *Freeman*, does not conflict with the position taken up by him in *Delondre* v. *Shaw*, since Pelletier not only manufactured the medicine, but supplied it to Delondre, so that he had a pecuniary interest in the maintenance of his reputation. *Clark* v. *Freeman* was decided on the point that the plaintiff did not manufacture or sell pills.

(*e*) 1 K. & J. 509; 6 D. & G. 214; 4 K. & J. 650.

(*f*) In *Millington* v. *Fox*, 3 My. & Cr. 338, the account was waived; and see *Barnett* v. *Leuchars*, 13 L. T. N. S. 495; and other cases.

(*g*) 1 H. & M. 264.

(*h*) See Exhibition Medals Act, 1863 (26 & 27 Vict. c. 119); also *Taylor* v. *Gillies*, 14 Sickels, 331.

mark to promote the sale of his own commodities. The fact that the fraud has been committed by a servant of the trader makes no difference, for principals "are bound to know what their agents do, and if they do not know, they are responsible exactly as if they did know." Hence, where a defendant's manager had affixed to his master's goods, without the knowledge of the latter, as he alleged, a ticket infringing the rights of the plaintiff, an injunction was granted against the master, with costs (*a*).

Agents.

And English agents of foreign traders will be restrained from selling goods received from their principals falsely marked, to the injury of other manufacturers (*b*). So, too, commission merchants, selling with the knowledge that the goods they sell are so marked as to deceive (*c*).

Engravers.

The remedy will, however, not only be awarded against such persons as are to profit directly by the perpetration of a fraud, but also against all who connect themselves with and assist in the same. Thus, persons who engrave or print a trade mark for one not entitled to use it may be restrained.

In *Guinness* v. *Ullmer* (*d*), where the defendants had supplied to one Taylor blocks engraved with the main part of the plaintiffs' trade mark, including their names, from which blocks Taylor had printed labels similar to the plaintiffs', the Vice-Chancellor of England, Sir L. Shadwell, was of opinion, that, as the matter complained of could not have happened without the prints which had been made from the blocks, the defendants had made themselves ancillary to the piracy, and he accordingly granted the injunction. It had been contended for the defendants that it had been only with a part of the plaintiffs' mark that they had been concerned; but the Vice-Chancellor thought that if a thing contained twenty-five parts, and

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

(*b*) *Farina* v. *Cathery*, L. J., Notes of Cases, 1867, p. 134.

(*c*) *Coats* v. *Holbrook*, 2 Sandf. 586, R. Cox, 20.

(*d*) 10 L. T. (Old Series), 127

one only was taken, such an imitation would be sufficient to contribute to a deception, and that the law would hold those responsible who had contributed to the fraud. In *Farina* v. *Shaw* (*a*), and *Farina* v. *Silverlock* (*b*), injunctions were granted to restrain the printing of labels similar to those used by the plaintiff. In the latter case, on appeal (*c*), Lord Cranworth, C., dissolved the injunction, and sent the right to be tried at law (*d*); but this can no longer be done (*e*).

Spurious goods in innocent hands.

A different combination of circumstances arises when the goods improperly marked are in the charge of an innocent third party, for purposes of conveyance, storage, or the like. In such a case, although that person be merely a carrier receiving goods, which, though fraudulently marked, are not for his own use, nor to be sold by him for his own benefit, but have been received by him merely for the purpose of transmission to the persons to whom they are consigned, yet an injunction will issue to restrain the defendant from parting with the goods spuriously marked (*f*). "It is the duty of the person in charge of the marked goods at once to give all the information required, and to undertake that the goods shall not be removed or dealt with, unless the spurious brand has been removed, and to offer to give all facilities to the person injured for that purpose." He should also on discovering the fraud at once inform his correspondent abroad (*g*). If, on the other hand, the carrier declines to give information required by the injured party for the purpose of an action against the author of the fraud, even after the marked goods have passed out of his control, the

(*a*) Decided by V.-C. Parker, and referred to in *Farina* v. *Silverlock*, 1 K. & J. 509–12. See 3 Eq. Rep. 886—90.

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

(*c*) 6 De G. M. & G. 214.

(*d*) Where the plaintiff obtained a verdict, see 4 K. & J. 650.

(*e*) 25 & 26 Vict. c. 27.

(*f*) *Upmann* v. *Elkan*, L. R. 12 Eq. 140; L. R. 7 Ch. 130; and see *Rivero* v. *Norris*, Seton, 4th ed. 236; *Del Valle* v. *Mayer*, *ib.*; *Moet* v. *Pickering*, W. N. 1877, p. 193.

(*g*) Per Sir J. Romilly, M. R., and Lord Hatherley, C., in *Upmann* v. *Elkan*, L. R. 12 Eq. 140; and L. R. 7 Ch. 130.

person injured is entitled to succeed in an action brought against him to compel discovery (*a*). Supposing the carrier, &c., to give the required information and undertaking, and to seek to facilitate the proceedings, then, "if, after that, the person injured files a bill, though he will be entitled to all that he seeks in the shape of relief, as he might have got it all without suit, he will not get from the defendants the costs of the suit, and he may have to pay them (*b*). On the fact of the fraudulent mark being discovered, it is no redress for the carrier, &c., to send back the goods, or to offer to do so, for that would only put it in the power of the consignor to repeat his fraud; but if the carrier, &c., offers as an alternative to erase the mark, he has done all he can be reasonably required to do" (*c*).

Innocent mortgagee.

Where wines bearing a spurious trade mark were in the custody of a dock company, and an innocent third party had advanced money on the security of the wines, it was ordered by Sir J. Romilly, M. R., that the wines should be delivered to the mortgagee, on the spurious brands being removed and destroyed (*d*).

Warehousemen.

In *Hunt* v. *Maniere* (*e*), where warehousemen, at the request of the owners of a certain brand on wines, refused to deliver (*f*) to the indorsee of the dock warrants wines improperly marked with that brand, the same learned judge restrained the indorsee from proceeding with an action at law against the warehousemen for their refusal. The jurisdiction of the old Court of Chancery to restrain actions at law is now gone, but the warehousemen would have a good defence in the Common Law Divisions to an action there commenced (*g*).

(*a*) *Orr* v. *Diaper*, L. R. 4 Ch. D. 92.

(*b*) *Upmann* v. *Elkan*, L. R. 12 Eq. 140.

(*c*) Per Lord Hatherley, C., in *Upmann* v. *Elkan*, L. R. 7 Ch. 130.

(*d*) *Ponsardin* v. *Peto*, 33 Beav. 642.

(*e*) 34 Beav. 157.

(*f*) On the same day, but subsequently, an injunction was granted to restrain them from doing so.

(*g*) Judicature Act, 1873, § 24.

Questions of contract.

In exercising its jurisdiction to restrain breach, and enforce specific performance of contract, the Court has sometimes had to deal with questions of trade mark, or akin thereto. Thus, where an injunction was granted to restrain the use of a man's name (*a*) otherwise than in accordance with a contract into which he had entered, or of an initial (*b*), or of a singer's voice (*c*), or of a publication (*d*).

Steinthal v. *Samson.*

Where, among other symbols, the arms, crest, and motto (the latter being the word "Excelsior") of one of the partners were used as trade marks of a partnership, and on dissolution of the partnership it was agreed that the other partner might use all the trade marks of the firm, except such private arms, crest, and motto, it was held that no breach of the agreement had been committed by the continuing partner in using the word "Excelsior," apart from the arms and crest, on some of his goods, since it had been so used alone previously as a trade mark, and it was not then used as a motto, but as a trade mark (*e*).

Fraudulent agreement.

The Court will not specifically enforce an agreement the object of which is to defraud the public by putting goods spuriously marked on the market (*f*), nor will it protect a person who has intended to commit fraud by buying the right to stamp on his own goods the name of another person who has acquired a reputation in the trade (*g*). And where an action for damages was brought against a person who had filled with inferior seeds seed-bags which he had bought from the plaintiffs, marked with their labels, it was held on demurrer that the plaintiffs, having knowingly been parties to a fraud upon the public, were not entitled to recover (*h*).

(*a*) *Ainsworth* v. *Bentley*, 14 W. R. 630; *Ward* v. *Becton*, L. R. 19 Eq. 207.

(*b*) *Tudor* v. *Tudor*, W. N. 1873, p. 72.

(*c*) *Lumley* v. *Wagner*, 5 De G. & Sm. 485; 1 De G. M. & G. 604; and see *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518, as to a singer's voice.

(*d*) *Clowes* v. *Hogg*, W. N. 1870, p. 268.

(*e*) *Steinthal* v. *Samson*, Court of Appeal, April 16, 1877.

(*f*) *Oldham* v. *James*, 13 Ir. Ch. 393; 14 *ib.* 81.

(*g*) *Samuel* v. *Berger*, 24 Barb. 163, R. Cox, 178.

(*h*) *Bloss* v. *Bloomer*, 23 Barb. 604 R. Cox, 200.

Where a contract has been entered into for the purchase of goods of a particular stamp, the question arises whether the stamp was specified as indicative of a particular quality, or as possessing some value in itself, so that the goods would be of less value if stamped differently. Thus, in *Hopkins* v. *Hitchcock* (*a*), where iron stamped with "S. & H." and a crown had been contracted for, and iron stamped with "H. & Co." and a crown was supplied, the firm having become differently constituted, and having consequently marked their iron of the quality originally denoted by the former brand with the latter stamp in substitution for the former, it was decided that the contract turned upon the quality of the iron and not upon the brand (*b*); if, however, the brand had possessed a special value, and the object of the purchase had been to resell the iron at a price which would have had to be lowered in the absence of the special mark, or even if it had been clear that the defendant had contracted for the brand for its own sake and not as indicative of quality, it seems that the decision would have been the other way. Such questions must, however, depend in each case upon the terms in which the intention of the contracting parties is expressed. Contract for purchase of goods with a specified mark.

In the case of paintings, described in a catalogue as being the work of Claude Lorraine and Teniers, it was held by Lord Kenyon, C. J., that the description was merely an expression of the vendor's opinion, and not a warranty of the authenticity of the paintings (*c*); in a similar case, however, where the painter was said to be Canaletto, it was held by the Court of King's Bench to be for the jury to say whether or not the description amounted to a warranty (*d*). The paintings being so much more modern, it was more reasonable in this case to suppose that the Painter's name on paintings.

(*a*) 32 L. J. C. P. 154.

(*b*) Compare *Nichol* v. *Godts*, 10 Ex. 191.

(*c*) *Jendwine* v. *Slade*, 2 Esp. N. P. C. 572.

(*d*) *Power* v. *Barham*, 4 Ad. & E. 473.

vendor intended to make an assertion as to the fact of their authenticity, as within his own knowledge.

Merchandise Marks Act.

By the Merchandise Marks Act, 1862, any person selling or contracting to sell any article bearing a trade mark (*a*), or any description, &c., of its number, quantity, measure, weight, or place of production (*b*), is held to warrant the genuineness of the trade mark, or the correctness of the description, &c., unless he expresses the contrary in signed writing, delivered to and accepted by the vendee.

By section 21 the Court has power to direct the destruction or other disposal of goods wrongfully marked, to award an injunction, and to make an order for inspection.

By section 11 the punishment of an offender under that Act does not take away the civil remedy to which any person aggrieved by his conduct is entitled.

(*a*) 25 & 26 Vict. c. 88, § 19. (*b*) *Ibid.* § 20.

CHAPTER VII.

THE CIVIL REMEDY. II.

DEFENCES, DISCOVERY AND INSPECTION, ACCOUNT, DAMAGES, COSTS.

Defences.

Defences. THE possible defences to an action to restrain an infringement of trade mark are numerous, some being of a somewhat special character. The following are some of the most important.

1. *Non-infringement.*

1. Non-infringement. The first and usual defence is that the conduct on the part of the defendant, of which the plaintiff complains, has not been, in fact, such as to have for its object or its result the appropriation by the defendant of what was the plaintiff's due, the fruits of his enterprise and reputation; shortly, that the defendant has not infringed (*a*).

2. *Plaintiff's Trade Mark bad in itself.*

2. Plaintiff's trade mark bad. This defence must for the future be founded mainly on the definition of a trade mark in sect. 10 of the Act of 1875 (*b*). A newly adopted *quasi* trade mark, which possesses none of the essential particulars therein enumerated, or one used before the Act which contains no special and distinctive feature, even though it should, by some

(*a*) *E. g. Crawshay* v. *Thompson*, 4 Man. & G. 357; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Blackwell* v. *Crabb*, 36 L. J. Ch. 504; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434.

(*b*) 38 & 39 Vict. c. 91.

oversight, obtain registration, will yet be incapable of protection. The process of registration cannot make that a trade mark which does not contain the necessary elements. Thus, any mere word not used as a trade mark before the passing of the Act cannot be registered (*a*), or if registered, could not be upheld as a valid trade mark. Thus, too, at no time could a mere adjective used in its ordinary sense be protected, as the word "nourishing" applied to stout (*b*), "superfine" or "superior" to soap (*c*). So, too, any scandalous design (*d*).

3. *No Registration or Certificate of Non-registration.*

3. No registration or certificate.

The trade mark, so called, may present some one or more of the essential particulars required by the Act, and may not be objectionable in itself, but yet the fact of non-registration under the Acts will, if it is a new mark, effectually debar the person who has used it from obtaining the injunction which would otherwise be awarded as a matter of course (*e*). If it is an old mark, a certificate of refusal to register will preserve the existing right to protection. However, it does not at all appear that, when a case of actual intentional fraud can be proved, there is anything in the Acts to prevent proof of imitation of marks, though unregistered, &c., being given as corroborative evidence of the fraud. In such a case the state of things would be similar to that in which it is a mode of packing that has been imitated (*f*). The injunction which would not be granted to restrain the infringement of the unregistered and uncertified trade mark would, as it seems, be granted to restrain the intentional fraud, in which the imitation of marks was a mere incident.

(*a*) *Ex parte Stephens*, L. R. 3 Ch. D. 659.

(*b*) *Raggett* v. *Findlater*, L. R. 17 Eq. 29.

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

(*d*) See § 6 of the Act of 1875.

(*e*) See the Act of 1876, 39 & 40 Vict. c. 33.

(*f*) *Woollam* v. *Ratcliff*, 1 H. & M. 259; *Edelsten* v. *Vick*, 11 Hare, 78; *Orr* v. *Diaper*, L.R. 4 Ch. D. 92.

4. *The Plaintiff not the Registered Proprietor.*

4. Plaintiff not the registered proprietor.

By section 3 of the Act of 1875 (*a*), it is provided that "the registration of a person as first proprietor of a trade mark shall be *primâ facie* evidence of his right to the exclusive use of such trade mark, and shall, after the expiration of five years from the date of such registration, be conclusive evidence of his right to the exclusive use of such trade mark, subject to the provisions of this Act as to its connexion with the goodwill of a business."

The effect of this seems to be to prevent a person, whose established trade mark has been registered without his knowledge or laches in the name of another, from taking steps to prevent infringement until he has first secured the rectification of the register (*b*). However, a legal transmittee of a registered trade mark may assign his interest, and hence, it appears, protect it also, before his name has been inserted in the register in place of that of the former proprietor (*c*).

The trade mark being duly registered, the objection which formerly prevailed, by which a trade mark was excluded from protection when there were no vendible goods in the market stamped therewith (*d*), will be avoided, for registration will for the future, subject to the provisions in the Act as to goodwill, be equivalent to public use of the mark (*e*).

5. *Trade Mark severed from Goodwill.*

5. Trade mark severed from goodwill.

It is a good defence to an action for infringement of trade mark, to prove that the plaintiff is not the owner of the business and goodwill concerned in the particular

(*a*) 38 & 39 Vict. c. 91, § 3.
(*b*) See § 5 of the Act of 1875.
(*c*) Rule 25.
(*d*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307.
(*e*) § 2 of Act of 1875.

goods or classes of goods in respect of which the trade mark is registered (*a*).

6. *Licence.*

6. Licence.

The defendant may plead a licence from the plaintiff. However, the Court would not allow a licensee to defraud the public by the sale of goods the mark on which was similar to that on the licensor's own goods, while the goods themselves were not the goods or goods equivalent to the goods of the licensor (*b*).

7. *Delay and Acquiescence.*

7. Delay and acquiescence.

A man may by his own laches lose his right to that protection which he would have obtained at once, had he come to the Court with reasonable promptitude (*c*). In fact, that which has originally been a valid trade mark, the property of an individual or firm, entitled to protection, may become *publici juris*, that is to say, the use of it may be thrown open to the public, by its proprietor allowing his right to be so habitually infringed that the trade mark no longer conveys to those who see it the impression that the goods to which it is attached are of his manufacture (*d*).

Principle of this defence.

The principle on which the Court allows the plaintiff's delay to be pleaded by way of defence is thus stated by Sir W. P. Wood, V.-C., in *Beard* v. *Turner* (*e*). "By not

(*a*) See §§ 2—3 of Act of 1875. There can be no trade mark in gross: *Cotton* v. *Gillard*, 44 L. J. Ch. 90.

(*b*) *Oldham* v. *James*, 13 Ir. Ch. 293 ; 14 *ib.* 81 ; *Bloss* v. *Bloomer*, 33 Barb. 604, R. Cox, 200 ; *Samuel* v. *Berger*, 24 Barb. 163, R. Cox, 178.

(*c*) *Motley* v. *Downman*, 3 My. & Cr. 1 ; *Morison* v. *Moat*, 9 Hare, 241 ; *Flavel* v. *Harrison*, 10 Hare, 467 ; *Wason* v. *Waring*, 15 Beav. 151 ; *Attorney-General* v. *Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 327 ; *Burgess* v. *Burgess*, 3 De G. M. & G., 89 ; *Farina* v. *Gebhardt*, 3 Eq. Rep. 891 ; *Chappell* v. *Sheard*, 2 K. & J. 117 ; *Coles* v. *Sims*, 5 De G. M. & G., 1 ; *Kinahan* v. *Bolton*, 15 Ir. Ch. 75 ; *Hovenden* v. *Lloyd*, 18 W. R. 1132 ; *Isaacson* v. *Thompson*, 20 W. R. 196 ; *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276 ; *Amoskeag Manufacturing Co.* v. *Garner*, 55 Barb. 151 ; R. Cox, 541 ; and other cases cited below.

(*d*) *Ford* v. *Foster*, L. R. 7 Ch. 611 ; *Wheeler & Wilson* v. *Shakespeare*, 39 L. J. Ch. 36.

(*e*) 13 L. T. N. S. 746.

complaining at the time when you might complain (I do not say that it is your intention, we must judge of the intention by the necessary result) you are lying by, the man continuing to use your property, with the hope (and such is the prayer of your bill filed two or three years afterwards) of obtaining those profits which you stood by, allowing him to make under this designation, without apprising him of your intention to make any such use of it. On that ground it falls within the principle enunciated by Lord St. Leonards in the Irish case referred to, in which it is stated that it is a fraud to allow a plaintiff to avail himself of delay to obtain benefit for himself. In that case you will not grant him relief."

On motion for injunction.

In the case of a motion for an injunction "the argument as to acquiescence is no doubt very important. A short acquiescence may properly induce the Court not to interfere *ex parte*. A longer acquiescence may, under the circumstances, throw serious doubt upon the right of the plaintiff, and induce the Court not to interfere by any interlocutory order, even when applied for on notice" (*a*). And it is not sufficient for the plaintiff to commence proceedings promptly; if he wishes for an interlocutory injunction he must bring on his motion at once, or the Court will hold that he has shown by his own conduct that he does not consider such interference to be imperative (*b*).

At the hearing or on demurrer.

Where, however, the case has arrived at the hearing, or is being argued on demurrer, the degree of delay or acquiescence must be much greater; there must be such an acquiescence as to amount, not only to a positive licence, but to an implication of an actual grant, before the parties can be for ever deprived of their rights (*c*).

(*a*) Per Lord Langdale, M. R., in *Gordon* v. *Cheltenham Railway Co.*, 5 Beav. 233; and see *Isaacson* v. *Thompson*, 20 W. R. 196, where an interlocutory injunction was refused on the ground of delay.

(*b*) *Pickford* v. *The Grand Junction Railway Co.*, 3 Railway Cas. 538.

(*c*) *Patching* v. *Dubbins*, Kay, 11; *Gordon* v. *The Cheltenham Railway Co.*, 5 Beav. 233; *Rodyers* v. *Rodyers*, 31 L. T. N. S. 285; and see *Gillott* v. *Esterbrook*, 47 Barb.

Rights must be actively defended.

It is not a sufficient answer to a plea of delay on the part of the plaintiff for the plaintiff to allege continual assertions of his right. He must take some more decided measures. "What the plaintiffs mainly relied on was the continual claim on their part," says Sir G. Turner, L. J. (*a*), "and no doubt they have not ceased to assert their claim; but I cannot agree to a doctrine so dangerous as that the mere assertion of a claim, unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded" (*b*).

Delay for purpose of securing evidence.

Inasmuch as in a case where no proof of actual deception is produced, the Court has to try a hypothetical case, turning on the probabilities of deception, as to which witnesses could probably be brought forward by both sides, a person who believes others to be infringing his trade mark is entitled to wait until he can collect a sufficient number of cases to prove to the Court that the proceedings of which he complains do actually deceive the public; and his right to protection is not gone by reason of such delay (*c*). It seems that in *Rodgers* v. *Rodgers (d)*, and *Estcourt* v. *Estcourt Hop Essence Co.* (*e*), the delay would have been condoned had it resulted in the production of satisfactory evidence of deception. On the other hand, where a plaintiff delayed his motion until December, having been in possession of sufficient evidence in May, the delay was fatal to the motion (*f*).

Delay in regard to motion to commit.

Where an injunction has been granted by the Court, there must, in order to deprive the party who has obtained the injunction of his right to move for committal upon

455; R. Cox, 340; 3 Sickles, 374; *Filley* v. *Fassett*, 44 Mo. 173; R. Cox, 530.

(*a*) *Clegg* v. *Edmonton*, 8 De G. M. & G. 810.

(*b*) This dictum was approved and followed by Wood and Selwyn, L. JJ., in *Lehmann* v. *McArthur*, 37 L. J. Ch. 625; but see *Attorney-General* v. *Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 327; and *Kinahan* v. *Bolton*, 15 Ir. Ch. 75.

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

(*d*) 31 L. T. N. S. 285.

(*e*) L. R. 10 Ch. 276.

(*f*) *Isaacson* v. *Thompson*, 20 W. R. 196.

the breach of it, be a case made out almost amounting to such a licence to the party enjoined to do the act enjoined against as would entitle him to maintain an action against others for doing that act (*a*).

Indulgence to defendant, plaintiff having delayed.

Even if the delay has not been such as to disentitle the plaintiff to his injunction, it may yet obtain some indulgence for the defendant; as, for instance, the permission to dispose of the wares on which he expended money in consequence of the plaintiff's delay (*b*).

Account withheld.

Or, the injunction may be granted and the account of profits, by which it is usually accompanied, withheld (*c*).

Costs not given.

Lastly, the delay of the plaintiff may be punished by his being left to pay his own costs, though successful in his main contention (*d*). On the other hand, a defendant who has only defeated the plaintiff's claim by pleading the latter's delay, may fail to obtain thereby the costs of the proceedings occasioned by his own fraud (*e*).

8. *Plaintiff's Misrepresentation.*

8. Plaintiff's misrepresentation.

"The administration of Equity is founded on perfect truth" (*f*), and "when the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade mark, or in the business connected with it, be himself guilty of any false or misleading representation; for if the plaintiff makes any material false statement in connexion with the property which he seeks to protect, he loses, and

(*a*) Per Sir G. Turner, L. J., in *Rodgers* v. *Nowill*, 3 De G. M. & G. 614.

(*b*) *Clowes* v. *Hogg*, W. N. 1870, p. 268; S. C. on appeal, W. N. 1871, p. 40; *Anglo-Swiss Condensed Milk Co.* v. *Swiss Condensed Milk Co.*, W. N. 1871, p. 163.

(*c*) *Harrison* v. *Taylor*, 11 Jur. N. S. 408; and see *Beard* v. *Turner*, 13 L. T. N. S. 746.

(*d*) See *Millington* v. *Fox*, 3 My. & Cr. 338; *Beard* v. *Turner*, 13 L. T. N. S. 746.

(*e*) *Rodgers* v. *Rodgers*, 31 L. T. N. S. 285.

(*f*) Per Lord Romilly, M. R., in *Cocks* v. *Chandler*, L. R. 11 Eq. 446.

very justly, his right to claim the assistance of a Court of Equity. He must come there with clean hands" (*a*).

It is impossible to define what misrepresentation will disentitle the plaintiff to relief; all that can be said is, that "he that hath committed iniquity shall not have equity" (*b*).

Misstatements in plaintiff's marks.

The trade marks, labels, &c., of the plaintiff, who is complaining of fraud on the part of another, may themselves contain statements calculated to mislead and defraud the public, who are induced by such statements to buy goods which otherwise they would not buy. Thus, in *Piddling* v. *How* (*c*), the plaintiff sold tea, which he termed "Howqua's Mixture," and which he put up in packets labelled with extravagant and false statements as to its origin and quality. Sir L. Shadwell, V.-C., declined to protect the plaintiff until he had established his title in a Court of Law, saying that it was a clear rule laid down by Courts of Equity not to extend their protection to persons whose case was not founded in truth.

Perry v. *Truefitt*.

In *Perry* v. *Truefitt* (*d*), the plaintiff sold "Perry's Medicated Mexican Balm," the secret of which he had bought from a Mr. Leathart. On his show-cards he falsely stated that the hair-mixture in question was made from a recipe of Von Blumenbach, and he also alleged in the same way that it was compounded from Mexican plants, which was not in the least borne out by evidence at the trial. Lord Langdale, M.R., agreeing with the observations of the Vice-Chancellor of England, in *Piddling* v. *How* (*c*), did not think it a favourable case for the interposition of the

(*a*) Per Lord Westbury, C., in *Leather Cloth Co.* v. *American Cloth Co.*, 33 L. J. Ch. 199; and see *Edelsten* v. *Vick*, 11 Hare, 78; *Fetridge* v. *Wells*, 13 How. Pr. R. 385, R. Cox, 180; *Palmer* v. *Harris*, 60 Penn. 156, R. Cox, 523; *Laird* v. *Wilder*, 9 Bush. 131, 15 Amer. Rep. 707; *Wolfe* v. *Burke*, 11 Sickles, 115. A trade mark which would not be entitled to protection in Equity, by reason of its being calculated to deceive, is not to be registered under the T. M. R. Act, § 6.

(*b*) *Palmer* v. *Harris*, 60 Penn. 156; R. Cox, 523.

(*c*) 8 Sim, 477.

(*d*) 6 Beav. 66.

Court, and ordered the matter to stand over, with liberty to bring an action.

Leather Cloth Co.' case.

In *The Leather Cloth Co.* v. *The American Leather Cloth Co.* (*a*), the House of Lords sustained the judgment of Lord Westbury, C. (*b*), and declined to protect the plaintiffs, who used a label or advertisement containing false statements as to the character and manufacture of their goods. Lord Westbury, C. (*b*), remarked, that he "could not receive it as a rule either of morality or of equity, that the plaintiffs were not answerable for a fraud because it might be so gross and palpable that no one was likely to be deceived by it. If there was a wilfully false statement, he would not stop to enquire whether it was too gross to mislead."

Puffing.

In short, the Court will not protect a trade mark, label, &c., which contains, or has attached to it, a serious misstatement calculated to deceive; mere puffing, however, or exaggerated statements as to the value, &c., of patent medicines, and similar preparations, will not disentitle their owners, since every one knows how to estimate the value of such statements correctly (*c*).

False statement in foreign language.

If the misrepresentation is in other respects such as to disentitle, the fact of its being made in a foreign language does not necessarily prevent the plaintiff from losing the rights which he would have had if no such statements had been made (*d*).

Hogg v. *Kirby*

In *Hogg* v. *Kirby* (*e*), the defendant, who had brought out what he intended to be taken for a continuation of the

(*a*) 11 H. L. C. 523

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

(*c*) *Holloway* v. *Holloway*, 13 Beav. 209; *Comstock* v. *White*, 18 How. Pr. R. 421; R. Cox, 232; *Smith* v. *Woodruff*, 48 Barb. 438; R. Cox, 373. In America puffing has been treated somewhat more severely: *Fowle* v. *Spear*, 7 Penn. L. J. 176; R. Cox, 67; *Heath* v. *Wright*, 3 Wall. Jr.; R. Cox, 154; *Fetridge* v. *Wells*, 13 How. Pr. R. 385; R. Cox, 180; *Hobbs* v. *Français*, 19 How. Pr. R. 567; R. Cox, 287; *Phalon* v. *Wright*, 5 Phila. 464; R. Cox, 307; *Laird* v. *Wilder*, 9 Bush 131; 15 Amer. Rep. 707; *Wolfe* v. *Burke*, 11 Sickels, 115.

(*d*) *Palmer* v. *Harris*, 60 Penn. 156; R. Cox, 523.

(*e*) 8 Ves. 215.

plaintiff's magazine, set up in his defence the fact that the plaintiff's magazine untruly professed to be by "William Granger, Esq." Lord Eldon granted the injunction, and it is certainly improbable that any one could be injured by the use of a name previously unknown (*a*).

Use of predecessor's name.

It is clear that the use of the name of his predecessor by one who has succeeded him in business, when such use will not lead to any other supposition than that the business is the same (*b*), or the use of his own name, without more, by one whose name happens to be the same as that of another manufacturer (*c*), is not such a misrepresentation as to disentitle such a person to relief against fraud.

Collateral misrepresentations.

Collateral misrepresentations made by the plaintiff, as, for instance, in an advertisement in the newspapers, do not necessarily disentitle him to protection (*d*).

Fraudulent speculation.

It is not the province of the Court, however, to protect speculations which aim at inducing the public to buy one thing when they think they are buying another, and therefore, where both plaintiffs and defendant were engaged in speculations of that character, although the Court refused, on the ground of the plaintiffs' delay, to grant the injunction they prayed, it declined to give costs to the defendant, who was *in pari delicto* (*e*).

Hogg v. *Maxwell*.

In *Hogg* v. *Maxwell* (*f*), the plaintiff registered, under the Copyright Acts, the title of an intended magazine in 1863, but did not bring out the work. In June, 1866, the defendant registered the same name. The plaintiff discovered this in August. He then hastened on his own

(*a*) And see *Dale* v. *Smithson*, 12 Abb. Pr. R. 237; R. Cox, 282; *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450; 12 Amer. Rep. 401.

(*b*) *Leather Cloth Cos.' case*, 1 H. & M. 271; 33 L. J. Ch. 199; 11 H. L. C. 523; *Churton* v. *Douglas*, Johns. 174; *Hudson* v. *Osborne*, 39 L. J. Ch. 79.

(*c*) *Holloway* v. *Holloway*, 13 Beav. 209; *Burgess* v. *Burgess*, 3 De G. M. & G. 89.

(*d*) *Curtis* v. *Bryan*, 2 Daly, 212; R. Cox, 434; and see *Ford* v. *Foster*, L. R. 7 Ch. 611.

(*e*) *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276; and see *Samuel* v. *Berger*, 24 Barb. 163; R. Cox, 178; *Bloss* v. *Bloomer*, 33 Barb. 604; R. Cox, 200.

(*f*) L. R. 2 Ch. 316.

publication, which was first announced on September 24, and published next day. In the meantime the plaintiff had, on the 19th, undertaken to advertise the defendant's intended magazine, but retracted the undertaking, and gave the defendant notice of his claim to the title on the 25th. Proceedings were taken by both parties with a view to an injunction, which was refused in both cases, the Court being of opinion, in *Hogg* v. *Maxwell*, that the plaintiff had got beforehand by improper means, which disentitled him to relief.

Short weight.

The Court will not protect persons in carrying on a trade in which short weight is given systematically and knowingly (*a*).

9. *Word "Patent" improperly used by Plaintiff.*

9. Improper use of word "patent."

"It is impossible not to see," says Sir G. Mellish, L.J., "that persons do try to use their right in trade marks for the purpose of getting a monopoly in particular articles, just as if they had a patent for the goods which they manufacture" (*b*). A special form of misrepresentation consists in the use by persons in their trade marks of words inducing the belief that they have a patent for the articles to which those trade marks are affixed, and the tendency which the use of such words has to procure for the persons using them an unfair monopoly, or to prolong a monopoly granted only for a limited time, causes it to be regarded with special disfavour. The importance of the point is forcibly pointed out by Sir W. P. Wood, V.-C., in *Morgan* v. *McAdam* (*c*). He says: "All those who are induced to buy these crucibles thus described as 'Patent Plumbago Crucibles,' are to a certain extent deceived, because they are led to believe that the article is protected by a patent, and thus may be induced to purchase it from the plaintiffs, under the belief that there is a patent, and that

(*a*) See per Sir G. M. Giffard, L.J., in *Lee* v. *Haley*, L. R. 5 Ch. 155.

(*b*) *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434-56.

(*c*) 36 L. J. Ch. 228.

the plaintiffs, or at least some limited number of persons, are the only persons authorized to sell it; and further, they are led to believe that if they should be minded to set up any manufactory of the same kind for themselves, they would be unable to do so in consequence of the plaintiffs being the possessors, either by way of licence or ownership, of a patent preventing the world at large from imitating the article which is sold by them under this particular designation" (*a*).

Plaintiff disentitled.

Where, therefore, the plaintiff has used in his trade mark the word "patent," or words to that effect, although, in point of fact, he has never had a patent for the goods to which the mark is applied, the Court will refuse to extend to him the protection which he has forfeited. Previously to Sir John Rolt's Act (*b*), liberty was given to the plaintiff to bring an action at Law (*c*); but since then the action has been simply dismissed, with or without costs (*d*). And the course would be the same if the words were first inserted in the trade mark, after the expiration of a patent which had existed (*e*). In *Sykes* v. *Sykes* (*f*), a patent had been taken out by the plaintiff's father. That patent was held to be invalid, on account of a defect in the specification, but the use of the word "patent" was not held to disqualify the plaintiff from recovering at Law. The question does not seem, however, to have been fairly raised in that early case.

Retention of word after expiration of patent.

There has been some apparent difference of opinion in regard to the case in which the word "patent" has been inserted in the trade mark while the article was still

(*a*) And see per the same learned judge, in *Flavel* v. *Harrison*, 10 Hare, 467.

(*b*) 25 & 26 Vict. c. 27.

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

(*d*) *Morgan* v. *McAdam*, 36 L. J. Ch. 228; *Lamplough* v. *Balmer*, W. N. 1867, p. 293; *Leather Cloth Co*, v. *Lorsont*, L. R. 9 Eq. 352; *Nixey* v. *Roffey*, W. N. 1870, p. 227; and see *Ford* v. *Foster*, L. R. 7 Ch. 611. In *Stewart* v. *Smithson*, 1 Hilt. 119, R. Cox, 175, the Court of C.P. of New York refused to recognise this as a defence.

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

(*f*) 3 B. & Cr. 541.

patented, and has been retained there after the patent has run out. In such a case (*a*), Sir W. P. Wood, V.-C., held that the plaintiffs were entitled to recover, the blocks for the labels having been made during the existence of the patent, when the representation was perfectly true. Lord Kingsdown, in discussing this judgment (*b*), said that he agreed with it, if the word "patent" were only used as part of the designation of an article, but that he could not do so if the trade mark represented the article as protected by an existing patent. In a subsequent case (*c*), the Vice-Chancellor explained his meaning as being in harmony with that of Lord Kingsdown. "If originally you have a patent, and the article is in the market as a patent article, and you stamp all your goods which are sent out with these words 'patent pins,' or 'patent wire,' or whatever the particular article might be, at the end or the expiration of the patent, it is not necessary, as I thought, to call in the whole of the previous stamps, and remodel the whole of your stamps, and have a new form of packing your article, in order that you may inform the world that the patent, which did exist, has expired. Of course, it would be better, and those who are inclined to act with scrupulous honesty would take care, to put the date of their patent, which would obviate all difficulty, upon the articles which they designate as patented." In a very recent case (*d*), it was clearly established that the principle enunciated by Lord Kingsdown is the rule of the Court, and that the use of the word "patent," so as to indicate an existing patent, is equally fatal, whether there has never been a patent for the article in question, or the patent which did exist has expired (*e*).

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

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

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

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

(*e*) The penalties inflicted under 5 & 6 Wm. 4, c. 83, § 7, for the improper use of the word "patent," are not, however, incurred by the continued use of the word upon goods for which a patent has previously been possessed.

Word so used as not to deceive.

As has been seen, Lord Hatherley, when V.-C. (*a*), and Lord Kingsdown (*b*), were of opinion that when the word "patent" formed part of the name of an article, and did not operate so as to induce a belief in the existence of a patent, the trade mark in which the word appeared might be protected. A distinct decision to this effect was pronounced by Sir W. M. James, V.-C., in *Marshall* v. *Ross* (*c*), where "patent thread" was compared by the learned judge to "patent leather boots" (*d*).

Grossness of misrepresentation no excuse.

The fact that the misrepresentation is so gross as hardly to be capable of deceiving will not exonerate the person making it from the consequences. Thus, the use on untanned leather cloth of the words "tanned patented" was a ground for refusing assistance (*e*).

"Manufacturer and patentee."

Where a plaintiff described himself on his labels as "manufacturer and patentee," it was held that this was equivalent to describing the article as "patent," and the bill was dismissed, without costs (*f*).

Lamplough v. *Balmer.*

When a plaintiff used on his stopper labels with the words "Royal Letters Patent," the explanation that he had for twenty-five years paid the stamp duty on "patent medicines," and that he was only continuing to use the labels he had had on hand when he discovered his medicines did not belong to that class, was not accepted as satisfactory, and his motion for an injunction to restrain an imitator was refused (*g*).

Collateral use of word.

If, however, the plaintiff's trade is a perfectly honest trade, and the trade mark is a perfectly honest trade mark, the fact that the plaintiff has committed a purely collateral misrepresentation, by describing himself, though not in the

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

(*b*) *Leather Cloth Cos.' case*, 11 H. L. C. 523.

(*c*) L. R. 8 Eq. 651.

(*d*) See the observations on this case, in *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 352.

(*e*) *Leather Cloth Cos.' case*, 33 L. J. Ch. 199; 11 H. L. C. 523.

(*f*) *Nixey* v. *Roffey*, W. N. 1870, p. 227.

(*g*) *Lamplough* v. *Balmer*, W. N. 1867, p. 293.

trade mark itself, as "patentee," will not disentitle him to his remedy (*a*).

Word "patent" not registered.

With respect to trade marks not used before the passing of the Trade Marks Registration Act, 1875, the improper use of the word "patent" will not in the future form a subject for consideration, since that word will not be registered in connexion with such a trade mark (*b*).

Penalty for use of patentee's name.

A penalty is assigned for the improper use of the name of a patentee, or designation of an article as patent, by 5 & 6 Wm. IV. c. 83, § 7 (*c*).

Merchandise Marks Act.

By the Merchandise Marks Act, 1862, § 7 (*d*), a penalty is imposed upon every one who shall mark, &c., upon any goods any word, &c., for the purpose of falsely indicating such goods, or the mode of manufacturing them, or the ornamentation, shape, or configuration thereof, to be the subject of any existing patent, privilege, or copyright.

Under § 9, however, the use of the word "patent" and words of that class is not punishable under the 7th section, when used in such combinations as "patent thread," in *Marshall* v. *Ross* (*e*), or "patent leather boots."

Inoperative defences.

Among the defences which have occasionally been set up in actions for infringement of trade mark, but without success, are the following:

Ignorance.

Ignorance of the plaintiff's rights. This will not suffice to prevent the issue of the injunction (*f*); although it may have the effect of relieving the defendant from the necessity of accounting (*g*).

Puffing.

Mere exaggerated statements of the merits of medical or other compounds on the part of the plaintiff, which do

(*a*) *Ford* v. *Foster*, L. R. 7 Ch. 611.
(*b*) See Instructions.
(*c*) And see *Myers* v. *Baker*, 3 H. & N. 802.
(*d*) 25 & 26 Vict. c. 88.
(*e*) L. R. 8 Eq. 651.
(*f*) *Burgess* v. *Hills*, 26 Beav. 244; *Geary* v. *Norton*, 1 De G. & S. 9; *Cartier* v. *Carlile*, 31 Beav. 292; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578; and other cases.
(*g*) *Edelsten* v. *Edelsten*, *ubi suprà*; *Moet* v. *Couston*, *ubi suprà*.

not amount to fraud, will not exonerate the defendant from the consequences of his own fraud (*a*).

Equality in quality.

It is no defence to say that the spurious goods are equal in quality to the genuine ones, for the plaintiff's right is equally invaded (*b*).

Infancy.

Infancy is no defence, for "if an infant practises a fraud, he is liable for the consequences" (*c*), and he will be in the same position as an adult with respect to the payment of costs (*d*).

Colourable authority.

A fraud will not escape punishment by an authority being produced to use the name of a person having the same name as the plaintiff (*e*).

Slight delay.

The defendant will not escape by alleging laches on the part of the plaintiff in prosecuting his suit, if no greater delay has taken place than was requisite to obtain necessary evidence (*f*).

Infringement by others.

Nor by showing that the plaintiff's trade marks have been infringed by others without his knowledge or acquiescence (*g*).

Immediate purchasers not deceived.

Nor by proving that all the persons who bought from the defendant goods bearing the plaintiff's mark were well aware that they were not of the plaintiff's manufacture (*h*).

No proof of actual deception.

Nor by the absence of proof of actual deception or fraudulent intention, if in the opinion of the Court or

(*a*) *Holloway* v. *Holloway*, 13 Beav. 209. But see the American cases, at p. 129, note (*c*).

(*b*) *Blofeld* v. *Payne*, 4 B. & Ad. 410; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185 (per Lord Westbury, C. "It is not necessary, for the injunction, to prove . . . that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by loss of custom is sufficient to support his title to relief"); *Coats* v. *Holbrook*, 2 Sandf. 586, R. Cox, 20; *Taylor* v. *Carpenter*, 11 Paige, 292; 2 Sandf. 603; R. Cox, 45; *Partridge* v. *Menck*, 2 Barb. 101; 1 How. App. Cas. 558; R. Cox, 72; *Coffeen* v. *Brunton*, 5 McLean 256; R. Cox, 132.

(*c*) Per Sir T. Plumer, V.-C., in *Cory* v. *Gertcken*, 2 Madd. 49.

(*d*) *Chubb* v. *Griffiths*, 35 Beav. 127.

(*e*) *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450; 12 Amer. Rep. 401; *Wolfe* v. *Barnett*, 24 La. Ann. 97; 13 Amer. Rep. 111.

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

(*g*) *Ford* v. *Foster*, L. R. 7 Ch. 611; *Taylor* v. *Carpenter*, 3 Story, 458; R. Cox 14; *Filley* v. *Fassett*, 44 Mo. 173; R. Cox, 530.

(*h*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.

jury there is such imitation as to be calculated to deceive (*a*).

Discovery and Inspection.

Discovery.

The plaintiff in a trade-mark case sometimes thinks it advisable, for the purposes of his action, to obtain from the defendant a disclosure of certain particulars of his business, as, for instance, of the names of customers to whom the goods alleged to be marked with the plaintiff's trade mark have been sold, or, on whose account such goods have been conveyed.

Principle on which given.

The principles on which this advantage is given or withheld are thus stated by Lord Hatherley, C. (*b*): "The Court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the question of materiality or immateriality; but where the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the Court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery which can be of use to him, on the other, it is bound to protect the defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the case made by the plaintiff's pleadings, and to what will be in issue at the hearing."

Not given where oppressive.

"The more strict the Court is in compelling a full answer, the more necessary it is that the Court should be vigilant in seeing that the process of the Court is not made use of in an oppressive manner" (*c*). Where, therefore, the L.JJ. were of opinion that the discovery asked was such as the plaintiff, even if he failed at the hearing,

(*a*) *Edelsten* v. *Edelsten*, *ubi suprà*; *Cope* v. *Evans*, L. R. 18 Eq. 138; *Coats* v. *Holbrook*, *ubi suprà*; *Taylor* v. *Carpenter*, *ubi suprà*; *Coffeen* v. *Brunton*, 4 McLean, 516, R. Cox, 82; S. C. 5 McLean, 256; R. Cox, 132; *Davis* v. *Kendall*, 2 R. I. 566, R. Cox, 112; and see Ch. 4, on Infringement.

(*b*) *Moore* v. *Craven*, L. R. 7 Ch. 94.

(*c*) Per Sir C. J. Selwyn, L.J., in *Lockett* v. *Lockett*, L. R. 4 Ch. 341.

might yet afterwards use in a manner prejudicial to the defendant, and were not satisfied that there was any real prospect of its being of material service to the plaintiff at the hearing, they reversed the order of the Duchy Court of Lancaster by which such discovery had been granted (*a*).

Given when necessary.

On the other hand, "the Court, while it takes care that no oppressive use is made of its forms of procedure, must take care that parties are not allowed to refuse discovery which they ought to make" (*b*). Where, therefore, a defendant, who, having been the agent in London of the plaintiff, an American sewing-machine maker, continued, after dismissal, to advertise himself as the plaintiff's agent, and to sell as "the Howe Sewing Machine" machines not made by the plaintiff, and refused to give discovery of all the machines sold by him, with the prices, profits, names of purchasers, and other particulars, on the ground that he would thereby disclose the names of his customers and the secrets of his trade, Sir J. Romilly, M.R., held that the discovery might be extremely material to the plaintiff, and ordered it to be given (*c*). Again, where the plaintiff obtained an injunction against the defendants, and the defendants offered to submit to an injunction and pay costs, and then moved to stay proceedings, the answer to the plaintiff's interrogatories not having yet been given, Sir W. P. Wood, V.-C., said that the plaintiff had a right to ascertain the facts in his own way, by the answer of the defendants to his interrogatories, and that until the defendants had put in their answer, it was impossible for the Court to say whether or not he had done rightly in rejecting the terms offered by the defendants. The motion was dismissed, with costs (*d*).

(*a*) *Carver* v. *Pinto Leite*, L. R. 7 Ch. 90. "If the Court sees that all fair and legitimate purposes will be answered by a restricted discovery, it will so restrict it;" per Sir C. Hall, V.-C., in *Orr* v. *Diaper*, L. R. 4 Ch. D. 92, commenting on this case.

(*b*) Per Sir G. M. Giffard, L. J., in *Thompson* v. *Dunn*, L. R. 5 Ch. 576.

(*c*) *Howe* v. *McKernan*, 30 Beav. 547.

(*d*) *Stephens* v. *Brett*, 10 L. T. N. S. 231.

In *Leather Cloth Co.* v. *Hirschfeld* (*a*), a decree having been made directing the defendant to account for all goods sold by him with a particular stamp, it was decided by the same learned judge that the defendant was compellable to disclose the names of all persons to whom he had sold any such goods, and that if he could not say to which of his customers the stamped goods were sold, he was then (but not otherwise) compellable to disclose the names of all customers to whom he had sold goods which he would not swear positively were unstamped. *Leather Cloth Co.* v. *Hirschfeld.*

In *Orr* v. *Diaper* (*b*) the plaintiffs discovered that the defendants, who were shippers, had exported large quantities of goods packed and marked in imitation of others, for certain persons unknown. Being unable to discover the infringers, they applied to the defendants for discovery, and this being refused, instituted an action against them, in which discovery was prayed. The defendants having demurred, on the ground that no relief was prayed or intended to be prayed against them, Sir C. Hall, V.-C., held that the fact that the plaintiffs required the information for the purposes of an action against the infringers was sufficient, without their intending to bring an action against the shippers, and granted the discovery. Action for discovery.

By the Merchandise Marks Act, 1862 (*c*), any person who has sold, &c., any goods marked with a spurious trade mark, is bound, within forty-eight hours after delivery of a demand in writing, to give full information in writing of the name and address of the person from whom he obtained the goods, and of the time when he obtained them. In case of refusal, a justice of the peace may summon and fine the person refusing, and such refusal is *primâ facie* evidence that the person refusing was acquainted with the illegal circumstances. Discovery under Merchandise Marks Act.

Again, by sect. 21, the Court or a judge is empowered, Inspection.

(*a*) 1 H. & M. 295.
(*b*) L. R. 4 Ch. D. 92.
(*c*) 25 & 26 Vict. c. 88, § 6.

in a trade mark case, "to make such order as such Court or judge shall think fit for the inspection of every or any manufacture or process carried on by the defendant in which any such forged or counterfeit trade mark, or any such trade mark as aforesaid, shall be alleged to be used or applied as aforesaid, and of every or any chattel, article, and thing in the possession or power of the defendant alleged to have thereon or in any way attached thereto any forged or counterfeit trade mark, or any trade mark falsely or wrongfully applied, and every or any instrument in the possession or power of the defendant used or intended to be or capable of being used for producing or making any forged or counterfeit trade mark, or trade mark alleged to be forged or counterfeit, or for falsely or wrongfully applying any trade mark; and it is provided that any person who shall refuse or neglect any such order shall be guilty of a contempt of court."

Inspection under Judicature Act.

In *Hennessy* v. *Bohmann* (*a*), Sir R. Malins, V.-C., granted inspection under Supreme Court of Judicature Act, 1875, Order LII., rule 3.

Account.

Account.

A most important part of the remedy given in Equity for the infringement of the rights of the owner of a trade mark is the account of the profits, by which such profits as have been dishonestly acquired by a defendant by means of the reputation of another are restored to the plaintiff, whose they ought to have been at first. The principle is the same as where a man is made to account for the profits which he has improperly received, arising from the fraudulent manufacture of a secret medicine (*b*), or the publication of a newspaper (*c*).

Incident to injunction.

"The liability to account for the profits is incident to the injunction" (*d*), and "on authority and principle it is

(*a*) W. N. 1877, p. 14.
(*b*) *Green* v. *Folgham*, 1 S. & S. 398.
(*c*) *Giblett* v. *Read*, 9 Mod. 459.
(*d*) Per Sir J. Romilly, M.R., in *Cartier* v. *Carlile* 31 Beav. 292.

clear that if a man manufactures goods and knowingly marks them with the trade mark of another person, he is accountable for the profits so made" (*a*).

Wherever another's mark is used.

So long as the defendant is aware that he is using a trade mark which is not his, the fact that he does not know to whom the trade mark which he has copied belongs, does not in the slightest degree affect the right of the owner to an injunction and an account of profits (*b*).

Except where it was not known to be a trade mark.

If, however, the defendant has marked goods, or sold them already marked, in ignorance that he was using a trade mark at all, although the plaintiff will be entitled to his injunction, he will not be entitled to an account, except in respect of any user by the defendant after he became aware of the prior ownership (*c*).

Account sometimes useless.

In many cases the main object of the action is to obtain the injunction, the account being of very secondary importance (*d*), and occasionally the injury suffered by the plaintiff, and the profits received by the defendant, have been so small that the account has not formed part of the relief awarded, so that the old rule that the injunction was subordinate to the account (*e*) no longer holds good.

No account where laches.

As a plaintiff may be disentitled by reason of his own laches to his injunction, so he may be disentitled by the same reason to the account of profits. If he permits the defendant to continue his infringement for a prolonged period, he will not then be allowed to treat him as his salesman, and claim an account (*f*).

Offer of submission.

Where a defendant offered, among other things, to account for profits, but the plaintiff, declining the offer of submission, insisted upon his own terms, including an account, the Court granted the account, but only upon the

(*a*) Per Sir J. Romilly, M.R., in *Moet* v. *Couston*, 33 Beav. 578.

(*b*) *Cartier* v. *Carlile*, *ubi suprà*; *Moet* v. *Couston*, *ubi suprà*.

(*c*) *Edelsten* v. *Edelsten* 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578.

(*d*) *Barnett* v. *Leuchars*, 13 L. T. N. S. 495; *Shipwright* v. *Clements*, 19 W. R. 599, &c.

(*e*) *Delondre* v. *Shaw*, 2 Sim. 237.

(*f*) *Beard* v. *Turner*, 13 L. T. N. S. 746; *Harrison* v. *Taylor*, 11 Jur. N. S. 408.

plaintiff's request, and at his peril in respect of costs, in case it should turn out that the account furnished by the defendant of his own accord was accurate (*a*).

Subdivided account.

In *Dent* v. *Turpin* (*b*), where a defendant had infringed a trade mark, which had become by devise the property of two different persons, and those persons brought distinct actions against the defendant, the prayer in each case including an account and payment of such share of the profits as should be shown to be attributable to the individual plaintiff's share, it was held that such an account and payment could be granted.

Extent of account.

As to the extent of the account, it will not be given for a period of more than six years before the commencement of the action, and it will not include every species of profit made by the defendant during that period, but only so much as is properly attributable to the use of the plaintiff's trade mark (*c*). If the defendant was at first ignorant that he was using a trade mark, the account will commence from the date when he became aware of that fact (*d*); and where the defendant had himself been guilty of misrepresentation, and the defendant's business was carried on on so much larger a scale than the plaintiff's as to render it impossible to suppose that the use of the plaintiff's mark had alone brought the defendant his customers, the account was only given from the date of filing the bill, and not earlier (*e*).

Election between account and damages.

The acceptance of an account of profits by the plaintiff operates as a condonation of the infringement, so that a plaintiff must elect between the account and an inquiry as to damages, but cannot claim both (*f*).

Damages.

Damages.

It is in the option of a successful plaintiff in a trade-mark

(*a*) *Nunn* v. *D'Albuquerque*, 34 Beav. 595.
(*b*) 2 J. & H. 139.
(*c*) *Cartier* v. *Carlile*, 31 Beav. 292.
(*d*) *Moet* v. *Couston*, 33 Beav. 578; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.
(*e*) *Ford* v. *Foster*, L. R. 7 Ch. 611.
(*f*) *Neilson* v. *Betts*, L. R. 5 H. L. 1.

action to elect between an account of profits and an inquiry as to damages, although, as before stated, he cannot have both (*a*). Damages being the appropriate remedy at Common Law, while the account of profits was peculiar to Equity, the result, and probably the cause of the great majority of trade-mark cases being brought into Equity, has been that an account has been commonly awarded and not damages. This has been the case notwithstanding that the Courts of Equity have had the power of giving relief in the shape of damages (*b*), since in most cases the account forms the most convenient remedy.

When given.

Some of the remarks made in reference to the account apply in respect of damages: thus, the defendant is liable in damages for improper user of what he has reason to know, or suppose to be, a trade mark, though he may be ignorant of the owner; but not for use of a mark which he did not know to be a trade mark at all (*c*).

Special damage need not be proved.

For damages to be recovered, it is not necessary that special damage should be proved; it is sufficient to show that the plaintiff's right has been invaded, in which case some damages, even if only nominal, will be given (*d*).

Measure of damages.

The measure of damages which can be recovered when special damage is proved is not yet clearly settled by authority; but in *Leather Cloth Co.* v. *Hirschfeld* (*e*), it was held by Sir W. P. Wood, V.-C., that it would not be assumed in the absence of evidence that the amount of goods sold by the defendant under the fraudulent trade mark would have been sold by the plaintiff but for the defendant's unlawful use of the plaintiff's trade mark, for how could the Court assume that the persons who bought what the plaintiff

(*a*) *Neilson* v. *Betts*, L. R. 5 H. L. 1.

(*b*) Thus, inquiries as to damages were given in *Cheavin* v. *Walker*, L. R. 5 Ch. D. 850-61; and *Gravely* v. *Winchester*, Seton, 4th ed. 257.

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

(*d*) *Blofeld* v. *Payne*, 4 B. & Ad. 410; and see *Sykes* v. *Sykes*, 3 B. & Cr. 541; *Morison* v. *Salmon*, 2 Scott, N. R. 449; 2 Man. & G. 385; and cases at p. 99, n. (*b*).

(*e*) L. R. 1 Eq. 229.

averred were inferior articles, at an inferior price, would necessarily, if they had not done so, have bought the superior articles at the higher prices (*a*).

Offer of submission.

Where a defendant offered submission in terms which were rejected by the plaintiff, the latter was allowed an inquiry as to damages at his own risk (*b*).

Merchandise Marks Act.

By sect. 22 of the Merchandise Marks Act, 1862 (*c*), a person who forges a trade mark, or applies a forged trade mark to goods for the purpose of sale, or in any other of certain specified ways attempts to pass off spurious goods as genuine, is liable in damages to every person aggrieved by such wrongful acts.

Costs.

General rule as to costs—follow event.

The same general principles on which costs are given in other cases prevail in those in which a question of trade mark is at issue. Thus, the primary rule is that costs follow the event; that is to say, that where a plaintiff succeeds, he will get his costs (*d*); where he is unsuccessful, he will have to pay costs (*e*). And the fact that merely nominal damages have been awarded will not deprive a successful plaintiff of his right to his costs, since a question of his right has been involved (*f*).

Sometimes otherwise.

Costs, however, being in the discretion of the Court, the Court will, under some circumstances, grant the injunction, but without costs, as where the plaintiff has persisted in litigation which had become unnecessary (*g*). On the other hand, while the relief claimed by the plaintiff is

(*a*) See, however, *Graham* v. *Plate*, 40 Cal. 593, 6 Amer. Rep. 639.

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

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

(*d*) *Chappell* v. *Davidson*, 2 K. & J. 123; *Farina* v. *Silverlock*, 1 K. & J. 509; 6 De G. M. & G. 214; 4 K. & J. 650; *Collins Co.* v. *Walker*, 7 W. R. 222; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.

(*e*) *Woollam* v. *Ratcliff*, 1 H. & M. 259; *Williams* v. *Osborne*, 13 L. T. N. S. 498; *Morgan* v. *McAdam*, 36 L. J. Ch. 228; *Bass* v. *Dawber*, 11 L. T. N. S. 626.

(*f*) *Morison* v. *Salmon*, 2 Scott, N. R. 449; 2 Man. & G. 385.

(*g*) *Millington* v. *Fox*, 3 My. & Cr. 338; *Moet* v. *Couston*, 33 Beav. 578; *Hudson* v. *Bennett*, 12 Jur. N. S. 519.

refused, the defendant may still be left to pay his own costs, as where the plaintiff has lost his remedy by lapse of time (*a*), or improper use of the word "patentee (*b*)," or other similar reasons(*c*), the defendant's fraudulent intention being evident, or, more commonly, where the defendant's conduct, though not so clearly fraudulent as to entitle the plaintiff to an injunction, has yet been so suspicious and uncandid as to call for some punishment (*d*). In some cases the costs of interlocutory proceedings will be made costs in the cause, as where, on motion for injunction, the plaintiff failed on the score of delay (*e*). Where a respondent appeared at the hearing of an appeal, after having received notice from the appellant that no alteration would be asked in the order in the Court below, with respect to his costs, which the appellant had been ordered to pay, that respondent was left to pay the costs of such appearance (*f*). If a plaintiff makes charges which he is unable to substantiate, he may obtain an injunction with costs, and yet have to pay all costs occasioned by the making of that charge (*g*). In the same way, if a plaintiff insists upon having an account taken, after the defendant has given full information, the plaintiff will have to pay the costs of that account, if it turn out to have been unnecessary (*h*).

Costs given against wharfingers.

Where wharfingers were in possession of wines spuriously branded, and resisted an action by the injured party by setting up a claim to a lien on the wines, they, as well as the actual offender, were ordered to pay costs (*i*).

(*a*) *Rodgers* v. *Rodgers*, 31 L. T. N. S. 285.

(*b*) *Nixey* v. *Roffey*, W. N. 1870, p. 227.

(*c*) *E.g. Fetridge* v. *Wells*, 13 How. Pr. R. 385 : R. Cox, 180.

(*d*) *Edgington* v. *Edgington*, 11 L. T. N. S. 299 ; *Bass* v. *Dawber*, 19 L. T. N. S. 626 ; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518 ; *Wylam* v. *Clarke*, W. N. 1876, p. 68 ; *Robineau* v. *Charbonnel*, W. N. 1876, p. 160.

(*e*) *Isaacson* v. *Thompson*, 20 W. R. 196. And see *Brook* v. *Evans*, 2 L. T. N. S. 740 ; *Wallis* v. *Wallis*, 4 Dr. 458.

(*f*) *Upmann* v. *Elkan*, L. R. 7 Ch. 130.

(*g*) *Pierce* v. *Franks*, 15 L. J. Ch. 122 ; *Standish* v. *Whitwell*, 14 W. R. 512 ; *Wylam* v. *Clarke*, W. N. 1876, p. 68.

(*h*) *Nunn* v. *D'Albuquerque*, 34 Beav. 595.

(*i*) *Moet* v. *Pickering*, W. N. 1877, p. 193.

Costs in case of compromise.

One of the main objects which the Court has in view in the exercise of its jurisdiction is "to repress unnecessary litigation, and to keep litigation within those bounds which are essential to enable the parties to vindicate and establish their rights" (*a*). When, therefore, "a plaintiff, immediately after the suit is commenced, is offered and may obtain all he seeks, and still thinks proper to go on with his suit, the Court may give him his decree, but will not give him the costs of the suit so unnecessarily prosecuted" (*b*). The defendant is, however, the aggressor, since the litigation has been first occasioned by his unwarrantable interference with the plaintiff's rights in respect of his trade mark, and this is equally the case whether the aggression was made with knowledge or in ignorance of those rights of the plaintiff. The defendant must therefore offer all the plaintiff has a right to obtain, and the offer must include all the costs which have been occasioned by his improper conduct (*c*). A plaintiff whose rights have been attacked is not bound to rely on the assurance of his assailant that the act will not be repeated, but is entitled to the protection of an injunction (*d*).

Costs of unnecessary litigation thrown on party causing them.

Where in a patent case an injunction was granted, the defendants having previously promised to commit no further infringement and to pay the costs of preparing the bill, Sir J. L. Knight Bruce, V.-C., gave the plaintiffs their costs at the hearing, since the defendants ought to have

(*a*) Per Lord Cottenham, C., in *Millington* v. *Fox*, 3 My. & Cr. 338.

(*b*) Per Sir J. Wigram, V.-C., in *Colburn* v. *Simms*, 2 Hare, 560, commenting on *Millington* v. *Fox*; and see *McAndrew* v. *Bassett*, 33 L. J. Ch. 561; *Hudson* v. *Bennett*, 12 Jur. N. S. 519; *Upmann* v. *Elkan*, L. R. 12 Eq. 140, 7 Ch. 130; *Williams* v. *Osborne*, 13 L. T. N. S. 498.

(*c*) *Fradella* v. *Weller*, 2 R. & M. 247; *Kelly* v. *Hooper*, 1 Y. & C. 197; *Geary* v. *Norton*, 1 De G. & S. 9; *Burgess* v. *Hills*, 26 Beav. 244; *Burgess* v. *Hately*, 26 Beav. 249; *Wallis* v. *Wallis*, 4 Dr. 458; *Collins Co.* v. *Walker*, 7 W. R. 222; *Moet* v. *Couston*, 33 Beav. 578; *Nunn* v. *D'Albuquerque*, 34 Beav. 595; *Coats* v. *Holbrook*, 2 Sandf. 586; R. Cox, 20.

(*d*) *Geary* v. *Norton*, 1 De G. & S. 9; *Routh* v. *Webster*, 10 Beav. 561; *Tonge* v. *Ward*, 21 L. T. N. S. 480; *Coats* v. *Holbrook*, 2 Sandf. 586; R. Cox, 20.

offered, on the injunction being obtained, to pay all costs up to that time (*a*). The same result followed where a defendant, who had offered to pay the taxed costs as between party and party, but refused to pay them as between solicitor and client, put in his answer, and then, the plaintiff offering to accept the costs as between party and party, declined to pay the costs of the answer (*b*).

Apportionment of costs.

Where a plaintiff company succeeded on the question of imitation of labels and wrappers, but failed as to trade mark, the plaintiffs were given their costs up to the motion for injunction, each party having to bear his own after that (*c*).

Notice to infringer.

It seems that a person whose trade mark has been infringed should give notice to the infringer of his intention to take proceedings, so as to give him an opportunity of explaining his conduct or submitting (*d*); and that, a fair offer being made, he should not hasten to incur needless expense (*e*), or he may in either case be punished in respect of costs. Lord Romilly, M. R., was, however, of opinion (*f*) that the defendant having been the aggressor, the plaintiff would be justified in filing his bill, without making any application to the defendant; and in *Upmann* v. *Elkan* (*g*) he indicated his adherence to the same view, saying that he did not mean to lay down that the person whose trade mark had been imitated might not file a bill without making any enquiry at all.

Infancy does not excuse from costs.

A plea of infancy will not excuse an infant infringer from paying the costs which his conduct has occasioned (*h*).

Costs occasioned to a third party by defendant's fraud.

A person who has induced another person to manufacture for him goods marked with the trade mark of a third person is liable to repay to the person he has made

(*a*) *Geary* v. *Norton*, *ubi suprd.*

(*b*) *Kelly* v. *Hooper*, 1 Y. & C. 197.

(*c*) *Compagnie Laferme* v. *Hendrickx*, M. R. July 20, 1876.

(*d*) *Chappell* v. *Davidson*, 2 K. & J. 123; *Wallis* v. *Wallis*, 4 Dr. 458.

(*e*) *Williams* v. *Osborne*, 13 L. T. N. S. 498.

(*f*) In *Burgess* v. *Hately*, 26 Beav. 249. And see *Coats* v. *Holbrook*, 2 Sandf, 586; R. Cox, 20.

(*g*) L. R. 12 Eq. 140; L. R. 7 Ch. 130.

(*h*) *Cory* v. *Gertcken*, 2 Madd. 49; *Chubb* v. *Griffiths*, 35 Beav. 127.

the instrument of his fraud the cost of legal proceedings brought about by the infringement, including any sum which that person may have reasonably paid to compromise the matter (*a*).

(*a*) *Dixon* v. *Faucus*, 3 Ell. & Ell. 537.

CHAPTER VIII.

CASES ANALOGOUS TO THOSE OF TRADE MARK.

Cases not strictly trade-mark cases.

In addition to the cases in which there has been an infringement of trade mark properly so called, a variety of cases have been decided in which the Court has restrained the practice of fraud by one person at the expense of another, the means adopted to perpetrate the fraud resembling to some extent the infringement of a trade mark, but yet being distinguishable therefrom.

Cases of true trade mark.

A trade mark is a highly technical matter, and for there to be an infringement of trade mark there must be a valid trade mark in existence; that is to say, there must not only be such a device in existence as is capable of forming a trade mark, but it must be actually attached to vendible articles in the market (*a*), or must, at least, if first used since the Trade Marks Act of 1875, be properly registered under the Registration Acts (*b*).

Cases not of true trade mark.

Where, however, there has been a representation that one thing is another, by means of which one person has secured custom intended for another, so that both the purchaser and the genuine trader have been defrauded, there the Court will interfere and protect the right of both parties to trade freely without fraudulent deceptions, although the fraud has taken another form than that of imitating a trade mark.

(*a*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561 ; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307.

(*b*) See the Registration Act of 1876, 39 & 40 Vict. c. 33.

Trade name.

An important class of cases of this description consists of cases in which there has been a wrongful assumption by one person or firm of the trade or firm name under which a reputation has been gained by another person or firm, and which has therefore become a very important part of the goodwill of the business of such person or firm (*a*), although when used as a name, and not as a mark on vendible goods, it is not used as a trade mark. The imitation of such a name falsely represents not merely a certain class of goods, but the entire business to be that of one not the true proprietor.

No exclusive right in name apart from business.

"In this country," says Lord Chelmsford (*b*), "we do not recognise the absolute right of a person to a particular name, to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connexion with a trade or business is familiar to our law; and any person using that name, after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or at least of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction."

Fraud must be proved.

For an action to restrain the use of a trade name to be successful, fraud must be proved: there is no question of goods despatched about the world with a false indication of origin. In a case of this description it was said by Sir W. P. Wood, V.-C. (*c*), that "the Court must not only be satisfied that the course which had been taken by the defendants had been calculated to deceive the public, but that it had been represented to them by the plaintiffs as having that effect. If, after such representation, the defendants persisted in continuing the use of the name in the same manner, then, on the plaintiffs bringing the case before the

(*a*) Per Wood, V.-C., in *Churton* v. *Douglas*, Johns. 174.

(*b*) *Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 441.

(*c*) *Williams* v. *Osborne*, 13 L. T. N. S. 498. And see *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.

Court, the Court would be justified in saying that that whichwas not fraudulent at first became so by the defendants persisting in the same course, and that therefore the plaintiffs would be entitled to the relief they claimed." The principle is, not that there is property in the name (*a*), but that it is a fraud on the part of one person to attract to himself the custom intended for another, by a false representation, direct or indirect, that the business carried on by himself is identical with that of the other person by whose ability and exertions the name has acquired the reputation it possesses (*b*). The question is not whether the defendants' business is represented as being similar to the plaintiffs', but whether it is represented as being that very identical business (*c*).

Name of company.

When the name which is alleged to have been imitated is that of a company, and is composed of such words as are in ordinary use in the language, very clear evidence indeed of fraud will be required for an action for infringement to be successful. Thus, where a bill was filed by The London and Provincial Law Assurance Society against The London and Provincial Joint Stock Life Assurance Company (*d*), the injunction was refused, an action at law being directed; and in suits by The Colonial Life Assurance Company against The Home and Colonial Assurance Company, Limited (*e*),and by The London Assurance Company against The London and Westminster Assurance Corporation, Limited (*f*), the injunction was simply refused. Where

(*a*) In *Singer Manufacturing Co.* v. *Kimball*, Court of Session Cas. 3rd Series XI. 267, the Scotch Court appears to have held that there was some sort of right of property in the name of a company; but in *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434, the English Courts refused to follow that decision. And see per Sir G. M. Giffard, V.-C., in *Boulnois* v. *Peake*, W. N. 1868 p. 95.

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

(*c*) *Cruttwell* v. *Lye*, 17 Ves. 335; *Churton* v. *Douglas*, Johns. 174.

(*d*) *London and Provincial Law Assurance Society* v. *London and Provincial Joint Stock Life Assurance Co.*, 17 L. J. Ch. 37.

(*e*) *Colonial Life Assurance Co.* v. *Home and Colonial Assurance Co.*, 33 Beav. 548.

(*f*) *London Assurance Co.* v. *London and Westminster Assurance Corporation*, 32 L. J. Ch. 664.

a bill was filed by a person representing The London Manure Company, against another person representing The London Patent Manure Company (*a*), the Vice-Chancellor of England, on motion to dissolve an injunction, held that the defendants' circulars were clearly fraudulent imitations of the plaintiffs', but dissolved the injunction, and sent the case to a jury for the purpose of deciding whether the plaintiffs' user of their title had been sufficiently long. In *Lawson* v. *The Bank of London* (*b*), a case at Common Law, the plaintiff was defeated on the ground of a want of averment in the declaration that he was a banker or had ever carried on that business; Willes, J., however, remarked that "he was not prepared to say that the defendants would not be liable, if the cause of complaint were properly alleged." In *Lee* v. *Haley* (*c*), the plaintiffs were coal merchants, trading under the name of The Guinea Coal Company, and having their business premises at No. 22, Pall Mall. The defendant had been in their service as manager, and on leaving them set up in business at Beaufort Buildings, Strand, under the name of The Pall Mall Guinea Coal Company. From Beaufort Buildings he removed to No. 48, Pall Mall. In that case fraud was held to be proved, and the injunction was granted, but there being no property in the name, and the Court being of opinion that the only reasonable chance of successful deceit depended upon the residence of the defendant in Pall Mall, the injunction against the user by the defendant of his trade name as above was restricted to Pall Mall. Where a plaintiff company sold white lead in kegs marked "Brooklyn White Lead Company," or "Co.," and the defendant, who had formerly marked his "Brooklyn White Lead, pure, 100 lbs.," changed the name to "Brooklyn White Lead and Zinc Company," it was held that, though he was entitled to continue to

(*a*) *Purser* v. *Brain*, 17 L. J. Ch. 141.

(*b*) 18 C. B. 84.

(*c*) L. R. 5 Ch. 155.

mark his goods "Brooklyn White Lead and Zinc," he had no right to add "Company" or "Co." (*a*)

The Companies Act, 1862.

By sect. 20 of the Companies Act, 1862 (*b*), it is enacted that "no company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except in a case where such subsisting company is in the course of being dissolved, and testifies its consent in such manner as the registrar requires; and if any company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a subsisting company is registered, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company may, with the sanction of the registrar, change its name" (*c*).

Name of individual.

If the trade name which has been imitated is that of an individual, and this has been assumed by another person of different name, little is required to prove the fraud. In fact, the assumption of another's name is almost sufficient proof if taken alone (*d*).

Assumed name.

Sometimes the plaintiff's name is itself an assumed or fanciful one; thus the use of the name "Christy's Minstrels" has been restrained (*e*); and in *Isaacson* v. *Thompson* (*f*) the plaintiff kept a millinery establishment, as "Madame Elise," which being imitated by the defendant, an injunction would have been awarded, had not the plaintiff's own delay disentitled her to relief.

(*a*) *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 416; R. Cox, 210. And see *Churton* v. *Douglas*, Johns. 174.

(*b*) 25 & 26 Vict. c. 89.

(*c*) In *Newby* v. *Oregon Central Railway Co.*, 1 Deady, 609, 9 Amer. Rep. 331 n., the adoption of the name "The Oregon Central Railway Co." was restrained, there being a subsisting corporation of that name. See also *Holmes, Booth & Haydens* v. *Holmes, Booth & Atwood Manufacturing Co.*, 37 Conn. 278; 9 Amer. Rep. 324; *Batchellors* v. *Batchellor Manufacturing Co.*, 12 Amer. Rep. 414 n., as to imitation of names of companies.

(*d*) Per Sir G. J. Turner, L. J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 89. See *Binninger* v. *Wattles*, 28 How. Pr. R. 206; R. Cox, 318.

(*e*) *Christy* v. *Murphy*, 12 How. Pr. R. 77; R. Cox, 164; *Montague* v. *Moore*, Seton, 4th ed. 238.

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

Man's own name.

In some cases the use of a man's own name may be such as to deceive, and where this is so the person aggrieved is entitled to obtain an injunction against such use of the name (*a*), but he must prove clearly the fraudulent intent, and "it is a question of evidence in each case whether there is false representation or not" (*b*).

Evidence of fraud.

Such evidence was supplied in one case (*c*) by a removal by the defendant into the neighbourhood in which the plaintiff was carrying on his business, and the addition of "and Co." to the name, "H. Fullwood," the plaintiff's trade name being "R. J. Fullwood & Co." In another case (*d*), the defendant, who had sold his business and the goodwill, including the name, "John Douglas & Co.," recommenced business, and employing the three managing men of his former business, styled his new business, "John Douglas & Co.," and sent round circulars informing the public that his firm was so well known that it was unnecessary to say anything about it; thus, in fact, "representing himself to be the owner of that which he had sold." So, too, it was held to be fraud for a person who had recently come into the neighbourhood of the "Carriage Bazaar" in Baker street, and set up a "Carriage Repository," to change that name to "The New Carriage Bazaar," with some incorrect additions (*e*).

Deceptive circulars.

Again, a fraudulent intention may be shown to exist by

(*a*) *Churton* v. *Douglas*, Johns. 174; *Burgess* v. *Burgess*, 3 De G. M. & G. 89; *Fullwood* v. *Fullwood*, W. N. 1873, pp. 93—185; *Holloway* v. *Holloway*, 13 Beav. 209; *Holmes* v. *Holmes*, 37 Conn. 278; 9 Amer. Rep. 324; *Gillis* v. *Hall*, R. Cox, 596. See *Christie* v. *Christie*, W. N. 1873, pp. 8—70.

(*b*) Per L. J. Turner, in *Burgess* v. *Burgess*, *ubi suprd.*

(*c*) *Fullwood* v. *Fullwood*, W. N. 1873, pp. 93—185. And see *Glen & Hall Manufacturing Co.* v. *Hall*, 16 Sickels, 226. Where Robert Minton Taylor, formerly a member of the firm of Minton, Hollins & Co., set up for himself as Robert Minton Taylor & Co., and, on being threatened with legal proceedings, undertook to trade only as Robert Minton Taylor, it was held that a purchaser of R. M. Taylor's business could not carry it on under the style of "The Minton Brick and Tile Co.:" *Campbell* v. *Hollins*, H. L. April 26, 1877.

(*d*) *Churton* v. *Douglas*, Johns. 174. But see the American case of *Howe* v. *Searing*, 10 Abb. Pr. R. 264; R. Cox, 244.

(*e*) *Boulnois* v. *Peake*, W. N. 1868 p. 95. And see *Glen & Hall Manufacturing Co.* v. *Hall*, 16 Sickels, 226.

the production of deceptive circulars so framed by the defendant as to represent his business to be identical with, or a continuation of that carried on by the plaintiff; and such a fraud will be restrained (*a*).

Opening letters.

So, too, one person will not be allowed to defraud another by opening letters addressed to him, and executing orders intended for him (*b*). Where, however, various acts of misrepresentation by the defendant were alleged, pointing to an intention to simulate the plaintiff, but only one case was made out, in which the defendant had opened a letter addressed to the plaintiff, answered it in his own name, and endeavoured to obtain the custom offered by that letter to the plaintiff, it was held that, though this raised grave suspicion of the defendant's motives, yet it was not sufficient ground for an injunction. The defendant, however, was refused his costs (*c*).

Fraudulent partnership.

Nor will fraud be permitted to be perpetrated under cover of a partnership got up for the purpose of fraud (*d*).

Vendor of business may recommence business.

On the sale of the goodwill of a business, the vendor, in the absence of a special stipulation on the point, retains the right of recommencing business, even in his own name, however similar that may be to the trade name of the business the goodwill of which has been sold; provided that he scrupulously abstains from doing anything to induce the public to believe that his new business is in fact the old one which he has sold. If, however, he does anything calculated to induce the belief that his new business is not merely similar to, but is identical with the old one, the purchaser of the old business is entitled to restrain him by injunction (*e*).

(*a*) *Churton* v. *Douglas*, Johns. 174; *Stevens* v. *Paine*, 18 L. T. N. S. 600; *Purser* v. *Brain*, 17 L. J. Ch. 141; *Christie* v. *Christie*, W. N. 1873, pp. 8—70; *Burrows* v. *Foster*, Seton, 4th ed. 257; *Graveley* v. *Winchester*, *ib.*; *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

(*b*) *Scheile* v. *Brakell*, 11 W. R. 796; Seton, 4th ed. 253; *Witt* v. *Corcoran*, *ib.* 257.

(*c*) *Edgington* v. *Edgington*, 11 L. T. N. S. 299

(*d*) *Croft* v. *Day*, 7 Beav. 84; *Dence* v. *Mason*, W. N. 1877, p. 23; *Holmes* v. *Holmes*, 37 Conn. 278; 9 Amer. Rep. 324.

(*e*) *Cruttwell* v. *Lye*, 17 Ves. 335; *Churton* v. *Douglas*, Johns. 174; *Johnson* v. *Helleley*, 34 Beav. 63;

Dissolution of partnership.

On the dissolution of a partnership, if the whole concern and the goodwill are sold, the trade name is sold with it (*a*). But if the partners merely divide the partnership assets, and there are no express stipulations in the articles as to the disposal of the trade name, then each is at liberty to use the old name just as the partnership did before (*b*); at all events, if no injury will be thereby caused to a partner whose name the firm have used (*c*). If, again, on the dissolution of partnership, one partner takes over the whole concern by arrangement, he must compensate the other partner for his interest in the trade name (*d*), and the retiring partner is at liberty to set up a similar business in his own name, even on adjoining premises (*e*).

Scott v. *Scott*.

In *Scott* v. *Scott* (*f*), R. & W. Scott carried on business in partnership at Nithsdale, and Glasshouse Street, Regent Street, as "R. & W. Scott." The partnership being dissolved, the agreement for the dissolution contained no stipulation by either party not to continue the business, but neither of the parties was to use the name of the firm, except so far as might be necessary for winding up the partnership affairs. W. Scott retiring from the business, and setting up for himself in the neighbourhood of Nithsdale, R. Scott retained the business premises of the late firm, and made them over with his business to the defendants, Scott & Nixon. The inscription used by the late firm over their house at Glasshouse Street having been "R. & W. Scott, of Nithsdale," the defendants replaced this by "Scott & Nixon, late R. & W. Scott, of Nithsdale." Upon this W. Scott filed a bill

Hudson v. *Osborne*, 39 L. J. Ch. 79. *Tudor* v. *Tudor*, W. N. 1873, p. 72, depended on an express stipulation in the deed under which the plaintiff retired from the business.

(*a*) *Banks* v. *Gibson*, 34 Beav. 566. See *Hoffman* v. *Duncan*, Seton, 4th ed. 256; *Witt* v. *Corcoran*, *ib.* 257.

(*b*) *Ib.* See *Clark* v. *Leach*, 32 Beav. 14; *Dence* v. *Mason*, W. N. 1877, p. 23; *Mitchell* v. *Condy*, *ib.* 153.

(*c*) *Scott* v. *Rowland*, 20 W. R. 508.

(*d*) *Banks* v. *Gibson*, 34 Beav. 566.

(*e*) *Bond* v. *Milbourn*, 20 W. R. 197.

(*f*) 16 L. T. N. S. 143.

against them, and on motion for injunction, the injunction was granted to restrain the defendants from permitting that inscription to remain, and from representing their business to be in continuance of that carried on by the late partnership of R. & W. Scott (*a*).

Representations that plaintiff has retired.

The injury caused by the defendants to the plaintiffs is even greater than in an ordinary case of misappropriation of a trade name, when the representations made by the defendants go to show that the plaintiffs have retired from business, and that the defendants have succeeded to the business formerly carried on by them. Thus, where the defendants had acquired a lease of works at which the plaintiffs had formerly manufactured bricks, but not of the mines from which the brick-clay used by the plaintiffs had been obtained, and then issued cards and circulars, styling themselves "E. J. & J. Pearson (late Harpers & Moore)," and otherwise representing themselves to have succeeded to the business of the plaintiffs, who were, as a matter of fact, carrying on their business on other works, the defendants were restrained by injunction from their misrepresentations (*b*); and Sir W. P. Wood, V.-C., expressed an opinion that, on application by the owner of the mines of fire-clay used by the plaintiffs, but not by the defendants, the issue of an injunction would have been almost a matter of course.

Former firm or employer may be stated.

A person who has been a member or employé of a firm of reputation, and who sets up in business on his own account, is entitled to derive what benefit he may from a fair statement of the fact of his former employment (*c*),

(*a*) See *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

(*b*) *Harper* v. *Pearson*, 3 L. T. N. S. 547; also *Scott* v. *Scott*, *ubi suprd*; and *Stevens* v. *Paine*, 18 L. T. N. S. 600. And as to a representation of one business being a continuation of another, see *Churton* v. *Douglas*, Johns. 174; *Burrows* v. *Foster*, Seton, 4th ed. 257; *Witt* v. *Corcoran*, *ib.* 257; *Gravely* v. *Winchester*, *ib.* 257; *Montague* v. *Moore*, *ib.* 238; *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

(*c*) See per Sir W. P. Wood, V.-C., in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; also *Clark* v. *Leach*, 32 Beav. 14; and cases *infrà*. But see *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

which is usually expressed by the addition after his own name of the name of his former firm or employer, with the words "late of," or "late with." But such statement must be made in an unambiguous way, and not in such a manner as to induce the belief that the tradesman in question is selling the goods of his former firm or employer. For the purposes of the plaintiff's right to relief it is a matter of indifference whether or not the defendant has acted with a fraudulent intention; if what he has done is, though unintentionally, calculated to deceive "the unwary, the heedless, the incautious portion of the public" (*a*), the plaintiff is entitled to protection just as much as if there were intentional fraud.

Glenny v. *Smith.*

In *Glenny* v. *Smith* (*b*), the defendant, who had been in the plaintiff's service, opened a shop in Oxford Street, where he placed his own name over the door, but on the brass plates and on the awning the words, "from Thresher and Glenny," "from" being in much smaller letters than the plaintiff's name. It further appeared that the defendant's own name over the door was quite hidden when the awning was let down. Sir R. T. Kindersley, V.-C., granted an injunction (*c*).

Hookham v. *Pottage.*

In *Hookham* v. *Pottage* (*d*), the parties had been tailors in partnership at Oxford, the defendant having been formerly the plaintiff's manager, and afterwards taken into partnership by him. On the dissolution of the partnership it was arranged that the plaintiff was to continue the business, the defendant receiving from the plaintiff such an amount as should be found to be due to him. The plaintiff, in continuing the business, styled himself, "Hookham & Co.," and the defendant, setting up close to him, put over his shop, "S. Pottage, from Hookham & Pottage."

(*a*) V.-C. Kindersley, in *Glenny* v. *Smith*, 2 Dr. & Sm. 476.

(*b*) *Ubi suprà.*

(*c*) See, too, *Burgess* v. *Burgess*, 3 De G. M. & G. 89; and *Colton* v. *Thomas*, 2 Brewster, 308; R. Cox 507.

(*d*) L. R. 8 Ch. 91. And see *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

There was some evidence of deception, and Sir R. Malins, V.-C., granted an injunction, which decision was upheld by the Court of Appeal.

In *Foot* v. *Lea* (*a*), an older case, the Master of the Rolls in Ireland was of opinion that there was no attempt to deceive on the part of the defendant, who had used show-boards and labels on which his own name was followed by "late of Lundy Foot & Co.," the latter name being of equal size with the defendant's, and he accordingly refused the injunction, with leave to bring an action at Law. In *Williams* v. *Osborne* (*b*), Sir W. P. Wood, V.-C., was of a similar opinion, and dismissed the bill, and, on account of the extreme haste with which it had been filed, with costs. In a very recent case (*c*), the defendants, who had been forewomen in the plaintiff's shop in Paris, used on their window blinds, in Bond Street, the words "Ex 1ères de la," in small letters, followed by "Maison Boissier de Paris," in large letters, to signify their former employment; and although V.-C. Malins declined to restrain the use of those words, notwithstanding that they were not generally understood in London as equivalent to "From," he left the defendants to pay their own costs. Other cases.

Deception of the same kind will be restrained when what is imitated is not a name of an individual or firm, but a designation of the place at which the business of an individual or firm is carried on, and by which it is known and recognised. Thus, "Osborne House" (*d*), "The Carriage Bazaar," &c. (*e*). But in such cases the plaintiff must prove that the result of the defendant's acts is calcu- Name of establishment.

(*a*) 13 Ir. Eq. 490.

(*b*) 13 L. T. N. S. 498.

(*c*) *Robineau* v. *Charbonnel*, W. N. 1876, p. 160.

(*d*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79.

(*e*) *Boulnois* v. *Peake*, W. N. 1868, p. 95. And see *Cave* v. *Myers*, Seton, 4th ed. 238. In an American case, *Genin* v. *Chadsey*, cited in *Dixon Crucible Co.* v. *Guggenheim*, R. Cox, 567, an injunction was granted to the proprietor of "The Captain's Live-and-Let-Live Oyster and Dining Saloon," to restrain a person who had set up "G. W. Chadsey & Co's Great Eastern Live-and-Let-Live Dining Saloon." See, too, *Glen & Hall Manufacturing Co.* v. *Hall*, 16 Sickles, 226.

lated to represent his business as identical with the plaintiff's, and that there is something distinctive about the appellation of his own establishment (*a*).

Hotel. In America the same principle has been extended to hotels, and a proprietor of one already established has been held entitled to protection against the setting up of hotels in the same neighbourhood under a similar title. Thus, "The Irving House," "The What Cheer House," and "The McCardel House" have been protected (*b*). And not only the proprietors of such establishments have been protected in respect of the names by which they have been known, but other persons who have contracted with such proprietors for the exclusive conveyance of visitors to and from their hotels have been held entitled to restrain the use by others not so authorized upon their vehicles and servants' clothing of the name of the establishment with which they were connected (*c*).

Name not trade name. Closely connected with the cases which concern the rights of an individual or firm in the trade name under which his or their business is carried on, are the cases in which it has been sought by one person to restrain the unauthorized use of his name by another, though he does not himself use that name over a shop, or, in fact, as a trade name usually so called.

Libel. The first point in cases of this description is that such an improper use by one person of the name of another person as to amount to a libel upon that other person raises a question which must be decided by the verdict of a jury. Lord Cottenham, C., said (*d*) that the Libel Act

(*a*) Thus, in *Choynski* v. *Cohen*, 39 Cal. 501, R. Cox, 593, it was held that there was nothing in the title "The Antiquarian Book Store" to entitle its proprietor to an injunction against "The Antiquarian Book and Variety Store."

(*b*) *Howard* v. *Henriques*, 3 Sand. S. C. 725; R. Cox, 129; *Woodward* v. *Lazar*, 21 Cal. 448; R. Cox, 300; *McCardel* v. *Peck*, 28 How. Pr. R. 120; R. Cox, 312.

(*c*) *Stone* v. *Carlan*, 13 Mo. L. R. 360; R. Cox, 115; *Marsh* v. *Billings*, 7 Cush, 322; R. Cox, 118. And compare *Knott* v. *Morgan*, 2 Keen, 213.

(*d*) *Fleming* v. *Norton*, 1 H. L. C. 376. This case was a Scotch one

"appointed a jury as the proper tribunal for trial of injuries to the person by libel or defamation; and that the liberty of the press consisted in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels, public or private." The principle that the publication of a libel was a crime, and that the Court of Chancery had no jurisdiction to prevent the commission of crimes, except in such cases as those relating to the protection of infants, was laid down in the most express terms by Lord Eldon so long ago as the year 1818 (*a*), and Equity judges have since that time repeatedly recognised that it is not within the proper scope of their authority to restrain the publication of libels (*b*).

Where right of property injured.

Where, however, a right of property is injured by reason of the improper use of another's name, the Court has jurisdiction to protect that right of property; and the same is the case where an act injurious to property is threatened (*c*). For the interference of the Court to be successfully invoked there must, indeed, be a certainty or probability that some pecuniary loss or damage will be sustained from the wrongful act (*d*), but there must be not only loss sustained, but a right of property also to be

and the Lord Chancellor was speaking in reference to the Scotch Libel Act, but his remarks are equally applicable to cases arising in England.

(*a*) *Gee* v. *Pritchard*, 2 Swanst. 413.

(*b*) *Martin* v. *Wright*, 6 Sim. 297; *Seeley* v. *Fisher*, 11 Sim. 581; *Clark* v. *Freeman*, 11 Beav. 112; *Emperor of Austria* v. *Day*, 2 Giff. 628, 3 De G. F. & J. 217 (in particular, per L. J. Turner); *Mulkern* v. *Ward*, L. R. 13 Eq. 619; *Browne* v. *Freeman*, W. N. 1873, p. 178; *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142; *Fisher* v. *Apollinaris Co.*, *ib.* 297. In *Thorley's Cattle Food Co.* v. *Massam*, W. N. 1877, p. 174, the plaintiffs, who had been previously held by the Vice-Chancellor to be in possession of, and entitled to use the same secret recipe as the defendants, sought to restrain the defendants from publicly advertising that they, the defendants, were alone acquainted with the secret. Vice-Chancellor Malins refused the motion, considering himself bound by *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142, but indicated an opinion that an injunction might have been granted under the extended powers conferred upon the Court by the Judicature Act, 1873, § 25, sub-s. 8.

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

(*d*) Per Lord Westbury, C., in the *Leather Cloth Cos.' case*, 33 L. J. Ch. 200.

protected. "The first question is 'is there a right, or is there property, on the part of the plaintiff to be protected?'" (*a*).

Where articles are produced under a certain name.

Where a person produces certain articles, and a representation is made by another that articles not the production of that person are in fact produced by him, there is an injury to the right of property in the name, which has in fact, though not used as a trade mark, yet come to be the producer's means of selling the articles produced.

Poet.

Thus, a poet is entitled to protection for the name which sells his poems for him. In *Lord Byron* v. *Johnston* (*b*), the defendant, who had advertised for sale poems which he represented to be by the plaintiff, but as to which he declined to swear to his belief in their genuineness, was restrained by injunction.

Legal author.

So, again, a legal author is entitled to prevent the issue as his of works or editions not of his production. In *Archbold* v. *Sweet* (*c*), the plaintiff was the author of a book on a legal subject, of which he had sold the copyright to the defendant. The plaintiff refusing to re-edit the book, the defendant had it edited by another, and the plaintiff thereupon came forward to complain of the inaccuracies which he alleged to be contained in the new edition. Lord Tenterden, C.J., after remarking on the close analogy between that case and those in which an inferior article was sold in the name of a well-known manufacturer, the injury being in the latter case to the sale of the goods, in the former to the character of the author, laid down to the jury that if the new edition, in the form in which it was put forth, would be understood by purchasers who paid reasonable attention to its contents, the plaintiff was entitled to a verdict. "The matter of his complaint." Expenditure gives no exclusive right, nor do advertisements. Per Sir G. Turner, L. J. *ib.*

(*a*) Per Sir H. M. Cairns, L. J., in *Maxwell* v. *Hogg*, L. R. 2 Ch. 307. "The first principle which applies, not only to this case, but to every case in this Court, is that the plaintiff must show some property right or interest in the subject-

(*b*) 2 Mer. 29.

(*c*) 1 M. & Rob. 162.

tents to be by the plaintiff, their verdict must be in his favour.

So, again, a painter will be protected from having exhibited as his a picture which he has not painted (*a*), and a medical man who compounds medicines from having spurious medicines sold as his (*b*). Painter. Medical man.

In all such cases the plaintiff must, of course, show that deception is probable, or he cannot succeed in obtaining the relief he seeks. Thus, where an artist painted a picture, and another person exhibited a diorama imitated from it, it was held that there could be no deception or injury, though if the plaintiff's picture had been a diorama the case would have been different (*c*). So where a person who wrote songs under the name of Claribel sought to restrain the publication of a song described as "written by Claribel," no mention being made of the composer's name, though the music given was not that of Claribel, it was decided that the words "written by" did not imply that the music was also composed by Claribel, and the injunction was refused (*d*). Deception must be probable.

The decision in *Clark* v. *Freeman* (*e*) has been much discussed with respect to the right a man has in his name. In that case the plaintiff, Sir James Clark, was an eminent physician, who filed a bill to restrain the advertisement and sale by the defendant of certain pills termed by him "Sir J. Clarke's Consumption Pills," the advertisements being so framed as to be calculated to induce the public to buy the pills as being of the plaintiff's invention. Lord Langdale, M.R., refused to grant the injunction, on the ground that there was no injury to property, but apparently not without some doubt, since he gave leave for the case to be mentioned again to him if cases in support of *Clark* v. *Freeman*.

(*a*) *Martin* v. *Wright*, 6 Sim. 297.
(*b*) *Clark* v. *Freeman*, 11 Beav. 112.
(*c*) *Martin* v. *Wright*, 6 Sim. 297.
(*d*) *Barnard* v. *Pillow*, W. N. 1868, p. 94; and see *Seeley* v. *Fisher*, 11 Sim. 581; and *Archbold* v. *Sweet*, 1 M. & Rob. 162.
(*e*) 11 Beav. 112.

the bill could be produced. He did not, however, think the cases mentioned to him (*a*) sufficient to warrant him in granting the injunction, but at the same time he remarked that "if Sir James Clark had been in the habit of manufacturing and selling pills, it would have been very like the other cases in which the Court had interfered for the protection of property." The principle on which Lord Langdale's decision was based was that the Court would not interfere where the name pirated by the defendant had not become known to the public in connexion with a manufactured article, but was merely a name under which an individual had acquired a certain reputation (*b*). It is evident, however, that the sale of quack medicines under the name of an eminent physician would tend to destroy his reputation and the confidence of his patients in him, and thereby to cause him a far more severe pecuniary loss than would be incurred by the sale of a few boxes of pills or copies of a book being lost to him. Later judges have, therefore, been of opinion that the case in question "might have been decided in favour of the plaintiff, on the ground that he had a property in his own name" (*c*).

Contracts in respect of names.

Whatever rights a man may, irrespective of contract, have in his own name, so as to be able to prevent the unauthorized use of it by another, it is always open to him to modify those rights by contract, whether by way of permitting others to use his name in a certain manner (*d*), or by way of restraining his own use of it to a certain extent (*e*). Thus, where a publisher had sold to the de-

(*a*) *Lord Byron* v. *Johnston*, 2 Mer. 29; and *Routh* v. *Webster*, 10 Beav. 561.

(*b*) See *Delondre* v. *Shaw*, 2 Sim. 237.

(*c*) Per Sir R. M. Cairns, L.J., in *Maxwell* v. *Hogg*, L. R. 2 Ch. 307. In *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 561, Sir R. Malins, V.-C., went even farther. Lord Westbury, C., however, spoke of the decision at all events without disapprobation: *Leather Cloth Cos.' case*, 33 L. J., Ch. 199.

(*d*) *Ward* v. *Beeton*, L. R. 19 Eq. 207. See *Mitchell* v. *Condy*, W. N. 1877, p. 153.

(*e*) *Ainsworth* v. *Bentley*, 14 W. R. 630; *Ward* v. *Beeton*, *ubi suprà*.

fendants the copyright of an annual, entitled "Beeton's Christmas Annual," he himself entering into their service, it was held that the defendants were entitled to continue the annual publication under that same name, even after the plaintiff had ceased to remain in their employ, and had become unwilling for his name to be used by them in connexion with a work not of his production (*a*). The name of the editor of a publication, appearing upon the title page, forms no part of the title. Vice-Chancellor Wood refused, therefore, to restrain the proprietors of a paper, who had agreed with their editor not to alter the title of their paper without mutual consent, from omitting the publication on the title-page of the editor's name as such (*b*).

Where name is used so as to injure.

It is clear that a man has a right to prevent the unauthorized use of his name by another person, apart from any special manufacture, at all events, where such use of it might involve him in legal or other difficulties, though this does not extend to the prohibition of a mere libel.

Routh v. *Webster*.

In *Routh* v. *Webster* (*c*), a bill was filed to restrain the provisional directors of a joint-stock company, called "The Economic Conveyance Company," from using the plaintiff's name in their prospectuses as a trustee of the company without his authority. The defendants setting up by way of defence that what had been done had been done inadvertently, and stating their intention of discontinuing their misrepresentations, the Master of the Rolls granted the injunction, holding that the defendants were not entitled "to use the name of any person they pleased, representing him as responsible in their speculations, and to involve him in all sorts of liabilities, and then to be allowed to escape the consequences by saying they had done it by inadvertence," and also that the plaintiff was in nowise bound to surrender his right to the injunction,

(*a*) *Ward* v. *Beeton*, *ubi suprà*. 1131.
(*b*) *Crookes* v. *Petter*, 6 Jur. N. S. (*c*) 10 Beav. 561.

trusting to the assurances of the defendants as to their intentions for the future. This decision has been generally approved as an "authority for preventing the improper use of a man's name against his will; not for the restraint of a libel, for no libel was involved" (*a*).

Other instances.

Bullock v. *Chapman* (*b*) was a somewhat similar case, the question concerning the return to the Stamp Office, under 7 & 8 Vict. c. 113, by a banking company, of the name of a person as one of its shareholders who alleged that he had ceased to be such. Sir J. L. Knight-Bruce, V.-C., refused the injunction, but it seems that if the plaintiff's case had been clear, or the apprehended damage irreparable, the decision would have been different (*c*). In *Dixon* v. *Holden* (*d*), Sir R. Malins, V.-C., restrained the insertion of the plaintiff's name in an advertisement, which stated him to be a member of a bankrupt firm (*e*).

Trade union.

In *Springhead Spinning Co.* v. *Riley* (*f*), an injunction was granted to restrain a somewhat unusual form of injury to property. The defendants there were officers of a trade union, who had given notice to workmen not to enter into the employment of the plaintiffs during a certain dispute between the plaintiffs and the union, thus interrupting the plaintiff's business, and materially diminishing the value of their property. In an American case (*g*), the Court of Appeals of New York rescinded an injunction which had been granted to restrain the defendants from interfering with the plaintiffs' business by threatening them with legal proceedings in respect of an alleged infringement of trade mark.

(*a*) Per Lord Cairns, C., in *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142.

(*b*) 2 De G. & Sm. 211.

(*c*) In *Webster* v. *Webster*, 3 Swanst. 490 n, the injunction was refused because there was no injury to be apprehended. In *Tudor* v. *Tudor*, W. N. 1873, p. 72, there was an express contract.

(*d*) L. R. 7 Eq. 488. See the observations in *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142; and *Fisher* v. *Apollinaris Co.*, *ib.* 297.

(*e*) See, too, *Clover* v. *Royden*, L. R. 17 Eq. 190; and *Brook* v. *Evans*, 2 L. T. N. S. 740.

(*f*) L. R. 6 Eq. 561.

(*g*) *Wolfe* v. *Burke*, 11 Sickels, 115.

Literary production.

The rights which are possessed by the owners of a magazine, newspaper, or other literary publication, are of a very similar character to those which a person has in the goodwill of a business carried on by him. Just as a name affixed to a shop conveys to customers the idea of a certain degree of excellence, with which the articles sold by the person using that name are associated in their minds; so the title prefixed to a periodical, or its general appearance, conveys to those who take it up the impression that the contents of that publication will be found to be up to the standard to which former editions of the simulated publication have attained. Like goods bearing a trade mark, literary publications carry with them wherever they go the guarantee for their quality, and the representations conveyed by their titles are made to all into whose hands they may come, not merely to the original purchaser. With the doctrine of trade marks that of the titles of literary works has also progressed, so that in this case also that which was formerly protected on the general ground of repression of fraud is now protected as property.

Hogg v. *Kirby.*

The earliest of the cases with respect to the titles of publications was *Hogg* v. *Kirby* (*a*), before Lord Eldon, C., in 1803. The plaintiff was the proprietor of a monthly magazine, called "The Wonderful Magazine," which was in fact edited by the plaintiff, though the defendant's name was used as that of the publisher. At the completion of the fifth number, the defendant refused to allow the longer use of his name, and the arrangement was accordingly discontinued, and the accounts between the parties finally settled. The plaintiff then put out a notice stating that he would publish the sixth number, which he did, but on the following day a new magazine was published by the defendant, under the same title as the old one, but with the addition of "New Series Improved,

(*a*) 8 Ves. 215.

printed for Kirby & Scott," and it was announced that it was intended to issue this monthly. The plaintiff then instituted a suit to check the piracy, and was able to point to several circumstances, in addition to the title, which indicated an intention of inducing the belief that the work was in fact a continuation of the plaintiff's. Lord Eldon, in his judgment, after alluding to the circumstance that the plaintiff's counsel had argued the case on the several grounds of copyright, fraud, and contract, said that he should state the question to be, "not whether the defendant's work was the same as the plaintiff's, but, in a question between those parties, whether the defendant had not represented it to be the same," in fact, resting the case upon fraud on the part of the defendant. His Lordship held that the defendant's intention did appear to be to represent his work as a continuation of the plaintiff's, "taking the credit which had been acquired by that to his own" (*a*), and the injunction was accordingly granted, but in such terms as to extend only to the pretence of the defendant's work being a continuation of the plaintiff's (*b*).

Spottiswoode v. *Clarke.*

In *Spottiswoode* v. *Clarke* (*c*), where the plaintiff published "The Pictorial Almanack," the defendant, "Old Moore's Pictorial Almanack," there being certain similarities between the wrappers of the two works, Lord Cottenham, denying that trade marks had anything to do with the case, said that it was difficult to believe that no fraud was intended, but that if such were the case, the attempt was very clumsy. And he felt so much doubt as to the

(*a*) See *Longman* v. *Winchester*, 16 Ves. 269, in which Lord Eldon explained his decision in the present case.

(*b*) In *Strahan* v. *King*, V.-C. M., Feb. 22, 1877, the proprietors of the "Contemporary Review" sought to restrain their publishers and a former assistant editor from issuing the "Nineteenth Century," alleging among other things that the defendants were representing the latter to be the plaintiff's Review; the Vice-Chancellor, however, held that the charges failed, and refused to grant an injunction. And see *Clowes* v. *Hogg*, W. N. 1870, p. 268; *ib.* 1871, p. 40.

(*c*) 2 Ph. 154.

legal right that, on the balance of convenience, he dissolved the injunction which had been granted by the Vice-Chancellor of England, giving the plaintiff leave to bring an action, and ordering the defendant to keep an account.

Title of periodical.

In both of the above cases fraud was the *ratio decidendi*, the actions of the defendants being examined with a view to the discovery of their motives and intentions. But at the present date the rule is that even though one person may have adopted in ignorance and *bonâ fide* a name coincident or nearly coincident with that employed by another person, yet he is bound to discontinue the use of that name so assumed as soon as he is made acquainted with the fact of its earlier employment, and the previous employer of the name is entitled to obtain an injunction against him, unless by his own laches or other default he has lost the rights which he otherwise would have had. The principle enunciated by Sir W. P. Wood, V.-C., in *McAndrew* v. *Bassett* (*a*), would be equally applicable to the case of a title of a periodical, that is to say, that although A. may have innocently used the title employed by B., yet if he continues to trade upon B.'s reputation after being made aware of his error, he does so fraudulently.

Fraudulent intention need not be proved.

The modern doctrine was thus stated by the L. JJ. in the "Sporting Life" case (*b*): "It appears to us that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person from adopting the same name for any other similar publication." And in *Clement* v. *Maddick* (*c*), the principle was even more plainly stated by Sir J. Stuart, V.-C. The plaintiffs were the publishers of "Bell's Life," the defendants the originators of a "Penny Bell's Life." The Vice-Chancellor said: "This is an application in support of the right to property. It has been argued on behalf of the

(*a*) 33 L. J. Ch. 561. And see *Williams* v. *Osborne*, 13 L. T. N. S. 498.

(*b*) *Kelly* v. *Hutton*, L. R. 3 Ch. 708.

(*c*) 1 Giff. 98.

defendants that, unless a fraudulent intention is made out, the plaintiffs are not entitled to an injunction. That is a view of the law to which I cannot accede. Lord Cottenham, in the case of *Millington* v. *Fox* (*a*), has declared that where a trade mark has been innocently and even unconsciously made use of to the injury of another, the owner of the trade mark is entitled to the protection of this Court."—"The defendants' whole case appears to rest on the fact that they intended to commit no fraud; that they had no fraudulent intention in adopting the words 'Bell's Life,' and thought that by prefixing the word 'Penny' to the title they had sufficiently warned the public that they were not purchasing the plaintiffs' paper. But the absence of fraudulent intention is no defence against an application to the Court for an injunction by the person whose property has been injured" (*b*).

But deception must be probable.

While, however, the fact that the defendant has adopted a title calculated to deceive is sufficient to entitle the plaintiff to his remedy, without it being necessary for him to go into the defendant's motives, he must prove the probability of deception, and if he cannot do this, he will fail, even though there may be circumstances pointing to a fraudulent intention. Thus, where the proprietors of the "Era," one of the principal writers in which paper used the pseudonym of "Touchstone," sought to restrain the publication of "Touchstone, or the New Era," and alleged certain further resemblances between the two papers, the Court of Appeal rescinded the injunction which had been granted, on the ground that no deception could occur (*c*).

Titles of literary works protected generally.

Although the title of a periodical publication as a newspaper, magazine, or almanack, most closely resembles a trade

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

(*b*) And see *Edmonds* v. *Benbow*, Seton, 3rd ed. p. 905; *Keene* v. *Harris*, 17 Ves. 338; *Prowett* v. *Mortimer*, 2 Jur. N. S. 414; *Ingram* v. *Stiff*, 5 Jur. N. S. 947; *Corns* v. *Griffiths*, W. N. 1873, p. 93; *Matsell* v. *Flanagan*, 2 Abb. Pr. R. N. S. 459; R. Cox, 367.

(*c*) *Ledger* v. *Ray*, Ct. of Appeal, May 3, 1877. And see *Bradbury* v. *Beeton*, 39 L. J. Ch. 57; *Snowden* v. *Noah*, Hopk. 347; R. Cox, 1; *Bell* v. *Locke*, 8 Paige, 75; R. Cox, 11; *Stephens* v. *De Conto*, 7 Robertson, 343; R. Cox, 442.

mark, on acconnt of its repeated and continued use from time to time upon articles of a certain class, the protection afforded by the Court is extended to the title of any kind of literary production. Thus, the publishers of "The Birthday Scripture Text Book" succeeded in obtaining an injunction against persons who had brought out "The Children's Birthday Text Book," Lord Romilly, M.R., remarking that the defendants were not entitled to publish a work "with such a title, or in such form as to binding or general appearance as to be a colourable imitation of that of the plaintiffs (*a*)." And so, where the title of a song was imitated in such a manner as to be calculated to induce the public to buy the spurious publication in mistake for the genuine, the continuance of the fraud was restrained (*b*).

Incidents of title of publication.

The right which exists in the title of a publication is a right of property (*c*), a chattel interest (*d*), capable of assignment (*e*) or bequest (*f*), passing, in the event of its proprietor's bankruptcy, to his trustee, but incapable of seizure by a sheriff (*g*), and which, in the event of a dissolution of partnership between joint proprietors, must be sold for the purpose of the proceeds of the sale being included in the assets of the partnership (*h*).

No copyright in title.

Although the term copyright has been inadvertently applied to the right in the title of a publication (*i*), there is no copyright therein (*k*), and registration under the

(*a*) *Mack* v. *Petter*, L. R. 14, Eq. 431.

(*b*) *Chappell* v. *Sheard*, 2 K. & J. 117; *Chappell* v. *Davidson*, *ib.* 123.

(*c*) *Clement* v. *Maddick*, 1 Giff. 98; *Kelly* v. *Hutton*, L. R. 3 Ch. 708.

(*d*) Per Wood, L. J., in *Kelly* v. *Hutton*, *ubi suprà*.

(*e*) *Longman* v. *Tripp*, 2 Bos. & P. N. R. 67; *Ex parte Foss*, 2 De G. & J. 230; *Kelly* v. *Hutton*, L. R. 3 Ch. 708; *Clowes* v. *Hogg*, W. N. 1870, p. 268; *ib.* 1871, p. 40; *Ward* v. *Beeton*, L. R. 19 Eq. 207; *Snowden* v. *Noah*, Hopk. 347; R. Cox, 1.

(*f*) *Keene* v. *Harris*, 17 Ves. 338.

(*g*) *Ex parte Foss*, 2 De G. & J. 230.

(*h*) *Bradbury* v. *Dickens*, 27 Beav. 53; *Dayton* v. *Wilkes*, 17 How. Pr. R. 510; R. Cox, 224.

(*i*) *E.g.* per Lord Romilly, M. R., in *Mack* v. *Petter*, L. R. 14 Eq. 431.

(*k*) *Kelly* v. *Hutton*, L. R. 3 Ch. 708; *Correspondent Newspaper Co.* v. *Saunders*, 11 Jur. N. S. 540.

Copyright Acts gives no further right to protection than exists independently of such registration (*a*).

Must be actual user.

Just as a trade mark must, in order to be entitled to protection, be affixed to a vendible article in the market (*b*), so a title of a publication must be actually used. The mere intention, previous to publication, of using a particular name as the title of a literary work, even if followed by the registration of the proposed title as copyright, the advertisement of the forthcoming work, or the actual preparation of its contents, confers no right to protection, for, "in the case of advertisement, followed by publication, the party publishing has given something to the world, and there is some consideration for the world's giving him a right; but in the case of mere advertisement, he has neither given, nor come under any obligation to give anything to the world, so that there is a total want of consideration for the right which he claims" (*c*).

Misrepresentations as to genuineness.

While it is open to any one to manufacture an unpatented article with the process of manufacture of which he has become acquainted, and also to describe it by the name applied to it by the original inventor, so soon as that name shall have become *publici juris*, that is to say, descriptive of a specific article, but not of a specific maker, yet at the same time such subsequent manufacturer is not entitled to carry on an unfair competition in trade with the original maker or his successors in business, by means of assertions or representations that his own article is the genuine one, or that the article of the original maker or his successors is spurious (*d*).

"Original."

And where such an assertion or representation is embodied in the title of the later manufacturer's article

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

(*b*) Or registered, since the Trade Mark Act of 1875.

(*c*) Per Sir G. J. Turner, L. J., in *Maxwell* v. *Hogg*, L. R. 2 Ch. 307. And see *Correspondent Newspaper Co.* v. *Saunders*, 11 Jur. N. S. 540.

(*d*) *James* v. *James*, L. R. 13 Eq. 421.

by its being styled the "original," an appellation which would naturally suggest the idea of the article in question being the make of the original manufacturer, such fraudulent representation will usually be restrained (*a*). But in the entire absence of evidence as to deception, Sir W. P. Wood, V.-C., refused to grant an injunction in a similar case (*b*), and from the result of later litigation between the same parties (*c*), it is clear that the presumption against a person who styles an article of his own manufacture, but not of his invention, "the original," may be rebutted.

Deceptive labels and notices.

In an early case (*d*) the defendant attempted to attract to himself the custom intended for the plaintiffs by an ingenious variation of their labels, his own labels being facsimiles of those of the plaintiffs, with only the difference that whereas theirs contained the sentence "Manufactured by Day and Martin," his bore the words "Equal to Day and Martin's," the "Equal to" being in very small type. So, in an American case (*e*), a dentist formerly employed by the Colton Dental Association, on setting up in business for himself, described himself in his notice as "formerly operator at the Colton Dental Rooms," "formerly operator at the" being printed very small.

Franks v. *Weaver*.

Again, in *Franks* v. *Weaver* (*f*), the plaintiff sold a medicine which he had invented, and which he termed "Franks' Specific Solution of Copaiba," in bottles enclosed in wrappers, on which were printed directions for use, and testimonials. The defendant, an agent of the plaintiff, sold a preparation of his own, labelled "Chemical Solution of Copaiba." The label went on to state that the plaintiff had invented the "Specific Solution," and then gave the testimonials printed by the plaintiff as commendatory

(*a*) *Cocks* v. *Chandler*, L. R. 11 Eq. 446; *Lazenby* v. *White*, *ib.*

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

(*c*) *Browne* v. *Freeman*, W. N. 1873, p. 178.

(*d*) *Day* v. *Binning*, C. P. Cooper, 489; 1 Leg. Obs. 205.

(*e*) *Colton* v. *Thomas*, 2 Brewster, 308; R. Cox, 507.

(*f*) 10 Beav. 297.

of the plaintiff's medicine, and also the same directions for use as those given by the plaintiff. In *Sedon* v. *Senate* (*a*), a person who had sold a medicine to another, set up a new medicine under a similar description, and in his advertisement adopted verses which had been attached to the original medicine. In all these cases injunctions were granted.

The question of representation.

Cases in which the defendant, without putting any trade mark at all on his goods, or putting a trade mark admittedly different from the trade mark, if any, of the plaintiff on his goods, has represented the goods as being goods manufactured by the plaintiff, are always cases of fraud, and the Court has to try the question of representation. What the defendant has said or done must amount to a representation that the goods to be sold are the goods of the plaintiff, or that they are manufactured by the plaintiff. It is strongly in favour of the defendant if he has put a distinct and obvious trade mark on the goods, showing them to be of his own make; or, again, if he states fairly and in plain English that he is the manufacturer (*b*). And describing articles formerly patent by the name of the former patentee is not necessarily fraudulent, since the name may be used as indicative of a principle of construction (*c*).

Mode of packing.

The imitation of a peculiar manner of making up and packing goods may, in combination with other circumstances, be held to prove a fraudulent intention, and it seems that, even in the absence of other circumstances of fraud, if the imitation is very significant, and the evidence very conclusive, an injunction will be awarded (*d*).

(*a*) 2 V. & B. 220.

(*b*) *Singer Manufacturing Co.* v. *Wilson*, L. R. 2 Ch. D. 434 (see in particular, pp. 443—52—55). The observations there made on the last point were repeated in the Court of Appeal in *Cheavin* v. *Walker*, L. R. 5 Ch. D. 850.

(*c*) *Ib.* And see *Wheeler & Wilson Manufacturing Co.* v. *Shakespear*, 39 L. J. Ch. 36.

(*d*) See *Edelsten* v. *Vick*, 11 Hare, 78; *Woollam* v. *Ratcliff*, 1 H. & M. 259; *Anglo-Swiss Condensed Milk Co.* v. *Swiss Condensed Milk Co.*, W. N. 1871, p. 163. See also *Orr* v. *Diaper*, L. R. 4 Ch. D. 92.

Imitation of line of omnibuses.

The manner in which the Court interferes by way of injunction to prevent unfair competition in trade is well illustrated by a case which has always attracted a good deal of attention, that of the omnibus companies (*a*). In that case the plaintiffs were the proprietors of a line of omnibuses painted in a particular manner, with the words "Conveyance Company" and "London Conveyance Company" upon them. The defendant ran omnibuses similarly painted, and dressed his servants in a livery imitated from that of the plaintiffs' employés. On his being required to alter this, he made some mere colourable alterations, but really left the matter as it stood at first. Lord Langdale, M.R., on the case coming before him on motion to dissolve an interlocutory injunction, said that he had not the least doubt that the defendant intended to represent his omnibuses to the public as those of the plaintiffs. He said, "it was not to be said that the plaintiffs had any exclusive right to the words "Conveyance Company" or "London Conveyance Company," or any other words, but they had a right to call upon that Court to restrain the defendant from fraudulently using precisely the same words and devices which they had taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages, really the defendant's, belonged to and were under the management of the plaintiffs." This case was not at all a case of trade mark, though reference has been made to it as such, the Master of Rolls expressly denied any exclusive right in the words painted on the vehicles, and personally altered the terms of the injunction so as to avoid creating such a right. In the language of Sir W. P. Wood, V.-C. (*b*), "the defendant might have had those

(*a*) *Knott* v. *Morgan*, 2 Keen, 213. See also *Stone* v. *Carlan*, 13 Mo. L. R. 360; R. Cox, 115; *Marsh* v. *Billings* 7 Cush. 322; R. Cox, 118.

(*b*) *Woollam* v. *Ratcliff*, 1 H. & M. 259.

words painted on a yellow omnibus without objection, and so of the other resemblances; the wrong lay in their accumulation, not in any one of them alone." The value of the case really consists in the example it affords of the way in which the aggregation of a number of circumstances, individually comparatively harmless, may produce a result injurious to an individual and obnoxious to the law; and also of the manner in which the law will interfere to protect the interests of honest trade.

Bank notes.

In *Emperor of Austria* v. *Day* (*a*), the issue of spurious bank notes was restrained on the ground that "damage would thereby be done to the property of the Austrian sovereign as King of Hungary, and to the property of his subjects, whom he had a right to represent in an English Court of Justice" (*b*).

Etchings.

Where A. had surreptitiously obtained possession of some etchings by B., and had advertised them for exhibition, and a catalogue of them, Lord Cottenham, C., held that there was a title to relief alike on the ground of injury to property and on that of breach of trust (*c*).

Singer.

Again, where A. had agreed to sing at B.'s theatre during a certain period, and during that period to sing at no other without B.'s authority, Lord St. Leonards, C., decided that even though the Court of Chancery had no means of enforcing the positive branch of the agreement by A., viz., for her to sing at B.'s theatre, yet it would enforce the negative branch of the agreement, and restrain A. from singing at a place unauthorized by B. (*d*).

Trade secrets.

As to the cases which have been decided in respect of trade secrets, the general rule may be stated as being that any person who has, without the use of unfair means, become acquainted with the mode of compounding a secret unpatented preparation, may make and sell the compound,

(*a*) 3 De G. F. & J. 217.
(*b*) Per Lord Campbell, C.
(*c*) *Prince Albert* v. *Strange*, 1 Mac. & G. 25.
(*d*) *Lumley* v. *Wagner*, 1 De G. M. & G. 604.

provided he does not lead the public to suppose that his preparation is the manufacture of the original discoverer or of his successors in business, and he may even call the compound made by himself by the same name as that given by the original discoverer to his, so long as he does not sell *his* own goods as and for those of another (*a*). On the other hand, where the knowledge of the secret process has been acquired by means of a breach of trust, neither the person who has committed the breach of trust, nor anyone to whom he has imparted his discovery, will be allowed to make use of the information so surreptitiously acquired (*b*).

Contract not to use or divulge another's secret.

If, again, one person has entered into a contract, express or implied (*c*), with another person, to keep that other person's secret, and not to divulge it, nor to use it for his own advantage, he will be restrained by injunction from so divulging or using the secret in question (*d*); and a contract by which one person who has sold to another a trade secret has bound himself not to use that secret is not invalid as being in restraint of trade (*e*).

Name of secret manufacture.

Where the defendant is availing himself of a breach of faith or of contract by means of the use of a certain designation for his goods, in such a case the defendant will be restrained from the use of such designation,

(*a*) *James* v. *James*, L. R. 13 Eq. 421; *Singleton* v. *Bolton*, 3 Doug. 293; *Williams* v. *Williams*, 3 Mer. 157; *Canham* v. *Jones*, 2 V. & B. 218. And see the comments on that case, in *Morison* v. *Moat*, 9 Hare, 241. *In Massam* v. *J. W. Thorley's Cattle Food Co.*, W. N. 1877, p. 152, Sir R. Malins, V.-C., decided in the same way.

(*b*) *Williams* v. *Williams*, 3 Mer. 157; *Yovatt* v. *Winyard*, 1 Jac. & W. 394; *Tipping* v. *Clarke*, 2 Hare, 383; *Morison* v. *Moat*, 9 Hare, 241; *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276.

(*c*) See *Tipping* v. *Clarke*, 2 Hare, 383.

(*d*) *Sedon* v. *Senate*, 2 V. & B. 220; *Bryson* v. *Whitehead*, 1 S. & S. 74; *Green* v. *Folgham*, *ib.* 398; *Tipping* v. *Clarke*, 2 Hare, 383; *Morison* v. *Moat*, 9 Hare, 241. But see *Newbery* v. *James*, 2 Mer. 446, in which Lord Eldon declined to issue an injunction, on the ground that the Court could have no means of judging as to its infringement.

(*e*) *Bryson* v. *Whitehead*, 1 S. & S. 74. And see *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 352; and *Allsopp* v. *Wheatcroft*, L. R. 15 Eq. 59.

although the plaintiff may have no exclusive right in the same, apart from such special circumstances (*a*).

Cannot be used in ignorance of true recipe.

No one will be allowed to use the name of a well-known article, with the secret recipe of which he is unacquainted, upon goods of his own make, so as to represent the spurious goods to be genuine (*b*).

Green v. *Folgham.*

The manner in which the Court deals with a secret process is well exemplified by the case of *Green* v. *Folgham* (*c*). There the grandfather of the plaintiffs and defendant possessed the secret of a recipe for an ointment called "Dr. Johnson's Ointment for the Eyes." This secret he settled on his daughter at her marriage, and directed that at the death of the survivor of her and her husband it should be sold for the benefit of the children. The daughter communicated the secret to her eldest son and destroyed the recipe. On a bill being filed against the eldest son by the younger children, Sir J. Leach, V.-C., decreed an account of the profits made by the defendant since his mother's death by the sale of the ointment, a reasonable allowance being made him for his time and trouble in preparing and vending the same. And the Vice-Chancellor went on to remark that if the secret could be made a subject of sale, the plaintiffs would be next entitled to ask from the Court that a sale should be directed accordingly. But inasmuch as the Court had no possible means either to communicate the secret to a purchaser with certainty, or to protect him in the enjoyment of it, a sale was, he said, impracticable (*d*). But, he continued, although the Court could not direct a sale, it had the power of taking a course which, in point

(*a*) *Morison* v. *Moat*, 9 Hare, 241. And see *Green* v. *Folgham*, 1 S. & S. 398; *James* v. *James*, L. R. 13 Eq. 421; *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276. In *Canham* v. *Jones*, 2 V. & B. 218, and *Green* v. *Rooke*, W. N. 1872, p. 49, L. J. Notes of Cases, 1872, p. 54, no fraud was proved.

(*b*) *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *Ansell* v. *Gaubert*, Seton, 4th ed. 235.

(*c*) 1 S. & S. 398.

(*d*) See *Newbery* v. *James*, 2 Mer. 446.

of advantage, would be equivalent to the plaintiffs'. It could enquire what would be the value of the secret to sell, provided it could be made the subject of sale; and the annual profits which had actually been made by the sale of the ointment from the death of the mother would be a fair criterion by which that value might be estimated. And the Vice-Chancellor accordingly decreed the value to be ascertained at law, as at the date of the decree.

Fraudulent secret.

In connexion with this subject it should be mentioned that when, as is frequently the case, the article manufactured by the secret process is a quack medicine, or an article intended to deceive the public, the Court will not struggle to protect the secret or to punish those who invade it (*a*).

(*a*) *Williams* v. *Williams*, 3 Mer. 157; *Estcourt* v *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276.

CHAPTER IX.

GOODWILL.

Value of goodwill.

So early as the time of Lord Hardwicke (*a*) it was fully recognised that the goodwill of a trade might be of considerable value, and by the beginning of the present century it was said at the bar (*b*) to be a matter of common experience that contracts for the sale of a goodwill were enforced by actions at Law at every sittings.

Connexion between goodwill and trade marks.

The connexion between goodwill and trade marks is very intimate. Thus, where in a suit for specific performance of a contract for sale of a business (*c*), one of the subjects of the contract was "goodwill, &c.," Sir J. Romilly, M.R., said that those words united such things as were necessarily connected with and belonged to the goodwill, many of which were easily pointed out; for instance, the use of trade marks. Such things would be included in the words "et cætera," and would be included in the conveyance.

In *Shipwright* v. *Clements* (*d*), it was held by Sir R. Malins, V.-C., that the sale of a business carried with it the goodwill and trade marks (*e*). Again, a trade mark

(*a*) *Giblett* v. *Read*, 9 Mod. 459.
(*b*) *Bunn* v. *Guy*, 4 East, 190.
(*c*) *Cooper* v. *Hood*, 26 Beav. 293.
(*d*) 19 W. R. 599.
(*e*) And see *Hall* v. *Barrows*, 33 L. J. Ch. 204. In *Churton* v. *Douglas*, Johns. 174, V.-C. Wood went so far as to say that the question of trade mark was in fact the same as the question of firm name, which, it was obvious, was an important part of the goodwill. See, too, *Congress & Empire Spring Co.* v. *High Rock Congress Spring Co.*, 57 Barb. 526, R. Cox, 599; and *Dixon Crucible Co.* v. *Guggenheim* 2 Brewster, 321, R. Cox, 559.

cannot exist in gross and apart from the goodwill of the business with which it has been connected (*a*).

Connexion recognised by Registration Act of 1875.

This close connexion is fully recognised in the Trade Marks Registration Act, 1875 (*b*), by the second section of which it is provided that a registered trade mark shall be assigned and transmitted only in connexion with the goodwill of the business concerned in such particular goods or classes of goods, and shall be determinable with such goodwill. In the third section the right of the registered proprietor to the exclusive use of the trade mark is made subject to the provisions in respect of its connexion with the goodwill. Again, by the 27th rule, every declaration made by an assignee or transmittee of a registered trade mark must state that he is entitled to the goodwill of the business concerned in the goods with respect to which the trade mark is registered, or to some part of such goodwill (*c*).

What constitutes goodwill.

"Goodwill, I apprehend," said Sir W. P. Wood, V.-C., in the important case of *Churton* v. *Douglas* (*d*), "must mean every advantage, every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."—"Very frequently the goodwill of a business or profession, without any interest in land connected with it, is made the subject of sale, though there is nothing tangible in it" (*e*).

(*a*) *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *Dixon Crucible Co.* v. *Guggenheim*, 2 Brewster 321, R. Cox, 559; *Derringer* v. *Plate*, 29 Cal. 292, R. Cox, 325.

(*b*) 38 & 39 Vict. c. 91.

(*c*) And see Forms E and F, appended to the Rules; also that given in the Instructions, p. 266.

(*d*) Johns. 174.

(*e*) Per Pollock, C. B., in *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147.

Formerly treated as always local.

Previously to the case of *Churton* v. *Douglas* (*a*), the language of various eminent judges as to what constituted "goodwill" had rather tended to connect the goodwill with the premises on which the business was carried on, than with the business carried on there, probably because that language, though in general terms, was directed to the circumstances of the case then in course of decision (*b*). Thus, Lord Eldon, C., in *Cruttwell* v. *Lye* (*c*), describes goodwill as "nothing more than the probability that the old customers will resort to the old place" (*d*). Sir J. Leach, M.R., describes it (*e*) as "an advantage attaching to the possession of the house" in which the business had been carried on; and Lord Langdale, M.R. (*f*), as "the chance or probabilty that custom will be had at a certain place of business in consequence of the way in which that business has been previously carried on" (*g*).

Not so now.

The judgment in *Churton* v. *Douglas* has now established that the dictum of Lord Eldon in *Cruttwell* v. *Lye* (*h*) must be read as meaning that goodwill is the probability that the old customers will buy the old goods from the old firm or their successors in business, whether the means of identification be the place of business or otherwise (*i*). The customers of a large wholesale house cannot be supposed to pay much attention to the exact site of the establishment, and "there may even be a species of goodwill which may be the subject of bargain and sale, although not dependent on the business being carried on in any particular place; for instance, in the case of what are called quack medicines" (*k*).

(*a*) Johns. 174. Madd. 198.

(*b*) See *Churton* v. *Douglas*, *ubi suprà*.

(*c*) 17 Ves. 335.

(*d*) In this case Sir A. Piggott, in the course of his argument, said that "goodwill" was "the advantage belonging to a house long accustomed to carry on a particular trade." See, too, Sir T. Plumer, V.-C., in *Harrison* v. *Gardner*, 2

(*e*) In *Chissum* v. *Dewes*, 5 Russ. 29.

(*f*) In *England* v. *Downs*, 6 Beav. 269.

(*g*) Johns. 174.

(*h*) 17 Ves. 335.

(*i*) And compare *Labouchere* v. *Dawson*, L. R. 13 Eq. 322.

(*k*) Brett, J., in *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456. The

Local connexion important.

While, however, there may be a species of goodwill not intimately connected with a particular spot, where, as is usually the case, there is such a connexion, it will be of great consequence, and a house of little value in itself, at a rack rent, may have a peculiar value attached to it from the fact of a long-established business having been carried on there (*a*).

Another view of goodwill.

Looked at from another point of view, the goodwill may be said to be the money value of what has just been described as the goodwill (*b*).

Goodwill in learned professions.

While the value of most businesses is determined partly by the personal qualifications of the proprietor, partly by those of his subordinates, partly (sometimes principally) by local situation, partly, it may be, by yet other considerations, there is one class of business in which the personal character and ability of the head of the establishment are of paramount and almost exclusive importance. That class comprehends the medical and legal, or "learned" professions.

Division into personal and local.

Adverting to this distinction, Sir J. Cross, in *Ex parte Thomas* (*c*), divided goodwill into personal and local, adding that there might be a goodwill partly personal and partly local (*d*). But the employment of the word "local" as descriptive of one of the two principal heads under which goodwill falls seems open to objection, on the ground that it tends to produce the misconception exposed and removed by Vice-Chancellor Wood, in *Churton* v. *Douglas* (*e*), and to unduly narrow the meaning to be assigned to "goodwill," which, as has been seen, comprehends, not merely

goodwill of a newspaper is suggested by Lindley, J., in his work on Partnership. See, too, *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147.

(*a*) *Parsons* v. *Hayward*, 31 L. J. Ch. 666; *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456.

(*b*) *Austen* v. *Boys*, 27 L. J. Ch. 714; *Llewellyn* v. *Rutherford* (Brett, J.), *ubi suprd.*

(*c*) 2 Mont. D. & De G. 294.

(*d*) This division corresponds to that of trade marks into personal and local, made by Sir J. Romilly, M.R., in *Hall* v. *Barrows*, 32 L. J. Ch. 548, which, however, was not indorsed by Lord Westbury, C. See 33 L. J. Ch. 204.

(*e*) Johns. 174.

the advantage of local situation, but every positive advantage connected with an established trade.

Division into goodwill of profession and of trade.

The two classes of goodwill may more satisfactorily be distinguished, from the classes of pursuit to which they respectively relate, as the goodwill of a profession on the one hand, and that of a trade on the other. It is, indeed, true that the goodwill of a trade, the more usual kind, possesses so many characteristics which that of a profession has not, that the latter has been thought to be hardly entitled to the name of goodwill at all (*a*); but, on the other hand, there are points of resemblance in which both classes are governed by the same general rule, and there is a convenience in following an established phraseology.

Contract by attorney to transfer goodwill enforced.

In *Bunn* v. *Guy* (*b*), the Lord Chancellor was impressed by the difference between the goodwill of a profession and that of a trade, and caused the opinion of the Court of King's Bench to be taken as to whether a contract by a practising attorney (among other things) to relinquish his business and recommend his clients to two other attorneys for valuable consideration, and not to practise within certain limits, and to permit them to use his name for a certain time, was good at Law, so that the vendor could recover in an action. The answer was that the contract was good in Law.

Decision doubted.

This decision did not long remain uncriticized. In *Bozon* v. *Farlow* (*c*) Sir W. Grant, M. R., refused to grant specific performance of an agreement for the sale of an attorney's business, the terms of the agreement not being sufficiently specified to enable the Court to give the purchaser the proper return for his money, and he took the opportunity of questioning the propriety of a sale of an attorney's business, which depended so much on the incumbent's own character. And in *Farr* v. *Pearce* (*d*), Sir J. Leach, V.-C., strongly supported the personal cha-

(*a*) See *Austen* v. *Boys*, 27 L. J. Ch. 714.
(*b*) 4 East, 190, in 1803.
(*c*) 1 Mer. 459.
(*d*) 3 Madd. 74.

racter of a profession as contrasted with a commercial business.

Where, however, a solicitor had actually sold his practice for valuable consideration, and undertaken not to practise as a solicitor in Great Britain for twenty years, Lord Langdale, M. R., granted an injunction to restrain him from so practising, and from endeavouring to induce any persons who were the clients of the former and then present firm to cease to employ that firm (*a*). Sale of solicitor's practice.

In a case (*b*) which was "not quite a case of dissolution of partnership, but something between a dissolution of the partnership and a purchase of an attorney's business and firm name," Sir J. L. Knight-Bruce, V.-C., having refused specific performance of the alleged contract, on the ground of non-acceptance by the plaintiff, said that, "notwithstanding the case of *Bunn* v. *Guy* (*c*), from which he did not mean to express dissent, decided as it was by judges of high authority, he was not prepared to say that it was fit that a Court of Equity should enforce an agreement between two solicitors that one on retiring from the business should permit the other to carry on the business in his name. Whether such an agreement were or were not within the strict policy of the law, it might be doubtful whether the Court of Chancery ought to assist it." *Thornbury* v. *Bevill*.

But where, on a dissolution by two solicitors of a *bonâ fide* partnership between them, it was agreed that one should carry on the business under the old firm name, paying the other certain annuities, it was held by Sir W. P. Wood, V.-C., that the agreement contained nothing illegal or contrary to public policy (*d*). Partnership between solicitors dissolved.

Again, on a dissolution of a professional partnership, a retiring partner is not entitled to compensation in respect

(*a*) *Whittaker* v. *Howe*, 3 Beav. 383.
(*b*) *Thornbury* v. *Bevill*, 1 Y. & C. Ch. 554.
(*c*) 4 East, 190.
(*d*) *Aubin* v. *Holt*, 2 K. & J. 66.

of his share in the goodwill (*a*), and a surviving partner may continue the business (*b*).

Spicer v. *James.*

In *Spicer* v. *James* (*c*), a country attorney having died intestate, his administrator carried on the business until his son came of age, when he handed over the business to the son. The son becoming insolvent, a bill for an account of profits, and insisting that a sum was due to the intestate's estate in respect of the goodwill, was filed against the administrator by a creditor of the son, but was dismissed by Sir J. Leach, M. R., on the ground that the goodwill of an attorney's business was not a subject of administration.

Estate of professional man interested in proceeds of goodwill.

Where, however, the widow of a surgeon-dentist, being one of his executors, sold the goodwill of his business with an introduction to patients, Vice-Chancellor Knight-Bruce held that either the whole, or, at all events, some part of the price paid belonged to the testator's estate (*d*).

Goodwill of professional business. Recapitulation.

The goodwill of a professional business may, in short, be sold, and a breach of a contract to sell may be a ground for damages, but the authorities are against the enforcement of the specific performance of such a contract, though when the sale is complete, the terms of the sale will be carried into execution. Such a goodwill, in the case of a partnership, survives to the surviving partner, and is not a subject of compensation to an outgoing partner. Special stipulations will, however, be enforced. Such a goodwill will not be considered in the administration of the proprietor's estate unless actually sold; but if that has been done, the price paid or some part of it will be attributed to the estate.

Goodwill of a trade.

"The goodwill of a trade," said Tindal, C. J. (*e*), "is a subject of value and price. It may be sold (*f*), be-

(*a*) *Austen* v. *Boys*, 27 L. J. Ch. 714; *Farr* v. *Pearce*, 3 Madd. 74.
(*b*) *Farr* v. *Pearce*, 3 Madd. 74.
(*c*) Collyer on Partnership, 104.
(*d*) *Smale* v. *Graves*, 3 De G. & S. 706.
(*e*) In *Hitchcock* v. *Coker*, 6 Ad. & E. 438—54.
(*f*) See *Darbey* v. *Whitaker*, 4 Dr. 139; *Churton* v. *Douglas*, Johns.

queathed (*a*), or become assets in the hands of the personal representatives of a trader" (*b*). Though incapable, by reason of its incorporeal nature, of seizure by a sheriff (*c*), it is "goods and chattels within the Bankruptcy Acts (*d*), and may be dealt with by the trustee in bankruptcy just as the bankrupt's other property" (*e*). It is also "property" within the Stamp Acts (*f*).

Universally valuable.

The valuable character of goodwill is not confined to a few trades, but is recognised throughout the commercial world. Thus, among the cases on this subject which have come before the Courts, instances are to be found in which the traders were public-house keepers (*g*), brewers (*h*), bankers (*i*), tailors (*j*), mercers (*k*), dyers (*l*), milliners (*m*), upholsterers (*n*), pencil-makers (*o*), tobacco-brokers (*p*), snuff-makers (*q*), paper-makers (*r*), provision-merchants (*s*), cheesemongers (*t*), glass-blowers (*u*), glass-stainers (*x*), manufacturing chemists (*y*), commission agents (*z*), iron

174; *Cooper* v. *Hood*, 26 Beav. 293; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Shipwright* v. *Clements*, 16 W. R. 599; *Howe* v. *Searing*, 10 Abb. Pr. R. 264; R. Cox, 244.

(*a*) See *Keene* v. *Harris*, 17 Ves. 338; *Robertson* v. *Quiddington*, 28 Beav. 529.

(*b*) See *Worral* v. *Hand*, Peake, 74; *Dakin* v. *Cope*, 2 Russ. 170; *Chissum* v. *Dewes*, 5 Russ. 29.

(*c*) *Ex parte Foss*, 2 De G. & J. 230.

(*d*) *Longman* v. *Tripp*, 2 Bos. & P. N. R. 67; *Ex parte Foss*, *ubi suprà*.

(*e*) See *Hudson* v. *Osborne*, 39 L. J. Ch. 79.

(*f*) *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147.

(*g*) *Coslake* v. *Till*, 1 Russ. 376; *Spratt* v. *Jeffery*, 10 B. & C. 249; *Ex parte Thomas*, 2 Mont. D. & De G. 294; *Tweed* v. *Mills*, L. R. 1 C. P. 39; *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456.

(*h*) *Cooper* v. *Watson*, 3 Doug. 414; *Wade* v. *Jenkins*, 2 Giff. 509; *Hall* v. *Hall*, 20 Beav. 139.

(*i*) *Smith* v. *Everitt*, 27 Beav. 446.

(*j*) *Newling* v. *Dobell*, 38 L. J. Ch. 111; *Parsons* v. *Hayward*, 31 L. J. Ch. 666.

(*k*) *Morris* v. *Moss*, 25 L. J. Ch. 194.

(*l*) *Bryson* v. *Whitehead*, 1 S. & S. 74.

(*m*) *Shackle* v. *Baker*, 14 Ves. 468.

(*n*) *Chissum* v. *Dewes*, 5 Russ. 29.

(*o*) *Banks* v. *Gibson*, 34 Beav. 566.

(*p*) *Davies* v. *Hodgson*, 25 Beav. 177.

(*q*) *Hammond* v. *Douglas*, 5 Ves. 539.

(*r*) *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147.

(*s*) *Scott* v. *Mackintosh*, 1 V. & B. 503.

(*t*) *Hudson* v. *Osborne* 39 L. J. Ch. 79.

(*u*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.

(*x*) *Scott* v. *Rowland*, 20 W. R. 508.

(*y*) *Turner* v. *Major*, 3 Giff, 442.

(*z*) *Macdonald* v. *Richardson*, 1 Giff. 81.

masters (*a*), carriers (*b*). The goodwill of a newspaper or magazine, consisting of the right to use the title under which reputation has been acquired by a publication, is another instance of valuable goodwill (*c*).

Firm name part of goodwill.

"The name of a firm," said Sir W. P. Wood, V.-C., in *Churton* v. *Douglas* (*d*), "is a very important part of the goodwill of the business carried on by the firm. A person says, "I have always bought good articles at such a house of business; I know it by that name, and I send to the house of business identified by that name for that purpose. There are cases every day in this Court with reference to the use of the name of a particular firm, connected generally, no doubt, with the question of trade mark. But the question of trade mark is in fact the same question. The firm stamps its name on the articles. It stamps the name of the firm which is carrying on the business on each article, as a proof that they emanate from the firm; and it becomes the known firm to which applications are made, just as much as when a man enters a shop in a particular locality. And when you are parting with the goodwill of a business, you mean to part with all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it. You cannot put it anything short of that. That the name is an important part of the goodwill of a business is obvious, when we consider that there are at this moment large banking firms, and brewing firms, and others, in this metropolis, which do not contain a single member of the individual name exposed in the firm" (*e*).

(*a*) *Cooper* v. *Hood*, 26 Beav. 293; *Hall* v. *Barrows*, 33 L. J. Ch. 204.
(*b*) *Cruttwell* v. *Lye*, 17 Ves. 335.
(*c*) *Giblett* v. *Read*, 9 Mod. 459; *Keene* v. *Harris*, 17 Ves. 338; *Longman* v. *Tripp*, 2 Bos. & P. N. R. 67; *Ex parte Foss*, 2 De G. & J. 230; *Marshall* v. *Watson*, 25 Beav. 501; *Bradbury* v. *Dickens*, 27 Beav. 53; *Snowden* v. *Noah*, Hopk. 347; R. Cox, 1; *Dayton* v. *Wilkes*, 17 How. Pr. R. 510; R. Cox, 224.
(*d*) Johns. 174.
(*e*) And see *Lewis* v. *Langdon*, 7 Sim. 421; *Banks* v. *Gibson*, 34 Beav. 566; *Bond* v. *Milbourn*, 20 W. R.

Goodwill is a subject of sale (*a*), and may fetch a considerable price. There was formerly a doubt whether a contract for the sale of a goodwill would be specifically enforced in Equity (*b*), but this question was set at rest by Sir R. T. Kindersley, V.-C., in *Darbey* v. *Whitaker* (*c*). "It is said there can be no specific performance of a contract to purchase a goodwill. No doubt you cannot have a specific performance of a contract to purchase a goodwill alone, unconnected with business premises, by reason of the uncertainty of the subject-matter. But when a goodwill is entirely or mainly annexed to the premises, and the contract is for the sale of the premises and goodwill, there is not the slightest ground for doubt that such a contract is a fit matter for a decree in a suit for specific performance." It seems, however, that there may be cases in which a contract for sale of a goodwill would be specifically enforced, the business and goodwill being included together, though there was no such dependence on the business premises (*d*). Such would be the case with the goodwill of a quack medicine or a newspaper, which is practically independent of locality (*e*). The connexion between the business and the goodwill is

Sale of goodwill.

197 ; *Scott* v. *Rowland*, 20 W. R. 508 ; *Peterson* v. *Humphrey*, 4 Abb. Pr. R. 394 ; R. Cox, 212 ; and *Howe* v. *Searing*, 10 Abb. Pr. R. 264 ; R. Cox, 244.

(*a*) See, among other cases, *Bunn* v. *Guy*, 4 East, 190; *Smale* v. *Graves*, 3 De G. & S. 706 ; *Cooper* v. *Hood*, 26 Beav. 293 ; *Bradbury* v. *Dickens*, 27 Beav. 53 ; *Churton* v. *Douglas*, Johns. 174.

(*b*) *Baxter* v. *Connolly*, 1 Jac. & W. 580. And see *Coslake* v. *Till*, 1 Russ 376 ; *Bozon* v. *Farlow*, 1 Mer. 459.

(*c*) 4 Dr. 139.

(*d*) Thus, Sir J. Romilly, M. R., says, in *Robertson* v. *Quiddington*, 28 Beav. 529 : " Goodwill is never a tangible thing unless it is connected with the *business* itself, from which it cannot be separated. I never knew a case in which it has been so treated." In *England* v. *Downs*, 6 Beav. 269, and *Morris* v. *Moss*, 25 L. J. Ch. 194, the goodwill of a business was held, under the circumstances, to pass with the stock, and not with the premises. And see *Woodward* v. *Lazar*, 21 Cal. 448 ; R. Cox, 300. In *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456, the price of the goodwill was held to belong to the previous lessee, under the contract between him and the lessor.

(*e*) See *Bryson* v. *Whitehead*, 1 S. & S. 74 ; *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456 (per Brett, J.) ; *Snowden* v. *Noah*, Hopk. 347 ; R. Cox, 1.

such that the sale of the business (*a*), or of a share in the business (*b*), as a going concern, carries with it the goodwill, or the corresponding share in the goodwill, even without its being specifically mentioned. And if the goodwill is sold, the trade name goes with it (*c*).

Rights of vendor of goodwill. After sale may set up new business.

As to the rights of the vendor after the sale of his business and goodwill, "it has been settled that there is no implied covenant of any kind" (*d*), and, in the absence of any express restrictive covenant, the vendor is at liberty to set up a business of precisely the same description as that of which he has sold the goodwill, and that next door to the place where his former business was carried on; but he is not entitled to represent that he is carrying on the same identical business, either by direct representations, or by assuming the trade name under which the business he has sold acquired its reputation, or the trade marks by which its goods have become known in the market (*e*). If the trade name consisted simply of the vendor's own name, the restraint upon his continuing to use that name will have to depend upon the evidence of that user being fraudulent (*f*), but in the absence of such evidence, the *bonâ fide* use by a man of his own name will not be prohibited (*g*). But where the trade name in question consisted of the name of the defendant, John Douglas, with the addition "and Co.," it was held that the use of that was an important ingredient in the case, as proving fraudulent intention (*h*).

(*a*) *Shipwright* v. *Clements*, 19 W. R. 599.

(*b*) *Churton* v. *Douglas*, Johns. 174.

(*c*) *Banks* v. *Gibson*, 34 Beav. 566; *Churton* v. *Douglas*, *ubi suprà*.

(*d*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79. And see *Harrison* v. *Gardner*, 2 Madd. 198; *Churton* v. *Douglas*, Johns. 174.

(*e*) *Shackle* v. *Baker*, 14 Ves. 468; *Cruttwell* v. *Lye*, 17 Ves. 335; *Kennedy* v. *Lee*, 3 Mer. 441-52; *Sedon* v. *Senate*, 2 V & B. 220; *Harrison* v. *Gardner*, 2 Madd. 198; *Churton* v. *Douglas*, Johns. 174; *Hudson* v. *Osborne*, 39 L. J. 79; *Labouchere* v. *Dawson*, L. R. 13 Eq. 322.

(*f*) *Churton* v. *Douglas*, Johns. 174; *Holloway* v. *Holloway*, 13 Beav. 209.

(*g*) *Burgess* v. *Burgess*, 3 De G. M. & G. 89; *Bond* v. *Milbourn*, 20 W. R. 197.

(*h*) *Churton* v. *Douglas*, *ubi suprà*. In *Bond* v. *Milbourn*, 20 W. R. 197 (very shortly reported), it seems

But must not interfere unfairly with purchaser.

When the vendor of a goodwill has established a new firm for the purpose of carrying on a business similar to that which has been sold, "the new firm," says Lord Romilly, M.R. (*a*), "is entitled to publish any advertisement he pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world to say that he is carrying on such a business, but he is not entitled, either by private letter, or by a visit, or by his traveller or agent, to go to any person who was a customer of the old firm, and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm (*b*)." In short, the new firm may set up a new business, just as any one else may, but he is not at liberty to resume the advantages connected with the old firm, which he has sold, although it is perfectly allowable for him to state his connexion with the former business (*c*).

Vendor restrained, though no express covenant.

Although there is no implied covenant on the sale of a goodwill, without more, that the vendor will not set up a similar business in the same neighbourhood, yet where a vendor had received in payment for his share of a goodwill a sum calculated by arbitrators upon the understanding (to which he had assented) that he would not carry on business in the same street, it was held to be contrary to Equity that he should carry on business in that street, and he was accordingly enjoined (*d*).

Express restrictive covenant usual.

In the sale of a business and goodwill, it is customary to insert an express restrictive covenant, which will be binding on the vendor, restraining him from setting up the same trade within a certain limit of time or space, or

that the plaintiff would have been entitled to an injunction at all events against the use of the words "and Co." by the defendant, if that had been the relief prayed.

(*a*) *Labouchere* v. *Dawson*, L. R. 13 Eq. 322. See *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

(*b*) As to the surrender of a business by A. "for the benefit" of B., see *Clark* v. *Leach*, 32 Beav. 14; and also *Harrison* v. *Gardner*, 2 Madd. 198; and *Churton* v. *Douglas*, Johns. 174.

(*c*) *Clark* v. *Leach*, 32 Beav. 14; *Hookham* v. *Pottage*, L. R. 8 Ch. 91.

(*d*) *Harrison* v. *Gardner*, 2 Madd. 198.

using his name or allowing it to be used for that purpose (*a*); and this has become so usual that, where (*b*) in a contract for sale one of the items was "goodwill, &c.," Sir J. Romilly, M.R., held that in the "&c." would be included, amongst other things, a covenant by the vendor not to carry on a similar business in Great Britain, for a reasonable time, to be limited in the conveyance, having regard to the nature of such undertakings. Such a covenant may even have the effect of compelling the vendor to quit his trade altogether for the period specified, as was held by Lord Mansfield, C. J., and the Court of King's Bench, in *Cooper* v. *Watson* (*c*); and it has been held that a breach of a covenant "not to carry on or be concerned or interested in" a certain business, was committed by the vendor entering into the service of a nephew, who carried on the same trade, under the same name, within the proscribed limits (*d*). Again, a covenant not to carry on a certain business directly or indirectly within the counties of C., A., and M., was broken by soliciting orders on three occasions within C., though the offices of the new business were outside the limits (*e*).

Covenant to make profitable.

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

Rights of purchaser of goodwill.

The purchaser of a business and goodwill is entitled to all the advantages of the reputation and connexion of the business as previously conducted, except such benefit as the vendor, on setting up a *bonâ fide* new business, as he

(*a*) *Cooper* v. *Watson*, 3 Doug. 414; *Bryson* v. *Whitehead*, 1 S. & S. 74; *Williams* v. *Williams*, 2 Swanst. 253; *Whittaker* v. *Howe*, 3 Beav. 383; *Turner* v. *Evans*, 2 De G. M. & G. 740; *Newling* v. *Dobell*, 38 L. J. Ch. 111; *Wolmershausen* v. *O'Connor*, W. N. 1877, p. 113; *Gillis* v. *Hall*, 2 Brewster, 342; R. Cox, 580.

(*b*) *Cooper* v. *Hood*, 26 Beav. 293.

(*c*) 3 Doug. 414.

(*d*) *Newling* v. *Dobell*, 38 L. J. Ch. 111.

(*e*) *Turner* v. *Evans*, 2 De G. M. & G. 740.

(*f*) Per Lord Eldon, C., in *Scott* v. *Mackintosh*, 1 V. & B. 503.

is at liberty to do if there is no covenant to the contrary, may derive from the fact of his being known to have belonged to the former business; and the purchaser is entitled to restrain the vendor by injunction from interfering with what he has sold. As to the trade name, if that were the name of the vendor, "inconvenience might naturally result to him from having his name so exposed" (*a*), *i.e.* in the name of the new business. In *Scott* v. *Rowland* (*b*), on a dissolution of partnership, in which the defendant bought the plaintiff's interest at a valuation, and then continued to trade as "John Scott & Co.," a bill was filed to restrain the use of the name of the plaintiff in the business, and the question was considered by Sir J. Wickens, V.-C. He said, "even assuming the goodwill to have been effectually assigned to the defendant, it would be a question whether that would give him the right of using the plaintiff's name; as expressed in *Churton* v. *Douglas* (*c*), there is a liability attached to an outgoing partner who leaves his name in the style of a firm. He would *primâ facie* be liable on bills of exchange. In *Banks* v. *Gibson* (*d*) Mr. Banks was dead, and the case may be referred to the principle that, inasmuch as no liability attaches in the case of an outgoing partner who is dead or a bankrupt, there is no reason why the name should not be retained; but, if living, he is entitled to say he is not a member of the firm," and the Vice-Chancellor accordingly granted the injunction (*e*). The purchaser is, however, entitled to represent himself as continuing the old business; thus, where the business of John Douglas & Co. was sold,

(*a*) *Churton* v. *Douglas*, Johns. 174.
(*b*) 20 W. R. 508.
(*c*) *Ubi suprà*.
(*d*) 34 Beav. 566.
(*e*) And see *Webster* v. *Webster*, 3 Swanst. 490 n.; *Lewis* v. *Langdon*, 7 Sim. 421; *Routh* v. *Webster*, 10 Beav. 561; *Bullock* v. *Chapman*, 2 De G. & Sm. 211; *Turner* v. *Major*, 3 Giff. 442; *Clark* v. *Leach*, 32 Beav. 14; *Bond* v. *Milbourn*, 20 W. R. 197; *Dence* v. *Mason*, W. N. 1877, p. 23; *Mitchell* v. *Condy*, *ib.* 153; *Howe* v. *Searing*, 10 Abb. Pr. R. 264; R. Cox, 244; *Peterson* v. *Humphrey*, 4 Abb. Pr. R. 394; R. Cox, 212; Lindley on Partnership, 3rd ed. 887.

it was held that the purchasers alone had the right to describe themselves as "late John Douglas & Co.," and the vendor was restrained from calling his new firm "John Douglas & Co.," that being an interference with that right (*a*).

Implied contract to keep up business.

Where, in a purchase of a business and goodwill, it was agreed that the purchaser should pay the vendor at the end of each of the first ten years a certain proportion of the profits, but there was no special agreement by the purchaser to keep up the business; it was held by Erle, C. J., and the Court of Common Pleas, that the purchaser had entered into an implied contract to keep up the business, at all events for the ten years over which the instalments were to extend (*b*). It seems that while such an implied contract would give a right to damages, if broken, it could not be specifically enforced in Equity (*c*), though carrying on a similar business under a different style could be restrained (*d*).

Goodwill is partnership assets.

In a case of partnership, the goodwill of a business, newspaper, &c., including the firm name, is partnership assets, and, on a sale of the partnership business, must be sold with it, for the benefit of the partners or their creditors (*e*).

Disposal on dissolution.

On a dissolution of partnership the business and goodwill may be disposed of in three different ways: by sale, for the benefit of the partners or their creditors; by the whole concern, including the trade name, being taken by one partner at a valuation; or by a simple division of the tangible assets of the partnership, in which case each is at liberty to use the trade name just as the partnership did

(*a*) *Churton* v. *Douglas*, Johns. 174. But see *Howe* v. *Searing*, 10 Abb. Pr. R. 264; R. Cox, 244.

(*b*) *McIntyre* v. *Belcher*, 32 L. J. C. P. 254. Compare *Harrison* v. *Gardner*, 2 Madd. 198.

(*c*) *Lewis* v. *Langdon*, 7 Sim. 421.

(*d*) *Evans* v. *Hughes*, 18 Jur. 691. And see *Turner* v. *Major*, 3 Giff. 442.

(*e*) *Bradbury* v. *Dickens*, 27 Beav. 53; *Banks* v. *Gibson*, 34 Beav. 566; *Hall* v. *Barrows*, 33 L. J. Ch. 204; *Dayton* v. *Wilkes*, 17 How. Pr. R. 510; R. Cox, 224.

previously (*a*), provided no ex-partner will thereby be exposed to liability through his name constituting the trade name of the old firm (*b*), or at all events to state his connexion with the old firm (*c*).

Compensation governed by articles.

On a dissolution of a partnership governed by articles, the retiring partner will not be entitled to compensation for his share in the goodwill, except in accordance with the articles (*d*). Thus, in a case where provision was not made for such compensation, it was held that the premises on which the business had been carried on for many years, and which the continuing partner was entitled on dissolution to take at a valuation, were to be valued without regard to the fact of previous occupation, as, if that were taken into account, it would have the effect of making the partner in question pay for the goodwill (*e*).

Goodwill included in valuation.

Where articles of partnership provided that the goodwill should belong to the partners in the proportion of their shares in the business, but should not be taken into account in the accounts of the partnership, and that on the determination of the partnership a general account and valuation of the property and effects of the partnership should be taken, the partnership being dissolved by the death of one of the partners, it was held by Sir J. Stuart, V.-C., that the goodwill must be included in the valuation of the partnership property (*f*).

One partner cannot monopolise goodwill.

In *Featherstonhaugh* v. *Fenwick* (*g*), it was decided that on a dissolution of a partnership, not provided for by articles, one partner could not secure to himself the whole benefit of the goodwill by claiming to take the share of the other at a valuation, or requiring him to remove his pro-

(*a*) *Banks* v. *Gibson*, 34 Beav. 566.

(*b*) *Scott* v. *Rowland*, 20 W. R. 508; *Peterson* v. *Humphrey*, 4 Abb. Pr. R. 394; R. Cox, 212.

(*c*) *Clark* v. *Leach*, 32 Beav 14; *Hookham* v. *Pottage*, L. R. 8 Ch. 91; *Peterson* v. *Humphrey*, *ubi supra*.

(*d*) *Hall* v. *Hall*, 20 Beav. 139; *Kennedy* v. *Lee*, 3 Mer. 441–52; *Farr* v. *Pearce*, 3 Madd. 74.

(*e*) *Burfield* v. *Rouch*, 13 Beav. 241.

(*f*) *Wade* v. *Jenkins*, 2 Giff. 509.

(*g*) 17 Ves. 298.

portion from the premises, or clandestinely obtaining a renewal to himself of the lease of the premises occupied by the partnership.

Estate of dead partner shares in partnership profits until settlement.

If, after a dissolution of partnership by the death of a partner, "the surviving partners think proper to make that which is in Equity the joint property of the deceased and them the foundation and plant of increased profit, if they do not think proper to settle with the executors and put an end to the concern, they must be understood to proceed upon the principle which regulated the property before the death of their partner" (*a*); that is to say, capital belonging to the estate of the deceased partner having been risked, such a proportion of the total profits as are attributable to that capital will belong to that estate.

Subject to circumstances.

But in the computation of what profits are attributable to that capital a variety of circumstances have to be taken into consideration: thus, "the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, the conduct of parties after his death, all of which may materially affect the rights of the parties" (*b*).

Similarly with goodwill.

In the same manner, on the death of a partner, the goodwill ought, if there is no provision regulating its destination in such an event, to be sold for the benefit of the partnership, and if that is not done, the continuing partners will have to account to the estate of the deceased partner for his share in the goodwill.

Goodwill does not survive.

There is, indeed, a distinct decision (*c*) by Lord Lough-

(*a*) Per Lord Eldon, C., in *Crawshay* v. *Collins*, 15 Ves. 227. And see *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Heathcote* v. *Hulme*, 1 Jac. & W. 122; *Brown* v. *De Tastet*, Jac. 284; *Cook* v. *Collingridge*, Jac. 607; *Macdonald* v. *Richardson*, 1 Giff. 81; and *Parsons* v. *Hayward*, 31 L. J. Ch. 666.

(*b*) Sir Per J. Wigram, V.-C., in *Willett* v. *Blanford*, 1 Hare, 253. And see *Simpson* v. *Chapman*, 4 De G. M. & G. 154, where these remarks were highly approved by Sir G. Turner, L.J., and it was held that, under the circumstances of the case, nothing was due to the estate of the deceased partner.

(*c*) *Hammond* v. *Douglas*, 5 Ves. 539. And see *Lewis* v. *Langdon*, 7

borough, C., that upon a dissolution of a partnership without articles the goodwill survives to the surviving partner. This position was, however, doubted by Lord Eldon, C., in *Crawshay* v. *Collins* (*a*); and it is now thoroughly established that the goodwill is partnership assets. "The goodwill of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a Court of Equity. Accordingly, in reported cases, Lord Eldon held that a share of it properly and as of right belonged to the estate of the deceased partner. It does not survive to the remaining partners, unless by express agreement; but it may by agreement, as it may be agreed that any particular portion of the partnership assets shall so survive. Goodwill manifestly forms a portion of the subject-matter which produces profits, which constitutes partnership property, and which is to be divided between the surviving partners and the estate of the deceased partner, according to the terms of the contract, and when that is silent, according to their shares in the concern." (*b*). The share of the deceased partner in the concern is not, however, the sole guide to the interest of his estate in the goodwill. The various circumstances alluded to by Vice-Chancellor Wigram, in *Willett* v. *Blanford* (*c*) must be considered. Thus, where at the time of the death of one of two partners the partnership was insolvent and the deceased partner indebted to the partnership, and the surviving partner subsequently carried on the business with such energy and success that he was able at a later period to sell the goodwill for £1700, it was held by Sir G. Jessel, M.R., that the surviving partner

Sim. 421; and *Robertson* v. *Quiddington*, 28 Beav. 529.

(*a*) 15 Ves. 227.

(*b*) Per Sir J. Romilly, M.R., in *Wedderburn* v. *Wedderburn*, 22 Beav. 124. And see *Macdonald* v. *Richardson*, 1 Giff. 81; *Bradbury* v. *Dickens*, 27 Beav. 53; *Smith* v. *Everett*, 27 Beav. 446; *Hall* v. *Barrows*, 33 L. J. Ch. 204; *Dayton* v. *Wilkes*, 17 How. Pr. R. 510; R. Cox, 224.

(*c*) 1 Hare, 253.

was only liable to account to the estate of his deceased partner for the value of a moiety of the goodwill at the time of the latter's death (*a*).

Firm name.

With respect to the trade name, Sir L. Shadwell, V.-C., in *Lewis* v. *Langdon* (*b*), expressed an opinion that it survived, but the decision in that case only amounted to this: that one of three executors of a deceased partner in the firm of "Brookman & Langdon" had no right to set up business as "Brookman & Langdon," and that the surviving partner, who was carrying on business as "James Lewis & Co., successors to Brookman & Langdon," had sufficient interest in the name of the old firm to restrain an unauthorised use of it (*c*), and it seems clear that one member of a firm cannot, on the death of his partner, monopolise all the benefit to be derived from the use of the firm name (*d*).

Firm continued by certain partners.

When, on a dissolution of partnership, the goodwill of the business becomes the property of some of the former partners, with it they acquire the right of representing their remodelled business as being the continuation of the old one; and they are at liberty to express this by styling themselves "B. & C., late A. & B.," or "B. & C., successors to A. & B.," or any similar words (*e*). If they continue to use the style of the old business, "A. & B.," as before, then, as regards the public, this alone constitutes no false representation, the only statement being that the new firm is carrying on the business of the old one (*f*). Such continued user, however, will not be per-

(*a*) *Broughton* v. *Broughton*, 44 L.J.Ch. 526. And compare *Simpson* v. *Chapman*, 4 De G. M. & G. 154.

(*b*) 7 Sim. 421.

(*c*) In this respect, *Hine* v. *Lart*, 10 Jur. 106, and *Dent* v. *Turpin*, 2 J. & H. 139, seem to be in point, as in those cases the plaintiff had a certain right, but not an exclusive right, in the trade marks. See *Scott* v. *Scott*, 16 L. T. N. S. 143.

(*d*) A decided opinion to this effect is expressed in Lindley on Partnership, 3rd ed. 887.

(*e*) *Churton* v. *Douglas*, Johns. 174; *Lewis* v. *Langdon*, 7 Sim. 421; *Hookham* v. *Pottage*, L. R. 8 Ch. 91; *Peterson* v. *Humphrey*, 4 Abb. Pr. R. 394, R. Cox, 212.

(*f*) *Banks* v. *Gibson*, 34 Beav. 566; *Aubin* v. *Holt*, 2 K. & J. 66. And see *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; 33 L. J. Ch. 199; 11 H. L. C. 523.

mitted where it can be only for an improper and fraudulent purpose, and in order to deceive the public (*a*); nor where the partnership has been only contrived with a view to giving the purchaser of a professional business the means of appropriating to himself the personal reputation of the vendor (*b*). As regards the partner by whose retirement or death the dissolution has been brought about, his right or that of his representatives to complain must depend upon whether he or his estate will be exposed to any loss or inconvenience by the continued user of the old name (*c*).

Rights on dissolution by retirement or by death and sale of goodwill.

When a partner has retired from a business, his share and interest therein being taken over by the continuing partners, or when, on the death of a partner, the partnership business has been sold, the retiring or surviving partner, as the case may be, has full liberty to set up a precisely similar business to that which the partnership carried on, but he must not represent it to be the same business (*d*). In the valuation, therefore, of the share of a retiring or dead partner, which is to be taken over by the surviving partner, this fact should be taken into consideration, as it may materially affect and even destroy the value of the share (*e*); and when the business is to be sold, that fact should be stated in the particulars of sale, in order that the purchaser may be able to buy with a full knowledge of the facts (*f*). In *Smith* v. *Everett* (*g*), the survivor of two partners in a banking business sold

(*a*) *Dence* v. *Mason*, W. N. 1877, p. 23.

(*b*) *Thornbury* v. *Bevill*, 1 Y. & C. Ch. 554.

(*c*) *Banks* v. *Gibson*, 34 Beav. 566; *Scott* v. *Rowland*, 20 W. R. 508; *Webster* v. *Webster*, 3 Swanst. 490 n; and other cases cited at p. 193, note (*e*).

(*d*) *Kennedy* v. *Lee*, 3 Mer. 441-52; *Harrison* v. *Gardner*, 2 Madd. 198; *Churton* v. *Douglas*, Johns. 174; *Hall* v. *Barrows*, 33 L. J. Ch. 204; *Clark* v. *Leach*, 32 Beav. 14; *Bond* v. *Milbourn*, 20 W. R. 197; *Hookham* v. *Pottage*, L. R. 8 Ch. 91; *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

(*e*) *Mellersh* v. *Keen*, 28 Beav. 453; *Davies* v. *Hodgson*, 25 Beav. 177.

(*f*) *Cook* v. *Collingridge*, Jac. 607; *Hall* v. *Barrows*, 33 L. J. Ch. 204. And see the form settled by the L. JJ. in *Johnson* v. *Helleley*, 2 De G. J. & S. 446.

(*g*) 27 Beav. 446.

the business, and it was held that the estate of the deceased partner was entitled to a share of so much of the purchase-money as was attributable to the goodwill. Sir J. Romilly, M. R., directed that this value should be ascertained, regard being had to the facts that: 1st, the partnership premises belonged to the survivor; 2ndly, the survivor had the right to carry on the business of a banker on the same premises after the sale of the goodwill; 3rdly, the sole right of issuing bank notes survived to him.

Retiring or surviving partner may state former connexion.

A retiring or surviving partner may advertise generally the facts that he was connected with the former business, and that he is establishing a new business, but he must not address any special solicitations to the customers of his former firm (*a*).

And the termination of that connexion.

A retiring partner may advertise the discontinuance of his participation in a periodical issued by the partnership, but he is not at liberty to advertise its discontinuance generally, any more than he might represent the partnership to have ceased to carry on business, upon his own retirement (*b*).

Necessary announcements may be made.

While, however, a retiring partner is not at liberty to depreciate the property, his share in which has passed to others (*c*), a partner who has bought the share of his partner may, even before the purchase is in all respects completed, publish statements which are necessary to induce others to join him, and to enable him to carry on the business, though, in the opinion of the selling partner, that may have a prejudicial effect on what is still in a sense the partnership property (*d*).

Business carried on in separate districts.

Where two partners, having been in the habit of carrying on the partnership business, each in a separate

(*a*) *Bradbury* v. *Dickens*, 27 Beav. 53; *Clark* v. *Leach*, 32 Beav. 14; *Labouchere* v. *Dawson*, L. R. 13 Eq. 322; *Graveley* v. *Winchester*, Seton, 4th ed. 257; *Burrows* v. *Foster*, *ib.*; *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

(*b*) *Bradbury* v. *Dickens*, 27 Beav. 53.

(*c*) *Bradbury* v. *Dickens*, *ubi suprâ*.

(*d*) *Marshall* v. *Watson*, 25 Beav. 501.

district, agreed to dissolve partnership, the premises, stock, and goodwill to be sold, or until sale to vest in a receiver, Sir J. Stuart, V.-C., restrained one partner from carrying on the business on his own account in one district, and directed him to account for the profits (*a*).

Right of election protected.

Again, where it was provided by the partnership articles that, on the death of one of the partners, his personal representative should have the right to elect, within three months, to take the deceased partner's share in the business, Sir W. P. Wood, V.-C., restrained the surviving partner from carrying on the business under any other firm or style than that used in the lifetime of the deceased partner, for three months, or until election by his representative (*b*). But it seems that though the Court can restrain the surviving partner from carrying on the business in any other name, it has no means of compelling him to carry it on in the original name (*c*).

Valuation of goodwill.

The value of a goodwill, or share of a goodwill, is usually estimated at so many years' purchase upon the amount of the profits (*d*); thus, in *Mellersh* v. *Keen* (*e*), it was fixed at one year's purchase of the net annual profits, calculated on an average of three years (*f*).

(*a*) *Turner* v. *Major*, 3 Giff. 442.
(*b*) *Evans* v. *Hughes*, 18 Jur. 691.
(*c*) *Lewis* v. *Langdon*, 7 Sim. 421.
(*d*) *Austen* v. *Boys*, 27 L. J. Ch. 714.
(*e*) 28 Beav. 453.
(*f*) As to other circumstances to be considered, see *Smith* v. *Everett*, 27 Beav. 446; *Johnson* v. *Helleley*, 34 Beav. 63; 2 De G. J. & S. 446.

APPENDIX A.

PRECEDENTS OF INJUNCTIONS, &c.

1. CROFT *v.* DAY, 7 Beav. 84—90.

Label on Blacking Bottles—Trade Cards—Injunction.

INJUNCTION to restrain the defendant, his servants, &c., "from selling, or exposing for sale, or procuring to be sold, any composition or blacking described as, or purporting to be, blacking manufactured by Day and Martin, in bottles having affixed thereto such labels as in the complainant's bill mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by John Weston (the manager), for the benefit of the estate of Charles Day, the testator; and from using trade cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by John Weston" (*a*).

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2. SEIXO *v.* PROVEZENDE, L. R. 1 Ch. 192—194.

Brand on Casks of Wine—Injunction.

Injunction to restrain the defendants, &c., "from affixing or causing to be affixed to any casks of wine shipped to their orders the brand or marks of a crown and the word *Seixo*, or any other combination of marks or words so contrived as, by colourable imitation or otherwise, to represent the marks or brands of the plaintiff, and from employing any marks or words which should be so contrived as to represent, or induce the belief, that such wines were Crown Seixo, or the produce of the *Quinta do Seixo*, or otherwise using the word *Seixo* without clearly distinguishing the same from the wine produced by the *Quinta do Seixo*" (*b*).

(*a*) Lord Langdale, M. R.

(*b*) Wood, V.-C.

3. STEPHENS *v.* PEEL, 16 L. T. N. S. 145.

Labels on Bottles of Ink—Injunction.

Injunction restraining the defendant, &c., "from selling, or exposing, or advertising for sale, or procuring to be sold, any ink or writing fluid in bottles bearing thereon such labels as after mentioned, and from using any labels, or stamps, or advertisements so contrived or expressed as by colourable imitation or otherwise to represent or lead to the belief that the ink sold by the defendant is the ink or writing fluid manufactured by the plaintiffs, and sold by them under the name of 'Stephens' Blue Black Writing Fluid'" (*a*).

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4. WOTHERSPOON *v.* CURRIE, L. R. 5 H. L. 508—523.

Glenfield Starch—Injunction.

Injunction restraining the respondent, &c., "from using the word 'Glenfield' in or upon any labels affixed to packets of starch manufactured by or for him, and from in any other way representing the starch manufactured by or for him to be 'Glenfield Starch,' and from selling or causing the same to be sold as 'Glenfield Starch,' and from doing any act or thing to induce the belief that starch manufactured by or for him, the respondent, is 'Glenfield Starch,' or starch manufactured by the appellant" (*b*).

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5. BROADHURST *v.* BARLOW, L. J. Notes of Cases, 1872, p. 183.

Stamps on Shirtings—Injunction.

Injunction restraining the defendants, &c., "from stamping, impressing, or affixing, or causing to be stamped, impressed, or affixed on or to any Spanish shirtings or pieces of white calico manufactured or sold by them, any mark consisting of words in the Turkish, Armenian, and Greek languages, meaning 'exactly 12 yards,' and placed between a figure or crest and the words 'Spanish Shirtings' enclosed in a scroll in the same manner as those were respectively placed in the plaintiff's trade mark, or in any manner only colourably differing therefrom" (*c*).

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6. FORD *v.* FOSTER, L. R. 7 Ch. 611—634.

Eureka Shirts—Injunction.

Injunction restraining the defendants, &c., "from applying the mark or title 'Eureka' to any shirts manufactured by them, or to any shirts sold by

(*a*) Wood, V.-C. (*b*) House of Lords. (*c*) Wickens, V.-C.

them, unless manufactured by the plaintiffs, and from selling any shirts already marked with the mark and title 'Eureka,' unless such mark or title has been applied with the sanction of the plaintiffs; and from issuing any boxes or packages on which the mark or title of 'Eureka' shall be applied to shirts not of the plaintiffs' manufacture; and from affixing or using any label, or card, or other mark containing the word 'Eureka' to or upon any shirts not of the plaintiffs' manufacture" (*a*).

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7. APOLLINARIS Co. *v.* NORRISH, 33 L. T. N. S. 242.

Apollinaris Water—Injunction.

Injunction restraining the defendants, &c., "from selling, &c., any mineral or other waters, not being the genuine Apollinaris water, under the name of 'Apollinaris Water,' or 'London Apollinaris Water,' or under any other name of which the word 'Apollinaris' so forms part as to be calculated to deceive the public" (*b*).

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8. EDELSTEN *v.* EDELSTEN, 1 De G. J. & S. 185—189.

Wire—Prayer of Bill—Injunction—Account—Delivery up.

Prayer of Bill: "that an account might be taken of the gains and profits made and obtained by the defendants by the sale of wire having tallies or labels attached thereto with the plaintiff's trade mark, or a trade mark in imitation of, or only colourably differing from that of the plaintiff, stamped or impressed thereon; and that the defendants might be ordered to pay to the plaintiff the amount of such gains and profits. That the defendants might be restrained by injunction from attaching to wire, not the manufacture of the plaintiff, any tally or label with the plaintiff's trade mark, or any mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, and from otherwise using the plaintiff's trade mark, or any mark in imitation thereof, so as to denote or represent that the said wire was the 'Anchor Brand Wire,' or was the manufacture of the plaintiff; and from selling, or offering for sale, or procuring to be sold, any wire not being of the

(*a*) James, L. J.

(*b*) Bacon, V.-C. And see also forms of injunctions in *Apollinaris Co.* v. *Edwards*, Seton, 4th ed. 237; *Millington* v. *Fox*, 3 My. & Cr. 338; and Pemberton, 2nd ed. 391; *Edelsten* v. *Vick*, 11 Hare, 78; *Collins Co.* v. *Walker*, 7 W. R. 222, and Seton, 4th ed. 235; *Harrison* v. *Taylor*, 11 Jur. N. S. 408, and Pemberton, 2nd ed. 391; *Braham* v. *Bustard*, 1 H. & M. 447; *McAndrew* v. *Bassett*, 33 L. J. Ch. 561, and Pemberton, 2nd ed. 392; *Sparagnapane* v. *Coombs*, Seton, 4th ed. 246; *Mickle* v. *Emery*, Seton, 4th ed. 234 (a case of a registered mark).

plaintiff's manufacture, having a tally or label attached thereto with the plaintiff's trade mark, or a mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, or otherwise in any manner having the said trade mark, or a mark in imitation thereof, or only colourably differing therefrom, attached thereto. That the defendants might deliver up to be cancelled all tallies, labels, and papers in their possession, or in the possession of their servants or agents, having the said trade mark so in colourable imitation of the plaintiff's as thereinbefore mentioned; and also all tallies, labels, and papers in their possession, or in the possession of their servants or agents, having the plaintiff's trade mark, or any mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, and also all dies for stamping or impressing the same; and that the defendants might pay all the costs of the suit" (*a*).

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9. GUINNESS *v.* ULLMER, 10 L. T. (Old Series), 127.

Engraving Blocks for Printing Forged Labels—Injunction.

Injunction restraining the defendants, &c., "from cutting, engraving, casting, or making, and from causing to be cut, engraved, cast, or made, and also from using or permitting to be used, and from selling, or otherwise disposing of or parting with any blocks or plates adapted for printing labels or sheets of labels in imitation of the label furnished by Sparkes Moline to and used by the agents appointed by him for sale of the plaintiffs' stout, as in the plaintiffs' bill mentioned, or any of them, or differing only colourably therefrom. And also from selling, or otherwise disposing of, and from delivering over or parting with any of such blocks or plates as were then in their possession, custody, or power, to any person other than the plaintiffs or such person as they should appoint to receive the same" (*b*).

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10. FARINA *v.* SILVERLOCK, 1 K. & J. 509.

Printing Forged Labels—Injunction.

Injunction restraining the defendant, &c., "from printing or selling, or exposing for sale, or procuring to be printed or sold, any labels similar to those in

(*a*) Wood, V.-C., made a decree in the terms of the prayer of the Bill. See 1 De G. J. & S. 196; Lord Westbury, C., affirmed the decree. As to the account, see also *Foster* v. *Megevand*, Pemberton, 2nd ed. 393; and the full decree in *Ford* v. *Foster*, Seton, 4th ed. 236. As to order restraining exportation of goods with forged trade marks, see *Henderson* v. *Jorss*, Seton, 4th ed. 236. As to order restraining the bringing into the market of imported goods with forged trade marks, see *Upmann* v. *Elkan*, L. R. 12 Eq. 140; 7 Ch. 130; *Rivero* v. *Norris*, Seton, 4th ed. 236; *Del Valle* v. *Mayer*, *ib.*

(*b*) Shadwell, V.-C. of Eng.

use by the plaintiff, as in the bill in this cause mentioned, or containing copies of the signature, or address, or flourish, seal, or stamp, or other marks invented and used by the plaintiff as therein mentioned, or any signature, address, flourish, seal, stamp, or other mark merely colourably differing therefrom, or any other papers or labels so printed or contrived as, by colourable imitation or otherwise, to represent or lead to the belief that Eau de Cologne prepared by other parties was Eau de Cologne prepared by the plaintiff" (*a*).

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11. CLEMENT *v.* MADDICK, 1 Giff. 98—101.

Name of Newspaper—Injunction.

Injunction restraining the defendants, &c., "from printing, publishing, or continuing to print or publish, any newspaper or other periodical paper with or under the name or style of 'The Penny Bell's Life and Sporting News,' or with or under any name or style of which the name, style, or words of 'Bell's Life' shall form a part, or in any way occur [therein]; and from using the said name, style, or title of 'Bell's Life' by way of name, style, or title to any newspaper or periodical without the licence or consent of the plaintiff" (*b*).

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12. INGRAM *v.* STIFF, 5 Jur. N. S. 947.

Name of Newspaper—Injuring Plaintiff's Paper—Injunction.

Injunction restraining the defendant, &c., "from printing, publishing, or selling any newspaper or other periodical under the name of 'The Daily London Journal,' or under any other name or style of which the words 'London Journal' form part, and from doing or committing any act or default which may tend to lessen or diminish the sale or circulation of the plaintiff's periodical, called 'The London Journal'"(*c*).

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13. PROWETT *v.* MORTIMER, 2 Jur. N. S. 414.

Name of Newspaper—Soliciting Customers—Injunction.

Injunction restraining the defendant, &c., "from printing, or publishing, or exposing for sale, or procuring to be printed or sold the newspaper

(*a*) Wood, V.-C.

(*b*) Stuart V.-C. And see *Edmonds* v. *Benbow*, Seton, 3rd ed. 905; and *Corns* v. *Griffiths*, Pemberton, 2nd ed. 308.

(*c*) Wood, V.-C.

publication called 'The True Britannia,' or any other newspaper or publication, as a continuation of the plaintiff's newspaper 'The Britannia,' in the bill mentioned, and from soliciting custom in the name of the plaintiff's trade and business as for 'The Britannia' newspaper" (*a*).

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14. Hogg *v.* Kirby, 8 Ves. 215—226.

Publication of a Magazine as a Continuation of Plaintiff's Magazine—Injunction.

Injunction restraining the defendant, &c., "from publishing or exposing to sale any copy or copies of the defendant's said work, and from printing, publishing, or exposing to sale, any other work or publication as or being a continuation of the plaintiff's work, or of the defendant's work, which had been so published as such continuation as aforesaid; and from printing all or any part or parts of the plaintiff's said work;" and Ordered "that the injunction should be continued as to any letters, &c., admitted by the Answer to have been received from correspondents by the defendant, while publishing for the plaintiff" (*b*).

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15. Ainsworth *v.* Bentley, 14 W. R. 630.

Publication of Magazine in Breach of Contract—Order—Injunction.

Ordered, "That the defendant, &c., be restrained from carrying on, &c., the said 'Temple Bar Magazine,' but the order to be without prejudice to the publication of the said magazine until the hearing of the cause, so as the name of Bentley do not appear either in the title-page, or in any other part of the said publication, or in any advertisement of the said publication, and this order to be without prejudice to the right (if any) of the plaintiff to damages or profits in respect of any publication of the work" (*c*).

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16. Prince Albert *v.* Strange, 2 De G. & Sm. 652—717.

Etchings Improperly Obtained and Published—Catalogues Improperly Published—Decree—Delivery up—Injunction.

Decree, by which—"Declared that the plaintiff was entitled to have delivered to him the impressions (by the Answer of defendant J. admitted to be in his possession) of such of the several etchings in the pleadings

(*a*) Stuart, V.-C. (*b*) Lord Eldon, C. (*c*) Wood, V.-C.

mentioned as in the catalogue and in the pleadings were stated to have been etched by the plaintiff; that is to say (description by reference to Nos. in the catalogue); Ordered, that J. should, within four days after the service of the decree, deliver up the impressions above specified on oath, and leave them with the Clerk of Records and Writs at the Record Office. Ordered, that the defendant S. should, within four days after the service of the decree, deliver to the Clerk of Records and Writs, at the said office, the twenty-five copies of the catalogue, being the same as were mentioned in the decree in the other suit of even date. Similar directions as to six copies of the catalogue admitted by J. to be in his possession. Ordered, that the Clerk of Records and Writs should destroy those copies of the catalogue, giving notice to the solicitors of the several parties of the time and place at which he intended to do so. Injunction, restraining the defendants, &c., from making or permitting to be made any engraving or copy of such etchings, or any of them, and from publishing the same; and from parting with or disposing of them or any of them, except in obedience to the decree; and from selling, or in any manner publishing the catalogue, or any work being or purporting to be a catalogue of the etchings made by the plaintiff. Provision made for costs. Liberty to apply reserved" (*a*).

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17. CHAPPELL *v.* SHEARD, 2 K. & J. 117—122.

Name and Title-page of Song—Injunction.

Injunction restraining the defendants, &c., "from printing, publishing, selling, exposing for sale, or otherwise disposing of the song "Minnie Dale," or any copy or copies thereof, or any other publication containing a colourable imitation of the name, title, or title-page of the plaintiff's said song" (*b*).

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18. MORISON *v.* MOAT, 9 Hare, 241—267.

Name of Patent Medicine—Secret Recipe—Injunction.

Injunction restraining the defendant, &c., "from selling, or causing or procuring to be sold, under the title or designation of 'Morison's Universal Medicine,' or 'Morison's Vegetable Universal Medicine,' any medicine made or manufactured by the defendant, or by or under his order or direction;" and restraining the defendant, &c., "from making or compounding any medicines according to the secret in, &c., and from in any manner using the secret of compounding the said medicines, or any part thereof" (*c*).

(*a*) Knight-Bruce, V.-C.

(*b*) Wood, V.-C. And see *Emperor of Austria* v. *Day* (V.-C. Stuart, 2 Giff. 628—631; Court of Appeal, 3 De G. F. & J. 217—219), for injunction against printing spurious Hungarian notes, and order for delivery up of plates used in such printing.

(*c*) Turner, V.-C. And see *Ansell* v. *Gaubert*, Seton, 4th ed. 235.

19. FRANKS *v.* WEAVER, 8 L. T. (Old Series), 510.

Fraudulently Using Another's Testimonials—Injunction.

Injunction restraining the defendant, &c., "from making, vending, or offering for sale, or in any manner disposing of any preparation, mixture, compound, or nostrum, having around, or upon, or in connexion with the same, or the bottles or other vessels containing the same, any cover, wrapper, envelope, label, bill, circular, notice, advertisement, or other formula, in the terms or to the purport or effect of the cover, wrapper, envelope, label, bill, circular, notice, advertisement, or other formula in the plaintiff's bill stated to have been used by the said defendant, or any other cover, &c., containing any testimonial in favour of the plaintiff's medicine or medical preparation in the said bill described as 'Franks' Specific Solution of Copaiba,' or in which any statement or representation is made or contained indicating, or implying, or tending to induce the public or purchasers to suppose that such preparation, mixture, compound, or nostrum made, vended, or disposed of by the said defendant, or in which any use is made of the character and reputation of the plaintiff, or his said specific solution of copaiba, and from publishing, or circulating, or causing to be published, or circulated, or in any manner using such cover, &c., as aforesaid" (*a*).

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20. KNOTT *v.* MORGAN, 2 Keen, 213—219.

Imitating a Rival Line of Omnibuses—Injunction.

Injunction restraining the defendant, &c., "from running, or in any manner using, or causing to be used, for the conveyance of passengers, his omnibus in the bill mentioned, or any other omnibus, having painted, stamped, printed, or written thereon the words or names 'London Conveyance,' or 'Original Conveyance Company,' or any other names, words, or devices painted, stamped, printed, or written thereon, in such manner as to form or be a colourable imitation of the names, words, and devices painted, stamped, printed, or written on the omnibuses of the plaintiffs" (*b*).

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21. GLENNY *v.* SMITH, 2 Dr. & Sm. 476.

Trade Name—Injunction.

Injunction restraining the defendant, &c., "from continuing to use, or from exhibiting or using the words 'Thresher and Glenny,' or the name of

(*a*) Lord Langdale, M. R.

(*b*) Lord Langdale, M. R. The M. R. altered the form so as not to restrain all use of the words "London Conveyance Company."

the plaintiffs' said firm in any form in or about his said shop in such a way as to deceive the public, or to lead to the belief that his shop is a shop of the plaintiffs, or that the business carried on there is carried on by the plaintiffs, or is in any way connected with the business of the plaintiffs" (*a*).

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22. LEE *v.* HALEY, L. R. 5 Ch. 155.

Name of Company—Injunction against User within a certain Locality.

Injunction restraining the defendant, &c., "from continuing to use, and from exhibiting or using the words 'The Pall Mall Guinea Coal Company,' in Pall Mall, or any other name or style so framed as to be a colourable imitation of the name or style in which the plaintiffs' branch business mentioned in the bill is carried on, or so as to deceive the public, or to lead to the belief that the business carried on by the defendant is the same as the business carried on by the plaintiffs under the name or style of 'The Guinea Coal Company,' or is in any way connected therewith" (*b*).

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23. SCOTT *v.* SCOTT, 16 L. T. N. S. 143.

False Representation of Continuation of Business—Injunction.

Injunction restraining the defendants, &c., "from allowing or permitting the brass plate affixed by the defendants to the door of the premises in Regent Street to remain affixed, with any inscription thereon representing, or holding out to the customers of the late partnership of 'R. & W. Scott,' or to any other persons whatsoever, that they are carrying on business in continuation of, or in succession to, the business carried on by the late firm of 'R. & W. Scott'" (*c*).

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24. LABOUCHERE *v.* DAWSON, L. R. 13 Eq. 322—327.

Soliciting former Customers, after Sale of Business—Injunction.

Injunction restraining the defendant, &c., "from applying to any person who was a customer of the firm of B. Dawson & Co. prior to the 12th of

(*a*) Kindersley, V.-C. And see *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Hookham* v. *Pottage*, L. R. 8 Ch. 92; *James* v. *James*, Seton, 4th ed. 237; *Montague* v. *Moore*, *ib.* 231; and *Cave* v. *Myers*, *ib.* 238.

(*b*) Malins, V.-C.

(*c*) Wood, V.-C. And see *Burrows* v. *Foster*, Seton, 4th ed. 256; *Hoffman* v. *Duncan*, *ib.* 256; *Witt* v. *Corcoran*, *ib.* 257; *Graveley* v. *Winchester*, *ib.* 257.

June, 1871, privately, by letter, personally, or by a traveller, asking such customer to continue to deal with the defendant, or not to deal with the plaintiffs, the Kirkstall Brewery Co., Limited" (*a*).

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25. WHEELER & WILSON MANUFACTURING CO. *v.* SHAKESPEAR, 39 L. J. Ch. 36—38—41.

False Representation of Agency—Injunction.

Injunction restraining the defendant, &c., "from, in manner aforesaid, or in any other manner, calling, or describing, or representing, his said shop or place of business, No. 32, Union Street, Birmingham, or any other shop, warehouse, or place, not belonging to the plaintiffs, as 'The Original Wheeler & Wilson Sewing Machine Depôt,' or 'Wheeler & Wilson Sewing Machine Depôt, established in 1860,' or as a place of business of the plaintiffs, or of 'Wheeler and Wilson,' manufacturers of sewing machines; and from in manner aforesaid, or in any other manner, calling, or describing, or representing, himself or his said firm of T. Shakespear & Co., as the agent or agents for the American 'Wheeler & Wilson' sewing machines, in the same manner in which he has been since 1860, or as the agent of the 'Wheeler & Wilson' sewing machines; and from in any other manner representing himself as the agent of the plaintiffs, and from permitting the names 'Wheeler & Wilson' to remain over the door of his shop or business premises, at 32, Union Street, Birmingham, or on the brass plate under the window, or on the brass plate on the door jamb, or on any other part of his said shop or place of business, or on any placard in his said shop, or on the door, or in the window thereof; and from causing the names 'Wheeler & Wilson' to be inserted in any railway time table, or directory, or other book or publication, under the head of, or described as sewing machine manufacturers, as residing or carrying on business at No. 32, Union Street, Birmingham, or as in any other manner connected with that or any other shop or place of business of the said defendant, and from doing any other act, matter, or thing representing, or whereby the trade or the public may be led to believe that the defendant has any connexion whatever in business with the plaintiffs" (*b*).

(*a*) Lord Romilly, M.R. And see *Burrows* v. *Foster*, Seton, 4th ed. 256; and *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191. As to opening letters containing orders intended for another firm, see *Scheile* v. *Brakell*, 11 W. R. 796; and Seton, 4th ed. 253; and *Witt* v. *Corcoran*, Seton, 4th ed. 257.

(*b*). James, V.-C.

26. ROUTH *v.* WEBSTER, 10 Beav. 561—563.

Unauthorized and Injurious Use of a Person's Name—Injunction.

Injunction restraining the defendants, &c., "from printing, publishing, or circulating, any prospectus or other document of, or relating to, a certain company called 'The Economic Conveyance Company,' mentioned and referred to in the plaintiff's bill in this cause, with the plaintiff's name thereto, and from in any manner using the name of the plaintiff so as to identify him as a party interested in, or associated with, the said company" (*a*).

(*a*) Lord Langdale, M.R.

APPENDIX B.

THE TRADE MARKS REGISTRATION ACTS AND RULES.

The Trade Marks Registration Act, 1875.

38 & 39 Vict. c. 91.

A.D. 1875. *An Act to establish a Register of Trade Marks.*

[13*th August*, 1875.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Registration of trade marks.

1. A register of trade marks (*a*) as defined by this Act, and of the proprietors thereof shall be established under the superintendence of the Commissioners of Patents (*b*), *and from and after the first day of July one thousand eight hundred and seventy-six, a person shall not be entitled to institute any proceeding to prevent the infringement of any trade mark as defined by this Act until and unless such trade mark is registered in pursuance of this Act.*

The latter part of this section is repealed by the first section of the Amendment Act of 1876 (see *post*, p. 222). By that, the 1st of July, 1877, is substituted, and an alternative for registration, in the case of marks used before the passing of this Act, is provided. For textile industries the 1st of January, 1878, is fixed by the Act of 1877.

(*a*) As to what constitutes a trade mark, see § 10 of this Act; also Ch. 2, p. 14.

(*b*) The Commissioners of Patents are the Lord Chancellor, the Master of the Rolls, and the law officers of the Crown for England, Scotland and Ireland. See Rule 68; and *In re Meikle*, 24 W. R. 1067; and *In re Barrows*, L. R. 5 Ch. D. 353—61.

Characteristics of registered trade marks.

2. A trade mark must be registered as belonging to particular goods, or classes of goods (*a*); and when registered shall be assigned and transmitted (*b*) only in connexion with the goodwill (*c*) of the business concerned in such particular goods, or classes of goods,

and shall be determinable with such goodwill, but subject as aforesaid, registration of a trade mark shall be deemed to be equivalent to public use (*d*) of such mark.

(*a*) The appropriation of a trade mark to particular goods or classes of goods is not new. See *Hall* v. *Barrows*, 33 L. J. Ch. 204; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518. See also Rules 1 to 4. The First Schedule to the Rules contains a classification of goods into fifty classes. An old trade mark may be registered for part of a class: *Ex parte Barrows*, W. N. 1877, p. 119; L. J. Notes of Cases, 1877, p. 110.

(*b*) As to assignment and transmission of trade marks, see Rules 23 to 29, and Instructions, p. 268. Also Forms E and F in the Third Schedule to the Rules. See, too, Ch. 3, p. 47.

(*c*) As to the connexion of trade marks with the goodwill of the business, see *Cooper* v. *Hood*, 26 Beav. 293; *Churton* v. *Douglas*, Johns. 174; *Shipwright* v. *Clements*, 19 W. R. 599; and *Cotton* v. *Giliard*, 44 L. J. Ch. 90. As to goodwill, see Ch. 9, p. 180.

(*d*) It is settled that for "public use" it is not sufficient for the marked goods to be advertised; they must be actually in the market. But so long as they are there, length of user is not necessary. See *McAndrew* v. *Bassett*, 33 L. J. Ch. 561; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307.

Title of first proprietor of a trade mark.

3. The registration of a person as first proprietor of a trade mark shall be *primâ facie* evidence (*a*) of his right to the exclusive use (*b*) of such trade mark, and shall, after the expiration of five years from the date of such registration, be conclusive evidence (*a*) of his right to the exclusive use of such trade mark, subject to the provisions of this Act as to its connexion with the goodwill of a business (*c*).

(*a*) The effect of this section seems to be that during the first five years after registration the title of the registered proprietor to the mark is good, unless a better title is shown by another person, which may, however, be done during that period; after the five years the title of the registered proprietor is secure against such claims, and is subject only to inherent defects in the mark itself, *e.g.*, that, being a mark invented since this Act, it contains no one of the essential particulars specified in § 10.

(*b*) The right to the exclusive use of a trade mark, first asserted in *Gout* v. *Alcploglu*, 5 Leg. Obs. 496, and *Millington* v. *Fox*, 3 My. & Cr. 338, and after much discussion settled by the Chancery judges (see p. 101), is now given by statute upon registration.

(*c*) See § 2, and the notes thereunder. By Rule 34, if at the end of the five years the registered proprietor is not engaged in any business concerned in the goods with respect to which the mark is registered, the mark may be removed from the register by the Court, on application by a person aggrieved.

Title of proprietor claiming by transmitted proprietorship.

4. Every proprietor registered in respect to a trade mark subsequently to the first registered proprietor shall, as respects his title to that trade mark, stand in the same position as if his title were a continuation of the title of the first registered proprietor.

See Rules 23 to 29. See, too, the American case of *Walton* v. *Crowley*, 3 Bl. C. C. 440; R. Cox, 166.

Rectification of register.

5. If the name of any person who is not for the time being entitled to the exclusive use of a trade mark in accordance with this Act, or otherwise in accordance with law, is entered on the register of trade marks as a proprietor of such trade mark, or if the registrar refuses to enter on the register as proprietor of a trade mark the name of any person who is for the time being entitled to the exclusive use of such trade mark in accordance with this Act, or otherwise in accordance with law, or if any mark is registered as a trade mark which is not authorized to be so registered under this Act (*a*), any person aggrieved may apply in the prescribed manner (*b*) for an order of the Court (*c*) that the register may be rectified; and the Court may either refuse such application, or it may, if satisfied of the justice of the case, make an order for the rectification of the register (*d*), and may award damages to the party aggrieved.

Where each of several persons claims to be registered as proprietor of the same trade mark, the registrar may refuse to comply with the claims of any of such persons until their rights have been determined by the Court (*e*), and the registrar may himself submit or require the claimants to submit in the prescribed manner (*f*) their rights to the Court.

The Court may, in any proceeding under this section, decide any question as to whether a mark is or is not such a trade mark as is authorized to be registered under this Act (*g*), also any question relating to the right of any person who is party to such proceeding to have his name entered on the register of trade marks, or to have the name of some other person removed from such register (*h*), also any other question that it may be necessary or expedient to decide for the rectification of the register (*i*).

The Court may direct an issue to be tried for the decision of any question of fact which may require to be decided for the purposes of this section.

Whenever any order has been made rectifying the register, the Court shall by its order direct that due notice of such rectification be given to the registrar (*k*).

(*a*) Three cases for remedy are here stated, viz.:
1. Where the name of a proprietor which ought not to have been registered has been registered.
2. Where the name of a proprietor which ought to have been registered has not been registered.
3. Where a mark which ought not to have been registered has been registered.

(*b*) *I.e.*, by motion, or by application in chambers, or in such other manner as the Court may direct. See Rule 43, and *Ex parte Stephens*, 24 W. R. 819.

(*c*) The Court is the Chancery Division of the High Court of Justice. See Rule 42.

(*d*) See Rule 36.

(*e*) See Rule 18.

(*f*) By special case, unless the Court shall otherwise order: Rules 44 and 45. In *Ex parte Grimshaw*, W. N. 1877, p. 24, Sir C. Hall, V.-C., refused to order otherwise.

(*g*) See § 10, and Ch. 2, p. 14, as to what is a trade mark.

(*h*) See Rule 34.

(*i*) As to alteration and rectification of the register, see Rules 35 to 39.

(*k*) See Rule 36, by which, on notification of the order and payment of the prescribed fee, the registrar is forthwith to make the rectification.

Restrictions on registry of trade marks.

6. The registrar shall not, without the special leave of the Court, to be given in the prescribed manner (*a*), register in respect of the same goods or classes of goods (*b*) a trade mark identical with one which is already registered with respect to such goods or classes of goods, and the registrar shall not register with respect to the same goods or classes of goods a trade mark so nearly resembling a trade mark already on the register with respect to such goods or classes of goods as to be calculated to deceive (*c*).

It shall not be lawful to register as part of or in combination with a trade mark any words the exclusive use of which would not, by reason of their being calculated to deceive or otherwise, be deemed entitled to protection in a Court of Equity (*d*); or any scandalous designs.

(*a*) On motion, &c., under Rule 43.

(*b*) See § 2, as to classes of goods.

(*c*) See Rule 19, and the former Rule 19, now cancelled. As to what will be considered calculated to deceive, see Ch. 4, p. 67, on Infringement. Thus in *Allsopp* v. *Walker*, M. R., April 10, 1877, a female hand pointed horizontally was held to be too similar to a man's hand held upwards, to be entitled to registration. And see *Ex parte Barrows*, W. N. 1877, p. 119; L. J. Notes of Cases, 1877, p. 110; and *In re Barrows*, L. R. 5 Ch. D. 353. In *Re Walkden Aerated Waters Co.*, M. R. June 8, 1877, the M. R. stated that "the Lord Chancellor was of opinion that the number of times which a new device or emblem might be registered as a trade mark for articles of the same class ought, for the sake of distinctiveness, in no case to exceed three," so that leave will in no case be given for the registration of similar new marks in excess of that number.

(*d*) As to what will be held to disentitle to protection in Equity, see p. 127.

Establishment of registry and general rules.

7. Subject as aforesaid, a register office (*a*) shall be established from and after such time (not being later than the first day of January one thousand eight hundred and seventy-six), in such manner and with such officers, and at such salaries, to be paid out of moneys provided by Parliament, as the Lord Chancellor may, with the consent of the Treasury, direct; and the Lord Chancellor may from time to time, with the assent of the Treasury as to fees, make, and, when made, alter, annul, or vary, such general rules as to the registry of trade marks (*b*), and as to notices to be given by advertisement before the registration of trade marks (*c*), and as to the classification of goods for the purposes of this Act (*d*), and as to the registration of first and subsequent proprietors of trade

marks (*c*), and as to the fees to be charged for registration (*f*), and also for the continuance of a trade mark on the register or otherwise (*g*), and as to the removal from the register of any trade mark (*h*), as to notices (*i*), and as to the persons entitled to inspect the register (*k*), and as to any proceedings to be taken to obtain the judgment or leave of the Court in any manner in which the judgment or leave of the Court is required to be obtained under this Act (*l*), and generally for the purpose of carrying into effect this Act, as he may deem expedient (*m*).

Any rules made in pursuance of this section shall be laid before both Houses of Parliament if Parliament be then sitting, or if not then sitting, then within ten days from the then next assembling of Parliament, and shall be of the same validity as if they had been enacted by Parliament; provided that if either House of Parliament resolve, within one month after such rules have been laid before such House, that any of such rules ought not to continue in force, any rule in respect of which such resolution has been passed shall, after the date of such resolution, cease to be of any force, without prejudice, nevertheless, to the making of any other rule in its place, or to anything done in pursuance of any such rules before the date of such resolution.

(*a*) The Register Office in London is at No. 4, Quality Court, Chancery Lane. The office established at Manchester for cotton marks, under Rule 57, is at No. 48, Royal Exchange, Manchester.
(*b*) i. See p. 224.
(*c*) ii. See Rules 13 to 15.
(*d*) iii. See First Schedule to Rules.
(*e*) iv. See Rules 17 to 29.
(*f*) v. See Second Schedule to Rules and Instructions, pp. 261-2, 271-2.
(*g*) vi. See Rules 30 to 34.
(*h*) vii. See Rules 30 to 34.
(*i*) viii. See Rules 69 and 70.
(*k*) ix. See Rule 40.
(*l*) x. See Rules 42 to 45.
(*m*) xi.

Certificate of registrar to be evidence.

8. The certificate of the registrar as to any entry, matter, or thing which he is authorized by this Act, or any general rules made thereunder, to make or do, shall be evidence of such entry having been made, and of the contents thereof, and of such matters and things having been done or left undone.

By Rule 41 the registrar, when required so to do for the purpose of any legal proceeding or other special purpose, *may* give a certificate, and on so doing *shall* specify on the face of it the purpose for which it has been granted.

By § 2 of the Amendment Act of 1876 the registrar is, on request and payment of the fee, (see p. 251), to give an applicant for registration of a mark used before the passing of this Act, which has been refused, a certificate of such refusal, which certificate is to be conclusive evidence of the refusal.

Provision as to Cutlers' Company and Sheffield corporate marks.

9. With respect to the master, wardens, searchers, assistants, and commonalty of the Company of Cutlers, in Hallamshire, in the county of York (in this Act called "the Cutlers' Company"), and the marks or devices (in this Act called "Sheffield corporate marks") assigned or to be assigned by the master, wardens, searchers, and assistants of that company (*a*), be it enacted as follows:

(1.) Within the prescribed time (*b*) and in the prescribed manner (*c*) the Cutlers' Company shall at their own expense deliver to the registrar under this Act copies (*d*) of all Sheffield corporate marks in force at the time of such delivery:

(2.) When any person, after the passing of this Act, applies to the said master, wardens, searchers, and assistants to assign to him any mark or device, notice of such application, with a copy of such mark or device, shall, within the prescribed time (*e*) and in the prescribed manner (*f*) be delivered to the registrar under this Act; and such mark or device shall not be assigned until after the expiration of the prescribed period (*g*) from the giving of such notice. In like manner, when any person applies for the registration under this Act of a trade mark as belonging to any goods or class of goods specified in section two of the Cutlers' Company's Act of 1860 (*h*), notice of such application, with a copy of such trade mark, shall, within the prescribed time (*i*) and in the prescribed manner (*k*), be delivered to the Cutlers' Company; and such trade mark shall not be registered until after the expiration of the prescribed period (*l*) from the giving of the last-mentioned notice:

(3.) Upon the assigning of any such mark or device, or the registration of any such trade mark as aforesaid, notice of the assignment or registration shall, within the prescribed time (*m*) and in the prescribed manner (*n*), be given to the registrar under this Act, or to the Cutlers' Company, as the case may be:

(4.) The registrar under this Act, without the special leave of the Court (*o*), to be given only in cases where the applicant proves his right, shall not in respect of any goods or classes of goods with respect to which a Sheffield corporate mark shall have been assigned and actually used, and of which mark a copy or description or notice of the assigning whereof shall have been delivered or given to the registrar as aforesaid, register a trade mark identical with such Sheffield corporate mark, or so nearly resembling the same as to be calculated to deceive:

(5.) The master, wardens, searchers, and assistants of the

Cutlers' Company shall not assign to any person a mark or device identical with any trade mark registered under this Act, and notice of the registration whereof shall have been given to the Cutlers' Company as aforesaid, or so nearly resembling the same as to be calculated to deceive:

(6.) Any person to whom a Sheffield corporate mark legally belongs shall be entitled to have the same mark registered also as a trade mark under this Act, in respect of any particular goods or classes of goods, in the same manner and upon the same terms and conditions in and upon which he might have registered the same if it were not a Sheffield corporate mark (*p*):

(7.) Nothing in this Act shall prejudice or affect the rights and privileges of the Cutlers' Company, nor, save as is otherwise in this Act expressly provided, shall any of the provisions of this Act apply to or in the case of any Sheffield corporate mark.

(*a*) As to the Cutlers' Company and the Sheffield corporate marks, see the Cutlers' Company's Acts 1623 to 1860, Appendix D, *post*.

(*b*) By Rule 46, May 1, 1876, or such later day as the Lord Chancellor may fix.

(*c*) The manner in which this is to be done is specified by Rule 47.

(*d*) As to what is a "copy" of a Sheffield mark for the purpose of the Rules, see Rule 56.

(*e*) As soon as possible after the mark or device has been selected. See Rule 48.

(*f*) As to the prescribed manner, see Rule 49.

(*g*) The prescribed period is six weeks from the notice being sent to the registrar: Rule 50.

(*h*) See Appendix D, *post*.

(*i*) By Rule 51, as soon as practicable after the receipt of the application by the registrar.

(*k*) By sending a copy of the *Trade Marks Journal*, with a note distinguishing the mark: Rule 52.

(*l*) Six weeks, by Rule 53.

(*m*) By Rule 54, within fourteen days after the assignment or registration.

(*n*) See Rule 55.

(*o*) Obtained on motion and under Rule 43. Compare § 6.

(*p*) See Rule 4.

Definitions.

10. For the purposes of this Act:

A trade mark consists of one or more of the following essential particulars (*a*); that is to say,

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

A written signature or copy of a written signature of an individual or firm (*c*); or

A distinctive device, mark, heading, label, or ticket (*d*);

and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures (*e*); also

Any special and distinctive word or words, or combination of figures or letters used as a trade mark before the passing of this Act (*f*), may be registered as such under this Act.

"Prescribed" means prescribed by general rules made in pursuance of this Act; and

"Court" means any of her Majesty's superior courts of law or equity at Westminster, or any court to which the jurisdiction of such courts may be transferred, or any one or more of such courts which may be declared to be the court for the purposes of this Act by such general rules as aforesaid (*g*); but the provisions of this Act conferring a special jurisdiction on the court as above defined shall not, excepting so far as such jurisdiction extends, affect the jurisdiction of any court in Scotland or Ireland in causes, actions, suits, or proceedings relating to trades marks; and if the register requires to be rectified in consequence of any proceedings in any such court in Scotland or Ireland, due notice of such requirements shall be given to the registrar, and he shall rectify the register accordingly.

(*a*) By Rule 35, though immaterial parts of the registered mark may be altered, the essential particular or particulars may not be. As to essential particulars, see *In re Barrows* L.R. 5 Ch. D. 353, and the order made by the Court of Appeal in that case.

(*b*) i. See p. 18.

(*c*) ii. See p. 25.

(*d*) iii. See p. 26. This does not include a fancy name or combination of letters. See *Ex parte Stephens*, L. R. 3 Ch. D. 659.

(*e*) "Figures" mean numerals. See *Ex parte Stephens*, L. R. 3 Ch. D. 659; and see p. 46. But there will not be registered as new marks or parts of new marks:

Representations of the Queen, or any member of the Royal Family, or Foreign Sovereign.

Royal or national arms, crests, or mottoes.

Representations of the royal crown, or national flags.

Arms of counties, cities, and boroughs in the United Kingdom.

Prize or exhibition medals. See *Batty* v. *Hill*, 1 H. & M. 264; *Taylor* v. *Gillies*, 14 Sickels, 331.

The words "trade mark," "patent," "warranted," "guaranteed."

Words implying a guarantee of the special quality of the goods to which the mark is applied, such as "best," "pure," "genuine," "excellent." See Instructions, p. 261, and note (*f*), *infrà*.

(*f*) See p. 30. The words "Registered" (see *Ex parte Meikle*, 24 W. R. 1067), "Copyright," "Entered at Stationers' Hall," "To counterfeit this is forgery," will not be registered. See Instructions, p. 260. A single letter does not come within this definition: *In re Mitchell*, V.-C. H. Aug. 2, 1877.

(*g*) By Rule 42, the Chancery Division of the High Court of Justice is designated.

Short title of Act.

11. This Act may be cited for all purposes as the Trade Marks Registration Act, 1875.

THE TRADE MARKS REGISTRATION AMENDMENT ACT, 1876.

39 & 40 VICT. c. 33.

A.D. 1876. *An Act for the Amendment of the Trade Marks Registration Act, 1875.* [*24th July*, 1876.]

Whereas by the Trade Marks Registration Act, 1875, in this Act referred to as the principal Act, it is provided that from and after the first day of July one thousand eight hundred and seventy-six, a person shall not be entitled to prevent the infringement of any trade mark as defined by the principal Act until and unless such trade mark is registered in pursuance of that Act:

And whereas by reason of the number of trade marks, and especially by reason of the difficulties attending the registration of trade marks in relation to textile fabrics,* it has been found impossible to complete the registration of existing trade marks within the time specified by the said section; and it is therefore expedient to prolong the time for the completion of such registration as aforesaid, and otherwise to amend the principal Act:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Amendment of s. 1 of the principal Act.

1. There shall be repealed so much of section one of the principal Act as provides that from and after the first day of July one thousand eight hundred and seventy-six, a person shall not be entitled to institute any proceeding to prevent the infringement of any trade mark as defined by that Act until and unless such trade mark is registered in pursuance of that Act, and in place thereof be it enacted that—

From and after the first day of July one thousand eight hundred and seventy-seven (*a*), a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement (*b*) of any trade mark as defined by the principal Act until and unless such trade mark is registered in pursuance of that Act, or until and unless, with respect to any device, mark, name, combination of words, or other matter or thing in use as a trade mark before the passing of the principal Act, registration thereof

* See Rules 57 to 63, by which this difficulty is dealt with.

as a trade mark under the principal Act shall have been refused as hereinafter is mentioned (*c*).

(*a*) For these words are now to be substituted, in so far as relates to the registration of trade marks used in the textile industries only, the words "From and after the first day of January one thousand eight hundred and seventy-eight, or such further time as her Majesty may by Order in Council determine." Act of 1877, § 1. See the Order in Council of Dec. 12, 1877, p. 223b *infrà*.

(*b*) As to what is infringement, see Ch. 4, p. 67.

(*c*) By § 1 of the original Act failure to register was fatal to the owner of the trade mark, whether old or new. By this section, where his mark was used before the original Act, he is, in default of registration, only remitted to his rights as they stood before the Acts. See per Sir *R. Malins*, V.-C., in *In Re Barrows*, L. R. 5 Ch. D. 353—59.

The different language of this section does not carry the definition contained in § 10 of the Act of 1875 any farther, *In re Mitchell*, L. R. 7 Ch. D. 36.

Saving of marks and devices not capable of being registered under Act.

2. When an application by any person to register as a trade mark a device, mark, name, word, combination of words, or other matter or thing proposed for registration as a trade mark, which has been in use as a trade mark before the passing of the recited Act, has been refused, it shall be the duty of the registrar, on request, and on payment of the prescribed fee, to give to the applicant a certificate of such refusal (*a*), and a certificate so granted shall be conclusive evidence of such refusal (*b*)

(*a*) For the form of certificate which will be given, see p. 269, *infrà*.

(*b*) See § 8 of the principal Act, and Rule 41.

Short title.

3. This Act may be cited for all purposes as the Trade Marks Registration Amendment Act, 1876.

THE TRADE MARKS REGISTRATION EXTENSION ACT, 1877.

40 & 41 VICT. C. 37.

A.D. 1877.

An Act for extending the Time for the Registration of Trade Marks, in so far as relates to Trade Marks used in Textile Industries. [6th *August*, 1877.]

39 & 40 Vict. c. 33.

38 & 39 Vict. c. 91.

Whereas by section one of the Trade Marks Registration Amendment Act, 1876, it is provided that from and after the first day of July one thousand eight hundred and seventy-seven, a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of any trade mark as defined by the Trade Marks Registration Act, 1875 (referred to in such Amendment Act and in this Act as the principal Act), until and unless such trade mark is registered in pursuance of the principal Act, or until and unless, with respect to any device, mark, name, combination of words, or other matter or thing in use as a trade mark before the passing of the principal Act, registration thereof as a trade mark under the principal Act shall have been refused, as is in the said Act thereafter mentioned:

And whereas by reason of the difficulties attending the registration of trade marks used in the textile industries it has been found impossible to complete the registration of such trade marks within the time specified by the said section, and it is therefore expedient to prolong such time as aforesaid:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Extension of time for registration of trade marks used in textile industries.

1. In so far as relates to the registration of trade marks used in the textile industries, but not further or otherwise, section one of the Trade Marks Registration Amendment Act, 1876, shall be construed as if for the words "from and after the first day of July one thousand eight hundred and seventy-seven" there were substituted

the words "from and after the first day of January one thousand eight hundred and seventy-eight, or such further time as her Majesty may by Order in Council determine." (*a*)

(*a*) Where an action in respect of a mark on calico goods was begun in July, 1877, after the expiration of the time allowed for registration by the Act of 1876, and before the Act of 1877, prolonging the time, relief was nevertheless given, *Twentsche Stoom Bleekery Goor* v. *Ellinger & Co.*, 26 W. R. 70.
The time is now extended by the Order in Council of Dec. 12th, 1877, to June 30th, 1878. See *infrd.*

2. The expression in this Act "Trade marks used in the textile industries" means the trade marks relating to goods comprised in Classes 23 to 35, both inclusive, of the First Schedule to the Rules under the Trade Marks Registration Acts, 1875—76, dated September, 1876. Definition of "trade marks used in the textile industries."

3. This Act may be cited for all purposes as the Trade Marks Registration Extension Act, 1877; and this Act and the Trade Marks Registration Amendment Act, 1876, and the Trade Marks Registration Act, 1875, may be cited together as the Trade Marks Registration Acts, 1875—77. Short title of Act.

ORDER IN COUNCIL.

At the Court at Windsor, the 12th day of December, 1877.

Present:

The Queen's Most Excellent Majesty in Council.

Whereas by section 1 of "The Trade Marks Registration Extension Act, 1877," 40 & 41 Vict., cap. 37, it is enacted that

"In so far as relates to the registration of trade marks used in the textile industries, but not further or otherwise, section one of the Trade Marks Registration Amendment Act, 1876, shall be construed as if for the words "from and after the first day of July one thousand eight hundred and seventy-seven" there were substituted the words "from and after the first day of January, one thousand eight hundred and seventy-eight, or such further time as Her Majesty may by Order in Council determine:"

And whereas it is deemed expedient that the time for the registration of trade marks used in the textile industries should be extended beyond the first day of January one thousand eight hundred and seventy-eight:

Now, therefore, Her Majesty by and with the advice of Her Privy Council is pleased in accordance with the above recited enactment to prolong, till the 30th of June, 1878, the time for the registration of trade marks used in the textile industries.

C. L. PEEL.

RULES

UNDER THE TRADE MARKS REGISTRATION ACTS, 1875—7.*

Whereas by the Trade Marks Registration Act, 1875, the Lord Chancellor is authorised from time to time, with the assent of the Treasury as to fees, to make general rules as to the registry of trade marks, and other matters connected therewith, and also when made to alter, annul, or vary such rules, as is in the said Act mentioned:

Now, therefore, I, the Right Honourable Hugh MacCalmont Baron Cairns, of Garmoyle in the county of Antrim, Lord High Chancellor of Great Britain, in pursuance of the said Act, and of all other powers enabling me in this behalf, do hereby, without prejudice to any proceedings that may have been taken under any

* For Additional Rules, see pp. 240a to 241.

former Rules as to the registry of trade marks before made by me, annul all such Rules, and do hereby make the following Rules :—*

Preliminary.

1. For the purposes of these Rules goods are classified in the manner appearing in the First Schedule hereto. Classification of goods in schedule.

See § 2 of the Act of 1875; note (*a*), p. 215; and § 7.

2. The fees to be charged in pursuance of these Rules are the fees specified in the Second Schedule hereto. Fees.

See § 7 of the Act; and Instructions, pp. 261–2, 271–2.

3. If any doubt arises as to what class any particular description of goods belongs to, the doubt shall be determined by the registrar. Determination of doubt as to classes.

4. A trade mark or trade marks may be registered in pursuance of the same application by the same person in respect of all or any goods, subject to the payment of the additional fees specified in the Second Schedule in respect of the registration of different trade marks or the extension of the same trade marks to goods in different classes. Registration of different trade marks, or trade marks in different classes.

Application for Registry.

5. A person (*a*), whether a British subject or an alien (*b*), desiring to register a trade mark shall apply to the registrar by sending to him a statement (*c*) accompanied by such declaration (*d*) as is hereinafter mentioned and the prescribed fee (*e*). Proceedings on application.

(*a*) This will include a corporate body or firm. See Rules 10 and 11. This is so for the purposes of the Merchandise Marks Act, 1862. See § 1 of that Act.

(*b*) The rights of aliens are thus recognised. See *Collins Co.* v. *Cowen*; *Same* v. *Brown*; also *Taylor* v. *Carpenter*, in America, p. 48, note (*a*).

(*c*) See the Forms of Statement, A and B in the Third Schedule.

(*d*) See the Forms of Declaration, C and D, in the Third Schedule; also Rule 9.

(*e*) See Schedule 2.

6. The statement shall contain the following particulars:
A. The name and address and calling of the applicant: and
B. The description (*a*) of the trade mark to be registered: and
C. The class or classes of goods (being some one or more of the classes mentioned in the First Schedule): (*b*) and Contents of statement on application.

* The variations from the original Rules are noted as they occur. Those variations are not considerable, but the Rules in regard to cotton marks are all new.

D. In the case of a trade mark used before the passing of this Act, a description of the goods in respect of which it has been used and the length of time during which it has been so used.

(*a*) In the original Rules, here followed the words, "*or reference to a description.*"

(*b*) Here followed the words, "*and the particular description or descriptions of goods in such class or classes, with respect to which he desires the trade mark to be registered: and*"—

All applications are to be made in the English language. See Instructions, p. 256.

Communications relating to different applications have to be made in separate letters. See Instructions, p. 256.

As to address of applications, see Instructions, p. 256.

Requisites of statement.

7. The above statement must bear a date and be signed by the applicant. Subject to any other directions that may be given by the registrar, the statement sent to the registrar shall be upon foolscap paper of a size of thirteen inches by eight inches, and shall have on the left-hand part thereof a margin of not less than one inch and a half.

See Forms A and B, in Schedule 3; and Instructions, p. 258.

Nature and size of representation of trade mark.

8. Subject to any other directions that may be given by the registrar, a description of a trade mark shall be given in writing, and shall be accompanied, when practicable, by a drawing or other representation (*a*) in duplicate not less than three inches square, on foolscap paper of the size aforesaid, or by pasting or otherwise fastening on such paper a specimen of the trade mark.

Where a drawing or other representation or specimen cannot be given in manner aforesaid, a specimen or copy of the trade mark may be sent either of full size or on a reduced scale, and in such form as may be thought most convenient.

The registrar may, if dissatisfied with the representation of a trade mark, require a fresh representation either before he proceeds with the application or before he registers the trade mark.

The registrar may also, in exceptional cases, deposit in the Patent Museum a specimen or copy of a trade mark which cannot conveniently be placed on his register, and may refer thereto in his register in such manner as he thinks advisable.

(*a*) See Instructions, p. 260, as to representations.

Declaration to accompany application.

9. The declaration must be on foolscap paper of the above-mentioned size, and must verify the statement, and declare that, to the best of the applicant's knowledge and belief, he is lawfully entitled to use the trade mark, and must be made and subscribed as hereinafter mentioned.

See Rule 5; also Forms C and D, in the Third Schedule; and Instructions, p. 257.

Application by company.

10. Where an application for the registry of a trade mark is made by or on behalf of a corporate body of persons, the statement

and declaration shall be made by the secretary or other principal officer of the body of persons; and the registrar may require such proof as he thinks fit that the application made is duly authorized by such body of persons.

The Statement, but not the Declaration, has to be made as "on behalf of" the body, and the capacity in which the person signing is acting should be stated. See Instructions, pp. 257–8; also next Rule.

Application by firm.

11. Where an application for the registry of a trade mark is made by or on behalf of any firm or partnership, the statement and declaration may be made by any one member of such firm or partnership, or by any person duly authorized by such firm or partnership; and the registrar may require such proof as he thinks fit that the application made is duly authorized by such firm or partnership.

This is a new Rule.

The person signing should use his ordinary signature, and state the trading name under which the business is carried on. See Instructions, p. 257; also last Rule.

Acknowledgment of application by registrar.

12. On receipt of the application the registrar shall send to the applicant an acknowledgment thereof.

Originally Rule 11.

Advertisement of Application and Notice of Opposition.

Advertisement of application.

13. As soon as may be after the receipt of an application made as provided by these Rules, the registrar shall require the applicant to insert an advertisement of the application in the official paper, during such time, and in such form, and generally in such manner as the registrar may think desirable, and distinguishing whether the mark has or has not been used before the thirteenth day of August one thousand eight hundred and seventy-five.

Originally Rule 12.

See Additional Rule 1, p. 241. This Rule is not applicable to cotton marks.

See *In re Meikle*, 24 W. R. 1067.

Definition of official paper.

14. The official paper (*a*) for the purposes of these Rules shall be some paper published under the direction of the Commissioners of Patents, or such other paper as such Commissioners, or any one of them, may from time to time direct.

Originally Rule 13.

(*a*) The official paper is *The Trade Marks Journal*, published frequently, at present once a week. It contains illustrations of all the trade marks applied for under the Trade Marks Registration Acts, as well as the name and calling of each applicant, the description of goods, and the length of time for which such mark has been used, thus affording all persons interested in the use of trade marks authentic information as to the nature of the marks applied for in their respective trades. Each number of the Journal consists of 24 pages quarto, and may be obtained, at 1*s.* per number, from the publishers mentioned at pp. 268–9. Copies of the Journal are open to inspection at the Patent Office Library, Southampton Buildings, Chancery Lane, and also at the Patent Office Museum, South Kensington.

Means of advertising trade mark to be supplied to official paper.

15. For the purposes of such advertisement the applicant may be required to furnish the printer of the official paper with a wood-block or electrotype (*a*) of the trade mark, of such dimensions as may from time to time be directed by the registrar, or with such other information or means of advertising the trade mark as may be allowed by the registrar (*b*).

Originally Rule 14. This Rule does not apply to cotton marks; as to which, see Additional Rules.

(*a*) For particulars respecting these wood-blocks or electrotypes, see Instructions, p. 263.

(*b*) Specimens of marks incapable of advertisement in the ordinary way (other than cotton marks in Classes 23-4-5) are deposited and may be seen at the Patent Office Museum, South Kensington. For instance, there are so deposited specimens of certain marks for worsted stuffs in Class 34, numbered 5844 to 5850, and consisting of selvages containing certain distinctive coloured threads. See *Trade Marks Journal*, vol. 2, No. 51, p. 88.

Notice and proceedings for opposition.

16. A notice of opposition (*a*) may be given by sending to the registrar, together with the prescribed fee, a written notice in duplicate, on foolscap paper of such size as aforesaid, stating the grounds of the opposition. The registrar shall acknowledge the receipt of such notice of opposition, and shall send one copy of such notice to the applicant.

Within three weeks after the receipt of such notice, or such further time as the registrar may allow, the applicant may send to the registrar, on foolscap paper of such size as aforesaid (*b*), a counter statement (*c*) of the grounds on which he relies for his application, and if he does not do so shall be deemed to have withdrawn his application.

If the applicant sends such counter-statement the registrar shall require the person who gave notice of opposition to give security, in such manner and to such amount as the registrar may require, for such costs as may be awarded in respect of such opposition (*d*); and if such security is not given within fourteen days after such requirement was made, or such further time as the registrar may allow, the opposition shall be deemed to be withdrawn.

If the person who gave notice of opposition duly gives such security as aforesaid, the registrar shall send him one copy of the counter-statement sent by the applicant, and thereupon the case shall be deemed to stand for the determination of the Court (*e*).

Originally Rule 15. The last clause is new.

(*a*) As to oppositions and notices thereof, see Instructions, pp. 263-4.

(*b*) See Rule 7.

(*c*) For Form of Counter-statement, see Instructions, p. 265.

(*d*) For Form of Bond suggested by the registrar, see Instructions, p. 265.

(*e*) See Rule 43.

Registration of Trade Marks.

Time of registration of trade mark.

17. On the expiration of three months from the date of the first appearance of the advertisement in the official paper, the registrar may, if he is satisfied that the applicant is entitled to registration,

register the trade mark in respect of the description of goods for which he may be entitled to be registered (*a*), and the applicant as the proprietor thereof, on payment of the prescribed fee (*b*).

Originally Rule 16. This Rule does not apply to cotton marks; as to which, see Additional Rules.

(*a*) As to the classification of goods, see First Schedule. By Rule 3 the registrar is empowered to decide questions as to the class to which goods belong.

(*b*) As to the fees, see Second Schedule, and Instructions, pp. 261-2, 271-2.

In *Re Meikle*, 24 W. R. 1067, V.-C. Hall held that he could not order a mark to be registered, so as to dispense with the three months' advertisement.

Duty of registrar in case of disputed claim.

18. Where each of several persons claims to be registered as proprietor of the same or a nearly identical trade mark, in respect of the same goods or goods belonging to the same class (*a*), the registrar shall use his discretion as to registering all or any of such trade marks, either unconditionally or on the condition of the introduction of such variations (if any) (*b*) or otherwise as he thinks fit, or the registrar may, if in any case he thinks it expedient, submit or require the claimants to submit their rights to the Court (*c*).

Originally Rule 17.

(*a*) See § 5 of the Act of 1875.

(*b*) See Instructions, p. 259, as to terms or symbols common to a trade.

(*c*) *I.e.* to the Chancery Division, by special case. See Rules 42, 44, and 45; and *Ex parte Grimshaw*, W. N. 1877, p. 24.

Prohibition of registration of identical trade marks.

19. Where a trade mark has been already registered in respect of any goods or description of goods belonging to one particular class, a trade mark identical with such trade mark, or so nearly resembling the same as to be calculated to deceive (*a*), shall not, without leave of the Court (*b*), be registered in the name of another person as proprietor thereof with respect to any goods in that class.

Originally Rule 18.

(*a*) See § 6 of the Act of 1875.

(*b*) *I. c.* on motion, or application in chambers, or otherwise as the Court shall direct, under Rule 43. Thus, in *Allsopp* v. *Walker* (April 10, 1877), the Master of the Rolls held that the defendants were not entitled to have registered as their trade mark a female hand pointing horizontally, the plaintiff's mark being a man's hand pointing upwards. And see note (*c*) to § 6 of the Act of 1875, *ante*, p. 217. An old trade mark may be registered for part of a class only: *Ex parte Barrows*, W. N. 1877, p. 119; L. J. Notes of Cases, 1877, p. 110.

The original Rule 19 is now cancelled; it was as follows:

Similar trade mark for similar goods not to be registered in two classes.

19. *Where goods may be considered as belonging to two or more classes, and the trade mark has been already registered in respect of such goods as belonging to one particular class, a trade mark identical with such trade mark, or so nearly resembling the same as to be calculated to deceive, shall not, without leave of the Court, be registered in the name of another person as proprietor*

thereof with respect to the same or similar goods as belonging to another class.

Entries to be made in register.

20. Upon registering any trade mark the registrar shall enter in the register the date on which the statement relating to the application for registry was received by the registrar (which day shall be deemed to be the date of the registry) (*a*) and such other particulars as he may think necessary, including the name and address of the proprietor.

(*a*) In cases in which a proposed new mark is refused registration, as being outside of § 10 of the Act of 1875, and another design is substituted for that rejected, the practice is to date the registration from the renewed application.

Notice of registration.

21. The registrar shall send notice to the applicant of the registration of his trade mark, together with a reference, where practicable, to the advertisement of such trade mark in the official paper.

The latter part of this Rule is new.

Trust not to be entered in register.

22. There shall not be entered in the register, or be receivable by the registrar, any notice of any trust, expressed, implied, or constructive.

Registration of subsequent Proprietors.

Registration of assignee or transmittee.

23. The person to whom any registered trade mark has been assigned or transmitted may apply to be registered as proprietor thereof.

See § 2 of the Act of 1875, as to the connexion of the trade mark with the goodwill; and see § 4, as to the position of registered proprietors subsequent to the first.

Production of assignment, &c., by assignee.

24. Where the trade mark has been assigned the person claiming as assignee to be registered shall send to the registrar, with his application (*a*), an assignment by deed executed both by the assignor and assignee (*b*), or a certified copy of such assignment, and a declaration verifying the fact of such assignment having been made (*c*).

The provision in respect to the "certified copy of an assignment" is new.

(*a*) As to the application, see Instructions, p. 268.
(*b*) See Form E, in the Third Schedule.
(*c*) The Declaration is to be in Form D, varying paragraphs 2 and 3. See Instructions, p. 268.

Right of transmittee or his assignee.

25. Where a trade mark has been transmitted by the death of the registered proprietor, the legal personal representative of such proprietor shall be recognised as having the title to the mark.

Where the trade mark has been transmitted by marriage, bankruptcy, or otherwise by operation of law, the person applying as

the transmittee to be registered shall send to the registrar, together with his application, a statement of the manner in which such trade mark has been transmitted, and a declaration (*a*) verifying such statement.

Any transmittee may assign his interest in the mark, notwithstanding that he has not been registered as proprietor thereof (*b*).

(*a*) See Form F, in the Third Schedule.
(*b*) But see § 2 of the Act of 1875, as to connexion with goodwill.

Evidence to be produced on transmission.

26. Where the person applying to be registered claims as the transmittee of any registered proprietor, or as the assignee of a transmittee, there shall be produced to the registrar the following evidence:

(1.) If the business concerned in the goods with respect to which the trade mark is registered is carried on in England or Ireland, then

A. If such transmission has taken place by the death of any person, there shall be produced the probate of the will of such deceased person, or the letters of administration to his estate, or an official extract therefrom; and

B. If such transmission has taken place by the marriage of the female proprietor, there shall be produced a certified copy of the register of such marriage, or other legal evidence of the celebration thereof, and a declaration of the identity of such female proprietor; and

C. If such transmission has taken place by the bankruptcy of the registered proprietor, or otherwise by operation of law, there shall be produced to the registrar such evidence as may, for the time being, be receivable as proof of the title of the applicant; and

(2.) Where the said business is not carried on in England or Ireland,—

There shall be produced similar evidence to that hereinbefore prescribed, or such evidence as would be received as sufficient evidence in the courts of justice of the country or place at which the proprietor carries on business.

Declaration by assignee and transmittee.

27. Every declaration made by an assignee or transmittee shall state his name and address, and that he is entitled to the goodwill of the business concerned in the goods with respect to which the trade mark is registered, or to some part of such goodwill.

See § 2 of the Act of 1875; and Form F, in the Third Schedule.

Assignee, &c., of joint owners.

28. Where two or more persons are registered as joint proprietors of the same registered trade mark, those proprietors, or the survivors or survivor of them, or their or his assignee or transmittee, shall alone be recognised by the registrar as having any title to the mark.

Registration of joint owners as separate owners of separate trade marks.

29. Where divers persons claim to be severally entitled to the goodwill of a business concerned in the goods with respect to which a trade mark has been registered, such persons, or any of them, may, if they all consent thereto, and on the production of the proper evidence, and on payment of the prescribed fee, be registered separately as separate proprietors of such trade mark.

If all of such persons so entitled do not so consent, the registrar shall not, without leave of the Court (*a*), register any of them as separate proprietors of such trade mark.

(*a*) This would be obtained on an application to rectify the register (§ 5 the Act of 1875), made as prescribed by Rule 43.

Continuance of a Trade Mark on the Register.

Removal of trade mark after fourteen years, unless fee paid.

30. At a time not being less than two months nor more than three months before the expiration of fourteen years from the date of the registration of a trade mark, the registrar shall send a notice to the registered proprietor that the trade mark will be removed from the register unless the proprietor pays to the registrar, before the expiration of such fourteen years (naming the date at which the same will expire), the prescribed fee (*a*), and if such fee be not previously paid, he shall at the expiration of one month from the date of the giving of the first notice send a second notice to the same effect, and if such fee be not paid before the expiration of such fourteen years, the registrar may, after the end of three months from the expiration of such fourteen years, remove the mark from the register, and so from time to time at the expiration of every period of fourteen years.

(*a*) *I.e.* £2. See Second Schedule.

Payment of additional fee after expiration of fourteen years.

31. If before the expiration of the said three months the registered proprietor pays the said fee, together with the additional prescribed fee (*a*), the registrar may, without removing such trade mark from the register, accept the said fee as if it had been paid before the expiration of the said fourteen years.

(*a*) *I.e.* £1. See Second Schedule.

Power of Commissioners to restore trade mark.

32. Where after the said three months a trade mark has been removed from the register for non-payment of the prescribed fee, the Commissioners of Patents, or one of them, may, if they are

satisfied that it is just so to do, restore such trade mark to the register on payment of the prescribed additional fee (*a*) and compliance with such conditions as they may think just.

(*a*) *I.e.* £2. See Second Schedule.

Trade mark like one removed not to be registered for five years.

33. Where a trade mark has been removed from the register for non-payment of the fee or otherwise, such trade mark shall nevertheless for five years after the date of such removal be deemed for the purpose of section six of the Act (*a*), and not for any other purpose, to be a trade mark which is already registered.

(*a*) *I.e.* for the purpose of preventing the registration of similar marks.

Removal of trade mark where no business in goods.

34. The Court may, on the application of any person aggrieved (*a*), remove any trade mark from the register on the ground, after the expiration of five years from the date of the registry thereof, that the registered proprietor is not engaged in any business concerned in the goods within the same class as the goods with respect to which a trade mark is registered (*b*).

The words "within—goods" are new.
(*a*) Under Rule 43.
(*b*) See § 5 of the Act of 1875.

Alteration and Rectification of Register.

Alteration of non-essential parts of trade mark.

35. The registered proprietor of any registered trade mark may, by leave of the Court, alter such trade mark, so that he do not alter any one or more of the particulars in such mark which are declared by section ten of the Act to be the essential particulars of a trade mark, and the registrar shall, on payment of the prescribed fee (*a*) and compliance with the requisitions of the registrar as to the deposit of representations of the trade mark as altered, alter the register accordingly.

(*a*) See Second Schedule.

Entry of rectification in register.

36. Where due notice of an order of any Court rectifying the register has been given to the registrar, the registrar shall forthwith, upon a copy of so much of the order as relates to such rectification being left with the registrar, and payment of the prescribed fee (*a*), rectify the register in accordance with the order.

(*a*) See Second Schedule.

Publication of rectification or alteration of register.

37. Wherever the register is rectified or altered in any particular in respect to any trade mark, the registrar shall, if he thinks that such rectification or alteration should be made public, at the expense of any person interested publish, by advertisement or otherwise, and

in such manner as he thinks just, the circumstances attending the rectification or alteration of the register.

Notice to registrar of opposition in any matter.

38. Any person may send, with the prescribed fee, notice to the registrar of his desire to oppose the registration of any assignee or transmittee, or any alteration of the register. The registrar shall give to the applicant for such registration or alteration the like notice (*a*), and may require security for costs (*b*) in like manner as in the case of a notice of opposition to the original registration of a trade mark.

The registrar in such case may, if he think fit, require the parties interested to submit their claims to the Court (*c*).

(*a*) See Instructions, p. 264.
(*b*) See Instructions, p. 265, as to form of Bond.
(*c*) Under Rule 44. Thus, *Allsopp* v. *Walker*, M. R. April 10, 1877.

Alteration of address, &c., in register.

39. If the registered proprietor of a trade mark send to the registrar, together with the prescribed fee (*a*), notice of an alteration in his address, the registrar shall alter the register accordingly.

(*a*) See Second Schedule.

Inspection of Register.

Inspection and copies of register.

40. On such days and during such hours as the registrar may from time to time determine, not being less than three hours on three separate days in a week, any person may, on paying the prescribed fee (*a*), inspect the register of trade marks; and any person may, on paying the prescribed fee (*a*), obtain an office copy of any entry in the register.

(*a*) See Second Schedule.

Certificate by registrar.

41. The registrar when required for the purpose of any legal proceeding or other special purpose to give a certificate (*a*) as to any entry, matter, or thing which he is authorized by this Act, or any of these Rules to make or do, may, on payment of the prescribed fee (*b*), give such certificate, and shall specify on the face of it the legal proceeding or other purpose for which such certificate is granted.

(*a*) See § 8 of the Act of 1875; and § 2 of the Amendment Act of 1876.
(*b*) See Second Schedule.

Application to the Court.

Definition of Court.

42. The Court for the purposes of this Act is hereby declared to be the Chancery Division of Her Majesty's High Court of Justice.

See § 10 of the Act of 1875.

Application to Court.

43. An application to the Court under the Act and these Rules may, subject to Rules of Court under the Supreme Court of Judicature Act, 1875, be made by motion or by application in chambers, or in such other manner as the Court may direct.

See § 5 of the Act of 1875.

In *Ex parte Stephens*, 24 W. R. 819, the registrar having refused to register a trade mark, Sir G. Jessel, M.-R., said that the unsuccessful applicant might apply by motion to rectify the register by inserting his name as proprietor of the trade mark, two clear days' notice being given to the registrar. As to evidence, the application might be supported by applicant's own affidavit stating the facts of the case. See, too, *In re Meikle*, 24 W. R. 1067; and *In re Barrows*, L. R. 5 Ch. D. 353.

Submission to Court of conflicting claims.

44. Where the registrar refuses to comply with the claims of any persons until their rights have been determined by the Court, the manner in which the rights of such claimants may be submitted by the registrar, or, if the registrar so require, by the claimants, to the Court shall, unless the Court otherwise order, be by a special case; and such special case shall be filed and proceeded with in like manner as any other special case submitted to the Court, or in such other manner as the Court may direct.

See § 6 of the Act of 1875. In *Ex parte Grimshaw*, W. N. 1877, p. 24, Vice-Chancellor Hall refused to adopt another mode of proceeding.

Settlement of special case.

45. The special case may be agreed to by the parties, or, if they differ, may be settled by the registrar.

See Instructions, p. 266, for notice to have case stated by registrar. By the Second Schedule the fee is £2.

*Cutlers' Company.**

Time for delivery of old Sheffield marks.

46. The time within which the Cutlers' Company are in pursuance of the Act to deliver to the registrar copies of all Sheffield corporate marks in force at the time of such delivery, shall be the first day of March one thousand eight hundred and seventy-six, or such later day as the Lord Chancellor may fix.

Manner of delivery of old Sheffield marks.

47. Subject to any other directions that may be given by the registrar, the manner in which such copies are to be delivered shall be the sending to the registrar of copies as hereinafter defined of such marks, accompanied by a statement of the names, addresses, and callings of the persons to whom such trade marks have been assigned.

Time for delivery of new Sheffield marks.

48. The time within which the Cutlers' Company are to deliver to the registrar notice of an application to them for assigning any mark or device, with a copy of such mark or device, shall be as

* See § 9 of the Act of 1875.

soon as practicable after the date at which such Company have determined on the mark or device to be assigned.

Manner of delivery of new Sheffield marks.

49. The manner in which such notice and copy shall be delivered to the registrar shall be the sending to the registrar a notice of the application, accompanied by a statement comprising the like particulars as a statement required to be made by an applicant for the registration of a trade mark by the registrar under the Act, so far as such particulars are known to the Cutlers' Company.

Period between notice to registrar and assignment of new Sheffield marks.

50. The period before the expiration of which such mark or device shall not be assigned by the Cutlers' Company, shall be six weeks from the date of sending the said notice to the registrar.

Time for notice of application to register new trade marks to Cutlers' Company.

51. The time within which notice of an application for the registration under the Act of a trade mark as belonging to any particular goods or class of goods specified in section two of the Cutlers' Company's Act, 1860, together with a copy of the trade mark, is to be delivered to the Cutlers' Company, shall be as soon as practicable after the receipt of the application by the registrar.

Manner of giving notice to Cutlers' Company of application.

52. The manner in which such notice is to be given shall be the sending to the Cutlers' Company a copy of the official journal containing the mark of which notice is required to be given, with a note distinguishing such mark.

Time between notice to Cutlers' Company and registration of trade mark.

53. The period from the giving of such notice, before the expiration of which the trade mark is not to be registered, shall be six weeks from the date of sending such notice to the Cutlers' Company.

Time for notice of assignment of mark or registration of mark.

54. The time within which notice of the assignment of any trade mark or device, or the registration of any trade mark, is to be given to the registrar or to the Cutlers' Company (as the case may be), shall be fourteen days after such assignment or registration.

Manner of giving notice of assignment or registration of mark.

55. The manner in which such notice shall be given shall be the sending a notice of such assignment or registration, with sufficient particulars to identify the mark, or device, or trade mark, to the registrar or Cutlers' Company, as the case may be.

Description of copies for purpose of Cutlers' Company.

56. A copy of a trade mark for the purpose of these Rules, when sent by the Cutlers' Company, shall be a drawing or representation of the trade mark, and, subject to any other directions that may be given by the registrar, shall be of a size of not less than three inches square, and shall be upon foolscap paper of such size as aforesaid.

*Cotton Goods.**

Establishment of office for exhibition of cotton trade marks at Manchester.

57. For the purpose of facilitating the granting of trade marks in respect of cotton goods in Classes 23 (*a*), 24 and 25 (*a*), there shall be established by the Commissioners of Patents, and subject to their control, an office at Manchester (*b*) for the exhibition of all devices, marks, headings, labels, tickets, letters, words, or figures, or combinations of letters, words, or figures used in the cotton trade, and in these Rules included under the expression "cotton marks."

(*a*) See the Instructions in respect of applications for registration in Classes 23 and 25, at pp. 267a and 269.

(*b*) This was opened at 48, Royal Exchange, Manchester.

58. (*a*)

(*a*) This rule, which required representations of old cotton marks to be sent to the Manchester office on or before Dec. 1st, 1876, is now annulled, and the time for sending in such representations is regulated by the new rule 58. See p. 240*b*, *infra*.

Committee of experts to be appointed, and to divide cotton marks into two classes.

59. A committee (*a*) of persons versed in the usages of the cotton trade shall be appointed by the Commissioners of Patents, consisting of such number of persons as may from time to time be determined by them; and it shall be the duty of such committee, on or before a time to be named by the Commissioners of Patents, to divide the cotton marks, representations of which have been so sent in to the Manchester office, into two classes, the first class consisting of such of the said cotton marks as are, in the opinion of the committee, trade marks within the meaning of the Act, and the second class, consisting of such of the said cotton marks as are not, in the opinion of the committee, trade marks within the meaning of the Act (*b*).

(*a*) As to the members of the committee, see Instructions, pp. 266-7.

(*b*) In *Ex parte Orr Ewing & Co.*, 26 W. R. 259, V.-C. Hall decided that certain cotton marks which had been placed by the Committee of Experts in the second class, were true trade marks within the Acts, and directed the registrar to proceed with the application to register as if the committee had placed the marks in the first class, and that if and when the applicants would have been entitled to register, had the committee so done, an order for the registrar to register the marks in question might be drawn up in accordance with Rule 62.

Committee to form list of marks sent in to Manchester office.

60. The said committee shall form a list of the cotton marks sent to the Manchester office in each of the aforesaid classes, and shall transmit such lists to the Commissioners of Patents, accompanied by two representations of each of the marks specified in the second class in such list.

* These Rules with respect to cotton goods and marks are all new. And see the Additional Rules. These regulations only apply to cotton marks used before the passing of the Act of 1875. See Instructions, p. 267.

The third representation of each of the marks in the second class in such list shall be retained for reference in the Manchester office.

Marks may be added to list.

61. The Commissioners of Patents may from time to time add to the aforesaid list any cotton marks as they may think just, and such addition shall be deemed to be part of the original list.

Any person claiming to be the proprietor of a cotton mark in Class 1 may apply to be registered.

62. Any proprietor of a cotton mark not specified in the second class in such list (*a*) may apply to be registered as proprietor of such cotton mark in manner and subject to the conditions in which he may apply to be registered as proprietor of any other trade mark, but it shall not be lawful for the registrar to register any person as proprietor of any cotton mark in the second class of the aforesaid list except in pursuance of an order of the Court (*b*).

(*a*) But see *Ex parte Orr Ewing & Co.*, 26 W. R. 259.

(*b*) But a certificate of refusal to register may be obtained under § 2 of the Amendment Act, 1876.

Cotton mark not to be registered except in manner herein prescribed.

63. A cotton mark shall not be registered except in manner and subject to the conditions prescribed by these Rules with respect to the registry of cotton marks.

Declaration and Evidence.

Dispensing with declaration, evidence, &c.

64. In any case in which any person is required under this Act to make a declaration on behalf of himself, or any body corporate, or any evidence is required to be produced to the registrar, the registrar, if satisfied that from any reasonable cause such person is unable to make the declaration, or that such evidence may be dispensed with, may, upon the production of such other declaration or evidence, and subject to such terms as he may think fit, dispense with any such declaration or evidence.

Originally Rule 57.

Manner in which and persons before whom declaration is to be taken.

65. The declarations required by these Rules shall be made and subscribed in the United Kingdom under the authority of the Act of the fifth and sixth years of the reign of King William the Fourth, chapter sixty-two, "to repeal an Act of the present session of Parliament, intituled 'An Act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extra-judicial oaths and affidavits,' and to make other provisions for the abolition of unnecessary oaths," and may be made and subscribed before any justice of the peace, or any commissioner or other officer authorized by law in any part of the United Kingdom to administer an oath for the purpose of any legal proceeding (*a*).

The declaration, when taken out of the United Kingdom, shall

(a.) If made in any part of her Majesty's dominions be made and subscribed before some court, justice, or officer authorized by law in such part of her Majesty's dominions to

administer an oath for the purpose of a legal proceeding (*b*); and,

(b.) If made out of her Majesty's dominions, be made and subscribed before a British consul, vice-consul, or other consular officer (*b*).

Originally Rule 58.

(*a*) See Forms C and F, in the Third Schedule; and Instructions, pp. 257, 270.

(*b*) See Form D; and Instructions, pp. 257, 270.

Notice of seal of officer taking declaration to prove itself.

66. Any document purporting to have affixed, impressed, or subscribed thereto or thereon the seal or signature of any person hereby authorized to take such declaration, in testimony of such declaration having been made and subscribed before him, may be admitted by the registrar without proof of the genuineness of any such seal or signature, or of the official character of such person or his authority to take such declaration.

Originally Rule 59.

Declaration by infant, lunatic, &c.

67. If any person is, by reason of infancy, lunacy, or other inability, incapable of making any declaration or doing anything required or permitted by the Act or these Rules to be made or done by such incapable person, then the guardian or committee, if any, of such incapable person, or if there be none, any person appointed by any Court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing such thing, may make such declaration, or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person, and all acts done by such substitute shall for the purpose of the Act and these Rules be as effectual as if done by the person for whom he is substituted.

Originally Rule 60.

Commissioners of Patents.

Registrar subject to Commissioners of Patents.

68. The registrar, in the exercise of his powers, duties, and discretion under the Act and these Rules, shall be subject to the superintendence of the Commissioners of Patents (*a*), and shall conform in every case to any instructions, directions, orders, or rules (general or special) that may be issued, given, or made by such Commissioners, or any one of them; and he shall in all cases of doubt be entitled to refer to the said Commissioners, or any of them, for instructions.

Originally Rule 61.

(*a*) *I. e.* the Lord Chancellor, the Master of the Rolls, the Attorney-General and the Solicitor-General for England, the Lord Advocate and the Solicitor-General for Scotland, and the Attorney-General and Solicitor-General for Ireland.

In *In re Meikle*, 24 W. R. 1067, Vice-Chancellor Hall refused to interfere with the instructions of the Commissioners; but see *In re Barrows*, L. R. 5 Ch. D. 353—61.

Notices.

Notices to be in writing and served by post.

69. Applications, statements, notices, and documents required by the Act or by these Rules to be served or sent shall be in writing or print, or partly in writing and partly in print, and may be delivered personally, or served and sent by post, and if sent by post shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post; and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was prepaid and put into the post properly addressed.

Originally Rule 62.

Mode of addressing notices.

70. Any application, statement, notice, and document to be served or sent on or to the registrar shall be deemed to be properly addressed if addressed to the Registrar of Trade Marks, at his office; and if required to be served on or sent to the proprietor of any trade mark shall be deemed to be properly addressed if addressed to the registered proprietor at his registered address.

Originally Rule 63.

Construction of Rules.

71. These Rules shall be construed as if they were part of the Trade Marks Registration Act, 1875, as amended by the Trade Marks Registration Amendment Act, 1876, and the said Trade Marks Registration Act, 1875, amended as aforesaid, is in these Rules referred to as "the Act."

Originally Rule 64.

Forms.

72. The Forms in the Third Schedule to these Rules, or such other forms as the registrar may direct, may be used in all cases to which they are applicable.

Originally Rule 65.

CAIRNS, C.

August, 1876.

We, the Commissioners of Her Majesty's Treasury, do hereby assent to the above Rules so far as they relate to fees.

CRICHTON.
R. WINN.

September, 1876.

RULE
AS TO CANCELLING OF AN ENTRY UPON THE REGISTER UPON APPLICATION OF PROPRIETOR.

Whereas by the Trade Marks Registration Act, 1875, the Lord Chancellor is authorized from time to time, with the assent of the Treasury as to fees, to make general rules as to the registry of trade marks, and other matters connected therewith, and also when made, to alter, annul, or vary such rules as in the said Act mentioned:

Now, therefore, I, the Right Honourable Hugh MacCalmont, Baron Cairns, of Garinoyle, in the County of Antrim, Lord High Chancellor of Great Britain, in pursuance of the said Act, and of all other powers enabling me in this behalf, do hereby, in addition to the rules as to the registry of trade marks before made by me, make the following rule:—

The registered proprietor of a trade mark may at any time send to the registrar an application to cancel the entry of such trade mark upon the register; such application to be accompanied by the prescribed fee and by a declaration made by the applicant, stating his name and address, and that he is the person whose name appears upon the register as the proprietor of the said trade mark; and thereupon the registrar may, if satisfied of the truth of the statement made by the applicant, cancel the entry of such trade mark.

CAIRNS.
C.

4th February, 1878.

ADDITIONAL RULE WITH RESPECT TO COTTON GOODS.

Whereas by the fifty-eighth rule of the Trade Marks Rules it is provided as follows :—

"Every person who at the date of the passing of the Act used any cotton mark shall, on or before the first day of December one thousand eight hundred and seventy six, send to the Manchester office three representations of such cotton mark, in such form and with such a description as may be from time to time required by the Commissioners of Patents."

And whereas it is expedient to extend the time for sending into the Manchester office the representations of cotton marks in the said rule mentioned:

Now, therefore, I, the Right Honourable Hugh MacCalmont, Baron Cairns, of Garmoyle in the County of Antrim, Lord High Chancellor of Great Britain, in pursuance of the Trade Marks Registration Act, 1875, and of all powers enabling me in that behalf, do hereby annul the said rule, and direct that there be substituted therefor the following rule; that is to say,

Representations of cotton marks to be sent by owners resident in the United Kingdom on or before Jan. 1, 1877; by owners resident abroad on or before March 1, 1877.

58. Every person who at the date of the passing of the Act used any cotton mark shall, if resident in the United Kingdom, on or before the first day of January one thousand eight hundred and seventy-seven, and if resident elsewhere, on or before the first day of March one thousand eight hundred and seventy-seven, send to the Manchester office (*a*) three representations of such cotton mark, in such form and with such a description as may be from time to time required by the Commissioners of Patents.

CAIRNS.
C.

1*st December*, 1876.

(*a*) It should be noted that in all cases of old cotton marks application *must* be made at Manchester.

ADDITIONAL RULES WITH RESPECT TO COTTON GOODS.

Whereas by the thirteenth, fifteenth, and seventeenth Rules of the Trade Marks Rules provision is made respecting the advertisement in the official paper of facsimiles of trade marks: And whereas such provisions cannot conveniently be applied to cotton goods (*a*) in Classes 23, 24, and 25, referred to in the said Rules.

Now, therefore, I, the Right Honourable Hugh MacCalmont, Baron Cairns, of Garmoyle, in the county of Antrim, Lord High Chancellor of Great Britain, in pursuance of the Trade Marks Registration Act, 1875, and all powers enabling me in that behalf, do hereby direct that the above-mentioned Rules 13, 15, and 17 shall not apply to trade marks in respect of cotton goods in the said classes, and that instead of such Rules there shall apply to the goods aforesaid the Rules following:

Advertisement of cotton marks.

1. As soon as may be after the receipt of an application, made as provided by the Trade Marks Rules, for the registration of a mark in Classes 23, 24, 25 aforesaid, or in any one or more of such classes, the registrar shall insert in the official paper an advertisement of such application, showing the name and address of the applicant, the class in which he applies, the number given to the mark by the registrar, the places in London and Manchester respectively where a specimen of such mark is deposited for exhibition, and distinguishing whether the mark has or has not been used prior to the thirteenth day of August one thousand eight hundred and seventy-five (*b*).

Time of registration of cotton marks.

2. On the expiration of three weeks from the date of the first appearance of the advertisement of a mark in Classes 23, 24, 25, or in any one or more of such classes, in the official paper, the registrar may, if he is satisfied that the applicant is entitled to registration, register such mark in respect of the description of goods for which he may be entitled to be registered, and the applicant as the proprietor thereof, on payment of the prescribed fee.

CAIRNS, *C.*

26th February, 1877.

(*a*) See Rules 57 to 63; and Instructions, pp. 266 and 269.

(*b*) Marks in Class 23 were first advertised in No. 105 of the *Trade Marks Journal*; marks in Class 25, in No. 113. Marks in Class 24 have not yet been advertised.

SCHEDULES.

FIRST SCHEDULE.

CLASSIFICATION OF GOODS.*

	Illustrations.
	Note.—Goods are mentioned in this column by way of illustration, and not as an exhaustive list of the contents of a class.
Class 1.	
Chemical substances used in manufactures, photography, or philosophical research, and anti-corrosives.	Such as— Acids, including vegetable acids. Alkalies. Artists' colours. Pigments. Mineral dyes. Varnish.
Class 2.	
Chemical substances used for agricultural, horticultural, veterinary, and sanitary purposes.	Such as— Artificial manure. Sheep washes. Deodorizers.
Class 3.	
Chemical substances not included in Class 1, used in medicine and pharmacy.	Such as— Tinctures. Extracts. Barks. Patent medicines. Cod-liver oil. Plaisters. Lozenges.
Class 4.	
Raw or partly prepared vegetable, animal, and mineral substances used in manufactures, not included in other classes.	Such as— Resins. Oils, not included in other classes. Dyes, other than mineral. Tanning substances. Fibrous substances (*e. g.* cotton, hemp, flax, jute).

* See Act of 1875, § 2, and Rules 1 to 4.

Class 4 (continued).	*Illustrations.*
	Wool. Silk. Bristles. Hair. Feathers. Cork. Seeds. Bone. Sponge.
Class 5.	
Unwrought and partly wrought metals used in manufacture.	Such as— Iron and steel, pig or cast. „ rough. „ bar and rail, including rails for railways. „ bolt and rod. „ sheets, and boiler and armour plates. „ hoops. „ wire. Lead, pig. „ rolled. „ sheet. Copper. Zinc. Gold, in ingots.
Class 6.	
Machinery of all kinds, and parts of machinery, except agricultural machines included in Class 7.	Such as— Steam engines. Boilers. Pneumatic machines. Hydraulic machines. Locomotives. Sewing machines. Weighing machines. Machine tools. Mining machinery. Fire engines.
Class 7.	
Agricultural and horticultural machinery, and parts of such machinery (*a*).	Such as— Ploughs.

(*a*) This class is only to include the larger implements and machines. See Instructions, p. 259.

Class 7 (continued).	*Illustrations.*
	Drilling machines. Reaping machines. Thrashing machines. Churns. Cyder presses. Chaff cutters.
Class 8.	
Philosophical instruments, instruments and apparatus for useful purposes, or for teaching.	Such as— Gauges. School desks. Logs.
Class 9.	
Musical instruments.	
Class 10.	
Horological instruments.	
Class 11.	
Instruments, apparatus, and contrivances for surgical or curative purposes, or in relation to health.	Such as— Bandages. Friction gloves. Lancets.
Class 12.	
Cutlery and edge tools.	Such as— Knives. Forks. Scissors. Shears. Files. Saws.
Class 13.	
Metal goods not included in other classes (*a*).	
Class 14.	
Goods of precious metals (including aluminium, nickel, Britannia metal, &c.), and jewellery, and imitations of such goods and jewellery.	Such as— Plate. Clock cases and pencil cases of such metals.

(*a*) This includes small agricultural and horticultural implements. See Instructions, p. 259.

Class 14 (continued).	*Illustrations.* Sheffield and other plated goods. Gilt and ormolu work.
Class 15. Glass.	Such as— Window and plate glass. Painted glass. Glass mosaic. Glass for optical purposes.
Class 16. Porcelain and earthenware.	Such as— China. Stoneware. Terra-cotta. Statuary porcelain. Tiles. Bricks.
Class 17. Manufactures from mineral and other substances for building or decoration.	Such as— Cement. Plaster. Imitation marble.
Class 18. Engineering, architectural, and building contrivances.	Such as— Diving apparatus. Warming apparatus. Ventilating apparatus. Filtering apparatus. Lighting contrivances. Drainage contrivances. Electric and pneumatic bells.
Class 19. Arms, ammunition, and stores not included in Class 20.	Such as— Cannon. Small-arms. Fowling-pieces. Swords. Shot and other projectiles. Camp equipage. Equipments.

	Illustrations.
Class 20. Explosive substances.	Such as— Gunpowder. Gun cotton. Dynamite. Fog signals. Percussion caps. Fireworks. Cartridges.
Class 21. Naval architectural contrivances and naval equipments not included in Classes 19 and 20.	Such as— Boats. Anchors. Chain cables. Rigging.
Class 22. Carriages.	Such as— Railway carriages. Waggons. Railway trucks. Velocipedes. Bath chairs.
Class 23. Cotton yarn and thread. See the special Instructions, p. 269.	
Class 24. Cotton piece goods of all kinds. See special Instructions, p. 269.	
Class 25. Cotton goods not included in Classes 23, 24, or 38. See special Instructions, p. 269.	
Class 26. Linen and hemp yarn and thread.	
Class 27. Linen and hemp piece goods.	

	Illustrations.
Class 28.	
Linen and hemp goods not included in Classes 26, 27, and 50.	
Class 29.	
Jute yarns and tissues, and other articles made of jute not included in Class 50.	
Class 30.	
Silk, spun, thrown, or sewing.	
Class 31.	
Silk piece goods.	
Class 32.	
Other silk goods not included in Classes 30 and 31.	
Class 33.	
Yarns of wool worsted, or hair.	
Class 34.	
Cloths and stuffs of wool, worsted, or hair.	
Class 35.	
Woollen and worsted and hair goods not included in Classes 33 and 34.	
Class 36.	
Carpets, floor-cloth, and oil-cloth.	Such as— Drugget. Mats and matting. Rugs.
Class 37.	
Leather and skins, unwrought and wrought.	Such as— Saddlery. Harness. Whips. Portmanteaus. Furs.

	Illustrations.
Class 38.	
Articles of clothing.	Such as— Hats of all kinds. Caps and bonnets. Hosiery. Gloves. Boots and shoes. Other ready-made clothing.
Class 39.	
Paper (except paper hangings), stationery, printing, and bookbinding.	Such as— Envelopes. Sealing wax. Pens (except gold pens). Ink. Playing cards. Blotting cases. Copying presses.
Class 40.	
Goods manufactured from indiarubber and gutta-percha not included in other classes.	
Class 41.	
Furniture and upholstery.	Such as— Paper hangings. Papier-mâché. Mirrors. Mattresses.
Class 42.	
Substances used as food, or as ingredients in food.	Such as— Cereals. Pulses. Olive oil. Hops. Malt. Dried fruits. Tea. Sago. Salt. Sugar. Preserved meats. Confectionery. Oil cakes.

Class 42 (continued).	*Illustrations.*
	Pickles. Vinegar. Beer clarifiers.
Class 43.	
Fermented liquors and spirits.	Such as— Beer. Cyder. Wine. Whisky. Liqueurs.
Class 44.	
Mineral and aerated waters, natural and artificial, including ginger beer.	
Class 45.	
Tobacco, whether manufactured or unmanufactured.	
Class 46.	
Seeds for agricultural and horticultural purposes.	
Class 47.	
Candles, common soap, detergents, illuminating, heating, or lubricating oils, matches, and starch, blue, and other preparations for laundry purposes.	Such as— Washing powders. Benzine collas.
Class 48.	
Perfumery (including toilet articles, preparations for the teeth and hair, and perfumed soap).	
Class 49.	
Games of all kinds. Archery. Fishing tackle. Toys.	Such as— Billiard tables. Roller skates. Fishing nets and lines.

Class 50.

Miscellaneous, including—

(1.) Goods manufactured from ivory, bone, wood, not included in other classes.
(2.) Goods manufactured from straw or grass, not included in other classes.
(3.) Goods manufactured from animal and vegetable substances, not included in other classes.
(4.) Tobacco pipes.
(5.) Umbrellas, walking sticks, brushes, and combs.
(6.) Furniture cream, plate powder.
(7.) Tarpaulins, tents, rick-cloths, rope, twine.
(8.) Buttons of all kinds, other than of precious metal or imitations thereof.
(9.) Packing and hose of all kinds.
(10.) Goods not included in the foregoing classes.

Illustrations.

Such as—

. Coopers' wares (*a*).

(*a*) And also—

Bags, sacks, tarpaulins, rick-cloths, cart-covers, tents, brattice-cloths.
Brushes (except artists' brushes) and combs.
Buttons of all kinds, other than of precious metals or imitations thereof.
Cordage, rope, twine.
Drinking-flasks, not of precious metals or imitations thereof.
Fuel (patent and artificial).
Furniture cream, plate powder, diamond cement, polishing paste.
Grindstones, oilstones, hones, emery.
Hose.
Knapsacks.
Preparations for softening leather.
Rugs (described in the Statement as "not included in Class 36").
Steam packing.

See Instructions, p. 259.

GENERAL NOTE.

Any wares made of mixed materials (for example, of both cotton and silk) shall be included in such one of the classes appropriated to those materials as the registrar may decide.

SECOND SCHEDULE.

FEES.

The following fees shall be payable to the registrar on or for the following occasions or purposes:

	£	s.	d.
1. On application to register one trade mark for one or more articles included in one class - - - - -	1	0	0
2. On application to register more than one trade mark for one or more articles included in one class, for each additional trade mark after the first - - - - - - -	0	10	0
3. On application to register a trade mark in respect of goods in different classes, for every class after the first to which such trade mark is extended, an additional fee of - - -	0	2	0
4. For registration of one trade mark - - - - -	1	0	0
5. Where the same person is registered at the same time for more than one trade mark, for registration of each additional mark after the first - - - - - - - -	0	10	0

	£	s.	d.
6. Where the same person is registered at the same time for the same trade mark in respect of goods in different classes, for the registration of one mark in each class after the first an additional fee of - - - - - - -	0	2	0
7.(*b*) For entering notice of opposition, for each trade mark, whether in one or more classes - - - - -	2	0	0
8.(*a*) For registering subsequent proprietor in cases of assignment or transmission, the first mark - - - - -	1	0	0
And for every additional mark assigned or transmitted at the same time - - - - - - - -	0	2	0
9. For altering address on the register - - - - -	0	5	0
10. For every entry in the register of a rectification thereof or an alteration therein, not otherwise charged - - -	0	10	0
11. For continuance of mark at expiration of fourteen years -	2	0	0
12. Additional fee where fee is paid within three months after expiration of fourteen years - - - - - -	1	0	0
13. Additional fee for restoration of trade mark when removed for non-payment of fee - - - - - - -	2	0	0
14.(*a*) For certificate of registration to be used in legal proceedings	1	0	0
15. For inspecting register, for every quarter of an hour - -	0	1	0
16. For office copy of documents, 2*d.* per folio, but never less than -	0	1	0
17. Settling a special case by registrar - - - - -	2	0	0
18.(*a*) For certificate of registration to be used for the purpose of obtaining registration in foreign countries - - -	0	5	0
19.(*a*) For copy of notification of registration - - - -	0	2	0
20.(*a*) In cases where a trade mark requires a greater space than two inches of the depth of the page of the *Trade Marks Journal*, for each additional inch or part of an inch - -	0	2	6
21.(*b*) For certificate of refusal to register a trade mark under section 2 of 39 & 40 Vict. c. 33 - - - - - -	1	0	0
22.(*b*) For certificate of refusal, at the same time, for more than one trade mark, for each additional mark after the first - -	0	10	0
23.(*c*) For cancelling the entry of a trade mark upon the register, on the application of the owner of such trade mark - -	0	5	0

Note.—If a copy of a trade mark is required for any purpose, such copy shall be supplied by or at the expense of the applicant.

Approved

CRICHTON.

R. WINN.

CAIRNS.

C.

4th February, 1878.

(*a*) 14th March, 1877. (*b*) 25th June, 1877. (*c*) 4th February, 1878.
The remaining items were sanctioned by the Treasury in September, 1876.

THIRD SCHEDULE.

FORM A.

FORM OF STATEMENT ON APPLICATION FOR REGISTRATION OF ONE TRADE MARK.

I * [*John Jones, of Moon Street, in the town of Birmingham, pharmaceutical chemist*], apply to be registered as proprietor of a trade mark † [*being a goat's head and neck with a gold collar attached thereto*], and which is represented in the paper annexed hereto.

I desire that the said trade mark may be registered in respect of the description of goods following, contained in [*Class* 1, *that is to say,* ‡ *acids, including pigments, mineral dyes*].

I have used the said trade mark in respect of the said goods for [*ten*] years before the 13th of August, 1875.§

‖ The day of 187 .

(Signed) *John Jones.*¶

* Here insert name, address, and calling of the applicant.
† Here insert in writing description of trade mark.
‡ Here insert description of the goods, and the class or classes under which the applicant desires to have them registered.
§ This paragraph may be omitted if the trade mark was not used before the 13th of August, 1875.
‖ Here insert date.
¶ Here insert signature.

FORM.

FORM OF STATEMENT ON APPLICATION FOR REGISTRATION OF MORE THAN ONE TRADE MARK.

I * [*John Jones, of Moon Street, in the town of Birmingham, pharmaceutical chemist*], apply to be registered as proprietor of the following trade marks, numbered from "1" to .

The trade marks are described as follows; that is to say,

No. 1 is †

and is represented on paper 1, annexed hereto.

No. 2 is †

and is represented on paper 2, annexed hereto [*and so forth*].

I desire that the said trade marks may be registered in respect of the descriptions of goods following; that is to say,

As to No. 1, in respect of the following goods contained in Class ‡

As to No. 2, in respect of the following goods contained in Class ‡ [*and so forth*].

§ I have used the trade marks numbered [*respectively*] and in respect of the goods for which I desire them to be registered for years before the 13th of August, 1875.

‖ The day of 187 .

(Signed) *John Jones.*¶

* Here insert name, address, and calling of the applicant.
† Here insert in writing description of trade mark.
‡ Here insert description of the goods and the class or classes under which the applicant desires to have them registered.
§ This paragraph may be omitted if the trade marks were not used before the 13th of August, 1875.
‖ Here insert date.
¶ Here insert signature.

FORM C.

FORM OF DECLARATION TO ACCOMPANY STATEMENT ON APPLICATION FOR REGISTRATION OF ONE TRADE MARK.

I *A.B.* of
do hereby solemnly and sincerely declare, to the best of my knowledge and belief, as follows:

(1.) The statement signed by me and dated the day of , and marked with the letter "A," and shown to me at the time of making this declaration is true:

(2.) The description of the trade mark in such statement is a true description of the trade mark for the registration of which I apply:

(3.) I am lawfully entitled to the use of the trade mark of which the said description is a true description.

And I make this declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the session of Parliament held in the fifth and sixth years of the reign of his late Majesty King William the Fourth, intituled, "*An Act to repeal an Act of the present session of Parliament, intituled 'An Act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extra-judicial oaths and affidavits, and to make other provisions for the abolition of unnecessary oaths.'*"

(Signed) *A.B.*

Declared before me

NOTE.—*The above Form will require to be altered so as to suit an application for the registration of more than one trade mark.*

FORM D.

FORM OF DECLARATION* TO ACCOMPANY STATEMENT ON APPLICATION FOR REGISTRATION OF ONE TRADE MARK.

* This form is to be used when the declaration is made out of the United Kingdom.

I *A.B.* of
do hereby solemnly and sincerely declare, to the best of my knowledge and belief, as follows:

(1.) The statement signed by me, and dated the day of , and marked with the letter "A," and shown to me at the time of making this declaration is true:

(2.) The description of the trade mark in such statement is a true description of the trade mark for the registration of which I apply:

(3.) I am lawfully entitled to the use of the trade mark, of which the said description is a true description.

(Signed) *A.B.*
Declared before me

NOTE.—*The above Form will require to be altered so as to suit an application for the registration of more than one trade mark.*

FORM E.

FORM OF ASSIGNMENT OF TRADE MARK.

Trade mark, Class*
Name
Place of business

* Here enter number or other means of identifying trade mark in register.

I† *A.B.* of in the county of being registered proprietor of the trade mark above particularly described, in consideration of pounds paid to me by *E.F.*, carrying on business at in the county of under the firm of *F. & Co.*, hereby assign the said trade mark to the said *E.F.*, together with the goodwill of the business concerned in the goods with respect to which the trade mark is registered.

† Alter as necessary if there be more than one proprietor.

In witness whereof I have hereunto subscribed my name and affixed my seal, this day of 18 .

(Signed)
Executed by the above-named *A.B.*,
in the presence of
[*insert description and place of residence*].
Executed by the above-named *E.F.*,
in the presence of

FORM F.

DECLARATION BY TRANSMITTEE APPLYING TO BE REGISTERED AS PROPRIETOR.

Trade mark, Class , No. .*
Name of owner
Firm
Place of business

* Here enter number or other means of identifying trade mark in register.

(1.) I,* the undersigned *A.B.* of in the county of , † carrying on business at in the county of declare as follows:

* Alter accordingly if more than one person makes the declaration.

† Alter according to circumstances.

I declare that *A.B.*, the registered proprietor of the trade mark above described † [died at in the county of , having first made his will, dated the day of whereby he appointed me executor, and I proved [*or* confirmed] his said will on the day of in the Court of], *or* [died at in the county of on the day of , intestate, and letters of administration of his estate and effects were [confirmation as executor of the said was] on the day of duly granted to me by the Court of]:

Or,

I declare that [the estate of] *C.D.*, the registered proprietor of the trade mark above described, was, on the day of duly‡ [adjudged a bankrupt] [sequestrated], and that I was on the day of appointed trustee of the [sequestrated] estate of the said *C.D.*, and I am by law entitled to be registered as proprietor of the said trade mark in place of the said *C.D.*:

‡ Alter according to circumstances.

Or,

I declare, that on the day of I intermarried with and am now the husband of *C.D.*, the registered proprietor of the trade mark above described; and § I declare that on such marriage the interest of the said *C.D.* in the said trade mark and in the goodwill of the business concerned in the goods with respect to which the trade mark is registered, became by law vested in me, and that I am entitled to be registered as owner of the said trade mark in place of the said *C.D.*, and I declare that *C.D.* is the person referred to in the annexed certificate.

§ Alter according to circumstances

(2.) I am lawfully entitled to the goodwill ‖ of the business concerned in the goods with respect to which the trade mark so transmitted to me is registered.

‖ If the declarant is entitled only to some share in the goodwill, the share must be specified.

And I make this declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the session of Parliament held in the fifth and sixth years of the reign of his late Majesty King William the Fourth, intituled "An Act to repeal an Act of the present session of Parliament, in-

tituled, 'An Act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extra-judicial oaths and affidavits, and to make other provisions for the abolition of unnecessary oaths.'"

(Signed)

Dated at the
day of 18 .
Made and subscribed by the above-named
A.B., in the presence of me
(Signed)

INSTRUCTIONS TO PERSONS APPLYING FOR THE REGISTRATION OF TRADE MARKS.

APPLICATIONS.

Applications may be made either on printed forms or altogether in writing, and may be delivered by hand, or sent, prepaid, by post. If by post, they should be addressed to

The Registrar,
Trade Marks Registry Office,
4, Quality Court,
Chancery Lane,
London, W.C.

The attention of applicants is called to the following points:

1. The papers necessary for the preparation of an Application to the Trade Marks Registry Office are:

(*a.*) The Statutory Declaration.
(*b.*) The Statement on Application.
(*c.*) Two Representations of each trade mark.

Specimen forms of Statement on Application and of the Declaration will be found at pages 25–6 (*a*) of the Rules under the Trade Marks Registration Acts, 1875–6. The applicant should carefully read over Nos. 3–11 of those Rules, and should attend to the notes attached to the forms above referred to.

2. *All applications must be made in the English language.*

3. Agents and other persons who may be interested in several applications should note that communications relating to different applications must be made in separate letters.

Persons acting as agents should write their name and address on the back of the Application papers.

(*a*) See pp. 252–3, *supra*.

The Declaration.

FORM C. (*See* Rules, p. 44) (*a*).

4. Declarations made *in the United Kingdom* are made under the authority of the Act 5 & 6 Will. IV. cap. 62 (*see* Rule 65), and should conclude in the form set out in that Act, viz., "And I make this declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the session of Parliament held in the fifth and sixth years of the reign of his late Majesty King William the Fourth, intituled 'An Act to repeal an Act of the present session of Parliament, intituled "An Act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extra-judicial oaths and affidavits, and to make other provisions for the abolition of unnecessary oaths."'"

5. The Declaration must be made before a justice of the peace or before a commissioner for administering oaths (*see* Rule 65). If made before a commissioner it should bear a 2*s*. 6*d*. Inland Revenue *impressed* stamp.

6. Declarations made *out of the United Kingdom* are not made under the authority of the Act 5 & 6 Will. IV. cap. 62, and should not conclude with the statutory termination above quoted, but should be made strictly in accordance with Form D of the Third Schedule of the Rules (*a*); such Declarations do not require an Inland Revenue stamp.

7. Declarations made *out of her Majesty's dominions* may, in cases where it is impracticable to make them before a British consular officer, be subscribed before a mayor or other public official, whose signature or official seal must, however, be certified by a British consular officer, or by the consul of the respective foreign nation in London.

8. The Declaration, and the Statement on Application, should contain the full name, address, and calling of the applicant, and should bear the ordinary signature of the person by whom made. The trading name under which the business is carried on must also in every case be given.

9. When the trade mark to which an application relates is the property of a *firm*, the Declaration and the Statement should be made by *one member* of the firm, and should be signed by him *alone*.

The Declaration should in such a case commence as follows:

"I of the firm of of , *." * Here insert trade or business.

And the first words of the third paragraph should be altered from "I am lawfully, &c.," to "My said firm are lawfully, &c."

The Statement on Application should commence as follows:

(*a*) See p. 253, *suprd.*

"I of and on behalf of the firm of of , * apply that the said firm may be registered as proprietors of the following trade mark, &c."

* Here insert trade or business.

And the words at the foot of the Statement, "I have used the said trade mark, &c.," should then be altered to, "My said firm have used the said trade mark, &c."

10. When the trade mark is the property of a *company*, the Declaration and the Statement should be made by the managing director, or by the secretary of the company, and should be signed by him *alone*. The Declaration and Statement on Application in such cases should be worded in a manner similar to that set out above for a firm, except that the words "Managing Director [*or* Secretary] of" should be used at the head of the Declaration, and the words "Managing Director [*or* Secretary] of and on behalf of" at the head of the Statement.

11. In filling up the first paragraph of the Declaration the date in full of the Statement on Application should be accurately quoted; and the blank spaces of the jurat clause at the foot of the Declaration should also be carefully filled up.

NOTE.—*All alterations or erasures in the Declaration must be initialled by the Authority before whom the same is declared.*

The Statement on Application.

FORM A or B. (*See* Rules, p. 44) (*a*).

12. The Statement should be certified as an exhibit to the Declaration by the authority before whom the latter document is declared.

13. The name of the person making the Declaration should be inserted in the certifying clause at the foot of the Statement, and the other blank spaces of this clause should also be carefully filled up.

14. The statement should give an accurate description of the mark, specifying any words, devices, or other things forming a conspicuous part of the mark. It should also specify *separately for each class* the description or descriptions of goods in respect of which the registration of the mark is applied for.

15. Ornamental or coloured groundwork, such as plaids or checks, cannot be claimed as part of a mark, unless such groundwork be included within the mark by some border or lines, which border or lines should be referred to in the description of the mark.

16. Where part of a label or mark consists of words or figures which vary with the different goods or qualities of goods to which the mark is applied, these variable parts should not be set out in the description of the mark, but should be referred to in general terms as "printed matter," or as "other words referring to the goods to which the mark is applied," in which case these parts may appear in the representations in one variety, or the applicant may leave these parts of the mark or label blank, describing the blank

(*a*) See p. 252, *suprà*.

spaces as "to be filled according to the quality or description of the goods with printed matter," or "to be filled with other words, referring to the goods to which the mark is applied," as above.

17. Terms or symbols common to a trade, such as, in the iron trade, the words "best," "best, best," "charcoal," "coke," "plating," "scrap," and representations of a crown or horse-shoe, or, in the wine and spirit trade, representations of vine leaves, grape clusters, stars, or diamonds, are not trade marks or parts of trade marks within the meaning of the Trade Marks Registration Act, 1875, and must not be shown upon representations of new marks; and where such terms or symbols have been used in combination with trade marks before the passing of that Act, they must be disclaimed in the Statement on Application as being "terms" or "symbols," as the case may be, "common to the trade concerned in the goods."

18. It is not intended to place upon the register under the Trade Marks Registration Act, 1875, a series of trade marks which differ *from one another only in respect of indications of quality* or quantity commonly used in a trade. Protection for the whole of such a series of marks will be obtained by the registration of *one* of the series, the description of which mark in the Statement on Application should be so worded as to include a reference to the common elements in combination with which it is used by the applicant.

For instance, if a manufacturer of iron is in the habit of using a number of combinations of a certain device together with a crown, a horse-shoe, the words "best," "best, best," "charcoal," or any other common indications of quality, he should include them in one description by the addition, after the description of the device which is private property, of words such as the following: "*used in combination with a crown, a horse-shoe, a crown and a* horse-shoe, or other mark, device, or word or words, commonly used by the trade to signify quality" (*a*).

19. Applications for the registration of trade marks in Class 7 should only be made in respect of the larger kinds of agricultural and horticultural implements and machines and parts of the same; for all the smaller descriptions of metal implements, such as gardening, draining, excavating, and mining tools, other than with a cutting edge, application should be made in Class 13.

20. Marks for the under-mentioned goods should be claimed in Class 50:

Bags, sacks, tarpaulins, rick-cloths, cart-covers, tents, brattice cloth.

Brushes (except artists' brushes) and combs.

Buttons of all kinds, other than of precious metals or imitations thereof.

(*a*) See *In re Barrows*, L. R. 5 Ch. D. 353.

Cordage, rope, twine.
Coopers' wares.
Drinking flasks, not of precious metals or imitations thereof.
Fuel (patent and artificial).
Furniture cream, plate powder, diamond cement, polishing paste.
Grindstones, oilstones, hones, emery.
Hose.
Knapsacks.
Preparations for softening leather.
Rugs (described in the Statement as "not included in Class 36").
Steam packing.

NOTE.—*All alterations or erasures in the Statement on Application must be initialled by the Authority before whom the Declaration is made.*

The Representations.

21. The Representations accompanying an application must be sent *in duplicate*, each Representation of each mark upon a separate half sheet of foolscap paper, and with a margin of not less than one inch and a half on the left-hand side of the page. The two Representations of each mark must in all cases be *exactly* similar.

22. Representations of a larger size than foolscap may be folded, but all such Representations must be mounted on linen.

23. Representations should be not only of a durable nature, but of such a kind as will admit of their being preserved, and bound together in volumes, as records of the property of the applicants.

24. No Representation or part of a Representation supplied for the purposes of registration should be in pencil.

25. The words "Registered," "Copyright," "Entered at Stationers' Hall," "To counterfeit this is forgery," will not be registered under the Trade Marks Registration Act, 1875, and should, therefore, not appear upon the Representations annexed to the Application, nor should any reference to such words be made in the description of a mark given in the Statement on Application.

MARKS NOT USED BEFORE THE PASSING OF THE TRADE MARKS REGISTRATION ACT, 1875 (13*th August*, 1875).

26. The definition of a trade mark not used prior to the passing of the Trade Marks Registration Act, 1875, is given in the 10th section of that Act, as follows:

"A trade mark consists of one or more of the following essential particulars; that is to say,

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

"A written signature or copy of a written signature of an individual or firm; or

"A distinctive device, mark, heading, label, or ticket."

All marks, therefore, which it is desired to register, and which were not used prior to the 13th August, 1875, *must include one or more of the above essential particulars.*

The 10th section goes on—"and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures."

27. *The following devices and words will not be registered as new marks or parts of new marks:*

Representations of her Majesty the Queen, or of any member of the Royal Family, or of foreign sovereigns.
Royal or national arms, crests, or mottoes.
Representations of the Royal crown or of national flags.
Arms of counties, cities, and boroughs in the United Kingdom.
Prize or exhibition medals.
The words "trade mark," "patent," "warranted," "guaranteed."
Words implying a guarantee of the special quality of the goods to which the mark is applied, such as "best," "pure," "genuine," "excellent."

Notice.—Considerable disappointment and expense arise from applications to register as new trade marks, marks which, though distinctive in themselves, nearly resemble marks already registered. It is desirable, therefore, that persons wishing to adopt new marks should, before engraving blocks and circulating impressions of such marks among their customers, make a search at the Trade Marks Registry Office with the view of ascertaining whether their proposed mark is already registered, or whether, from its being calculated to deceive by a resemblance to other marks already in use, it would be refused registration under the 6th section of the Trade Marks Registration Act, 1875 (38 & 39 Vict. cap. 91). The fee for inspecting the register is one shilling per quarter of an hour.

Persons resident in the country may cause a search to be made for them at the Trade Marks Registry Office, as to any trade mark, or proposed trade mark, by forwarding to the Office a copy of the mark, accompanied by a Post-office order for the fee of one shilling, and a statement of the class or classes of goods to which the mark is applied.

Fees.

28. Fees will not be received in cash. They may be paid by a Post-office order payable to H. Reader Lack, at the General Post-office, London, and *crossed;* or, if they exceed five pounds, may be paid by a cheque drawn to the "Registrar of Trade Marks, or Bearer," and *crossed* "Bank of England."

29. The following are extracts from the Schedule of Fees annexed to the Rules under the Trade Marks Registration Acts, 1875–77:

	£	s.	d.
(i.) On application to register one trade mark for one or more articles included in one class -	1	0	0

	£	s.	d.
(ii.) On application to register more than one trade mark for one or more articles included in one class, for each additional trade mark after the first - - - - - -	0	10	0
(iii.) On application to register a trade mark in respect of goods in different classes, for every class after the first to which such trade mark is extended, an additional fee of - - - -	0	2	0
(iv.) For registration of one trade mark - -	1	0	0
(v.) Where the same person is registered at the same time for more than one trade mark, for registration of each additional mark after the first - -	0	10	0
(vi.) Where the same person is registered at the same time for the same trade mark in respect of goods in different classes, for the registration of one mark in each class after the first an additional fee of -	0	2	0

The fees referred to in the above paragraphs, iv., v., and vi., viz., the fees for final *registration*, as distinct from the fees payable *on application*, should *not* be paid at the time of making the application. Notice will be sent when the fees for registration are required.

30. Each application should be accompanied by a memorandum upon paper of foolscap size (to which the Post-office order or cheque should be fastened), setting forth the name, address, and business of the applicant, and the amount of fees remitted; for example,— *Messrs. John Jones & Co.,*
Moon Street,
Birmingham,
Chemists.

Fees on Application.

	£	s.	d.
One trade mark in Class 4 - - - - -	1	0	0
or			
Two trade marks in Class 4 - - - - -	1	10	0
or			
Twenty trade marks in Class 47 - - - -	10	10	0
or			
One trade mark in Classes 5, 6, and 7 - - -	1	4	0
or			
Two trade marks, both to be registered in Classes 5, 6, and 7 - - - - - - -	1	18	0
or			
Two trade marks, one to be registered in Class 12, the other in Class 13 - - - -	2	0	0

An application will not be attended to unless it be accompanied by the proper fees.

ADVERTISEMENTS IN THE TRADE MARKS JOURNAL.

31. A wood-block or electrotype must be furnished for each mark in each class (except in the case of cotton marks, classes 23, 24, 25), even though the mark consists only of a word or of words.

32. Great inconvenience and delay arise from neglect of the requirement that the wood-blocks or electrotypes furnished must correspond *exactly* with the representations annexed to the application, one of which latter is returned for the guidance of the applicant along with the instructions for advertisement. The blocks must also afford distinct impressions of the marks. Worn, battered, or mutilated blocks cannot be accepted.

33. The blocks and electrotypes need not be larger than is required to show the mark in a distinct manner; and, provided the mark is clearly represented, it is not necessary that it should be on a block two inches square.

The largest space available for the representation of any single mark is eight and a half inches broad by ten inches deep.

When a block or electrotype exceeds two inches in depth, a charge for additional space is made, at the rate of two shillings and sixpence for every inch or part of an inch beyond the two inches.

No block should exceed two inches in *breadth*, unless a larger size is necessary in order to show the mark distinctly.

34. The number given by the registrar should *not* be cut on the face of the block or electrotype, but should only be marked upon the side in such a manner as to secure its identification.

A description of the manner in which the mark is applied should not be cut upon the block.

35. All blocks or electrotypes should be sent to the office of the registrar, together with the papers marked "Form 2" (*a*), and with the copy of the Representation sent for the guidance of the applicant in preparing the blocks.

It would greatly facilitate the compilation of the *Trade Marks Journal* if each applicant would affix an impression of the mark from the block, as cut for the Journal, to the "Form 2," before forwarding it to the Trade Marks Registry Office.

OPPOSITIONS.

36. Any person who claims as his own, or as part of his own, a trade mark for which application has been made by another person, should, on seeing such application advertised in the *Trade Marks Journal*, send to the registrar a notice (*in duplicate*) of opposition under Rule 16, setting out the particulars indicated in the form given below.

A separate notice of opposition is necessary in respect of *each* trade mark opposed.

(*a*) Form 2 is a form filled up at the Registry Office with the particulars intended to be inserted in the advertisement of a mark, and issued to the applicant for registration, by whom it has to be initialled and returned to the Office, together with the block or electrotype properly prepared.

Each notice of opposition should be accompanied by the prescribed fee, viz., £2.

Upon receipt of a notice of opposition, the registrar suspends the registration of the trade mark in question, and transmits one copy of the notice to the applicant, who is required within three weeks to deliver a counter statement (*in duplicate*) of the grounds on which he relies for his application.

A separate counter statement is necessary in respect of *each* trade mark opposed.

Upon delivery of the counter statement, the registrar requires the opponent to give security for such costs as may be awarded in respect of the opposition; and the applicant is afforded an opportunity of objecting to the solvency of the security.

If no objection is made to the security given, the registrar requires the opponent, within a period of six weeks, to take the necessary steps to bring the matters in dispute before the Chancery Division of the High Court of Justice, and to give him notice that such steps have been taken.

37. The manner in which the opponent should give the registrar notice that an opposition matter has been duly brought before the Court is by delivering at the Trade Marks Registry Office a copy of the notice of motion or of the summons which has been, within the six weeks referred to above, served upon the applicant, which copy of notice of motion or of summons must bear an indorsement of service, signed by the opponent's solicitor.

38. The registrar is empowered under Rule 45, on receiving a notice from the parties in an opposition matter that they wish to have a finding from him on certain matters of fact before taking the opinion of the Court on certain questions of law, and on payment of 1*l.* each by the parties, to examine the facts alleged in the presence of both parties or their agents, and to state a case on which to obtain the opinion of the Court.

39. The following forms indicate the particulars which the registrar requires to be furnished in the case of oppositions under Rule 16:

Form of Notice of Opposition.

Trade Marks Registration Act, 1875.

In the Matter of an Application, No.
by of .
To the Registrar of Trade Marks.

I, , of , hereby give notice that I oppose the registration of the trade mark advertised under the above number for Class , in the *Trade Marks Journal* of the day of 187 , No. , page .

The grounds of opposition are as follows:

(*To be dated and signed by the opponent or his solicitor.*)

Form of Counter Statement.

Trade Marks Registration Act, 1875.

In the Matter of an Application, No. ,
and of the opposition thereto, No.
To the Registrar of Trade Marks.

In reply to the notice of opposition in this matter by of , I give notice by way of counter statement that I rely for my application on the following grounds:

(*To be dated and signed by the applicant or his solicitor.*)

Form of Bond.

The following is suggested as a Form of Bond such as the registrar would be able to accept from persons opposing applications, and who have been required to give security for costs:

Trade Marks Registration Act, 1875.

In the Matter of an Application, No. ,
and of the opposition thereto, No.

Know all men by these presents that we of and of are jointly and severally held and firmly bound to Henry Reader Lack the Registrar of Trade Marks in the penal sum of pounds of good and lawful money of Great Britain to be paid to the said Henry Reader Lack or to other the Registrar of Trade Marks for the time being for which payment to be well and faithfully made we bind ourselves and each of us our and each of our heirs executors and administrators firmly by these presents Sealed with our seals.

Dated this day of 18 .

Whereas pursuant to the provisions of the Trade Marks Registration Act 1875 and the General Rules made thereunder by the Lord Chancellor an application (No.) has been made by of to the Registrar of Trade Marks for the registration of a certain trade mark in such application particularly described And whereas the above-bounden have delivered a notice of opposition to such registration and the said have sent to the said registrar a counter statement of the grounds on which they rely for their application And whereas the said registrar pursuant to the said General Rules hath required the said to enter into the above-written obligation (subject to the condition hereinafter contained) as security for such costs as may be awarded in respect of such opposition.

Now the condition of the above-written obligation is such that if the said or either of them their or either of

their heirs executors or administrators do and shall well and truly pay or cause to be paid to all such costs as the High Court of Justice shall think fit to award to the said in respect of the said opposition then the above-written obligation is to be void or else to remain in full force and virtue.

Signed sealed and delivered by the above-bounden and in the presence of . }

Notice to have Case stated by Registrar under Rule 45.

In the Matter of the Opposition, No. to the Application, No.

Sir,

Notice is hereby given that I , the opponent in this matter, and I , the applicant, are unable to agree upon the facts on which the opinion of the Court is to be taken in pursuance of Rule 44, and that we request you to fix a day on which we can attend before you and obtain your finding on the matters of fact to be submitted to the Court as settled.

(*To be dated and signed by the parties or their solicitors.*)

To the Registrar of Trade Marks,
Trade Marks Registry Office,
4, Quality Court, Chancery Lane,
London, W.C.

The Manchester Branch of the Trade Marks Registry Office.

40. For the convenience of merchants and manufacturers engaged in the cotton trade, a Branch of the Trade Marks Registry Office was opened at 48, Royal Exchange, Manchester, on the 24th October, 1876.

Mr. Joseph Fry has been appointed by the Commissioners of Patents as keeper of the Manchester Office.

41. The following gentlemen have been appointed by the Commissioners of Patents to form the Committee of Experts under Rule 59 of the Rules under the Trade Marks Registration Acts :—

Edmund Ashworth, Esq., President of the Chamber of Commerce, Manchester.

John Cheetham, Esq., Vice-President of the Chamber of Commerce, Manchester.
A. Bernus, Esq.
Chas. S. Carlisle, Esq.
James Chapman, Esq.
W. F. Danson, Esq.
B. Davies, Esq.
George R. Davies, Esq.
S. A. Fulda, Esq.
F. Goldschmidt, Esq.
C. P. Henderson, jun., Esq.
A. J. Hunter, Esq.
H. J. Leppoc, Esq.
G. Lord, Esq.
J. W. D. Mather, Esq.
E. Crompton Potter, Esq.
E. Reiss, Esq.
S. P. Schilizzi, Esq.
H. M. Steinthal, Esq.
E. H. Sykes, Esq.
A. Wallace, Esq.

42. The following Rules have been issued, under date the 26th February, 1877, with respect to the advertisement and time of registration of trade marks in Classes 23, 24, and 25:

Advertisement of cotton marks.

(1.) As soon as may be after the receipt of an application, made as provided by the Trade Marks Rules, for the registration of a mark in Classes 23, 24, 25 aforesaid, or in any one or more of such classes, the registrar shall insert in the official paper an advertisement of such application, showing the name and address of the applicant, the class in which he applies, the number given to the mark by the registrar, the places in London and Manchester respectively where a specimen of such mark is deposited for exhibition, and distinguishing whether the mark has or has not been used prior to the thirteenth day of August one thousand eight hundred and seventy-five.

Time of registration of cotton marks.

(2.) On the expiration of three weeks from the date of the first appearance of the advertisement of a mark in Classes 23, 24, 25, or in any one or more of such classes in the official paper, the registrar may, if he is satisfied that the applicant is entitled to registration, register such mark in respect of the description of goods for which he may be entitled to be registered, and the applicant as the proprietor thereof, on payment of the prescribed fee.

43. Pending the conclusion of the labours of the Manchester Committee of Experts in regard to *old* cotton trade marks, and with the object of sparing to the inventors of *new* cotton marks—that is to say, marks designed since the 13th August, 1875 and intended to be applied to goods in classes 23, 24, or 25—the

expense of making formal application to the Registrar's Office in London for marks which it may be subsequently found are not entitled to registration, the Commissioners of Patents have given their consent to the following arrangement :—

Persons having designs for *new* cotton marks shall be allowed to deposit at the Manchester branch duplicate copies of such marks *under cover*, to remain unopened until the Committee of Experts shall have completed the examination of *old* trade marks applied for in the cotton classes.

Each of the two copies of each mark deposited should be mounted upon a separate half sheet of foolscap paper.

Every packet containing such designs should be *sealed* and addressed to

The Keeper,
Trade Marks Registry Office,
(Manchester Branch)
48, Royal Exchange,
Manchester.

The name and address of the depositor, and the words "Designs for New Cotton Trade Marks," should be written conspicuously upon the packet.

It will nevertheless be open to inventors of new cotton marks, if they prefer it, to make formal application for the registration of such marks to the Registrar's Office in London, but such application must in every case be accompanied by the proper fees.

Applications for Cotton Marks.

44. The statement on application for the registration of trade marks in the cotton classes (classes 23, 24 and 25), may be prepared according to a form which differs slightly from the Forms A and B as given in the Third Schedule to the Rules, and which requires no description of the marks.

The following is an example :—

Form B (*a*).

I, *John Jones, of and on behalf of the firm of John Jones & Co., of* 55, *Moon Street, in the City of Manchester, Merchants,* apply that the said firm may be registered as proprietors of the following trade marks, which are represented respectively on the several papers annexed hereto ; that is to say,—

No. 1, on papers "1 ;"
No. 2, on papers "2 ;"
No. 3, on papers "3."

I desire that the said trade marks may be registered in respect of the description of goods following ; that is to say,

(*a*) Almost all applications being made in respect of more marks than one, Form A, which would be for one mark only, has not been printed. *See* Form A in Third Schedule.

As to No. 1, in respect of the following goods contained in Class 23—namely, cotton yarn [*or* cotton thread.]

As to No. 2, in respect of the following goods contained in Class 24—namely, cotton piece goods.

As to No. 3, in respect of the following goods contained in Class 25—namely, cotton goods not included in Classes 23, 24, or 38.

The said firm have used the said trade marks respectively in respect of the goods for which I desire them to be registered for the several respective periods, before the date of this statement, as hereinafter respectively set out; that is to say,

No. 1, for 3 months;
No. 2, for 1 month;
No. 3, for 2 weeks.

The day of , 187 .

(Signed) *John Jones.*

When an application is prepared according to the above example, each of the two representations of each mark should, for the purposes of identification, *bear the signature of the applicant.*

The statutory declaration accompanying an application prepared according to the above example, should run as follows:—

Form C.

I, *John Jones, one of the firm of John Jones & Co., of* 55, *Moon Street, in the City of Manchester, Merchants,* do hereby solemnly and sincerely declare, to the best of my knowledge and belief, as follows:

(1.) The statement signed by me, and dated the day of 187 , and marked with the letter "B," and shown to me at the time of making this declaration, is true:

(2.) The representations of the trade marks in such statement referred to are correct representations of the trade marks for the registration of which I apply:

(3.) My said firm are lawfully entitled to the use of the said trade marks:

(4.) And I make, &c.

Declared at
this day of
187 .
Before me,

(Signed) *John Jones.*

45. Borders are not recognized as distinctive parts of trade marks or labels in the cotton classes; it is necessary, therefore, *when any border appears in connexion with a proposed new cotton trade mark*, that the following note (signed by the applicant) should be written upon the face or back of each of the papers to which the representations of the mark are affixed:—

"The border of this mark is not in itself claimed as the property of the applicant."

Certificates of Refusal.

46. Owners desirous of obtaining the registrar's certificate of refusal under section 2 of the Trade Marks Registration Amendment Act, 1876, should forward a written application for the same to

The Registrar,
Trade Marks Registry Office,
4, Quality Court,
Chancery Lane, London, W.C.

The letter of application should be accompanied by two unmounted copies of each mark for which a certificate is required, and the registrar's number (or numbers) should be quoted.

A post office order (made payable to H. Reader Lack, at the General Post Office, London, and *crossed*) should be forwarded in payment of the proper fees, which are calculated at the rate of £1 for the first mark refused, and 10*s.* for each subsequent mark for which a certificate is required for the same owner at the same time.

When the certificate required relates to a mark placed by the Manchester Committee of Experts in the second class of cotton marks, the number given to the mark at the Manchester branch office should be quoted in the letter of application.

Certificates of refusal relating to marks placed in the second class of cotton marks will be in due course advertised in the *Trade Marks Journal* (*a*).

Assignment of Registered Marks.

47. If the assignee resides within the United Kingdom the deed of assignment or a certified copy of such deed should be sent to or left at the Trade Marks Registry Office, and application should at the same time be made by the assignee to be registered as proprietor.

The following form gives the particulars the registrar requires:

Form of Application by Assignee of registered Trade Mark applying to be registered as Proprietor.

(A) Trade Mark No.* , Class
Advertised *Trade Marks Journal*, No. p.
Name of owner
Firm
Place of business

I, the undersigned *A. B.* of , in the county

* Here enter number or other means of identifying trade mark on register.

(*a*) See form of certificate of refusal, p. 269, *infrà*.

of , carrying on business at
in the county of , †, apply to be registered as proprietor of the trade mark above mentioned in succession to the said .

† Here state calling.

The said , by deed dated the day of 18 , and made between assigned to me the said the said trade mark, together with the goodwill of the business concerned in the goods with respect to which the said trade mark is registered.

The day of , 18 .

(Signed) *A. B.*

This form of application should be verified by a Declaration as in Form C given in the Third Schedule to the Rules (*a*), substituting for paragraphs (2) and (3) in that form the words, "And I am lawfully entitled to the goodwill of the business concerned in the goods with respect to which the trade mark referred to in the said statement marked with the letter "A" is registered. And I make, &c."

The Application Form and the Declaration should be accompanied by the fee for registering a subsequent proprietor, as prescribed in the Second Schedule to the Rules under the Trade Marks Registration Acts, 1875–7, item 8 (*b*).

Rectification of Register.

48. Where an order of court has been obtained to rectify the register, the person interested or his agent should send the Registrar an office copy of the order or of the material part thereof, with a Post Office Order for the amount of 10*s*.

The following is suggested as a convenient form:—

To the Registrar of Trade Marks.

Sir, Mark No. .

Enclosed is an office copy of an order of court to rectify the entry of the Trade Mark No. on the Register of Trade Marks as to the particulars in the said order specified, together with a Post Office Order for 10*s*., the fee prescribed by the Second Schedule to the Rules published under the Trade Marks Registration Acts, 1875–7.

(Signed) *John Jones.*

Notice.

49. Copies of the Rules under the Trade Marks Registration Acts, 1875–7, and of each number of the *Trade Marks Journal*, may be obtained, on payment of a shilling for each copy, of the following publishers:-

Knight and Co., 90, Fleet Street;
Stevens and Sons, 119, Chancery Lane;

(*a*) See p. 253, *suprà*.
(*b*) See p. 251, *suprà*.

E. Stanford, 55, Charing Cross;
Shaw and Sons, Fetter Lane;
Butterworths, 7, Fleet Street;
G. Downing, 8, Quality Court, Chancery Lane;
Trübner and Co., 57 and 59, Ludgate Hill;
Waterlow and Sons, Limited, 25, 26 & 27, Great Winchester Street; 60 and 61, London Wall; and 49, Parliament Street;
J. M. Johnson and Sons, Limited, 3, Castle Street, Holborn, and 56, Hatton Garden;
Palmer and Howe, 1, 3, and 5, Bond Street, Manchester;
Alex. Thom, 87 and 88, Abbey Street, Dublin;
A. and C. Black, Edinburgh.

Copies will also be sent by post by any of the above publishers on a prepaid application, containing the name and address of the sender, and accompanied with a Post-office order for the amount due in respect of the copies required.

Printed Forms of Declaration and of Statement on Application, for the use of persons wishing to register trade marks, are not sold at the Registry Office, but they may be obtained from several of the firms named above.

Trade Marks Registry Office,
4, Quality Court,
Chancery Lane, London, W.C.
13*th February*, 1878.

H. READER LACK,
Registrar.

FORMS IN USE IN RESPECT OF TRADE MARKS.

Trade Marks Registration Acts, 1875-6-7.

FORM OF NOTIFICATION OF REGISTRATION OF A TRADE MARK.

Trade Marks Registry Office, London.

Sir,—I have to inform you that, pursuant to Rule 21 under the Trade Marks Registration Act, 1875, the trade mark applied for by you in Application No. , and duly advertised in No. of the *Trade Marks Journal*, has been registered in your name in Class

I am, Sir, your obedient servant,

H. READER LACK, Registrar.

FORM OF CERTIFICATE OF REGISTRATION OF A TRADE MARK.

Trade Marks Registration Acts, 1875-6.

38 & 39 Vict. c. 91, s. 8, and 39 & 40 Vict. c. 33.

Certificate.

In the matter of an application to register
Trade Mark in class

I, HENRY READER LACK, Clerk to the Commissioners of Patents, Registrar of Trade Marks, hereby certify that

of is entered on the register of trade marks as proprietor of a trade mark for
in class for the registration of which mark application was made on the day of 18 .
The user claimed for the said mark is
before the day of 18 .
A representation of the said mark, advertised in the Trade Ma ks Journal, is annexed hereto.
Witness my hand and seal this day of 18 .
Trade Marks Registry Office, London.

FORM OF CERTIFICATE OF REFUSAL TO REGISTER A TRADE MARK.

Trade Marks Registration Acts, 1875-6,
38 & 39 Vict. c. 91, and 39 & 40 Vict. c. 33.

Certificate of Refusal.

I, HENRY READER LACK, Clerk to the Commissioners of Patents and Registrar of Trade Marks, hereby certify that on the day of , 18 , of
duly applied to register the trade mark of which a reprcsentation is annexed, stating that the said trade mark had been in use as a trade mark before the 13th day of August, 1875; and that such application has been refused.
Witness my hand and seal this day of 18 .
Trade Marks Registry Office.

INSTRUCTIONS TO PERSONS APPLYING FOR THE REGISTRATION OF TRADE MARKS FOR COTTON YARN AND THREAD IN CLASS 23 (*a*).

I. All applications should be addressed, prepaid, to

The Registrar,
Trade Marks Registry Office,
4, Quality Court, London, W.C.

Agents and other persons who may be interested in sevcral applications should note that communications rclating to differcnt applications must be made in separate letters.

(*a*) These special Instructions and the forms on pp. 273—5 are applicable to *old* cotton marks, and are forwarded from the Registry Office to applicants for the registration of such marks, after their applications have been considered by the Committee of Experts, at Manchester. It will be seen that much of the matter contained in the General Instructions is embodied in these. The same Instructions are made applicable to Class 25, by the substitution of "Class 25" for "Class 23," *passim*, and the elision of the words in the heading "for Cotton Yarn and Thread." *See*, too, note on page 271. With respect to Class 24, special Instructions will probably be issued when the Committee of Experts have completed their labours with regard to that class.

Persons acting as agents should write their name and address on the back of the application papers.

II. The papers necessary for the preparation of an application to the Trade Marks Registry Office in London are:

1. The statutory Declaration.
2. The Statement on Application.
3. Two Representations of each trade mark.

Specimens of the Declaration and Statement (*a*) are sent with these Instructions to all applicants whose cotton marks in Class 23 have been pronounced by the Manchester Committee of Experts to be trade marks within the meaning of the Trade Marks Registration Act, 1875.

The two representations of each trade mark should be *the same which are received with these Instructions.*

III. The Declaration must be made before a justice of the peace or before a commissioner for administering oaths. If made before a commissioner it should bear a 2*s.* 6*d.* Inland Revenue *impressed* stamp.

Declarations made out of the United Kingdom are not made under the authority of the Act 5 & 6 Will. IV. cap. 62, and, therefore, should not conclude with the statutory termination beginning "And I make, &c.," but should be made strictly in accordance with Form D of the Third Schedule of the Rules under the Trade Marks Registration Acts, 1875-6; such declarations do not require an Inland Revenue stamp.

Declarations made out of her Majesty's dominions may, in cases where it is impracticable to make them before a British consular officer, be subscribed before a mayor or other public official, whose signature or official seal must, however, be certified by a British consular officer, or by the consul of the respective foreign nation in London.

In filling up the first paragraph of the Declaration, the date in full of the Statement on Application should be accurately quoted.

The blank spaces of the jurat clause at the foot of the Declaration should also be carefully filled up.

IV. The Statement on Application should be certified as an exhibit to the Declaration by the authority before whom the latter document is declared.

The name of the person making the Declaration should be inserted in the certifying clause at the foot of the Statement, and the other blank spaces of this clause should also be carefully filled up.

V. Special attention should also be paid to the following points in connexion with the Declaration and the Statement on Application:

1. Both papers should commence with the name, address, and calling of the applicant.

2. When the trade marks to which an application relates are the

(*a*) See *infra*, p. 274.

property of a *firm*, the Declaration and the Statement should be made by *one member* of the firm, and should be signed by him *alone*.

The Declaration should in such a case commence as follows:

"I of the firm of , * " * Here insert trade or business.

and the first words of the third paragraph should be altered from "I am lawfully, &c.," to "My said firm are lawfully, &c."

The Statement on Application should commence as follows:

"I of and on behalf of the firm of , † † Here insert trade or business.

of

apply that the said firm may be registered as proprietors of the following trade marks, &c.,"

and the words at the foot of the Statement, "I have used the said trade marks, &c.," should then be altered to "My said firm have used the said trade marks, &c."

3. When the trade marks are the property of a *company*, the Declaration and the Statement should be made by the managing director or by the secretary of the company, and should be signed by him *alone*. The Declaration and Statement on Application in such cases should be worded in a manner similar to that set out above for a firm, except that the words "Managing Director [or Secretary] of" should be used at the head of the Declaration, and the words "Managing Director [or Secretary] of and on behalf of" at the head of the Statement.

4. The following specification of goods for Class 23 will be accepted by the registrar in the Statement on Application:

Class 23. "Cotton Yarn and Thread," or "Sewing Thread" (*a*).

VI. No description of the marks should be given in the Statement on Application beyond a reference to the representations; but in cases where a mark consists partly of what is private property and partly of what is commonly used in the cotton trade, a note, signed by the applicant, should be written upon each of the two papers bearing the representations of the mark (or upon the back of the same), setting forth distinctly what portion of the mark is common to the trade.

VII. The words "Registered," "Copyright," "Entered at Stationers' Hall," "To counterfeit this is forgery," will not be placed upon the register under the Trade Marks Registration Act, 1875, and should therefore be struck out of the two representations of each mark annexed to the Statement on Application, wherever they occur.

VIII. Fees will not be received in cash. They may be paid by a Post-office order, made payable to H. Reader Lack, at the General Post-office, London, and *crossed;* or, if they exceed five pounds, may

(*a*) For Class 25 substitute:—Class 25. "Cotton goods not included in Classes 23, 24, or 38."

be paid by a cheque drawn to the "Registrar of Trade Marks, or Bearer," and *crossed* "Bank of England."

The following are extracts from the Schedule of Fees annexed to the Rules under the Trade Marks Registration Acts, 1875-6:

	£	s.	d.
1. On application to register one trade mark for one or more articles included in one class - -	1	0	0
2. On application to register more than one trade mark for one or more articles included in one class, for each additional trade mark after the first - - - - - - - - -	0	10	0
3. For registration of one trade mark - - -	1	0	0
4. Where the same person is registered at the same time for more than one trade mark, for registration of each additional mark after the first - - - - - - - - -	0	10	0

The fees referred to in the above paragraphs (3) and (4), viz., the fees for final *registration*, as distinct from the fees payable *on application*, should *not* be paid at the time of making the application.

Each application should be accompanied by a memorandum, upon paper of foolscap size (to which the Post-office order or cheque should be pinned), setting forth the name of the applicant and the amount of fees remitted; for example—

Messrs. John Jones & Co.

	£	s.	d.
Fees on Application, No. .*			
One trade mark in Class 23 - - - -	1	0	0
or			
Two trade marks in Class 23 - - - -	1	10	0
or			
Twenty trade marks in Class 23 - - - -	10	10	0

* Here quote number or numbers given by Registrar.

Trade Marks Registry Office,
4, Quality Court,
Chancery Lane,
London, W.C.

H. Reader Lack,
Registrar.

1*st August*, 1877.

FORMS IN USE IN RESPECT OF COTTON MARKS.

Trade Marks Registration Acts, 1875–6–7.

Notices to Applicants for Registration.

Form A.

Notice that a Mark has been passed for Registration by the Committee of Experts.

Trade Marks Registry Office,
4, Quality Court, Chancery Lane,
London, W.C.,
1877.

I have to inform you that the Committee of Experts appointed by the Commissioners of Patents under Rule 59 of the Rules published in pursuance of the Trade Marks Registration Acts, 1875-6, have placed your mark sent into the Manchester Branch of this office, and numbered and claimed in Class of the classes mentioned in the First Schedule to the Trade Marks Rules, in the first class of cotton marks, consisting of those marks which in the opinion of the said committee are trade marks within the meaning of the Trade Marks Registration Acts, 1875–6.

You are therefore requested, if you desire to take advantage of the provisions of the said Acts, *to apply to me without delay* at this office, in pursuance of Rules 5–11, for the registration of your said mark .

A paper of Instructions is herewith enclosed.

I am,

Your obedient servant,
H. Reader Lack,
Registrar.

A note is usually appended to the effect that, with regard to marks having borders, it should be understood that only the centres of such marks will be passed as private, borders not being considered distinctive parts of marks in the cotton trade.

FORM B.

Notice that a Mark has not been passed for Registration by the Committee of Experts.

Trade Marks Registry Office,
4, Quality Court, Chancery Lane,
London, W.C.
1877.

I have to inform you that the Committee of Experts appointed by the Commissioners of Patents under Rule 59 of the Rules published in pursuance of the Trade Marks Registration Acts, 1875–6, have placed your mark sent into the Manchester Office, and numbered
and claimed in Class of the classes mentioned in the First Schedule to the Trade Marks Rules, in the second class of cotton marks, consisting of those marks which are not in the opinion of the said committee trade marks within the meaning of the Trade Marks Registration Acts, 1875–6.

Representations of the said mark under the above No. will be retained for future reference at the Trade Marks Registry Office in London, and at the Manchester Office, No. 48, Royal Exchange.

A certificate of refusal to register the above mark will be furnished by the registrar (under section 2 of 39 & 40 Vict. c. 33) at any time you may require such certificate, on your applying for same and paying the prescribed fee.

I am,

Your obedient servant,
H. READER LACK,
Registrar.

SPECIAL FORMS ISSUED WITH THE INSTRUCTIONS FOR MARKS PASSED IN THE FIRST CLASS.

FORM B (*a*).

Form of Statement on Application for Registration of more than one Trade Mark in Class 23, 24, or 25.

I,*

* Here insert name, address, and calling of the applicant.

apply to be registered as proprietor of the following trade marks, which are represented respectively on the several papers annexed hereto and numbered as follows:

(*a*) Almost all applications being made in respect of more marks than one, Form A, which would be for one mark only, has not been printed. *See* Form A in Third Schedule.

I desire that the said trade marks may be registered in respect of the descriptions of goods following: that is to say,

As to Nos.*

in respect of the following goods contained in Class : that is to say,†

I have used the said trade marks respectively, in respect of the goods for which I desire them to be registered for the several respective periods, before the 13th August, 1875, as hereinafter respectively set out; that is to say,

No.‡ , years.

§The day of 187 .

‖

This is the Statement marked "B," referred to in the Declaration of made before me, this day of 187 .

* Here insert respective numbers given by the registrar.

† Here insert description of goods.

‡ Here insert registrar's numbers and length of user.

§ Here insert date.

‖ Here insert signature.

Form C.

Form of Declaration to accompany Statement on Application for Registration of more than one Trade Mark in Class 23, 24, *or* 25.

I,

of ,

do hereby solemnly and sincerely declare, to the best of my knowledge and belief, as follows:

(1.) The Statement signed by me and dated the day of , and marked with the letter "B," and shown to me at the time of making this declaration, is true:

(2.) The representations of the trade marks in such Statement referred to are correct representations of the trade marks for the registration of which the said apply:

(3.) I am lawfully entitled to the use of the said trade marks:

(4.) And I make this declaration conscientiously believing the same to be true, and by virtue of the provisions of an Act made and passed in the session of Parliament held in the fifth and sixth years of the reign of his late Majesty King William the Fourth, intituled "An Act to repeal

an Act of the present session of Parliament, intituled 'An Act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extra-judicial oaths and affidavits, and to make other provisions for the abolition of unnecessary oaths.'"

Declared at
this day of
187
Before me

N.B.—As the Rules have already been altered once, and the Instructions more frequently, it will be well for intending applicants for registration to ascertain whether any further modifications have been introduced into the Rules and Instructions as printed here.

APPENDIX C.

STATUTORY ENACTMENTS WITH RESPECT TO MARKS ON GOODS, &c.

The Merchandise Marks Act, 1862.

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

An Act to amend the Law relating to the Fraudulent Marking of Merchandise.
[*7th August*, 1862.]

Whereas it is expedient to amend the laws relating to the fraudulent marking of merchandise, and to the sale of merchandise falsely marked for the purpose of fraud: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

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

(*a*) It is not against the policy of the law for proceedings taken under this Act to be compromised: *Fisher* v. *Apollinaris Co.*, L. R. 10 Ch. 297.

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

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

3. Every person who, with intent to defraud, or to enable another to defraud any person, shall apply or cause or procure to be applied any trade mark or any forged or counterfeited trade mark to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, on, or with which any chattel or article shall be intended to be sold, or shall be sold or uttered or exposed for sale, or intended for any purpose of trade or manufacture, or shall enclose or place any chattel or article, or cause or

(*a*) The statutes now in force relating to registered designs are: 5 & 6 Vict. c. 100; 6 & 7 Vict. c. 65; 13 & 14 Vict. c. 104; 21 & 22 Vict. c. 70; 24 & 25 Vict. c. 73; 38 & 39 Vict. c. 93.

(*b*) As to this definition of "trade mark," see per Sir J. Bacon, V.-C., in *Ford* v. *Foster*, L. R.7 Ch. 611.

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

4. Every person who, after the 31st day of December one thousand eight hundred and sixty-three, shall sell, utter, or expose either for sale or for any purpose of trade or manufacture, or cause or procure to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade mark, which he shall know to be forged or counterfeited, or together with the trade mark of any other person applied or used falsely or wrongfully or without lawful authority or excuse, knowing such trade mark of another person to have been so applied or used as aforesaid, and that whether any such trade mark or forged or counterfeited trade mark as aforesaid, together with which any such chattel or article shall be sold, uttered, or exposed for sale or other purpose as aforesaid, shall be in, upon, about, or with such chattel or article, or in, upon, about, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, upon, about, or with which such chattel or article shall be so sold or uttered or exposed for sale or other purpose as aforesaid, shall for every such offence forfeit and pay to her Majesty a sum of money equal to the value of the chattel or article so sold, uttered, offered, or exposed for sale or other purpose as aforesaid, and a further sum not exceeding five pounds and not less than ten shillings.

5. Every addition to and every alteration of, and also every imitation of any trade mark which shall be made, applied, or used, with intent to defraud,

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

6. Where any person who, at any time after the thirty-first day of December one thousand eight hundred and sixty-three, shall have sold, uttered, or exposed for sale or other purpose as aforesaid, or shall have caused or procured to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade mark, or together with the trade mark of any other person used without lawful authority or excuse as aforesaid, and that whether any such trade mark, or such forged or counterfeited trade mark as aforesaid, be in, upon, about, or with such chattel or article, or in, upon, about, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing in, upon, about, or with which such chattel or article shall have been sold or exposed for sale, such person shall be bound, upon demand in writing delivered to him or left for him at his last known dwelling-house, or at the place of sale or exposure for sale by or on the behalf of any person whose trade mark shall have been so forged or counterfeited, or used without lawful authority or excuse as aforesaid, to give to the person requiring the same, or his attorney or agent, within forty-eight hours after such demand, full information in writing of the name and address of the person from whom he shall have purchased or obtained such chattel or article, and of the time when he obtained the same: and it shall be lawful for any justice of the peace, on information on oath of such demand and refusal, to summon before him the party refusing, and, on being satisfied that such demand ought to be complied with, to order such information to be given within a certain time to be appointed by him; and any such party who shall refuse or neglect to comply with such order shall for every such offence forfeit and pay to her Majesty the sum of five pounds, and such refusal or neglect shall be *primâ facie* evidence that the person so refusing or neglecting had full knowledge that the trade mark, together with which such chattel or article was sold, uttered, or exposed for sale, or other purpose as aforesaid, at the time of such selling, uttering, or exposing was a forged, counterfeited, and false trade mark, or was the trade mark of a person which had been used without lawful authority or excuse, as the case may be.

7. Every person who, with intent to defraud or to enable another to defraud, shall put or cause or procure to be put upon any chattel or article, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing, together with which any chattel or article shall be intended to be or shall be sold or uttered or exposed for sale, or for

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

8. Every person who, after the thirty-first day of December one thousand eight hundred and sixty-three, shall sell, utter, or expose for sale or for any purpose of trade or manufacture, or shall cause or procure to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article upon which shall have been, to his knowledge, put, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or uttered or exposed for sale or other purpose as aforesaid, shall have been so put, or upon any case, frame, or other thing used or employed to expose or exhibit such chattel or article for sale, shall have been so put, any false description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article or any part thereof, or the place or country in which such chattel or article shall have been made, manufactured, or produced, shall for every such offence forfeit and pay to her Majesty a sum not exceeding five pounds and not less than five shillings.

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

10. In every indictment, pleading, proceeding, and document whatsoever in which any trade mark shall be intended to be mentioned, it shall be suffi-

(*a*) A person who himself wrongfully inserts or retains the word "patent" in his trade mark cannot avail himself of the benefits of this Act: *Morgan v. McAdam*, 36 L. J. Ch. 228.

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

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

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

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

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

15. In every case in which any person shall have committed or done any offence or act whereby he shall have forfeited or become liable to pay to her Majesty any of the penalties or sums of money mentioned in the provisions of this Act, every such penalty or sum of money shall or may be recovered in England, Wales, or Ireland in an action of debt, which any person may as plaintiff for and on behalf of her Majesty commence and prosecute to judgment in any Court of Record, and the amount of every such penalty or sum of money to be recovered in any such action shall or may be determined by the jury (if any), sworn to try any issue in such action, and if there shall be no such jury then by the Court or some other jury, as the Court shall think fit, or instead of any such action being commenced, such penalty or sum of money shall or may in England or Wales be recovered by a summary proceeding before two justices of the peace having jurisdiction in the county or place where the party offending shall reside or have any place of business, or in the county or place in which the offence shall have been committed; and shall or may in Ireland be recovered in like manner by civil bill in the Civil Bill Court of the county or place in which the offence was committed, or in which the offender shall reside or have any place of business; and shall or may in Scotland be recovered by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence shall have been committed or the offender may reside or have any place of business, which sheriff, upon proof of the offence, either by the confession of the person offending or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable in the penalty or penalties aforesaid, as also in expenses; and it shall be lawful for the sheriff, in pronouncing such judgment for the penalty or penalties and costs, to insert in such judgment a warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by poinding: Provided always, that it shall be lawful to the sheriff, in the event of his dismissing the action and assoilzing the defender, to find the complainer liable in expenses; and any judgment so to be pronounced by the sheriff in such summary action shall be final and conclusive, and not subject to review by advocation, suspension, reduction, or otherwise.

16. In every case in which any such penalty or sum of money forfeited to her Majesty as hereinbefore mentioned shall be sought to be recovered by a summary proceeding before two justices of the peace, the offence or act by the committing or doing of which such penalty or sum of money shall have been so forfeited shall be and be deemed to be an offence and act within the meaning of a statute passed in the twelfth year of the reign of her present Majesty, intituled *An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders*; and the information, conviction of the offender, and other proceedings for the recovery of the penalty or sum so forfeited shall be had according to the provisions of the said Act.

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

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

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

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

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

21. In every casc in any suit at law or in equity against any person for forging or counterfeiting any trade mark, or for fraudulently applying any trade mark to any chattel or article, or for selling, exposing for sale, or uttering any chattel or article with any trade mark falsely or wrongfully applied thereto, or with any forged or counterfeit trade mark applied thereto, or for

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

22. In every case in which any person shall do or cause to be done any of the wrongful acts following, (that is to say,) shall forge or counterfeit any trade mark; or for the purpose of sale, or for the purpose of any manufacture or trade, shall apply any forged or counterfeit trade mark to any chattel or article, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or thing in or with which any chattel or article shall be intended to be sold or shall be sold or uttered or exposed for sale, or for any purpose of trade or manufacture; or shall enclose or place any chattel or article in, upon, under, or with any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing to which any trade mark shall have been falsely applied, or to which any forged or counterfeit trade mark shall have been applied; or shall apply or attach to any chattel or article any case, cover, reel, wrapper, band, ticket, label, or other thing to which any trade mark shall have been falsely applied, or to which any forged or counterfeit trade mark shall have been applied; or shall enclose, place, or attach any chattel or article in, upon, under, with, or to any cask, bottle, stopper, vessel, case, cover, reel, wrapper, band, ticket, label, or other thing having thereon any trade mark of any other person; every person aggrieved by any such wrongful act shall be entitled to maintain an action or suit for damages in respect thereof against the person who shall be guilty of having done such act or causing or procuring the same to be done, and for preventing the repetition or continuance of the wrongful act, and the committal of any similar act.

23. In every action which any person shall, under the provisions of this

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

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

25. Nothing in this Act contained shall be construed to affect the rights and privileges of the Corporation of Cutlers of the liberty of Hallamshire, in the county of York, nor shall anything in this Act contained be construed in any way to repeal or make void any of the provisions contained in the fifty-ninth George Third, chapter seven, intituled *An Act to regulate the Cutlery Trade in England.*

26. The expression "The Merchandise Marks Act, 1862," shall be a sufficient description of this Act.

The Weights and Measures (Ireland) Amendment Act, 1862,

25 & 26 Vict. c. 76.

Part III.

Prevention of Frauds.

§ 14. If any person commit any of the following offences, he shall for each offence be liable to a penalty not exceeding five pounds:

(1.) If he, with intent to defraud, counterfeit or procure to be counterfeited any brand or stamp used by or under the authority of the owner or lessee of a market or fair, or of any person having by law the control of a market or fair, to denote the weight, measure, or quality of any article sold in the market or fair, or within the prescribed limits, during the holding of the market or fair, or of any cask, firkin, or

other vessel, covering, or thing in which such article is sold, or the impression of any such brand or stamp:

(2.) Or, with the like intent, use or procure to be used any such counterfeit brand, or stamp, or impression:

(3.) Or, with the like intent, alter an impression of any such genuine brand or stamp:

(4.) Or, with the like intent, have in his possession anything having thereon an impression of any such counterfeit brand or stamp, or a fraudulently altered impression of any such genuine brand or stamp:

(5.) Or, with the like intent, transfer or apply any cask, firkin, or other vessel, covering, or thing, having thereon an impression of any such genuine brand or stamp, to any article other than that for denoting the weight, measure, or quality whereof such impression was made on such cask, firkin, or other vessel, covering, or thing, or in any other manner alter the *bonâ fide* application of an impression of any such genuine brand or stamp:

(6.) Or knowingly weigh or cause to be weighed, contrary to the provisions of this Act, or act or assist in committing or connive at any fraud respecting the weighing or the weight or measure of any such article as in Part II. of this Act is mentioned:

(7.) Or, with intent to defraud, alter any ticket specifying the weight of any such article:

(8.) Or, with intent to defraud, make or use, or be privy to the making or using of any such ticket, falsely stating the weight of any such article, or of any covering, cart, or load:

(9.) Or shall dispose of, sell, or cause to be sold any weight or measure having a false or counterfeit stamp, or a stamp purporting to resemble a genuine stamp.

§ 15. If any person shall wilfully pack up or mix, or cause to be packed up or mixed, with or in any butter contained in any firkin or cask, any salt, pickle, or other substance, with intent to increase the weight of such butter, and shall bring or send any butter so packed or mixed to any market for sale, he shall be liable to pay a fine not exceeding forty shillings, or be imprisoned for any period not exceeding one month, as the justice or justices shall determine.

§ 16. If any person shall wind or cause to be wound in any fleece or wool not being sufficiently rivered or washed, or wind or cause to be wound within any fleeces any deceitful locks, cots, skin, or lamb's wool, or any substance, matter, or thing, whereby the fleece may be rendered more weighty, to the deceit and loss of the buyer, such person shall be liable to a penalty of two shillings for every fleece so fraudulently made up.

By 30 & 31 Vict. c. 94 (1867), the provisions of the former Act are extended to "such parts of the Police District of Dublin Metropolis as are without the municipal boundaries of the borough of Dublin."

THE EXHIBITION MEDALS ACT, 1863—26 & 27 Vict. c. 119.

§ 1. If any trader commits any of the offences following; that is to say—

(1.) Falsely represents that he has obtained a medal or certificate from the Exhibition Commissioners (*z*) in respect of any article or process for which a medal or certificate has been awarded by the Commissioners:

(2.) Falsely represents (knowing such representation to be false) that any other trader has obtained a medal or certificate from the Exhibition Commissioners:

(3.) Falsely represents (knowing such representation to be false) that any article sold or exposed for sale has been made by, or by any process invented by, a person who has obtained in respect of such article or process a medal or certificate from the Exhibition Commissioners:

He shall incur the following penalties, that is to say:

(1.) For the first offence he shall forfeit to her Majesty a sum not exceeding five pounds:

(2.) For any subsequent offence he shall forfeit to her Majesty a sum not exceeding twenty pounds, or be imprisoned for a period not exceeding six months.

By § 2, in proceedings under this Act, it is not necessary to prove that any person has sustained damage by the false representations.

By § 5 no provision of this Act is to affect any right or civil remedy.

PATENTEE'S NAME, ETC.

Act to Amend the Law of Letters Patent—5 & 6 Wm. IV. c. 83 (1835).

§ 7. And be it enacted, that if any person shall write, paint, or print, or mould, cast, or carve, or engrave, or stamp, upon anything made, used or sold by him, for the sole making or selling of which he hath not or shall not have obtained letters patent, the name or any imitation of the name of any other person who hath or shall have obtained letters patent for the sole making and vending of such thing, without leave in writing of such patentee or his assigns; or if any person shall upon such thing, not having been purchased from the patentee or some person who purchased it from or under such patentee, or not having had the licence or consent in writing of such patentee or his assigns, write, paint, print, mould, cast, carve, engrave, stamp, or otherwise mark the word "patent," the words "letters patent," or the words "by the King's patent," or any words of the like kind, meaning, or import, with a view of imitating or counterfeiting the stamp, mark, or other device of the patentee, or shall in any other manner imitate or counterfeit the stamp, or mark, or other device of the patentee, he shall for every such

(*a*) Of 1851 or 1862. See § 3.

offence be liable to a penalty of fifty pounds, to be recovered by action of debt, bill, plaint, process, or information in any of his Majesty's Courts of Record at Westminster or in Ireland, or in the Court of Session in Scotland, one half to his Majesty, his heirs and successors, and the other to any person who shall sue for the same: Provided always that nothing herein contained shall be construed to extend to subject any person to any penalty in respect of stamping or in any way marking the word "patent" upon any thing made, for the sole making or vending of which a patent before obtained shall have expired.

Customs Regulations.

The Customs Consolidation Act, 1876—39 & 40 *Vict. c.* 36.

§ 42. The goods enumerated and described in the following table of prohibitions and restrictions inwards are hereby prohibited to be imported or brought into the United Kingdom, save as thereby excepted, and if any goods so enumerated and described shall be imported or brought into the United Kingdom contrary to the prohibitions or restrictions contained therein, such goods shall be forfeited, and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct.

A Table of Prohibitions and Restrictions inwards.

Goods prohibited to be imported.

* * * * *

Articles of foreign manufacture, and any packages of such articles bearing any names, brand, or mark being or purporting to be the name, brand or mark of manufacturers resident in the United Kingdom (*a*), or any name, brand, or mark which states or implies that such articles were manufactured at any place in the United Kingdom (*b*).

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

Clocks and watches, or any other article of metal impressed with any mark or stamp representing or in imitation of any legal British assay mark or stamp, or purporting by any mark or appearance to be of the manufacture of the United Kingdom (*d*).

(*a*) This is re-enacted from 16 & 17 *Vict. c.* 107, § 44.

(*b*) This is re-enacted from 35 & 36 *Vict. c.* 20, § 4.

(*c*) This is re-enacted from 35 & 36 *Vict. c.* 20, § 4.

(*d*) This is re-enacted from 16 & 17 *Vict. c.* 107, § 44.

§ 63. * * Provided also, that if any British goods brought into the United Kingdom bear the name, brand, or mark of any British manufacturer, the same shall, either by bill of store, or by and with the consent in writing of the proprietor of such name, brand, or mark, or his legal representative, or on proof to the satisfaction of the Commissioners of Customs, by declaration of the importer that such goods are of British manufacture, be admitted to entry as British (*a*).

§ 153. If any articles of foreign manufacture, and any packages of such articles, bearing any names, brands, or marks being or purporting to be the names, brands, or marks of manufacturers resident in the United Kingdom, shall be imported into any of the British possessions abroad, the same shall be forfeited (*b*).

(*a*) This is re-enacted from 30 & 31 *Vict. c.* 82, § 6.

(*b*) This is re-enacted from 16 & 17 *Vict. c.* 107, § 161.

APPENDIX D.

STATUTORY ENACTMENTS WITH RESPECT TO MARKS ON SPECIAL CLASSES OF GOODS (*a*).

CUTLERY.

59 *Geo. III. c.* 7 (*b*), "An Act to regulate the Cutlery Trade in England."

§ 1. Manufacturers may mark with the figure of a hammer articles of cutlery made by them by means of the hammer.

§ 3. No person is to mark articles of cutlery not made by means of the hammer with the figure of a hammer, or to possess for the purpose of sale, or offer for sale such articles so marked, under penalty of forfeiture of the articles so marked, together with a fine of 5*l.* a dozen.

§ 4. No person is to mark articles of cutlery, or possess for the purpose of sale, or offer for sale articles marked with any words indicative of a quality other than the true one, under similar penalties.

§ 5. No person is to mark articles, or possess, &c., articles marked with the words "London" or "London made," unless such articles were made within the City of London, or twenty miles distance therefrom, under penalty of forfeiture, together with a fine of 10*l.* a dozen.

§ 14. Articles of cutlery subject to forfeiture by virtue of the Act may be seized and destroyed, &c., by order of justices.

The remaining provisions refer chiefly to forms of procedure, recovery of penalties, &c.

The Cutlers' Company of Hallamshire.

21 *Jac. I. c.* 31 (1623).

§ 1 (*c*). The cutlers living in Hallamshire, or within six miles distance therefrom, are incorporated under the corporate name of "The Master,

(*a*) The Acts abstracted in the text are in force at present.

(*b*) The Merchandise Marks Act, 1862, does not interfere with this Act. See § 25 of that Act.

(*c*) The remainder of this Act is repealed by 31 *Geo. III.*, c. 58.

Wardens, Searchers, Assistants and Commonalty of the Company of Cutlers in Hallamshire in the county of York."

31 *Geo. III. c.* 58 (1791) (*a*).

§ 1. The Company to consist of the trades hereinafter mentioned, and of none other.

§ 3 enumerates "the arts or trades of makers of knives, sickles, shears, scissors, razors, files and forks."

§ 7. Apprentices who have served for seven years are to have, at twenty-one years of age, their freedom of the company and a mark to be assigned them.

The Act contains other provisions with respect to the constitution of the company, procedure, &c.

41 *Geo. III. c.* 97 (1801), (Local).

§ 2. A freeman of the company is empowered to give his mark by will to any person or persons, in the same manner as his other personalty, subject to the life estate therein which his widow is to have during her widowhood or any future coverture, and which she may sell, though on her death the provisions of the husband's will take effect.

§ 3. In default of a will, the mark is to pass in the same manner as its owner's other personalty, subject to the widow's life estate (*b*).

§ 5. Parish apprentices who shall prove to the satisfaction of a justice that they have regularly served a freeman for seven years shall be entitled to their freedom and a mark.

54. *Geo. III. c.* 119 (1814), (Local).

This Act repeals several of the provisions of the Act of 1791, in favour of free trade.

§ 3. Any person carrying on any of the specified trades within the specified limits has a right to have a mark assigned to him by the company on application, which mark is not to be one that is the property of another, nor a surname (*c*); and for such mark he is to pay forty shillings, and if the mark be one previously assigned but surrendered, 3*l.* in addition, besides, in either case, any stamp duty imposed by Act of Parliament (*d*).

§ 4. No mark is to be assigned by the company if they have notice that it is in common use, or in the use of any person within the district (*e*).

§ 5. Members of the company, or any other persons carrying on any of the specified trades within the specified limits, who shall counterfeit a mark assigned by the company to another person, shall for every offence

(*a*) Considerable portions of this Act have been repealed by the Acts which follow.

(*b*) And see § 6 of the Act of 1814.

(*c*) The similar provision in § 24 of the Act of 1791 (repealed by the present Act), with respect to non-freemen, provided that, on a non-freeman having a mark assigned to him, he should become a freeman of the company. This is not repeated here.

(*d*) A mark assigned to a non-freeman is assignable by him. See *Bury* v. *Bedford*, 33 L. J. Ch. 465.

(*e*) By the Trade Marks Registration Act, 1875, § 9, no mark is now to be assigned by the company which has been registered under the Trade Marks Registration Acts, notice of the registration having been given to the Cutler's Company.

forfeit and pay a sum not exceeding 20*l.*, half of the fine to go to the injured person, the other half to the company.

§ 6. The provisions made by § 2 of the Act of 1801, for the devolution of marks on the deaths of their owners are to apply to marks assigned under the present Act (*a*), but not more than one person of the family shall be entitled to use the mark at the same time.

23 *Vict. c. xliii.* (1860), (Local).

§ 1. The provisions of the previous Acts are extended to "the arts or trades of manufacturers of steel and makers of saws and edge-tools and other articles of steel, or of steel and iron combined, having a cutting edge.

§ 2. Any person exercising any of the trades formerly or now specified, within the specified limits, may and shall, on application to the company and payment of 20*l.* in addition to any other fees payable, become a freeman of the company and have a mark assigned to him.

§ 3. The former and present Acts may be cited as "The Cutlers' Company's Acts, 1623, 1791, 1801, 1814, 1860," respectively.

The rights of the Cutlers' Company were expressly reserved by The Merchandise Marks Act 1862 (*b*), § 25, and also by The Trade Marks Registration Act, 1875, § 9 (*c*).

See also the special provisions in regard to the Cutlers' Company contained in the Trade Marks Registration Act, 1875, § 9 (*c*), and in 46-56 of the Rules under that Act (*d*); the effect of which is that the registrar of trade marks is to be supplied with copies of all Sheffield corporate marks, and the Cutlers' Company with copies of all trade marks registered for goods or classes of goods within § 2 of the Cutlers' Company's Act, 1860; that notice of applications for assignment or registration of such marks, and of such assignment or registration, when complete, is to be given by the Cutlers' Company to the registrar and *vice versâ*; that marks identical with, or similar to marks already assigned or registered, are not to be registered or assigned respectively (except, in the former case, with the special leave of the Court); and that Sheffield marks may be registered under The Trade Marks Registration Acts.

Gold and Silver Plate.

England.

2 *Hen. VI. c.* 17 (in Ruffhead's ed., c. 14) (1423) (*e*).

No goldsmith or silversmith in the City of London to sell wrought silver of less than sterling fineness. No harness of silver to be offered for sale in

(*a*) Thus including non-freemen in possession of Company's marks.

(*b*) 25 & 26 *Vict. c.* 88. See p. 277.

(*c*) See p. 219.

(*d*) See p. 235.

(*e*) The earliest statute on the subject was 28 *Edw. I. c.* 20 (1300), by which it was provided, among other things, that no vessel of silver should pass out of the worker's hands until assayed by the wardens of the craft, and marked with the leopard's head, and that no worse gold

that city, until touched with the touch of the leopard's head, if it may reasonably bear the same, and also with the workman's mark, under penalty of forfeiture of double value. The mark of every goldsmith to be known to the wardens of the same craft. In the cities of York, Newcastle-upon-Tyne, Lincoln, Norwich, Bristol, Salisbury, and Coventry, to be divers touches. In other places, where no touch is ordained, silver not to be worked of less than sterling fineness, nor to be offered for sale without the worker's mark. Penalty of double value (*a*).

18 *Eliz. c.* 15 (1576) (*b*).

If plate marked by the Goldsmith's Company be found deceitful, the Company to forfeit the value.

8 & 9 *Wm. III. c.* 8 (1697).

§ 8 (in Ruffhead's ed. § 9) (*c*). No silver plate to be made of less fineness than 11 oz. 10 dwt. in the lb. troy (*d*), nor offered for sale until marked (*e*).

If plate marked by the Goldsmith's Company be found deceitful, the Company to forfeit the value, half to the Crown, half to the informer.

12 & 13 *Wm. III. c.* 4 (1700), "An Act for appointing wardens and assay masters for assaying wrought plate in the cities of York, Exeter, Bristol, Chester, and Norwich" (*f*).

§ 2. Goldsmiths, &c., of the cities of York, Exeter, Bristol, Chester, and Norwich, incorporated into respective companies, to be called respectively "The Company of Goldsmiths of ——."

§ 3. No goldsmith, &c., in those cities to make silver plate of less fineness than the standard for the time being, nor sell it until marked with :—

The worker's mark, to be expressed with the two first letters of his surname.

The lion's head erased and the figure of Britannia.

The arms of that one of the above cities in which the plate is assayed and marked.

should be worked than that of the touch of Paris. This Act was repealed, saving the King's prerogative, by 19 & 20 *Vict. c.* 64.

(*a*) 4 *Hen. VII. c.* 2 (1487) (repealed by 19 & 20 *Vict. c.* 64) required finers of gold and silver to put their marks upon the metal.

(*b*) It was provided by the earlier part of this Act (repealed by the Statute Law Revision Act, 1863) that gold should not be made or sold under 22 carats in fineness, nor silver under 11 oz. 2 dwt.; and that no silver plate should be sold without the worker's mark, under penalty of forfeiting the value.

(*c*) The remainder of the Act was repealed by the Statute Law Revision Act, 1867.

(*d*) The standard was thus raised from that fixed by the preceding Act (11 oz. 2 dwt.), but by 6 *Geo. I. c.* 11, both standards were established. See *infrà*.

(*e*) The following marks are appointed by this Act :—

The worker's mark, to be expressed by the two first letters of his surname.

The mark of the mystery or craft of the goldsmiths, which, instead of the leopard's head and the lion, shall for this plate be the figure of a lion's head erased, and the figure of a woman commonly called Britannia.

A distinct variable mark to denote the year of manufacture of the plate.

Penalty—Forfeiture of the plate or its value, half to the Crown, half to the informer. See 12 *Geo. II. c.* 26, § 5.

(*f*) Bristol never exercised the powers hereby conferred. York and Norwich have discontinued doing so.

A distinct variable mark or letter in Roman character to denote the year (*a*).

Penalty—Forfeiture of the plate or value, half to the Crown, half to the informer.

The Act also contains provisions with respect to the appointment of wardens and assayers, procedure, &c.

1 *Anne c.* 3 (1 Anne, stat. 1, c. 9, in Ruffhead's ed.) (1701).

The provisions of the last Act extended to Newcastle-upon-Tyne, and "The Company of Goldsmiths of Newcastle-upon-Tyne" incorporated.

6 *Geo. I. c.* 11 (1719) (*b*).

§ 1. The old silver standard of 11 oz. 2 dwt. restored.

§ 3. No goldsmith, &c., to work silver plate of less fineness than 11 oz. 2 dwt., nor to sell it, &c., until touched, assayed and marked, under the former penalties.

§ 41. Two standards of silver, 11 oz. 10 dwt. and 11 oz. 2 dwt. continued (*c*).

12 *Geo. II. c.* 26 (1739) (*d*).

§ 1. Gold plate not to be made under 22 carats in fineness, nor silver plate under 11 oz. 2 dwt. Penalty, 10*l.*

§ 5. Gold and silver plate not to be sold or exported until marked as follows:—

Gold plate of 22 carats fine and silver plate of 11 oz. 2 dwt. with:—

The worker's mark, which shall be the first letters of his Christian and surname.

These marks of the Company of Goldsmiths in London, viz., the leopard's head, the lion passant (*e*), and a distinct variable mark or letter to denote the year. Or,

The worker's mark, and

The marks appointed to be used by the assayers at York, Exeter, Bristol, Chester, Norwich, or Newcastle-upon-Tyne.

Silver plate of 11 oz. 10 dwt., with—

The worker's mark as before.

These marks of the said Company, viz., the lion's head erased, the figure of Britannia, and the mark or letter to denote the year. Or,

The worker's mark, and

(*a*) See 12 *Geo. II. c.* 26, § 5.

(*b*) The whole of this Act but §§ 1—3 and § 41 repealed by Statute Law Revision Act, 1870.

(*c*) Silver plate of 11 oz. 10 dwt. to be marked with:—

The workman's mark.

The mark of the wardens of the Goldsmith's Company.

The figure of a lion's head erased.

The figure of Britannia.

Silver plate of 11 oz. 2 dwt. to be marked with:—

The workman's mark.

The mark of the wardens of the Goldsmith's Company.

The figure of a lion passant.

The figure of a leopard's head.

See 12 *Geo. II. c.* 26, § 5.

(*d*) Repealed in part, 30 *Geo. III. c.* 31, § 1, Statute Law Revision Act, 1867.

(*e*) By 38 *Geo. III. c.* 69, § 2, gold plate of 18 carats fine is to be marked with a crown and 18, instead of the lion passant, and by 7 & 8 *Vict. c.* 22, § 15, gold of 22 carats with a crown and 22.

The mark of one of the said cities or towns.

Penalty—10*l.* fine, or, in default, hard labour not exceeding six months.

§ 21. All goldsmiths, &c., to enter their new marks, names, and places of abode in one of the assay offices at London, York, Exeter, Bristol, Chester, Norwich, or Newcastle-upon-Tyne. Such new marks to be of a character or alphabet different from their old marks; all old marks to be broken. Penalty, 10*l.* fine, and 10*l.* more for using any other mark; in default, hard labour not exceeding six months.

13 *Geo. III. c.* 52 (1772), "An Act for appointing wardens and assay-masters for assaying wrought plate in the towns of Sheffield and Birmingham" (*a*).

§ 2. Incorporation of "The Guardians of the standard of wrought plate for Birmingham" (*b*).

§ 4. No silversmith or plate worker in either of these towns, or within twenty miles thereof, to sell or export silver plate made in these towns, and the specified limits, until marked as follows:—

Silver plate of 11 oz. 2 dwt., with:—

The mark of the worker or maker, which shall be the first letters of his Christian and surname.

The lion passant.

The mark of the company in whose assay office the plate was assayed and marked.

A distinct variable mark or letter to denote the year.

Silver plate of 11 oz. 10 dwt. with:—

The worker's mark.

The figure of Britannia.

The mark of the Company, and

The mark or letter to denote the year.

Penalty—Forfeiture of the plate or value, half to the Crown, half to the informer.

§ 5. The peculiar mark of the Birmingham Company to be an anchor, of the Sheffield Company a crown.

The Act also contains provisions for the election of wardens and assayers, the process of assaying, punishment of counterfeiting, &c.

24 *Geo. III. sess.* 2, *c.* 20 (1784), relates to Sheffield.

§ 2. Manufacturers of goods plated with silver, within Sheffield or 100 miles thereof, may strike upon such goods their surname or the name of their firm, together with some other mark, figure, or device.

§ 3. Names to be in legible characters and struck with only one punch, and marks to be approved and registered by the Guardians for Sheffield.

24 *Geo. III. sess.* 2, *c.* 53 (1784) (*c*).

§ 5. The assaying officer to mark with an additional new mark, of the King's head, all gold and silver plate sent to be touched, marked and

(*a*) Repealed as to Birmingham, by 5 *Geo. IV. c. lii.* (local). As to Sheffield, see 24 *Geo. III. sess.* 2, c. 20. The present Act only deals with silver.

(*b*) Or "Sheffield."

(*c*) Repealed in part 25 *Geo. III. c.* 64, § 2; 30 *Geo. III. c.* 31, § 1; Statute Law Revision Acts, 1861—71.

assayed, but to ask and receive duty before touching, marking, or assaying.

§ 8. Gold and silver plate not to be sold or exported until marked with the King's head. Penalty—50*l.*, or, in default, hard labour of not more than one year, nor less than six months. Also, forfeiture of the unmarked plate, half to the Crown, half to the informer.

30 *Geo. III. c.* 31 (1790).

This Act regulates the exemptions from marking.

38 *Geo. III. c.* 69 (1798).

§ 1. Gold plate may be manufactured down to 18 carats fine.

§ 2. Such gold plate not to be sold or exported until marked with a crown and the figures 18, instead of the lion passant. Penalty, £10.

§ 3. Gold plate of 18 carats fine may be marked by the various Goldsmiths' Companies, &c., as before, with the exception of the alteration of this mark.

§ 4. Gold plate of 22 carats may still be made, sold, exported, &c.

§ 5. This Act not to authorize the application of the mark used before the Act to gold plate of less than 22 carats fine.

§ 6. Penalty of £50 for selling, exporting, &c., gold plate not marked with one of the marks.

§ 8 (*a*). Previous regulations for gold of 22 carats, except as to the mark of the lion passant, to apply to gold of 18 carats.

55 *Geo. III. c.* 185 (1815).

§ 7 (*b*). Penalties for forging duty marks on plate, or selling or exporting plate so marked, or possessing dies, &c.

5 *Geo. IV. c. lii.* (1824) (Local—Birmingham and thirty miles round).

§ 1. 13 *Geo. III. c.* 52, repealed, so far as relates to Birmingham.

§ 4. Re-incorporation of "The Guardians of the Standard of Wrought Plate in Birmingham," with authority within a radius of thirty miles.

§ 20. No goldsmith, silversmith, &c., within Birmingham or thirty miles thereof, to sell or export gold or silver plate made within the specified limits until marked as follows:—

Gold of 22 carats fine with the lion passant (*c*).
„ 18 „ „ crown and 18.
Silver of 11 oz. 2 dwt. fine with the lion passant.
„ 11 oz. 10 dwt. „ Britannia.

And all gold and silver alike with the following additional marks:—

The worker's mark (the first letters of his Christian and surname, or in case of any partnership, the initials of the name or firm of such partnership).
The company's mark (an anchor).
A distinct variable mark or letter, to denote the year.

(*a*) § 7 provided penalties for counterfeiting, but this was repealed as to England by 7 & 8 *Vict. c.* 22, § 1, though still unrepealed for Scotland.

(*b*) The greater part of this Act is repealed by 33 & 34 *Vict. c.* 99, and 36 & 37 *Vict. c.* 91.

(*c*) By 7 & 8 *Vict. c.* 22, § 15, a crown and 22.

Penalty—Forfeiture of the plate or its value, half to the Crown, half to the informer.

§ 21. Goldsmiths, silversmiths, &c., within Birmingham and thirty miles, to enter their names, marks, and places of abode with the company. Penalty—£100, half to the informer, half to the purposes of the Act.

§ 22. Penalties of counterfeiting, &c.

The Act also contains numerous provisions with respect to the constitution of the company, the election of its officers, its procedure, &c.

7 & 8 *Vict. c.* 22 (1844).

This Act (which see) regulates the punishments and penalties for counterfeiting, &c., hall-marks (*a*).

§ 15. Gold plate of 22 carats fine to be marked with a crown and 22, instead of the lion passant.

17 & 18 *Vict. c.* 96 (1854).

This Act authorizes her Majesty, by Order in Council, to allow any standard for gold plate, not being less than one-third part of the whole, and to approve thereby of the instrument for stamping such plate, setting forth in figures the actual fineness of the metal (*b*).

18 & 19 *Vict. c.* 60 (1855).

Gold wedding rings are to be assayed and marked in the same way as other gold plate.

5 & 6 *Vict. c.* 47 (1842) (Customs Act) (*c*).

§ 59. Foreign gold and silver plate imported from abroad shall be of the respective standards required for plate wrought in England, and it shall not be sold, &c., until assayed, stamped and marked in England, Scotland, or Ireland, as plate of the same description made in that country.

5 & 6 *Vict. c.* 56 (1842) (Customs Act).

§ 6 (*d*). Foreign ornamental plate, manufactured before 1800, and imported, is exempted from the operation of the last Act.

39 & 40 *Vict. c.* 35 (1876) (Customs Act).

§ 2 (*e*). Foreign gold and silver plate imported and sent to an assay office in the United Kingdom for assay shall be marked, in addition to the marks ordinarily used at that office for British plate, with an F on an oval escutcheon, to denote the foreign origin of the plate.

(*a*) See *R.* v. *Lee*, 1 Leach, 416, and *R.* v. *Ogden*, 6 C. & P. 631, decided on the earlier statutes; also *R.* v. *Suter & Coulson*, 10 Cox, 577; and *R.* v. *Ardley*, L. R. 1 C. C. R. 301, 12 Cox, 23; in which a spurious hall-mark was made the means of obtaining money by false pretences.

(*b*) Accordingly the following reduced standards were ordered by the Council:—

15 carats, to be marked with 15 and 625.
12 carats, to be marked with 12 and 500.
9 „ „ 9 „ 375.

The crown and sovereign's head are not placed on plate of these qualities.

(*c*) The entire Act but §§ 59 and 60 is repealed.

(*d*) The remainder of the Act is repealed by 8 & 9 *Vict. c.* 84, § 2.

(*e*) This re-enacts 30 & 31 *Vict. c.* 82, § 24, the whole of which Act is repealed by the present one.

ENGLISH HALL MARKS AT THE PRESENT DAY (*a*).

	GOLD.					SILVER.	
	22 CARATS.	18 CARATS.	15 CARATS.	12 CARATS.	9 CARATS.	11 OZ. 2 DWT.	11 OZ. 10 DWT.
Quality Mark	22	18	15·625	12·5	9·375	None (*b*).	None.
Standard Mark	Crown.	Crown.	None.	None.	None.	Lion passant.	Britannia.
Date Mark	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.
Maker's Mark	Initials.	Initials.	Initials.	Initials.	Initials.	Initials.	Initials.
Duty Mark	Sovereign's head.	Sovereign's head.	None.	None.	None.	Sovereign's head.	Sovereign's head.
Assay Town Mark	On all qualities of gold and silver the special mark of the town.						

The special marks of the assay towns are as follows:—London, a leopard's head (except for silver of 11 oz. 10 dwt., for which it is a lion's head erased); Exeter, a castle; Chester, a dagger and 3 sheaves; Newcastle, 3 castles; Sheffield, a crown; Birmingham, an anchor (*c*).

(*a*) Gold and silver of all these qualities are manufactured at London, Chester, Newcastle-on-Tyne, and Birmingham. At Exeter only gold of 22 carats and silver of 11 oz. 2 dwt. are manufactured; at Sheffield only silver of 11 oz. 2 dwt. and 11 oz. 10 dwt. At York and Norwich no plate is now manufactured. At Bristol the powers conferred by 12 & 13 *Wm. III. c.* 4, were never exercised.

(*b*) Except at Newcastle, where the mark of a leopard's head crowned is used.

(*c*) The marks for York and Norwich (now discontinued) were:—York, 5 lions on a cross; Norwich, a castle and a lion passant.

Scotland (*a*).

13 *Geo. III. c.* 59 (1773) (*b*).

§ 2, which provided penalties for counterfeiting, &c., the marks for plate, is unrepealed in Scotland.

38 *Geo. III. c.* 69 (1798), (see above).

§ 7 (*c*), which provided penalties for counterfeiting, &c., the marks for plate, is unrepealed in Scotland.

6 & 7 *Wm. IV. c.* 69 (1836).

§ 1. Gold plate not to be made, sold, or exported, under 18 carats fine, nor silver under 11 oz. 2 dwt. fine. Penalty—Fine not exceeding 100*l.*

§ 2. Scotch goldsmiths to send their names, descriptions, and marks (to consist of the initial letters of their Christian and surnames, or, in the case of a partnership, of the initial letters of the firm name) for registration to the Goldsmiths' Company of Edinburgh, or of Glasgow.

§ 3. Gold plate of 22 carats fine, and silver plate of 11 oz. 2 dwt. to be sent, marked with the maker's mark, to the assay office, and to be there marked with :—

The mark of the thistle.

A distinct variable letter to denote the year.

The mark of the assaying company.

Gold plate of 18 carats fine to be marked in addition with 18.

Silver plate of 11 oz. 10 dwt. fine to be marked in addition with the figure of Britannia.

§§ 16 and 17 contain certain exemptions from marking.

§§ 18, 19 and 21 contain penalties for selling or exporting plate not duly marked, counterfeiting marks, &c., marking base metal, &c.

The Act also contains provisions with respect to the assaying, recovering penalties, &c.

The following statutes mentioned above under the head of "England" are also in force in Scotland: 6 *Geo. I. c.* 11; 24 *Geo. III. sess.* 2, *c.* 53; 38 *Geo. III. c.* 69; 5 & 6 *Vict. c.* 47; 5 & 6 *Vict. c.* 56; 17 & 18 *Vict. c.* 96; 18 & 19 *Vict. c.* 60; and 39 & 40 *Vict. c.* 35.

(*a*) In the reign of James III. of Scotland (1483) gold 22 carats fine, and silver 11 penny fine were to be marked with the maker's mark, the mark of the deacon of the craft, and the mark of the town.

(*b*) This Act was repealed as to *England* by 7 & 8 *Vict. c.* 22, § 1. The first section was repealed by the Statute Law Revision Act, 1871.

(*c*) Repealed as to *England* by 7 & 8 *Vict. c.* 22, § 1.

SCOTCH HALL MARKS AT THE PRESENT DAY (*a*).

	GOLD.					SILVER.	
	22 CARATS.	18 CARATS.	15 CARATS.	12 CARATS.	9 CARATS.	11 OZ. 2 DWT.	11 OZ. 10 DWT.
Quality Mark	22	18	15	12	9	None.	Britannia.
Standard Mark—							
Edinburgh	Thistle.	Thistle.	None.	None.	None.	Thistle.	Thistle.
Glasgow	Lion rampant.	Lion rampant.	Lion rampant.	Lion rampant.	Lion rampant.	Lion rampant.	Lion rampant.
Date Mark	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.
Maker's Mark	Initials.	Initials.	Initials.	Initials.	Initials.	Initials.	Initials.
Duty Mark	Sovereign's head.	Sovereign's head.	None.	None.	None.	Sovereign's head.	Sovereign's head.
Assay Town Mark	On all qualities of gold and silver the special mark of the town.						

The special marks of the assay towns are :—Edinburgh, a castle; Glasgow, a tree, fish, and bell.

(*a*) Gold and silver of all these qualities are manufactured at Edinburgh and Glasgow.

IRELAND.

3 *Geo. II. c.* 3 (1730), (Irish Act) (*a*).

§ 32. Gold and silver plate not to be sold until assayed, touched and marked.

§ 33. Plate to be assayed by the Dublin Company of Goldsmiths. Gold of 22 carats, and silver of 11 oz. 2 dwt., to be touched by the wardens of the company, and marked with "the marks now usual for that purpose." On payment of duty, the plate to be marked with a mark to be appointed by the Commissioners of His Majesty's Revenue (*b*).

§ 38. Penalties for counterfeiting, &c., provided.

23 & 24 *Geo. III. c.* 23 (1783), (Irish Act).

§ 2. No gold plate to be made, sold, &c., except of 22 carats, 20 carats, or 18 carats fine. Penalty—Forfeiture and fine of 10*l.*

§ 3. The following marks appointed for gold of 22 carats:

The mark of the maker, which is the number 22, and the first letter of the maker's Christian and surname. And,

For Dublin, a harp crowned.

For New Geneva (*c*), a like harp with a bar across the strings.

§ 4. Marks for gold of 20 carats:

The number 20.

The maker's initials. And,

For Dublin, a plume with three feathers.

For New Geneva, a plume with two feathers.

§ 5. Marks for gold of 18 carats:

The number 18.

The maker's initials. And,

For Dublin, an unicorn's head.

For New Geneva, an unicorn's head with a collar round the neck.

§ 6 contains exemptions.

§ 11 provides for the registration of new marks.

§ 28 provides penalties for counterfeiting, &c.

47 *Geo. III. sess.* 2, *c.* 15 (1807).

§ 3. Irish gold plate of 22, 20 or 18 carats, and silver plate of 11 oz. 2 dwt., to be assayed by the Goldsmith's Company of Dublin, touched and marked with "the marks now or hereafter to be used."

§ 6. On payment of duty, gold and silver plate to be marked with the King's head, to denote that this has been done (*d*).

§§ 14, 15 and 16 provide penalties for persons selling or buying unmarked plate, or counterfeiting, &c., the marks used.

(*a*) This Act was repealed as to gold by 23 & 24 Geo. III. c. 23, § 1 (Irish). It fixed a standard of 22 carats for gold (§ 33).

(*b*) The figure of Hibernia was accordingly appointed.

(*c*) This was a company of Geneva watchmakers, who established themselves in Co. Waterford. They carried on operations only from about 1784 to 1790.

(*d*) The figure of Hibernia continued to be used in addition.

The Act also provides for the manner in which duty is to be paid, books kept, &c.

The following statutes mentioned above under the head of "England," are also in force in Ireland: 5 & 6 *Vict. c.* 47; 5 & 6 *Vict. c.* 56; 17 & 18 *Vict. c.* 96; 18 & 19 *Vict. c.* 60; 39 & 40 *Vict. c.* 35.

IRISH HALL MARKS AT THE PRESENT DAY (*a*).

	GOLD.						SILVER.
	22 CARATS.	20 CARATS.	18 CARATS.	15 CARATS.	12 CARATS.	9 CARATS.	11 OZ. 2 DWT.
Quality Mark	22	20	18	15·625	12·5	9·375	None.
Standard Mark	Harp crowned.	Plume of 3 feathers.	Unicorn's head.	None.	None.	None.	Harp crowned.
Date Mark	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.
Maker's Mark	Initials.	Initials.	Initials.	Initials.	Initials.	Initials.	Initials.
Duty Mark	Sovereign's head.	Sovereign's head.	Sovereign's head.	None.	None.	None.	Sovereign's head.
Dublin Mark	Hibernia.	Hibernia.	Hibernia.	Hibernia.	Hibernia.	Hibernia.	Hibernia.

(*a*) The only assay town in Ireland is Dublin, where gold is manufactured of a standard (20 carats) not used in England or Scotland, but silver only of the earlier standard of 11 oz. 2 dwt., and none of 11 oz. 10 dwt.

N.B.—For very full information on all points connected with Hall Marks, see Mr. Chaffers' book on Hall Marks, 5th ed., London, 1875, 8vo.

CLOCKS AND WATCHES, ETC.

39 & 40 *Vict. c.* 36, § 42 (*a*) (1876).

Clocks and watches and other metal articles marked in imitation of British marks are forbidden to be imported into the United Kingdom (*b*).

METAL BUTTONS.

36 *Geo. III. c.* 60 (*c*) (1796).

§ 1 provides penalties for ordering metal buttons to be falsely marked in indication of quality, and for purchasing buttons so marked.

§ 2 provides penalties for falsely marking buttons in indication of quality, and for offering them for sale so marked.

§ 3. No marks indicative of quality are to be placed upon metal buttons, except the words "gilt," or "plated," respectively.

§ 4. The words "double gilt" and "treble gilt" may be placed upon buttons gilt to a specified degree.

§ 7 declares what quality is required to constitute a "gilt" or "plated" button.

The Act also contains provisions with respect to procedure, &c.

GUN-BARRELS.

By *Royal Charter*, 1637, "The Master Wardens and Society of the Mystery of Gunmakers of the City of London" were incorporated, proof marks assigned to them, &c.

53 *Geo. III. c* 115 (*d*) (1813).

§ 4 incorporates "The Guardians, Trustees and Wardens of the Gun-Barrel Proof House of the Town of Birmingham."

§ 7 appoints the Birmingham proof marks to be—1. Crossed sceptres surmounted by a crown, with the letters B. C. P. 2. The same device, with the letter V (*e*).

18 & 19 *Vict. c.* 148 (1855) (Local), "The Gun-Barrel Proof Act, 1855."

§ 9 repeals the former Acts.

§ 12 continues the incorporation of the Birmingham Company, under the name of "The Guardians of the Birmingham Proof House."

Many provisions follow for the regulation of the Birmingham Company.

§§ 84—101 contain provisions with respect to the marking of gun-barrels, penalties for falsely marking, &c.

§§ 106—109 relate to foreign gun-barrels.

(*a*) This is a re-enactment, with some variations, of 16 & 17 *Vict. c.* 107, § 44.

(*b*) See p. 289.

(*c*) Repealed in part, Statute Law Revision Act, 1871.

(*d*) Repealed by 18 & 19 *Vict. c.* 148, § 9 (Local).

(*e*) 55 *Geo. III. c.* 59 (1815), further regulated the marking of gun-barrels, but was also repealed by 18 & 19 *Vict. c.* 148, § 9 (Local).

CHAIN CABLES AND ANCHORS.

27 & 28 *Vict. c.* 27 (1864); 34 & 35 *Vict. c.* 101 (1871); 35 & 36 *Vict. c.* 30 (1872); and 37 & 38 *Vict. c.* 51 (1874), regulate the testing, proving, and marking of chain cables and anchors, and provide penalties for falsely marking, &c.

By § 4 of the Act of 1874, every contract for the sale of a chain cable implies, in the absence of an express stipulation to the contrary, that the cable has been duly tested and marked.

PLAYING CARDS.

25 & 26 *Vict. c.* 22 (1862).

§§ 28—37 provide that playing cards are to be sold in separate packs, enclosed in wrappers to be provided by the Commissioners of Inland Revenue, on which the duty chargeable and the name of the maker are to be marked. Penalties for frauds, &c.

16 & 17 *Vict. c.* 107 (1853).

§§ 114—115. Imported playing cards are to be sold in separate packs, to be enclosed in proper wrappers to be provided by the Commissioners of Inland Revenue.

§ 116. Penalties for counterfeiting, &c., such wrappers.

PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

25 & 26 *Vict. c.* 68 (1862), "Copyright for Works of Art Act."

§ 7. By this section it is forbidden to do any of the following acts:—

1. Fraudulently sign any painting, drawing, photograph or negative with any name, initials or monogram.

2. Fraudulently sell, publish, &c., any painting, &c., marked with the name, &c., of a person who did not execute such work.

3. Fraudulently utter any copy or colourable imitation of any painting, &c., whether the subject of subsisting copyright or not, as having been executed by the author of the original.

4. Where the author of any painting, &c., has parted with the possession of the work, and the work is altered by any other person, it is forbidden, during the life of the author, to make, sell, publish, &c., such work or a copy of it so altered as or for the unaltered work of the author.

The section provides penalties for offenders against its provisions, but limits the time during which they can be incurred to within twenty years after the death of the person whose works have been wrongfully dealt with.

HOPS.

54 *Geo. III. c.* 128 (*a*) (1814).

§ 1. Growers of hops are to mark the bags, in letters of specified dimensions, with their names, and the names of the parish and county in which the hops were grown, before putting the hops into the bag. Penalty for putting in the hops before marking the bag.

29 & 30 *Vict. c.* 37 (1866), "The Hop (Prevention of Frauds) Act, 1866."

§ 2. Growers of hops are to mark each bag, in addition to their own names and the names of the parish and county, with the year in which the hops were grown, the progressive number of the bag, and its weight.

Penalties are provided for not marking, falsely marking, wilfully altering marks, &c.

§ 18. The vendor is to be deemed to contract that the marks are genuine.

§ 20. The provisions of the Merchandise Marks Act, 1862, §§ 23 and 24, are incorporated.

WOOLLEN CLOTHS.

5 *Geo. III. c.* 51 (1765), (West Riding of Yorkshire).

§ 2 provides for the appointment by the justices of the peace for the West Riding of Yorkshire of searchers and measurers of cloth within the riding.

§ 3. After measuring cloths milled at the fulling mill as provided, the searcher and measurer is to affix to one end of each cloth a leaden seal provided by the clothier, and to stamp on the seal or rivet the name of the searcher and measurer, the length and breadth of the cloth, and the number of the piece, according to an annual rotation.

§ 6. After the milled cloth is brought from the fulling mill, and before it is put upon the tenter, the clothier is to seal the other end, and stamp the seal or rivet with the length and breadth of the cloth.

§ 18. Every clothier is to weave or sew into the head of the cloth, at the time of making, his name and place of abode.

Penalties for frauds, &c.

6 *Geo. III. c.* 23 (1766), (West Riding of Yorkshire).

§ 2. The searcher and measurer is to measure milled cloths as provided by the last Act, and to rivet on a leaden seal, and to stamp on the rivet his name and the name of the mill where he is stationed, and on the rest of the seal the length, breadth, and number of the cloth.

§ 5. Where cloth is remeasured, as provided, and is found to be of less length, or of less length for above one third of the length than was stated on

(*a*) This Act is repealed in part. The former Acts, now repealed, were 14 *Geo. III. c.* 68, under which the excise officer was to mark each bag of hops with the weight of hops, the name and place of abode of the grower, and the date of the year; 39 & 40 *Geo. III. c.* 81, under which the grower was himself to mark his name and place of abode, the excise officer the weight, date, and progressive number of the bag; and 48 *Geo. III. c.* 134, under which the owner was in addition to mark the name of the parish and county in which the hops were grown.

the previous seal, the last measurer is to affix a new stamp, and place his own name on the rivet, with the words "Inspector" or "Supervisor," and on the same seal the true length and breadth.

§ 13. The clothier may weave or sew his name and place of abode into the cloth, either in distinct letters or words, or in common or usual abbreviations.

Penalties for frauds, &c.

LINEN.

13 *Geo. I. c.* 26 (*a*), (1726), (Scotland).

§ 30. Every trader, dealer, and weaver of linen may weave in any piece of linen of his make his name, or some known mark. Penalty for counterfeiting such mark.

17 *Geo. II. c.* 30 (*b*), (1743).

§ 1. Penalties provided for stamping foreign linens in imitation of British or Irish, and for placing counterfeit stamps on British or Irish linens.

18 *Geo. II. c.* 24 (*b*), (1744).

§ 1. Linens to be stamped must be sworn to be of the manufacture of [Scotland or] Ireland.

§ 2 (*c*). No bounty to be paid on British or Irish linens exported, but on such as are marked at both ends of every piece with the name and place of abode of the maker, the year of manufacture, the number of the piece in rotation, the name and place of abode of the exporter or seller for exportation; and unless the ends are also marked with the month and year when, and the name of the port at which the linens are entered for exportation. The marks to be stamped with lamp black and burnt oil.

Penalties for falsely stamping, &c.

4 *Geo. IV. c.* 40 (1823), (Scotland).

§ 3. Every manufacturer or weaver of linen and dealer in linen in Scotland may weave his name, or fix any mark or seal, in any piece of linen of his make, to denote the length, breadth, or quality of the linen, or the maker's name. Penalties for counterfeiting.

5 & 6 *Wm. IV. c.* 27 (1835), (Ireland).

§ 4. Across each end of every piece of linen offered for sale in open fair or market in Ireland there are to be woven two coarse threads or cords at a distance of one fourth of an inch, and close to such threads or cords on each end are to be written the Christian name, surname, and place of residence of the weaver or manufacturer, and on the outside fold of every piece its length and breadth.

§ 14. The Lord Lieutenant to appoint a committee of twelve in each county, to superintend the brown linen trade.

(*a*) This Act is in great part repealed.

(*b*) Repealed as to Scotland by 4 *Geo. IV. c.* 40, § 1.

(*c*) Repealed as to bounty by 6 *Geo. IV. c.* 105.

§ 19. The committee in each county to prescribe the form and device of the seal or stamp to be used by the county sealmaster of brown linen.

§ 21. The sealmaster shall affix to each piece of brown linen brought for the purpose, and which shall be in accordance with the Act, an impression of the seal, in black, red, or blue; and shall also mark with the same ingredients on the back of each piece its length, breadth, name of sealmaster, and the parish and county where he resides, or the name of the market town to which he is appointed.

Regulations for sales, penalties for frauds, &c.

PUBLIC STORES.

38 & 39 *Vict. c.* 25 (*a*) (1875), "The Public Stores Act, 1875."

§ 4. The marks described in the First Schedule to the Act are appropriated to denote her Majesty's property. Penalty for unauthorized use of such marks.

§ 5. Penalty provided for obliteration of marks.

§ 6. Penalty for unlawful possession of public stores (*b*).

(*a*) This Act repealed the following Acts, by which the Public Stores had previously been regulated:—9 *Wm. III. c.* 41 (1697); this Act provided penalties for forging the King's marks, or having in possession goods so marked; 9 *Geo. I. c.* 8 (1722); this Act modified the penalties contained in the former Act; 17 *Geo. II. c.* 40, § 10 (1743); this provided for the trial of offences against these Acts before any judge, justice, or justices at assizes, or justices of the peace at general quarter sessions; 39 & 40 *Geo. III. c.* 89 (1800); this Act provided penalties for selling or having in possession goods marked with the marks specified, or defacing, &c., such marks; 54 *Geo. III. c.* 60 (1814); this extended the provisions of the former Acts to cordage wrought with worsted threads; 54 *Geo. III. c.* 159, § 10 (1814); this provided a penalty for sweeping for lost anchors, cables, &c., belonging to the King's service; 55 *Geo. III. c.* 127 (1815); this extended the previous Acts to include all public stores; 30 & 31 *Vict. c.* 128 (1867), "*The War Department Stores Act*, 1867;" and 32 & 33 *Vict. c.* 12 (1869), "*The Naval Stores Act*, 1869." The following Acts have also from time to time regulated Naval Stores: 25 & 26 *Vict. c.* 64, "*The Naval and Victualling Stores Act*, 1862"; 27 & 28 *Vict. c.* 91, "*The Naval and Victualling Stores Act*, 1864"; 30 & 31 *Vict. c.* 119, "*The Naval Stores Act*, 1867"; all of which Acts were previously repealed.

(*b*) It has been repeatedly decided that on an indictment under 9 & 10 *Wm. III. c.* 41, for being unlawfully in possession of marked stores, the prisoner cannot be convicted unless he is in possession with knowledge of the marks. See *R. v.*—, Foster Cr. Cas. 439; *R.* v. *Banks*, 1 Esp. 144; *R.* v. *Willmett*, 3 Cox, 281; *R.* v. *Cohen*, 8 Cox, 41; *R.* v. *Sleep*, 8 Cox, 472. In *R.* v. *Banks* it was, indeed, held by Lord Kenyon, C. J., that it was sufficient for the prosecution to prove the finding of the marked goods in the prisoner's possession, the prisoner being allowed to obtain acquittal by proving his ignorance; but it is now for the prosecution to prove the knowledge, in the affirmative (see *R.* v. *Willmett*; *R.* v. *Cohen*; *R.* v. *Sleep*). Such knowledge may, however, be presumed by the jury from the circumstances attending the possession: *R* v. *Sleep*. Although a specified certificate was required by 9 & 10 *Wm. III. c.* 41, to justify possession of marked goods, it was held that another form of certificate might be accepted (*R.* v. *Willmett*), or even the

First Schedule.

Marks appropriated for use in or on her Majesty's stores :

Stores.	Marks.
Hempen cordage and wire rope.	White, black, or coloured worsted threads laid up with the yarns and the wire respectively.
Canvas, fearnought, hammocks, and seamen's bags.	A blue line in a serpentine form.
Buntin.	A double tape in the warp.
Candles.	Blue or red cotton threads in each wick or wicks of red cotton.
Timber or metal. Any stores not before enumerated, whether similar to the above or not.	The name of her Majesty, her predecessors, her heirs or successors, or of any public department, or any branch thereof, or the broad arrow, or a crown, or her Majesty's arms, whether such broad arrow, crown, or arms be alone or be in combination with any such name as aforesaid, or with any letters denoting any such name.

certificate be dispensed with altogether (*R.* v. —— ; *R.* v. *Banks*), there being no proof of knowledge.

Possession by a railway company for purpose of transfer, on behalf of the prisoner, is such a possession by the prisoner as to justify a conviction : *R.* v. *Smiley*, 8 Cox, 179.

As to the exception in favour of contractors and contractors' servants, see *R.* v. *Silversides*, 3 Q. B. 406 ; and *R.* v. *Fitzgerald*, 43 C. C. C. Sess. Pap. 369.

APPENDIX E.

UNITED STATES STATUTE LAW.

Act of Congress of July 8th, 1870.

§ 77. And be it further enacted, that any person or firm domiciled in the United States, and any corporation created by the authority of the United States, or of any State or Territory thereof, and any person, firm, or corporation resident of or located in any foreign country which, by treaty or convention, affords similar privileges to citizens of the United States, and who are entitled to the exclusive use of any lawful trade mark, or who intend to adopt and use any trade mark, for exclusive use within the United States, may obtain protection for such lawful trade mark by complying with the following requirements, to wit :—

First—By causing to be recorded in the Patent Office, the names of the parties and their residences and place of business, who desire the protection of the trade mark.

Second—The class of merchandise and the particular description of goods comprised in such class, by which the trade mark has been or is intended to be appropriated.

Third—A description of the trade mark itself with fac-similes thereof, and the mode in which it has been or is intended to be applied and used.

Fourth—The length of time, if any, during which the trade mark has been used.

Fifth—The payment of a fee of 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 trade mark, has a right to the use of the same, and that no other person, firm, or corporation, has the right to such use, either in the identical form, or having such near resemblance thereto as might be calculated to deceive, and that the description and fac-similes presented for record are true copies of the trade mark sought to be protected.

§ 78. And be it further enacted, that such trade mark shall remain in force for thirty years from the date of such registration, except in cases where such trade mark is claimed for and applied to articles not manufactured in this country, and in which it receives protection under the laws of any foreign country for a shorter period, in which case it shall cease to have any force in this country by virtue of this Act, at the same time that it becomes of no effect elsewhere, and during the period that it remains in force it shall entitle the person, firm, or corporation registering the same to the exclusive use thereof, so far as regards the description of goods to which it is appropriated in the statement filed under oath as aforesaid, and no other person shall lawfully use the same trade mark, or substantially the same, or so nearly resembling it as to be calculated to deceive upon substantially the same description of goods: Provided that six months prior to the expiration of the said term of thirty years, application may be made for a renewal of such registration, under regulations to be prescribed by the Commissioner of Patents, and the fee for such renewal shall be the same as for the original registration, certificate of such renewal shall be issued in the same manner as for the original registration, and such trade mark shall remain in force for a further term of thirty years: And provided further, that nothing in this section shall be construed by any court as abridging or in any manner affecting unfavourably the claim of any person, firm, corporation, or company to any trade mark after the expiration of the term for which such trade mark was registered.

§ 79. And be it further enacted, that any person or corporation who shall reproduce, copy, counterfeit, or imitate any such recorded trade mark, and affix the same to goods of substantially the same description, properties, and qualities as those referred to in the registration, shall be liable to an action on the case for damages for such unlawful use of said trade mark at the suit of the owner thereof in any Court of competent jurisdiction in the United States, and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of his trade mark, and to recover compensation therefor in any Court having jurisdiction over the person guilty of such wrongful use. The Commissioner of Patents shall not receive and record any proposed trade mark which is not and cannot become a lawful trade mark, or which is merely the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the same name where used by other persons, or which is identical with a trade mark appropriated to the same class of merchandise and belonging to a different owner and already registered or received for registration, or which so nearly resembles such last-mentioned trade mark as to be likely to deceive the public: Provided, that this section shall not prevent the registry of any lawful trade mark rightfully used at the time of the passage of this Act.

§ 80. And be it further enacted, that the time of the receipt of any trade mark at the Patent Office for registration shall be noted and recorded, and copies of the trade mark and of the date of the receipt thereof, and of the statement filed therewith under the seal of the Patent Office, certified by the

Commissioner, shall be evidence in any suit in which such trade mark shall be brought in controversy.

§ 81. And be it further enacted, that the Commissioner of Patents is authorized to make rules and regulations and to prescribe forms for the transfer of the right to use such trade marks, conforming as nearly as practicable to the requirements of the law respecting the transfer and transmission of copyrights.

§ 82. And be it further enacted, that any person who shall procure the registry of any trade mark, or of himself as the owner thereof, or an entry respecting a trade mark in the Patent Office under this Act, by making any false or fraudulent representations or declarations verbally or in writing, or by any fraudulent means, shall be liable to pay damages in consequence of any such registry or entry to the person injured thereby, to be recovered in an action on the case in any Court of competent jurisdiction within the United States.

§ 83. And be it further enacted, that nothing in this Act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade mark might have had if this Act had not been passed.

§ 84. And be it further enacted, that no action shall be maintained under the provisions of this Act by any person claiming the exclusive right to any trade mark which is used or claimed in any unlawful business, or upon any article which is injurious in itself, or upon any trade mark which has been fraudulently obtained, or which has been formed and used with the design of deceiving the public in the purchase or use of any article of merchandise.

Act of Congress of 1875.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled :—

§ 1. That every person who shall, with intent to defraud, deal in or sell, or keep or offer for sale, or cause or procure the sale of, any goods of substantially the same descriptive properties as those referred to in the registration of any trade mark, pursuant to the statutes of the United States, to which, or to the package in which the same are put up, is fraudulently affixed said trade mark, or any colourable imitation thereof, calculated to deceive the public, knowing the same to be counterfeit, or not the genuine goods referred to in said registration, shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or imprisonment not more than two years, or both such fine and imprisonment.

§ 2. That every person who fraudulently affixes, or causes or procures to be fraudulently affixed, any trade mark registered pursuant to the statutes of the United States, or any colourable imitation thereof, calculated to deceive the public, to any goods of substantially the same descriptive properties as those referred to in said registration, or to the package in which they are put up, knowing the same to be counterfeit, or not the genuine goods referred to in said registration, shall, on conviction thereof, be punished as prescribed in the first section of this Act.

§ 3. That every person who fraudulently fills, or causes or procures to be fraudulently filled, any package to which is affixed any trade mark, registered pursuant to the statutes of the United States, or any colourable imitation thereof, calculated to deceive the public, with any goods of substantially the same descriptive properties as those referred to in said registration, knowing the same to be counterfeit, or not the genuine goods referred to in said registration, shall, on conviction thereof, be punished as prescribed in the first section of this Act.

§ 4. That any person or persons who shall, with intent to defraud any person or persons, knowingly and wilfully cast, engrave, or manufacture, or have in his, her, or their possession, or buy, sell, offer for sale, or deal in, any die or dies, plate or plates, brand or brands, engraving or engravings, on wood, stone, metal, or other substance, moulds, or any false representation, likeness, copy, or colourable imitation of any die, plate, brand, engraving or mould of any private label, brand, stamp, wrapper, engraving on paper or other substance, or trade mark, registered pursuant to the statutes of the United States, shall, upon conviction thereof, be punished as prescribed in the first section of this Act.

§ 5. That any person or persons who shall, with intent to defraud any person or persons, knowingly and wilfully make, forge or counterfeit, or have in his, her, or their possession, or buy, sell, offer for sale, or deal in, any representation, likeness, similitude, copy, or colourable imitation of any private label, brand, stamp, wrapper, engraving, mould, or trade mark, registered pursuant to the statutes of the United States, shall, upon conviction thereof, be punished as prescribed in the first section of this Act.

§ 6. That any person who shall, with intent to injure or defraud the owner of any trade mark, or any other person lawfully entitled to use or protect the same, buy, sell, offer for sale, deal in, or have in his possession any used or empty box, envelope, wrapper, case, bottle, or other package, to which is affixed, so that the same may be obliterated without substantial injury to such box or other thing aforesaid, any trade mark, registered pursuant to the statutes of the United States, not so defaced, erased, obliterated, and destroyed as to prevent its fraudulent use, shall, on conviction thereof, be punished as prescribed in the first section of this Act.

§ 7. That if the owner of any trade mark, registered pursuant to the statutes of the United States, or his agent, make oath, in writing, that he has reason to believe, and does believe, that any counterfeit dies, plates, brands, engravings on wood, stone, metal, or other substance, or moulds, of his said registered trade mark, are in the possession of any person, with intent to use the same for the purpose of deception and fraud, or make such oaths that

any counterfeits or colourable imitations of his said trade mark, label, brand, stamp, wrapper, engraving on paper or other substance, or empty box, envelope, wrapper, case, bottle, or other package, to which is affixed said registered trade mark not so defaced, erased, obliterated, and destroyed as to prevent its fraudulent use, are in the possession of any person with intent to use the same for 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 authorising and directing the marshal of the United States for the proper district to search for and seize all said counterfeit dies, plates, brands, engravings on wood, stone, metal, or other substance, moulds, and said counterfeit trade marks, colourable imitations thereof, labels, brands, stamps, wrappers, engravings on paper, or other substance, and said empty boxes, envelopes, wrappers, cases, bottles, or other packages that can be found; and upon satisfactory proof being made that said counterfeit dies, plates, brands, engravings on wood, stone, metal, or other substance, moulds, counterfeit trade marks, colourable imitations thereof, labels, brands, stamps, wrappers, engravings on paper or other substance, empty boxes, envelopes, wrappers, cases, bottles, or other packages, are to be used by the holder or owner for the purpose of deception and fraud, that any of said judges shall have full power to order all said counterfeit dies, plates, brands, engravings on wood, stone, metal, or other substance, moulds, counterfeit trade marks, colourable imitations thereof, labels, brands, stamps, wrappers, engravings on paper or other substance, empty boxes, envelopes, wrappers, cases, bottles, or other packages, to be publicly destroyed.

§ 8. That any person who shall, with intent to defraud any person or persons, knowingly and wilfully aid or abet in the violation of any of the provisions of this Act, shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or imprisonment not more than one year, or both such fine and imprisonment.

APPENDIX F.

TREATY WITH THE UNITED STATES, 1877.

DECLARATION BETWEEN GREAT BRITAIN AND THE UNITED STATES FOR THE PROTECTION OF TRADE MARKS.

The Government of her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and the Government of the United States of America, with a view to the reciprocal protection of the marks of manufacture and trade in the two countries, have agreed as follows:

The subjects or citizens of each of the contracting parties shall have, in the dominions and possessions of the other, the same rights as belong to native subjects or citizens, or as are now granted or may hereafter be granted to the subjects and citizens of the most favoured nation, in everything relating to property in trade marks and trade labels.

It is understood that any person who desires to obtain the aforesaid protection must fulfil the formalities required by the laws of the respective countries.

In witness whereof the Undersigned have signed the present Declaration, and have affixed thereto the seal of their arms.

Done at London, the 24th day of October, 1877.

(L.S.) DERBY.
(L.S.) EDWARDS PIERREPONT.

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