THE

LAW OF TRADE MARKS

AND THEIR

REGISTRATION AND MATTERS CONNECTED THEREWITH,

INCLUDING PASSING OFF AND GOODWILL.

BY

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

OF LINCOLN'S INN, ESQ., BARRISTER AT-LAW.

FIFTH EDITION

BY

THE AUTHOR

AND

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BY THE SAME AUTHOR.

A DIGEST OF CASES

OF

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

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TO

The Memory of

THE RIGHT HON. SIR GEORGE JESSEL,

LATE

MASTER OF THE ROLLS,

TO WHOM,

BY HIS KIND PERMISSION,

THE FIRST EDITION OF

This Work

WAS MOST RESPECTFULLY DEDICATED,

IN THE YEAR 1878.

PREFACE TO THE FIFTH EDITION.

The history of the Acts for regulating the registration of trade marks is the history of a continued struggle on the part of the mercantile community to bring about a state of the law suited to their practical requirements, of repeated attempts on the part of the Legislature to comply with those requirements, and of a succession of discoveries of the failure of the language employed, when submitted to judicial decision, to carry out the objects arrived at.

The most familiar example of this is in connection with the provisions relating to the registration of words as trade marks. When the original Act of 1875 was passed it was thought that the difficulties affecting this subject were insurmountable, and the registration of words was simply dismissed from consideration, except in cases of old user, to which a concession was made by permitting the registration of any "special and distinctive word" used as a trade mark before the passing of the Act. This did not meet the needs of commerce, so in the Act of 1883 provision was made for the registration of words as new marks; but unfortunately, instead of allowing the registration of a "special and distinctive word" as a trade mark, the phrase "fancy word not in common use," which had previously been in fairly general use with much the same meaning as that attached to the phrase "special and distinctive word," was introduced, and before long it was discovered that the true signification of the term employed was so restricted that practically every word which came into question was ruled out for one reason or another. Then

came Lord Herschell's Committee and the Act of 1888, which introduced two alternatives, the one being "an invented word" and the other "a word having no reference to the character or quality of the goods." Here, again, the Courts at first considered it necessary to examine the words submitted to them with the same rigidity as before; but the decision of the House of Lords in the "Solio" case did much to relax the tension in the case of "invented words," while remote allusions to character or quality continued to exclude large classes of words. Unfortunately, too, the decision in the "Solio" case was accompanied by *dicta* of a somewhat ambiguous kind, which gradually led to the whole weary round being begun anew.

The new Act deals with the difficulty by slightly relaxing the stringency of the definition of registrable marks, and adding to this the provision that any distinctive mark may be registered. but that a name, signature, or word or words, other than such as are expressly permitted, shall not be deemed a distinctive mark except by order of the Board of Trade or the Court, and the tribunal is authorized to take into consideration the extent to which actual user has rendered the mark in fact distinctive, so that for the first time regard may be had to facts as well as to theories. Unfortunately the framers of the Act, in their desire to meet the possible contention that a mark which had not been used could not be distinctive, defined the word "distinctive" as meaning "adapted to distinguish," and it has become evident that if the Act fails to meet the expectations of its promoters, this will most likely be the cause. In the strictest sense, no word which is not registrable under the earlier portions of the section can be "adapted to distinguish," as words which have no reference, or only an indirect reference, to the character or quality of the goods, can be registered without any special sanction, and unless the words "adapted to distinguish" are interpreted with some liberality, and in the light of the facts proved in evidence, the special form of application might as well have been omitted from the Act altogether. It would be difficult, however, to say that any word has been refused under this provision without reasonable grounds, and it is to be hoped that words which have come to identify the goods of particular traders will not be rejected for mere *à priori* reasons.

Another matter which may be mentioned has reference to the necessity felt by traders for the use and registration of a number of marks substantially identical, while differing in minor respects. Such registrations have frequently been permitted, but in other instances the Courts have objected to the registration of a mark very similar to one already standing in the same name, on the ground that the existing registration afforded sufficient protection for such variations, and that to allow what was considered to be in substance a re-registration of the same mark would be to cumber the register unnecessarily. Now that the number of marks brought under the Act exceeds three hundred thousand, this objection is hardly one of substance, and it makes no allowance for trading requirements or foreign registrations. The point is successfully dealt with by the new Act.

Since the last edition of this book was published a very large number of decisions have been given, not only in trade mark cases properly so-called, but also in cases of passing-off, and these have thrown much additional light on the operation of the law, though without affecting its fundamental principles to any material extent.

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

(*a*) *Scaramanga* v. *Stamp*, 5 C. P. D. 295, 303.

(*b*) See *per* Patteson, J., in *Beverley* v. *Lincoln Gas Light and Coke Co.*, 6 Ad. & Ell. 829, 837, and Bacon, V.-C., in *Dawson* v. *Bank of Whitehaven*, 4 Ch. D. 639, 648.

after full consideration of English as well as American authorities; and it may reasonably be anticipated that English judges will in similar circumstances arrive at similar conclusions. It has been found necessary, however, to curtail to some extent the references to the American authorities, as otherwise, in view of the great growth of British and colonial case-law, room could not have been found for matter which could hardly have been omitted.

It has been thought best to retain the decisions under the Acts of 1883--1902 in the notes to those Acts in Appendix F., as to have inserted them in the notes to the Act of 1905 in Appendix A. might easily have led to mistakes, the language of the Acts being varied in very many respects. It is hoped that the copious cross-references will render them still easily available, when required, without the risk of their being supposed to be decisions under the Act now in force.

The author desires to offer his grateful thanks to his coadjutors, Mr. Hemming and Mr. S. Raymond Sebastian, who have devoted great pains and attention to the preparation of this edition; also to the officials of the Trade Marks Registry, the Board of Trade, and the Board of Customs, and others, for kind assistance.

L. B. S.

13, New Square, Lincoln's Inn,
February, 1911.

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Birmingham Hotel and Restaurant Co.—Grierson, Oldham & Co. *v.*
Birmingham Vinegar Brewery Co.—Powell *v.*
Biscombe—Schweppes *v.*
Bishop—State *v.*
Blackman—Filkins *v.*
Blackwell—Armistead *v.*
Blake—Jacobsohn *v.*
Blanford—Willett *v.*
Blezard—Wright, Crossley & Co. *v.*
Bloomer—Bloss *v.*
Blow—George *v.*
Blumberg—Hutchinson *v.*
Boehm—Mouson & Co. *v.*
Bolton—Kinahan *v.*
Bolton—Singleton *v.*
Bombay Tea Co., Ld.—Langley *v.*
Boston Rubber Co. of Montreal—Boston Rubber Shoe Co. *v.*
Bostwick—Lockwood *v.*
Bottomley—Lloyd *v.*
Bovril, Ld.—R. *v.*
Bowker—Carver *v.*
Bowles—Brett *v.*
Boyd—Beddow & Sons *v.*
Boyd—Punch *v.*
Boyes—R. *v.*
Boyington—Tucker Manufacturing Co. *v.*
Boys—Austen *v.*
Bradley—Coe *v.*
Bradley & Son—Randall, H. E. *v.*
Brain—Pursor *v.*
Brakell—Scheile *v.*
Bramall—R. *v.*
Bramble, Wilkins & Co.—Marcovitch *v.*
Braud—Denco *v.*

Braun—Witthaus *c.*
Brayton—Weener *c.*
Breidenbach—Rowland *c.*
Brendel—McVey *c.*
Brett—Stephens *c.*
Brewster—Constable & Co. *c.*
Brinsmead—Brinsmead *c.*
British and American Shoe Co.—Randall, H. E. *c.*
British Electromobile Co.—Electromobile Co. *c.*
British Empire Manufacturing Co.—Singer Manufacturing Co. *c.*
British Empire Typesetting Machine Co.—Linotype Co. *c.*
British Motor Traction Co.—Daimler Motor Car Co. *c.*
British North Borneo Cigar Co. *c.*—Jarrett *c.*
British Patent Perforated Paper Co.—Colleys Patents, Ld. *c.*
British Tea and Trading Association, Ld. Hanson *c.*
Britten—Sen Sen Co. *c.*
Broad—Woolley *c.*
Bromley, H., & Co.—Williams, J. B. Co. *c.*
Brooks—Dicks *c.*
Brotherhood—Halsey *c.*
Broughton—Broughton *c.*
Brown—Babbit *c.*
Brown—Coleman & Co. *c.*
Brown—Collins Co. *c.*
Brown—Hubbuck, Thomas & Son *c.*
Brown—Jones *c.*
Brown—R. *c.*
Brownrigg—Day *c.*
Broxburn Oil Co., Ld.—Burland & Co. *c.*
Bruoggeman Reinert Distillery Co.—Hostetter Co. *c.*
Brunton—Colleen *c.*
Brush Midland Electric Light and Power Co.—Midland Electric Light and Power Co. *c.*
Bryan—Curtis *c.*
Bryan—R. *c.*
Buchanan—Nicholson, J. & W. J. & Co. *c.*
Buchanan Flour Mills—Vernon *c.*
Bullock—Reynolds *c.*
Bulmer—Rolt *c.*
Burckhardt—Burckhardt *c.*
Burditt & Co.—Vadilal *c.*
Burgess—Burgess *c.*
Burgess—Wood *c.*
Burgoyne—R. *c.*
Burke—Wolfe *c.*
Burn—Stone *c.*
Bustard—Braham *c.*
Butcher—R. *c.*
Butler—R. *c.*
Butterfield—Tompkins *c.*
Byles—Kelly *c.*

California Fig Syrup Co.—Worden *c.*
Callow—R. *c.*
Cam Portland Cement Co.—R. *c.*
Cameron—R. *c.*
Camoccio—R. *c.*
Campbell—Charleson *c.*
Campbell—R. *c.*
Canada Chemical Co.—Provident Chemical Works *c.*
Canada Publishing Co.—Gage *c.*
Cantrell & Cochrane—Worden & Pegram *c.*
Capital and County Deposit Bank—Capital and Counties Bank, Ld. *c.*
Carbon Metallic Paint Co.—Prince Metallic Paint Co. *c.*
Carey—Mundy *c.*
Carey—Southern White Lead Co. *c.*
Cargill—Walker *c.*
Carlan—Stone *c.*
Carlile—Cartier *c.*
Carpenter—Taylor *c.*
Carron—Smith *c.*
Carter—R. *c.*
Cash—Cash, J. & J., Ld. *c.*
Cassin—Burke *c.*
Caswell—Hazard *c.*
Catesby—Meadows *c.*
Catesby—R. *c.*
Cathery—Farina *c.*
Cellonite Manufacturing Co.—Celluloid Manufacturing Co. *c.*
Central City Soap Co.—O'Rourke *c.*
Chadwick—Coats *c.*
Chandler—Cocks *c.*
Chaney—Hoxie *c.*
Chapman—Bullock *c.*
Chapman—Simpson *c.*
Chappell—Franke *c.*
Charbonnel—Robineau *c.*
Chatto & Windus—Poulett *c.*
Cheltenham Railway Co.—Gordon *c.*
Chemists' Co-operative Society, Ld.—Liebig's Extract of Meat Co. *c.*
Cherry Bros.—Donahoe, J., Ld. *c.*
Child—Filley *c.*

Chilworth Gunpowder Co.—Starey *v.*
Chivers, S. & Co.—Chivers, S. & Sons *v.*
Choonecloll Mullick—Orr-Ewing *v.*
Christie—Christie *v.*
Clark—Canal Co. *v.*
Clark—Clark *v.*
Clark—Fennessy *v.*
Clark—R. *v.*
Clarke—Jameson *v.*
Clarke—Rawlinson *v.*
Clarke—R. *v.*
Clarke—Spottiswoode *v.*
Clarke—Tipping *v.*
Clarke—Wylam *v.*
Cleat—Holloway *v.*
Clements—Shipwright *v.*
Cleveland Stone Co.—Pike Manufacturing Co. *v.*
Closs—R. *v.*
Clybouw—Moet *v.*
Clyde—Winsor *v.*
Cocks—Brooks *v.*
Cocos Butter Manufacturing Co. Fairbank, N. K. Co. *v.*
Cohen—Choynski *v.*
Cohen, J. & Co.—Palestine Wine and Trading Co. *v.*
Cohen—R. *v.*
Cohen Bros.—Kirstein, Sons & Co. *v.*
Cohen, Weenan & Co.—R. *v.*
Cohen & Wilks—Aquascutum, Ld. *v.*
Coker—Hitchcock *v.*
Cole—Popham *v.*
Cole—R. *v.*
Coleman—Radway *v.*
Colleuder—Phelan *v.*
Colley—Hart *v.*
Collicott—Hart *v.*
Collingridge—Cook *v.*
Collins—Crawshay *v.*
Commissioners of Inland Revenue—Potter *v.*
Comptroller-General—R. *v.*
Condy—Sanitas Co., Ld. *v.*
Conhaim—Cigar Makers' Protective Union *v.*
Connell—Bayer *v.*
Connolly—Baxter *v.*
Conservative Newspaper Co., Ld.—Marks *v.*
Cooke—British Tea and Trading Association, Ld. *v.*
Cooper—Christie, Manson & Woods *v.*
Cooper—Hennessy *v.*
Cooper—Kerfoot *v.*
Cooper—Parker Manufacturing Co. *v.*
Cooper & Co.—Ginesi *v.*
Co-operative Wholesale Society—Iron Ox Remedy Co. *v.*
Coopman—R. *v.*
Cope—Dakin *v.*
Copeman's Patent Seat Raft and Marine Life-Saving Association, Ld.—Roper's Patent Seat Raft and Marine Life-Saving Apparatus Co. *v.*
Corcoran—Witt *v.*
Cording—Burberrys *v.*
Cordingley—Lyric Theatre, Ld. *v.*
Cornwell—Morse *v.*
Coulson & Co.—Coulson & Sons *v.*
Coupland—Coupland's Trustee *v.*
Courtenay—Mogford *v.*
Couston—Moet *v.*
Covell—Chadwick *v.*
Cowen—Collins Co. *v.*
Cowie—Newton *v.*
Cowland—R. *v.*
Cox—R. *v.*
Crabb—Blackwell *v.*
Crampton—R. *v.*
Craven—Moore *v.*
Crichton—Russell *v.*
Cripps—Fowler *v.*
Crisp—R. *v.*
Crisp & Co.—Carr & Sons *v.*
Crisp & Co.—Knight, John & Sons *v.*
Crompton—R *v.*
Crook—United Tobacco Companies (South) *v.*
Crooks—Alaska Packers Association *v.*
Cropper, Charlton & Co.—Cropper Minerva Machine Co. *v.*
Crosse—R. *v.*
Crowley—Walton *v.*
Crump—Colman *v.*
Cruttenden—R. *v.*
Cunston—Hallett *v.*
Curling—England *v.*
Curnow—Sandner *v.*
Currey—Robinson *v.*
Currey—Upmann *v.*
Currie—Wotherspoon *v.*
Cuthbert—Somervell Bros. *v.*
Cuthbert & Co.—Southall & Co.
Cutter—Hardy *v.*
DAILY—Thomson & Co. *v.*
D'Albuquerque—Nunn *v.*

Dalton—Cobbey & Sons *v.*
Daniel—R. *v.*
Daniel—Rutter *v.*
Daniell & Sons' Breweries, Ld.—Paine *v.*
Dannenhoffer—Huwer *v.*
Dark—R. *v.*
Darley—Hagg *v.*
Darling—Barsalou *v.*
Dart—Milliken *v.*
Davenport, John & Sons' Brewery—Bass, Ratcliff & Gretton, Ld. *v.*
Davidson—Bile Bean Manufacturing Co. *v.*
Davidson—Chappell *v.*
Davies—Dawes *v.*
Davies Bros.—R. *v.*
Davis—Davis *v.*
Davis—Mallan *v.*
Davis—Royal Baking Powder Co. *v.*
Davol Mills—Ferguson *v.*
Dawber—Bass *v.*
Dawson—Labouchere *v.*
Day—Clayton *v.*
Day—Croft *v.*
Day—Day *v.*
Day—Emperor of Austria *v.*
Day—Fennessy *v.*
Deakin—Lea *v.*
Dean—Civil Service Supply Association *v.*
Deere & Co.—Candee, Swan & Co. *v.*
Deimel, Dr., Underwear Fabric Co.—R. *v.*
Denham—Hirst *v.*
Dennis—Edwards *v.*
Depatie—Bondier *v.*
De Tastet—Brown *v.*
Devlin—Devlin *v.*
Dewar—Dewar, John & Sons *v.*
Dewes—Chissum *v.*
Dey—Swift *v.*
Diaper—Orr *v.*
Dibrell—Blackwell *v.*
Dicey—Sayer *v.*
Dickens—Bradbury *v.*
Dicks—Weldon *v.*
Dickson—Dickson *v.*
Dobell—Newling *v.*
Dodd's Drug Stores — Jefferson Dodd *v.*
Domestic Inventions Co.—Peters, C. A., Ld. *v.*
Dompé—Hennessy *v.*
Donald & Co.—Montgomerie & Co. *v.*
Dorflinger—Consolidated Fruit Jar Co. *v.*
Dorr—Iowa Seed Co. *v.*
Dougall—Dockrell *v.*
Douglas—Churton *v.*
Douglas—Hammond *v.*
Dowling—Hunter *v.*
Downing—R. *v.*
Downman—Motley *v.*
Downs—England *v.*
Dowsing Radiant Heat Co.—Tallerman *v.*
Drapkin—R. *v.*
Drat—Ward *v.*
Dreyfus—Funke *v.*
Droz—Heiniger *v.*
Dubbins—Patching *v.*
Dublin Distilleries Co.—Jameson *v.*
Du Boulay—Du Boulay *v.*
Duckworth—Apollinaris Co. *v.*
Duncan—Concaris *v.*
Duncan—Hoffman *v.*
Duncans—Lipton Ld. *v.*
Dundas—R. *v.*
Dunlop Lubricant Co., Ld.—Dunlop Pneumatic Tyre Co. *v.*
Dunlop Motor Co.—Dunlop Pneumatic Tyre Co. *v.*
Dunlop Rubber Tyre Co.—R. *v.*
Dunlop-Truffault Cycle and Tube Manufacturing Co.—Dunlop Pneumatic Tyre Co. *v.*
Dunn—Eno *v.*
Dunn—Thompson *v.*
Dunnett—Batt & Co. *v.*
D'Utassey—Faber *v.*

Easterbrook—Saxby *v.*
Eaton, T. & Co.—R. *v.*
Edelsten—Edelsten *v.*
Edgington—Edgington *v.*
Edgington, J. & Co.—Edgington (B.), Ld. *v.*
Edmonds—R. *v.*
Edmonson—R. *v.*
Edmonton—Clegg *v.*
Edmunds—Heyl-Dia *v.*
Edney—Truefitt (H. P.) *v.*
Edwards—Apollinaris Co. *v.*
Edwards—Ingram & Kemp *v.*
Egan—R. *v.*
Ehlers—Siegert *v.*
Ehrhart—Lee *v.*
Ehrmann Bros. — Hunt, Roope, Teago & Co. *v.*
Ehrmann Bros.—Macmillan *v.*
Eichelo—Peltz *v.*

Eisner & Mendelson Co.—Saxlehner *v.*
Electric and Ordnance Accessories Co.—Defries, J. & Sons *v.*
Electrolibation Co.—Sauche *v.*
Elkan—Edwards *v.*
Elkan—Upmann *v.*
Ellam's Duplicator Co. — Neostyle Manufacturing Co. *v.*
Ellinger—R. *v.*
Ellinger & Co.—Twentsche Stoom Bleekery Goor *v.*
Elliott — Whitstable (Free Fishers and Dredgers of) *r.*
Elsworth—R. *v.*
Elvery—De la Blanchardière *v.*
Emery—Mickle *v.*
Emmott—Jaffray *v.*
Emmott—Walter *v.*
English Farmers' Association—R. *v.*
Era Omnibus Association—London Road Car Co. *v.*
Essa Abba Sait—Ebrahim Currim *v.*
Estcourt Hop Essence Co.—Estcourt *v.*
Esterbrook—Gillott *r.*
Evans—Brook *v.*
Evans—Cope *v.*
Evans—Lamb *v.*
Evans—R. *v.*
Evans—Ratcliffe *v.*
Evans—Rose *v.*
Evans—Turner *r.*
Evening Post, Ld.—Borthwick *v.*
Everett—Smith *r.*
Everitt—Price's Patent Candle Co. *r.*
Expansion of Trade, Ld.—Elliott *v.*
Finch—Day *r.*
Findlater—Raggett *v.*
Findlater—Sievert *v.*
Finlay—Legg *v.*
Finlay—Robinson *v.*
Finzer—Liggett & Myers Tobacco Co. *v.*
Fisher—People *v.*
Fisher—Seeley *v.*
Fitzgerald—R. *v.*
Fleming—McLean *v.*
Fleming—Ralli *v.*
Fleming, Birkby & Goodall—Gaudy Belt Manufacturing Co. *v.*
Flint—Leidersdorf *v.*
Floyd—Bowman *v.*
Folgham—Green *v.*
Footman—Blank *v.*
Footman, Pretty & Co.—Symington & Co. *v.*
Forester—Upmann *v.*
Foster—Burrows *r.*
Foster—Ford *v.*
Foster—R. *v.*
Foster Brewing Co., Ld.—Christie *r.*
Fox—Millington *v.*
Frankenburg — County Chemical Co. *v.*
Frankenburg—Griffiths *v.*
Frankenburgs—Star Cycle Co. *v.*
Franklin—Major Bros. *r.*
Franks—Pierce *v.*
Freeman—Browne *v.*
Freeman—Clark *v.*
Frictionless Engine Packing Co.—Reddaway *v.*
Fries—Hostetter *r.*
Frost—R. *v.*
Fullwood—Fullwood *v.*
Fabry Automobile Co.—Lucas *v.*
Fair—Smith *r.*
Famous Shoe & Clothing Co.—Merriam *r.*
Farlow—Bozon *v.*
Farrow & Co.—Colman *r.*
Fassett—Filley *r.*
Fawcus—Dixon *v.*
Fearis—Hill *v.*
Feder—Benkert *r.*
Fehr—Reiners Von Laer & Co. *r.*
Feltham & Co.—Slazenger & Sons *r.*
Felton—London General Omnibus Co., Ld. *r.*
Fenwick—Featherstonhaugh *r.*
Field—Bonner *v.*
Field—Schauer *r.*
Gaiety Bar and Restaurant Co.—Cusenier (E.) Fils Aîné et Compagnie *r.*
Gainsborough—Louise & Co. *v.*
Gallon—Edge & Sons, Ld. *v.*
Gamage—Werner Motors *v.*
Game, Harrison & Larner, Ld.—Hanson *r.*
Ganton—Lemoine *r.*
Gardner—Harrison *r.*
Garlick—R. *r.*
Garner — Amoskeag Manufacturing Co. *v.*
Garner—Merrimack Manufacturing Co. *r.*

Garnhart—McCartney *v.*
Gateley—Reveliere *v.*
Gaubert—Ansell *v.*
Gebhardt—Farina *v.*
Gedge—Jones *v.*
Geisendorf—Sohl *v.*
General Electric Co.—Wedekind *v.*
General Newspaper Co.—Dale *v.*
General Reversionary Co., Ld.—Bumsted *v.*
Gertcken—Cory *v.*
Gething—Hopton Wood Stone Firms, Ld. *v.*
Gibbens—Schweppes *v.*
Gibbings—Lee *v.*
Gibbons' Frame—Wilcox & Gibbs' Sewing Machine Co. *v.*
Gibbs—Missouri (State of) *v.*
Gibson—Banks *v.*
Gibson—North Eastern Breweries *v.*
Gibson—Parozone Co. *v.*
Gillard—Cotton *v.*
Gillard & Co.—King & Co. *v.*
Gillespie—Parsons *v.*
Gillies—Taylor *v.*
Gillings—London General Omnibus Co. *v.*
Gladstone—Steuart *v.*
Glasgow & S. W. Railway Co.—Inland Revenue Commissioners *v.*
Glave—R. *v.*
Glenn—Dunbar *v.*
Glover—Leahy *v.*
Gobindram—Barlow *v.*
Godfree—Burgoyne & Co. *v.*
Godts—Nichol *v.*
Goetze—Carter *v.*
Goff—R. *v.*
Goldsmiths' Co.—Fabergé *v.*
Gomm—Barrett *v.*
Gooch & Tarrant—Vacuum Oil Co. *v.*
Goodall—Pirie *v.*
Goodbody—Lambert & Butler *v.*
Goodbody—Lewis's *v.*
Goodway—Society of Accountants and Auditors *v.*
Goodwin—Lever *v.*
Goodwin—R. *v.*
Goodyear India Rubber Glove Manufacturing Co.—Goodyear Rubber Co. *v.*
Goss—Carey *v.*
Goss—R. *v.*
Goulard—Wolfe *v.*
Gould—Corbin *v.*
Graef—Saxlehner *v.*
Graeger—R. *v.*
Graham—Graham's Trustees *v.*
Graham—Ransome *v.*
Grand Junction Railway Co.—Pickford *v.*
Grant, Smith & Co.—Orr-Ewing *v.*
Gratz—Hohner *v.*
Graves—Smale *v.*
Gray—Bulloch, Lade & Co. *v.*
Gray—Wotherspoon *v.*
Gray & Gosling—R. *v.*
Great Northern Railway Co.—North London Railway Co. *v.*
Green—Robb *v.*
Green—Société Anonyme de la Distillerie de la Liqueur Benedictine, &c. *v.*
Greene—Symonds *v.*
Greenfield—Grosvenor Chemical Co. *v.*
Grenville—Kodak *v.*
Griffith—Chappoll *v.*
Griffiths—Chubb *v.*
Griffiths—Corns *v.*
Griffiths—Ripley *v.*
Griffiths—Wilkinson *v.*
Griffiths Cycle Corporation, Ld.—Eastman Photographic Materials Co., Ld. *v.*
Grossbaum—R. *v.*
Grosvenor Gallery Co.—Hoby *v.*
Grueber—R. *v.*
Guardian and General Assurance Co., Ld.—Guardian Fire and Life Assurance Co. *v.*
Guénin—Grillon *v.*
Guest—American Tobacco Co. *v.*
Guggenheim—Dixon Crucible Co. *v.*
Guggenheimer—Parlett *v.*
Gullian—Dadirrian *v.*
Guy—Bunn *v.*

Haish—Washburn and Moen Manufacturing Co. *v.*
Haley—Lee *v.*
Hall—Gillis *v.*
Hall—Glen & Hall Manufacturing Co. *v.*
Hall—Hall *v.*
Hall—Haslam *v.*
Hall—R. *v.*
Hall & Co.—Perks *v.*
Hallam—Vernon *v.*
Hallworth—Jones *v.*
Hamel—Sarazin *v.*
Hamilton—Cooper *v.*

Hamley Spa Water Co.—Helidon Spa Water Co. *v.*
Hampshire and North Wilts Bank—London and County Banking Co. *v.*
Hampton—R. *v.*
Hanbury—Liebig's Extract of Meat Co. *v.*
Hand—Worral *v.*
Harbord—Perry Davis & Son *v.*
Harper—Blackwell *v.*
Harper—Sparks *v.*
Harper, Robert & Co. Propriotary—National Starch Co. *v.*
Harris—Godillot *v.*
Harris—Keene *v.*
Harris—Palmer *v.*
Harris—Smith *v.*
Harrison—Edge *v.*
Harrison—Flavel *v.*
Harrod's Stores—R. *v.*
Hart—Bow *v.*
Hart—Colley *v.*
Hart—Low *v.*
Hart—Wolfe *v.*
Hart-Davis—Hill *v.*
Hartley—Heatie Bros. *v.*
Harwood, Cash & Co.—Fine Cotton Spinners Association, Ld., and J. Cash & Sons *v.*
Hately—Burgess *v.*
Hawkins—Marshall *v.*
Hawley—Cyclists Touring Club *v.*
Hawley—Fielding *v.*
Hawxhurst—Walker *v.*
Haydon—London General Omnibus Co. *v.*
Hayling Fisheries—Whitstable Oyster Fishery Co. *v.*
Hayward—Parsons *v.*
Hayward & Sons—Hayward & Co. *v.*
Hazard—Caswell *v.*
Hazard—Godillot *v.*
Head—Walter *v.*
Heap—Guinness *v.*
Hearnshaw—Rodgers & Sons, Ld. *v.*
Hecht—Klotz *v.*
Heddle—Melrose-Drover, Ld. *v.*
Hedley—Fels *v.*
Hegeman—Hegeman & Co. *v.*
Heisel—Adams *v.*
Helleley—Johnson *v.*
Helmbold Manufacturing Co.—Helmbold *v.*
Helsby—Coventry Machinists Co., Ld. *v.*
Hemmons—Weston *v.*
Henderson—Leishman *v.*
Hendrickx—Laferme (Compagnie) *v.*
Henley—Rose *v.*
Henriques—Howard *v.*
Henry—Alexander & Co. *v.*
Henry—Mitchell *v.*
Henshaw—Ihlee *v.*
Henshaw—Steinway & Sons *v.*
Herbert—Cowie *v.*
Herbert & Co.—Upper Assam Tea Co. *v.*
Herrfeldt—Apollinaris Co. *v.*
Hersey—R. *v.*
Hertz—Salomon *v.*
Hessin—Morrall *v.*
Heyde—Bryant & May *v.*
Hickling—R. *v.*
Hickling—Whitney *v.*
High Rocks Congress Spring Co.—Congress and Empire Spring Co. *v.*
Highmoor—Caruncho *v.*
Hill—Batty *v.*
Hill—Blanchard *v.*
Hill—Thorneloe *v.*
Hills—Burgess *v.*
Hine—Portal *v.*
Hinks—Rollins *v.*
Hirsch & Co.—Hirsch *v.*
Hirschfeld—Leather Cloth Co. *v.*
Hitchcock—Hopkins *v.*
Hodgart's Trustees—Donald *v.*
Hodge & Co.—Williams *v.*
Hodgson—Davies *v.*
Hodgson—Elliott, R. J. & Co. *v.*
Hodgson—Fels *v.*
Hodgson—Matthews *v.*
Hoffman—Sanders *v.*
Hogador—Doran *v.*
Hogan—Hennessy *v.*
Hoge—Moorman *v.*
Hogg—Clowes *v.*
Hogg—Harrison *v.*
Hogg—Maxwell *v.*
Holbrook—Coats *v.*
Holden—Dixon *v.*
Hollins—Campbell *v.*
Holloway—Holloway *v.*
Holt—Aubin *v.*
Homburger—R. *v.*
Home and Colonial Assurance Co.—Colonial Life Assurance Co. *v.*
Hood—Cooper *v.*
Hooper—Kelly *v.*
Hooper—Lavergne *v.*
Hoosier Drill Co.—Julian *v.*
Hopeon—R. *v.*
Horn—Sawyer *v.*
Horrigeen—R. *v.*
Horton Manufacturing Co.—Horton Manufacturing Co. *v.*
Houghton—Rowley *v.*
Houghton & Sons—Kodak *v.*

How—Pidding *v.*
How—Southern *v.*
Howe—Whittaker *v.*
Howe Machine Co.—Howe *v.*
Hoxie—Chaney *v.*
Hoyt—Hoyt *v.*
Huddart—Boord & Son *v.*
Hudson—Horneby *v.*
Hudson's Executors—Clarke *v.*
Hughes—Bewlay & Co. *v.*
Hughes—Evans *v.*
Hulme—Heathcote *v.*
Hulton—Cowen *v.*
Hunnewell—Gilman *v.*
Hunt—Richards *v.*
Hunt—Trego *v.*
Hunter—Monro *v.*
Hunter—R. *v.*
Hunter—Troughton *v.*
Huntington—Rudderow *v.*
Hutton—Kelly *v.*
Hygeia Sparkling Distilled Water Co. — Waukesha Hygeia and Mineral Springs Co. *v.*
Hyland—R. *v.*
Hynes—Liggett and Myers' Tobacco Co. *v.*

Illinois Watch Case Co.—Elgin National Watch Co. *v.*
Imperial French Dye Cleaning and Dyeing Co., Ld.—Thompson *v.*
Improved Fig Syrup Co.—Californian Fig Syrup Co. *v.*
India Rubber, Gutta Percha and Telegraph Co.—Ingram *v.*
Ingold—R. *v.*
Inland Revenue Commissioners—Brooke & Co. *v.*
Inland Revenue Commissioners—West London Syndicate *v.*
International Guide Syndicate, &c.—Reuter's Telegram Co., Ld. *v.*
Irwell and Eastern Rubber Co.—Reddaway *v.*
Isaacson—Chatteris *v.*
Ivory Soap Co.—Goodwin *v.*

Jackson—Dicks *v.*
Jackson—Dixon *v.*
Jackson—Jenkins *v.*
Jacob Henkell Co.—Cuervo *v.*
Jacobs—Lord Advocate *v.*
Jacobs—R. *v.*
Jacobus—Fairbanks *v.*
Jaeger, Dr., Sanitary Woollen System Co.—Watson *v.*
James—James *v.*
James—Newbery *v.*
James—Oldham *v.*
James—Spicer *v.*
James' Drug Stores—R. *v.*
Jamieson—Jamieson & Co. *v.*
Jarman—Townsend *v.*
Jarrett—Booth *v.*
Jay—Attenborough *v.*
Jebsen & Co.—Vulcan Match Manufacturing Co. *v.*
Jeffery—R. *v.*
Jeffery—Spratt *v.*
Jenkins—Wade *v.*
Jenkinson—R. *v.*
Jennings—Jennings *v.*
Jeyes' Sanitary Compounds Co.—Price's Patent Candle Co. *v.*
Johnson—Edge *v.*
Johnson—Kidd *v.*
Johnson—R. *v.*
Johnson—Sohier *v.*
Johnson & Co.—Ascough *v.*
Johnson & Co.—Barlow & Jones, Ld. *v.*
Johnston—Byron (Lord) *v.*
Johnston—Jameson *v.*
Johnston—Wheeler *v.*
Johnston & Co.—Orr-Ewing & Co. *v.*
Jonas—Hirsch *v.*
Jones—Banana Food Co. Ld., *v.*
Jones—Canham *v.*
Jones—R. *v.*
Jones—Rigden *v.*
Jorss—Henderson *v.*
Joshua—Mitchell & Co. *v.*
Judges—Talbot *v.*
Julier—R. *v.*
June—Singer Manufacturing Co. *v.*
Junior Army and Navy Stores, Ld. —Army and Navy Co-operative Society, Ld. *v.*
Jury—R. *v.*

Kahn—Cohn *v.*
Kass—Hawloetz *v.*
Kaufmann—Hazzopulo *v.*

Keating—Hennessy *v.*
Keating—Stevens *v.*
Keen—Mellersh *v.*
Kelley & Son—Poulton & Son *v.*
Kellogg—Sawyer *v.*
Kendall—Davis *v.*
Kendall—R. *v.*
Kendrick—Society of Architects *v.*
Kennedy- -Davis *v.*
Kennett—Hennessy *v.*
Kerr, Dods & Co.—Graham & Co. *v.*
Ketcham—Weston *v.*
Kettle—Gillott *v.*
Kilburn & Co.—Balfour & Co. *v.*
Kimball — Singer Manufacturing Co. *v.*
Kimpton—Nicholls *v.*
Kinahan—Kinahan *v.*
King & Co.—Strahan & Co. *v.*
King & Co.—Wallace & Co. *v.*
Kinney—Hornbostel *v.*
Kinney Tobacco Co.—Ginter *v.*
Kirby—Hogg *v.*
Kirk—Copley *v.*
Kit Coffee Co.—Paterson *v.*
Kitson, E. J.—Royal Warrant Holders Association *v.*
Klapproth—Lewis *v.*
Kleinhaus—Armstrong *v.*
Knight, Stocks & Co.—Berliner Brauerei Gesellschaft Tivoli *v.*
Knos & Co.—Vulcan Match Manufacturing Co. *v.*
Knott—Prudential Assurance Co. *v.*
Knott—Welch *v.*
Knowles—Primrose Press Agency *v.*
Koch—Gray *v.*
Kraft, Meyer & Co.—Curtis, Harvey & Co. *v.*
Kynoch, Ld.—Hodgson *v.*

La Belle Wagon Works—Fish Bros. Wagon Co. *v.*
Labrot—Pepper *v.*
Ladler—Jay *v.*
Laidlaw—Bass, Ratcliff & Gretton, Ld. *v.*
Laight—Shrimpton *v.*
Lamb—Deiz *v.*
Lambert—Wood *v.*
Landgraff—Stokes *v.*
Lang & Co.—Wolfe *v.*
Langdon—Lewis *v.*
Langford & Co.—Great Tower Street Tea Co. *v.*
Larned — Lowell Manufacturing Co. *v.*
Larsen—Singer Manufacturing Co. *v.*
Lart—Hine *v.*
Latham & Co.—Blakey & Sons *v.*
Latimer—Carmichel *v.*
Lavell—London General Omnibus Co. *v.*
Lawes Chemical Manure Co.—Western Counties Manure Co. *v.*
Lawrence—Siegert *v.*
Lazar—Woodward *v.*
Lazarus—Rock *v.*
Lazenby—Lazenby *v.*
Lea—Foot *v.*
Leach—Clark *v.*
Leapman—Mappin & Webb *v.*
Leas Hotel Co.—Salter *v.*
Le Barron—Magee Furnace Co. *v.*
Le Boutilliere—Jaeger's Sanitary Woollen System Co. *v.*
Lecouturier—Rey *v.*
Lee—Kennedy *v.*
Lee—McCaw, Stevenson & Orr *v.*
Lee—R. *v.*
Leeds Industrial Co-operative Society —Iron Ox Remedy Co. *v.*
Lehmann & Co.—Nitedals Taendstikfabrik *v.*
Lennox—Crawford's Trustees *v.*
Le Page—Russia Cement Co. *v.*
Lerwill—Cundey *v.*
Leslie—McKenzie, James F., & Co. *v.*
Leuchars—Barnett *v.*
Levine & Wood—R. *v.*
Levinstein—Badische Anilin & Soda Fabrik *v.*
Levinstein—Renard *v.*
Levitt—Grant *v.*
Levy—Fenton *v.*
Levy—Teacher *v.*
Lewis—Field *v.*
Lewis—Lewis's *v.*
Lewis—R. *v.*
Libby—Harrington *v.*
Liebig's Extract of Meat Co.—Anderson *v.*
Limiter—Love *v.*
Lincoln Gas Light and Coke Co.—Beverley *v.*
Lindner—Pneumatic Rubber Stamp Co., Ld. *v.*
Linotype Co., Ld.—Empire Typesetting Machine Co. of New York *v.*

Lipton—R. *v.*
Liverpool Vinegar Co., Ld.—Birmingham Vinegar Brewery Co., Ld. *v.*
Lloyd—Hovenden *v.*
Lloyd—R. *v.*
Locke & Co.—Worcester Royal Porcelain Co. *v.*
Lockett—Lockett *v.*
Lockwood—Hill *v.*
Lodge—Blackburn *v.*
Loftus—Rose *v.*
London and Provincial Joint Stock Life Assurance Co.—London and Provincial Law Assurance Society *v.*
London and Provincial Provident Association, Ld.—Provident Association of London, Ld. *v.*
London and Westminster Assurance Corporation—London Assurance *v.*
London Daimler Co.—Daimler Motor Car Co. *v.*
London Stereoscopic and Photographic Co.—Kodak *v.*
London Trans Omnibus Co.—Hodges *v.*
Loog—Singer Manufacturing Co. *v.*
Lorsont—Leather Cloth Co. *v.*
Loveless—Whitfield *v.*
Low—Benbow *v.*
Lowell—Lawrence Manufacturing Co. *v.*
Lucas—Budd *v.*
Lucas—Plotzker *v.*
Luke—Hop Bitters Manufacturing Co. *v.*
Lumphinnans Iron Co.—Lochgelly Co., Ld. *v.*
Lumsden Bros.—Gillette *v.*
Lund—Axmann *v.*
Lyc—Cruttwell *v.*
Lyman—Wilson *v.*

McAdam—Morgan *v.*
McArthur—Lehmann *v.*
McBain—Town and County Bank *v.*
McBride—Smith *v.*
McCarthy, Buck & Co.—R. *v.*
McCubbin—McCormick *v.*
McCulloch—Wilkie *v.*
McIntyre—Murray's Trustee *v.*
McKernan—Howe *v.*
McLean Publishing Co.—Rose *v.*
McMaster & Co.—Dickson *v.*
McNish—Cochrane *v.*
McNulty—Powell *v.*
McPherson—Potter *v.*
Macarthy—Allen *v.*
Macfarlane—Dumbarton Steamboat Co. *v.*
Mack—Shaw Stocking Co. *v.*
Mackinnon—Thompson *v.*
Mackintosh—Scott *v.*
Macrae—Young *v.*
Maddick—Clement *v.*
Mahalaxmi Spinning and Weaving Co., Ld.—Manockji Petit Manufacturing Co. *v.*
Mair & Dougall—Barr & Co. *v.*
Mair & Dougall—Comrie *v.*
Mair & Dougall—Moore *v.*
Maison Pinet—Pinet *v.*
Maison Talbot—Dunlop Pneumatic Tyre Co. *v.*
Major—Turner *v.*
Malcolm, Brunker & Co.—Hammond *v.*
Malings—Slazenger *v.*
Maneckji Shapurji Kabrak—Badische Anilin & Soda Fabrik *v.*
Manico—Barber *v.*
Maniere—Hunt *v.*
Mann—Great North of Scotland Railway Co. *v.*
Manoukian—R. *v.*
Mansbridge—Harris *v.*
Marole—United States *v.*
Marchant—Boussod, Valadon & Co. *v.*
Marks—Weinstock Lubin Co. *v.*
Marsh—Post *v.*
Marshall—Chameleon Patents Manufacturing Co. *v.*
Marshall—Collard *v.*
Marshall—Gillespie & Co. *v.*
Marshall—Knott *v.*
Marshall—Marshall *v.*
Marshall—Montgomerie & Co. *v.*
Martin—Morse *v.*
Mason—Dence *v.*
Mason—Gawthorne *v.*
Mason—Mossop *v.*
Mason—Smith *v.*
Mason, Cattley & Co.—Van Zeller *v.*
Massam—Thorley's Cattle Food Co. *v.*
Mathie—Boswell *v.*
Maxfield—Wilson *v.*
Maxton & Murray—Cellular Clothing Co., Ld. *v.*
Maxwell—Hogg *v.*
May—Cartier *v.*
May—Lacroix *v.*

Mayer—Del Valle *v.*
Mayman—Kirker, Greer & Co. *v.*
Mayo—Chase *v.*
M'Colgan—Maréchal *v.*
Mège—Hatchard *v.*
Mogevand—Foster *v.*
Moikle—Avery *v.*
Moikle—Williamson *v.*
Molachrino Egyptian Cigarette Co.—Molachrino (M.) & Co. *v.*
Molachrino (R.) & Co.—Molachrino (M.) & Co. *v.*
Molia—R. *v.*
Mollis—Lichtenstein *v.*
Monck—Partridge *v.*
Menendez—Holt *v.*
Mercer—Brown *v.*
Merchant Service Guild Co.—Toms & Moore *v.*
Merchants' Joint Stock Bank, Ld.—Merchant Banking Co. of London *v.*
Meriden Britannia Co.—Boardman *v.*
Merkel—St. Louis Piano Manufacturing Co. *v.*
Merrick Thread Co.—Coats *v.*
Messler—Curtiss *v.*
Metcalf—Anglo-Swiss Condensed Milk Co. *v.*
Metcalf—Cassidy *v.*
Metropolitan Board of Works—Cooper *v.*
Metropolitan Collar Co.—Union Paper Collar Co. *v.*
Metropolitan & Provincial Stores Ld.—R. *v.*
M'Evilly—Thwaites & Co. *v.*
Meyer—Brown Chemical Co. *v.*
Middleton—Vogeler Co. *v.*
Midland Education Co.—R. *v.*
Midland Insurance Co.—Royal Insurance Co. *v.*
Midland Railway Co.—King *v.*
Miesse Petrol Car Syndicate—Turner's Motor Manufacturing Co. *v.*
Milbourn—Bond *v.*
Millar—Lea *v.*
Millar's Karri and Jarrah Forests—Alcott *v.*
Miller—Cowan *v.*
Miller—Thompson *v.*
Mills—Tweed *v.*
Mills, Johnson & Co.—Kidd & Co. *v.*
Milner's Safe Co.—R. *v.*
Mitchell—Condy *v.*
Mitchell—Garde *v.*
Mitchell—Rowland *v.*
Moat—Morison *v.*
Moffatt & Paige—Besant *v.*
Montague—Hendriks *v.*
Montgomery—Thompson *v.*
Moonelis—Strasser *v.*
Moore—Coppen *v.*
Moore—Hothersall *v.*
Moore—Merryweather *v.*
Moore—Montague *v.*
Moore—Tallcott *v.*
Moore & Scantlebury—Aquascutum, Ld. *v.*
Morgan—Knott *v.*
Morgan—R. *v.*
Morley—Houlston *v.*
Morris—R. *v.*
Morris—United States *v.*
Morris & Cowdray—Midgley & Sons *v.*
Morris & Sons, Ld.—R. *v.*
Morrison—Woolley & Son *v.*
Morse—Alexander *v.*
Morson—Carnrick *v.*
Mortimer—Prowett *v.*
Moss—Boon *v.*
Moss—Morris *v.*
Moss—R. *v.*
Mottram—Walker *v.*
Mount Balfour Mines—Mount Balfour Copper Mines *v.*
Mowling—Burford & Co. *v.*
Mowling—Lever *v.*
Mowling—Neva Stearine Co. *v.*
Mudie—Avanzo *v.*
Muirhead—Muirhead's Trustees *v.*
Muller & Co's Margarine—Inland Revenue Commissioners *v.*
Mulligan—Littlejohn & Son *v.*
Munn's Patent Maizena & Starch Co.—National Starch Manufacturing Co. *v.*
Munro—Bain *v.*
Muratti—R. *v.*
Murphy—Christy *v.*
Murphy & Bradshaw—Cantrell & Cochrane *v.*
Myer—Brown Chemical Co. *v.*
Myers—Cave *v.*

NAIRN—Linoleum Manufacturing Co. *v.*
Nannucci—Lever *v.*
Napper—Jackson & Co. *v.*
Nathan—R. *v.*

National Folding Box Co., Ld.—National Folding Box & Paper Co. *v.*
Neale—Day *v.*
Neary—Hennessy *v.*
Neilson—Haddow *v.*
Nelson—Smith *v.*
Nevill—Rickett & Cockerell & Co. *v.*
New Incandescent Gas Lighting Co., Ld.—Incandescent Gas Light Co. Ld. *v.*
New Motor & General Rubber Co.—Warwick Tyre Co. *v.*
New Townsend Cycle Co.—Dover, H. W., & Dover *v.*
New Vacuum Cleaner Co.—British Vacuum Cleaner Co. *v.*
New York Publishing Co.—England *v.*
Newbery, J. B., & Son—Williams, J. B., Co. *v.*
Newman—Findlater, Mackie, Todd & Co. *v.*
Newnes, Ld.—London & Northern Bank, Ld. *v.*
Newton—Fleming *v.*
Niccolls—Edge *v.*
Nicholls—R. *v.*
Nickols & Co.—McCaw, Stevenson & Orr *v.*
Noah—Snowden *v.*
Noel—General Accident Corporation *v.*
Nopitsch—Wolff *v.*
Norfolk—Peabody *v.*
Norfolk Cyclo Co.—Brooks, J. H., & Co. *v.*
Norman—Radde *v.*
Norris—Rivero *v.*
Norrish—Apollinaris Co. *v.*
North Cheshire & Manchester Brewery Co.—Manchester Brewery Co. *v.*
North Eastern News Association—South Hetton Colliery Co. *v.*
Northwood—R. *v.*
Norton—Geary *v.*
Nowill—Rodgers *v.*

O'Brien—R. *v.*
O'Connor—Wolmershausen *v.*
Ogden—Phillips *v.*
Ogden—R. *v.*
Ogg—Harris *v.*
O'Hanlon—Watt *v.*
O'Meara—Reed *v.*
Oppenheim—Wittman *v.*
Orr-Ewing & Co.—Johnston & Co. *v.*
Osborne—Hudson *v.*
Osborne—Williams *v.*
Osgerby—Hudson *v.*
Otard de Montebello Cognac Co., Ld.—Otard, Dupuy & Co. *v.*
Ottawa Citizen Co.—New York Herald Co. *v.*
Owens—Bodega Co., Ld. *v.*

Paarl Berg Wine & Spirit Co.—Martell *v.*
Paget—R. *v.*
Paine—Stevens *v.*
Panhard Levassor Motor Co.—Société des Anciens Etablissements Panhard et Levassor *v.*
Pape—Curtis, Harvey & Co. *v.*
Parker—Meriden Britannia Co. *v.*
Parke's Drug Stores—R. *v.*
Parry—Holbrooks *v.*
Parry—James *v.*
Parton, Son & Co.—Osborne, Garrett & Co. *v.*
Patent Axlebox & Foundry Co.—Armstrong Oilor Co. *v.*
Payne—Blofeld *v.*
Peacock—Pratton *v.*
Peacock—Richardson *v.*
Peakall—Hayward Bros. *v.*
Peake—Boulnois *v.*
Pearce—Farr *v.*
Pearks, Gunston & Tee—Anglo-Swiss Condensed Milk Co. *v.*
Pearson—Harper *v.*
Pearson—Pearson *v.*
Pearson—Willox *v.*
Peck—Jarvis *v.*
Peck—McCardel *v.*
Peck Bros. & Co.—Adee *v.*
Peek—Derry *v.*
Peel—R. *v.*
Peel—Stephens *v.*
Pellett—Gillette Safety Razor Co. *v.*
Pelsall Coal & Iron Co.—Barrows *v.*
Pemberton—R. *v.*
People—Cohn *v.*
Peters—Swift *v.*
Peterson—Jones *v.*
Peterson—Weed *v.*
Peto—Ponsardin *v.*
Petter—Crookes *v.*
Petter—Mack *v.*
Peugeot—R. *v.*
Phalon—Burnett *v.*

Phillips—Henry Clay, Bock & Co. *v.*
Phillips—R. *v.*
Philp—Rodgers *v.*
Philp's Executor—Philp's Executor *v.*
Photographic Co.—Pollard *v.*
Pickering—Moet *v.*
Pierce—R. *v.*
Piggott, Cockson & Co.—Anglo-Swiss Condensed Milk Co. *v.*
Piggott, Cockson & Co.—Schnitzer *v.*
Pigott—Slazenger *v.*
Pike—R. *v.*
Pile—Pile *v.*
Pillow—Barnard *v.*
Pillsbury-Washburn Flour Mills Co.—Pillsbury *v.*
Pimms—Thorne & Sons *v.*
Pinkham—Marshall *v.*
Pinto—Nowman *v.*
Pinto-Leite—Carver *v.*
Piper—Aikins *v.*
Pirie & Sons, Limited — Towgood Bros. *v.*
Piza — Anheuser Busch Brewing Association *v.*
Plant—Hipkins *v.*
Plasmon, Ld.—International Plasmon, Ld. *v.*
Plate—Graham *v.*
Pollard, Graham & Co. — Derby Photographic Dry Plate Co. *v.*
Ponce—Stacholberg *v.*
Pond—Stimpson *v.*
Pope—Frankau *v.*
Pottage—Hookham *v.*
Potter—Heywood *v.*
Pozo—Solis Cigar Co. *v.*
Pratt—R. *v.*
Premier Tube Co., Ld.—Premier Cycle Co., Ld. *v.*
Price—Henry *v.*
Price—Lea & Perrins *v.*
Price—R. *v.*
Pride—Lorillard *v.*
Priestley—R. *v.*
Prince—Goodfellow *v.*
Pritchard—Gee *v.*
Provezende—Seixo *v.*
Pullar—Pullar *v.*
Purnell & Co.—Imperial Tobacco Co. *v.*

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

RABBITS & SON—Fennessy *v.*
Racco—R. *v.*
Ragg—R. *v.*
Randall (H. E.) Ld.—Gamage (A. W.) Ld. *v.*
Raper & Pulleyn—Burberrys *v.*
Ratcliff—Woollam *v.*
Ratcliffe—Page *v.*
Rawson—Baker *v.*
Ray—Ledger *v.*
Raylton—Johnson *v.*
Read—Giblett *v.*
Read—Mitchell *v.*
Reading Biscuit Co. — Huntley & Palmer *v.*
Reay—Rickerby *v.*
Reddaway—Smidt *v.*
Reed—Milner *v.*
Reeves—Collins Co. *v.*
Reeves—Peru (Republic of) *v.*
Registrar of Deeds—Ruffel *v.*
Registrar of Trade Marks — Orr-Ewing *v.*
Rehder & Co.—Compania General de Tabacos *v.*
Reid—Davis *v.*
Reid Bros. and Russel Proprietary—Lysaght, John, Co. *v.*
Rendle & Co.—Rendle *v.*
Reynolds—Rosenthal *v.*
Reynolds—Southorn *v.*
Rhensius—R. *v.*
Rhodes—Worcester Royal Porcelain Co. *v.*
Richards—Allen *v.*
Richards—Aplin & Barrett *v.*
Richardson—McDonald *v.*
Richardson & Co.—Read Bros. *v.*
Riddle—Hooper *v.*
Ridgway—R. *v.*
Riley—Cellular Clothing Co., Ld. *v.*
Riley—Day *v.*
Riley—Singer Manufacturing Co. *v.*
Riley—Springhead Spinning Co. *v.*
Rindskopf—Frost *v.*
Roberts — Briton Life Association, Ld. *v.*
Roberts—R. *v.*
Robertson—Poisson *v.*
Robertson—Thompson & Co. *v.*
Robinson—Atlantic Milling Co. *v.*
Robinson—Ward *v.*
Robinson & Barnsdale—R. *v.*
Roche—United States *v.*
Rodgers—Rodgers *v.*
Roebuck—R. *v.*
Roffey—Nixey *v.*

Rogers—Davis *v.*
Rogers—Morgan *v.*
Rogers—Rogers *v.*
Rogers & Spurr Manufacturing Co.—William Rogers Manufacturing Co. *v.*
Rohmann, Osborne & Co.—Hennessy *v.*
Rolfe—Rolfe *v.*
Rollason—Heath *v.*
Rooke—Green *v.*
Rorke—Société des Huiles d'Olive *v.*
Rosenthal—Weingarten *v.*
Ross—Marshall *v.*
Ross—Picture Press, Ld. *v.*
Ross—Ross' Trustees *v.*
Rottgen—Rodgers & Sons, Ld. *v.*
Rouch—Burfield *v.*
Rowland—Atlantic Milling Co. *v.*
Rowland—Scott *v.*
Royal Baking Powder Co.—Wright, Crossley & Co. *v.*
Royal British Bank, Ld.—Lloyds Bank, Ld. *v.*
Royden—Clover *v.*
Royle—Morris *v.*
Rubber Comb and Jewelry Co.—India Rubber Comb Co. *v.*
Ruffner—Dausman and Drummond Tobacco Co. *v.*
Rugby & Newbold Portland Cement Co.—Rugby Portland Cement Co., Ld. *v.*
Rushton—Ayer *v.*
Rushton—Faulder *v.*
Russell—Londonderry (Marquis of) *v.*
Russell—Phillips, Godfrey, Ld. *v.*
Rutherford—Llewellyn *v.*
Ruthin Soda Water Co.—Ellis & Sons *v.*
Rylands—Davenport *v.*
Rylands—R. *v.*

Sabiston—Montreal Lithographing Co. *v.*
Salem Flouring Mills—Oliphant *v.*
Salmon—Morison *v.*
Salmon & Gluckstein — Kirshenboim *v.*
Samson—Steinthal *v.*
Sandhurst Trustees, Executors and Agency Co.—Bendigo and Country District Trustees and Executors Co. *v.*
Sands—Woods *v.*
Sanitary Engineering and Ventilation Co.—Weaver *v.*
Sargood, Ewen & Co.—Moses *v.*
Sartor Resartus Co.—Resartus Co. *v.*
Satchwell—Parker & Smith *v.*
Saunders—Correspondent Newspaper Co. *v.*
Sayers — Automobile Carriage Builders, Ld. *v.*
Scalé—Pomeroy (Mrs.) *v.*
Schembri—Somerville *v.*
Schorer—Apollinaris Co. *v.*
Schlecht—White *v.*
Schmidt—Vonderbank *v.*
Schmincke—Schove *v.*
Schultz—Cady *v.*
Schultz—République Française *v.*
Schuyler—Morgan *v.*
Schwachhofer — Enoch Morgan's Sons' Co. *v.*
Sclater, William, & Co.—Asbestos & Asbestic Co. *v.*
Scott—Scott *v.*
Scottish National Insurance Co.—Scottish Union National Insurance Co. *v.*
Scottish Val de Travers Paving Co., Ld.—Stuart & Co. *v.*
Searing—Howe *v.*
Sellers—Fulton *v.*
Semprini—R. *v.*
Senate—Sedon *v.*
Sewage Manure Co.—Native Guano Co., Ld. *v.*
Shakespear — Wheeler & Wilson Manufacturing Co. *v.*
Shamrock Co.—Finlay *v.*
Sharp—Clark *v.*
Sharpe Bros. Co.—Freeman Bros. *v.*
Shaver—Shaver *v.*
Shaw—Blake *v.*
Shaw—Delondre *v.*
Shaw—Farina *v.*
Shaw—Radam *v.*
Sheard—Chappell *v.*
Sheard—Hutchings *v.*
Sheffield Gas Consumers' Co.—Attorney-General *v.*
Sheldon—Roberts *v.*
Shepherd—Green *v.*
Shepherd—R. *v.*
Sheppard—Chance *v.*
Sherrill — Royal Baking Powder Co. *v.*
Sherwood—R. *v.*
Sherwood—Weingarten *v.*
Shove—Thynne *v.*

Shuttleworth — McSymnons' Stores, Ld. *v.*
Shuttock—Crawford *v.*
Sibbald—Reid *v.*
Sidebotham—Marshall *v.*
Silverlock—Farina *v.*
Silversides—R. *v.*
Simmons—Simmons Medicine Co. *v.*
Simms—Colburn *v.*
Simpson—Rodgers & Sons, Ld. *v.*
Simpson—Wright *v.*
Sims—Coles *v.*
Sinclair—Hodgson *v.*
Singer Manufacturing Co.—Brill *v.*
Singer Manufacturing Co.—Nähmaschinon Fabrik, &c. *v.*
Singer Manufacturing Co.—Wilson *v.*
Slack—Ellen *v.*
Slade—Joudwine *v.*
Slade & Co.—Royal Warrant Holders' Association *v.*
Sleep—R. *v.*
Sleeper—Frank *v.*
Smaggasgalo—Davis *v.*
Smith—Champion *v.*
Smith—Dalo *v.*
Smith—Evans *v.*
Smith—George *v.*
Smith—Glenny *v.*
Smith—Gray *v.*
Smith—Great Tower Street Tea Co. *v.*
Smith—Hargreaves *v.*
Smith—Helmore *v.*
Smith—Holt *v.*
Smith—Liverpool Household Stores Association *v.*
Smith—McMurdo *v.*
Smith—R. *v.*
Smith—Russell & Sons, Ld. *v.*
Smith—Rutter *v.*
Smith—Silicate Paint Co., J. & R. Orr & Co. *v.*
Smith—Wedgwood *v.*
Smith—Wilson *v.*
Smithson—Dale *v.*
Snook—Apollinaris Co. *v.*
Soares—Beazley *v.*
Sœurs de l'Asile de la Providence—Korry *v.*
Souvazoglu—Harter *v.*
Spalding—Reinhardt *v.*
Spalding—Slazenger *v.*
Spear — Amoskeag Manufacturing Co. *v.*
Spence—Singer Manufacturing Co. *v.*
Stanage — Singer Manufacturing Co. *v.*
Standard Bank—Standard Bank of South Africa *v.*
Standard Sanitary Manufacturing Co. —Standard Ideal Co. *v.*
Starkey—Fleischmann *v.*
Starkweather—Cook *v.*
Steel, Peach, Tozer & Co.—R. *v.*
Stephens—Eno *v.*
Stephenson—Caruncho *v.*
Stephenson—Gamble *v.*
Stephenson, Robert, & Bros. — Reddaway *v.*
Stevens—Hunt *v.*
Stevens—R. *v.*
Stevenson Bros.—Fels *v.*
Stewart—Dawson *v.*
Stewart, Cooper & Co.—Wertheimer *v.*
Stiff—Ingram *v.*
Stiff & Sons—Weaver *v.*
Stirling—Hughes *v.*
Stock—Blair *v.*
Stodart, H.—Slater, Rodger & Co. *v.*
Stoddart—Champlin *v.*
Stonebraker—Stonebraker *v.*
Strange—Albert (Prince) *v.*
Stratton—Burton *v.*
Strauss Adler—Bayer *v.*
Stribolt & Co.—Davis & Co. *v.*
Stuart & Peterson—Sheppard & Co. *v.*
Stucky—Harris Drug Co. *v.*
Sturgess & Co.—Packham & Co., Ld. *v.*
Styles—R. *v.*
Such—Clement *v.*
Suits, Ld.—Lord Advocate *v.*
Sullivan—Byass *v.*
Sullivan—London General Omnibus Co. *v.*
Sullivan, Powell & Co.—Benedictus *v.*
Sun Life Assurance Co. of Canada—Saunders *v.*
Sunley—R. *v.*
Suter & Coulson—R. *v.*
Swan & Edgar—Bourne, Addley *v.*
Sweet—Archbold *v.*
Swinborne—Gridley *v.*
Swiss Condensed Milk Co.—Anglo-Swiss Condensed Milk Co. *v.*
Sykes—Sykes *v.*
Symonds—Thompson *v.*

TAINTOR—Rogers *v.*
Tandem Smelting Co. — Magnolia Metal Co. *v.*
Taper Sleeve Pulley Works—Gray *v.*
Tate—Burnett *v.*
Taylor—Backus *v.*
Taylor—Harrison *v.*

Taylor—Taylor *v.*
Taylor & Co.—Condy & Mitchell *v.*
Taylor & Co.—Muralo Co. *v.*
Taylor Drug Co.—Californian Fig Syrup Co. *v.*
Taylor Drug Co.—Humphries *v.*
Teede—India & China Tea Co. *v.*
Temperley—Jarrahdale Timber Co., Ld. *v.*
Tennessee Manufacturing Co.—Lawrence Manufacturing Co. *v.*
Texas Siftings Publishing Co.—Merriam *v.*
Thalheimer—Sternberger *v.*
Thatcher—Thatcher *v.*
Theal—McCall *v.*
Thom & Cameron—Boord & Son *v.*
Thomas—Chinn *v.*
Thomas—Colton *v.*
Thomas—Hill *v.*
Thomas—Wilmer *v.*
Thomas, Christopher & Bros.—Fels *v.*
Thompson—Carbolic Soap Co. *v.*
Thompson—Crawshay *v.*
Thompson—Isaacson *v.*
Thompson—Mackinnon *v.*
Thompson & Capper—Burroughs, Wellcome & Co. *v.*
Thomson—Batchelor *v.*
Thomson—Reid *v.*
Thomson, Talmey & Co.—Pearks, Gunston & Tee, Ld. *v.*
Thorley's Cattle-Food Co.—Massam *v.*
Thornton—R. *v.*
Tibbetts—Carlsbad *v.*
Tierney—Williamson *v.*
Tiffin—Havana Cigar and Tobacco Factories, Ld. *v.*
Till—Coslake *v.*
Tipper & Son—Christy & Co. *v.*
Tissell—R. *v.*
Titus Ward—Payton & Co. *v.*
Tobins—R. *v.*
Todd—Part'o *v.*
Toler—Bischop *v.*
Tollitt—Aerators, Ld. *v.*
Tomlin—Hat Manufacturers' Supply Co. *v.*
Tonsmierre—Oakes *v.*
Tooth—R. *v.*
Tothill—Williams, Dr., Medicine Co. *v.*
Townsend—Page *v.*
Townsend—R. *v.*
Trades & Labour Unions (Shipping, &c.) Federation—Pink *v.*
Trainer—Amoskeag Manufacturing Co. *v.*
Trester—Labbatt *v.*
Tripp—Longman *v.*
Triticine, Ld.—Meaby & Co. *v.*
Trott—Pinto *v.*
Truefitt—Perry *v.*
Trust—Gouraud *v.*
Trustees of Port of Bombay—Shepherd *v.*
Tudor—Tudor *v.*
Turnbull—Gravel Roofers' Exchange *v.*
Turner—Beard *v.*
Turner—Burns *v.*
Turpin—Dent *v.*
Turton—Turton & Sons, Ld. *v.*
Tussaud—Tussaud *v.*
Tweedy—R. *v.*
Tylor—Davis *v.*
Typewriter Exchange Co.—Yost Typewriter Co. *v.*

Ullmann—Leuba *v.*
Ullmor—Guinness *v.*
Union Bank of Spain and England—Street *v.*
United Horse Shoe & Globe Nail Co.—Sanders *v.*
Urban—Warwick Trading Co. *v.*
Ury—Carson *v.*
Uva Ceylon Rubber Estates, Ld.—Ouvah Ceylon Estates, Ld. *v.*

Valentine—Valentine *v.*
Valentine Extract Co.—Valentine Meat Juice Co. *v.*
Van Dulken—De Kuyper *v.*
Van Oppen—Van Oppen & Co. *v.*
Van Ryn Wine & Spirit Co.—Exshaw & Co. *v.*
Van Schaick—Marten *v.*
Van Straughton, Leon & Co.—R. *v.*
Vaughan—R. *v.*
Venning—Goodwin *v.*
Vick—Edelsten *v.*
Vining—Nuthall *v.*
Viper & Recovering Co.—St. Mungo Manufacturing Co. *v.*
Virasami—Taylor *v.*
Vulcan Crucible Co.—Morgan Crucible Co., Ld. *v.*

Wagel Syndicate—Field, J. C. & J., Ld. *v.*
Wagner—Lumley *v.*
Waite—Levy *v.*
Walker—Allsopp *v.*
Walker—Cheavin *v.*
Walker—Collins Co. *v.*
Walker—Levy *v.*
Walker—Reynolds & Son *v.*
Wallace—Nami Chand *v.*
Wallis—R. *v.*
Wallis—Wallis *v.*
Walmsley—Ainsworth *v.*
Walter—Pollill *v.*
Ward—Colnaghi *v.*
Ward—Idris & Co. *v.*
Ward—Mulkern *v.*
Ward—Tonge *v.*
Ward & Co.—Spratt's Patent *v.*
Waring—Wason *v.*
Warner—Warner *v.*
Warren Thread Co.—Warren *v.*
Warsop—Warsop, B., & Sons *v.*
Waters—Buckingham *v.*
Watson—Cooper *v.*
Watson—Marshall *v.*
Watts—R. *v.*
Way—Goodman *v.*
Wayland—Boake, A., Roberts & Co. *v.*
Weaver—Franks *v.*
Webley—Talbot *v.*
Webster—Curl Bros. *v.*
Webster—Lucke *v.*
Webster—Routh *v.*
Webster—Webster *v.*
Webster & Girling—Wurm *v.*
Wedderburn—Wedderburn *v.*
Weedon—R. *v.*
Weeks—Lafean *v.*
Weild—Wren *v.*
Weisberg—R. *v.*
Weller—Fradella *v.*
Wells—Fetridge *v.*
Wells & Co.—Leonard & Ellis *v.*
Welsh—R. *v.*
Wenz—Humphreys' Specific Homœopathic Medicine Co. *v.*
Western Distilling Co.—Société Anonyme *v.*
Westhead—Cartier *v.*
Westlake—Watson *v.*
Wharton—Hop Bitters Manufacturing Co. *v.*
Wheatcroft—Allsopp *v.*
Wheeler—Hennessy *v.*
Wheeler—Lafferty *v.*
Whitaker—Darbey *v.*
White—Barrett *v.*
White—Comstock *v.*
White—Hennessy *v.*
White—Lazenby *v.*
White—Mellin *v.*
White—R. *v.*
White's Golden Lubricator Co.—Leonard & Ellis *v.*
Whitehead—Bryson *v.*
Whitehouse—Daniel *v.*
Whiteley, William—Phillipart *v.*
Whiteley, William—R. *v.*
Whiteman—Degraves *v.*
Whitmore—Jacoby *v.*
Whitwell—Standish *v.*
Whitworth—Star Tea Co. *v.*
Wholesale Tobacco Co.—R. *v.*
Wiggins—Cameron *v.*
Wight—Lorillard *v.*
Wilcox—Popham *v.*
Wilde—Burchell *v.*
Wilder—Wilder *v.*
Wilkes—Roworth *v.*
Wilkinson—Burberrys *v.*
Wilkinson—Goodall *v.*
Wilkinson, Heywood & Clark, Ld.—Hubbuck & Sons, Ld. *v.*
William Dobbin & Co.—Wright, Crossley & Co. *v.*
Williams—Badham *v.*
Williams—Elsas *v.*
Williams—Fettes *v.*
Williams—McCord *v.*
Williams—Schneider *v.*
Williams—Thomas *v.*
Williams—Williams *v.*
Williams—Wilson *v.*
Williams Manufacturing Co.—Noera *v.*
Williamson—Meikle *v.*
Williamson—Richards *v.*
Willis—R. *v.*
Willmett—R. *v.*
Wilson—Apollinaris Co. *v.*
Wilson—Ferne *v.*
Wilson—Grand Hotel Co. of Caledonia Springs *v.*
Wilson—Singer Manufacturing Co. *v.*
Wilson—Williams *v.*
Winchester—Graveley *v.*
Winchester—Longman *v.*
Winchester—Thomson *v.*
Winkup—Showell *v.*
Winsor—Stetson *v.*
Winyard—Youatt *v.*
Wisden—Duke *v.*
Witteman—De Kuyper *v.*

Wittkowski—Heyde *v.*
Wolmershausen, G. S., & Co., Ld.—Wolmershausen *v.*
Wood—Manhattan Medicine Co. *v.*
Wood—Metzler *v.*
Woodruff—Smith *v.*
Woodside—Alleghany Fertiliser Co. *v.*
Woodward—Stoughton *v.*
Woolf—Lea *v.*
Woolf—Woolf *v.*
Worden, E., & Co.—California Fig Syrup Co. *v.*
Worrell—Morse *v.*
Worth—Pierce *v.*
Worthington—Estes *v.*
Wright—Blackwell *v.*
Wright—Bullivant *v.*
Wright—Martin *v.*
Wright—Simpson *v.*
Wright & Butler Lamp Manufacturing Co., Limited—John Harper & Co., Ld. *v.*
Wright, Crossley & Co.—Royal Baking Powder Co. *v.*
Wyatt—Goldsmiths' Co. *v.*

YALE—Yale Cigar Manufacturing Co. *v.*
Yates—Dicks *v.*
Young—Rosher *v.*
Young Bros.—Montgomerie & Co. *v.*
Young & Sons—Dunnachie *v.*

ZENDER—R. *v.*
Ziemer—Grezier *v.*

TABLE OF ABBREVIATIONS.

A. C. (preceded by 1891, or as the year may be).	Law Reports, Appeal Cases (current series).
A. J.	Australian Jurist.
A. L. T.	Albany (Australia) Law Times.
Abb. N. C.	Abbott's New Cases (New York).
Abb. Pr.....	Abbott's Practice Reports (New York).
Act. Comm.	Acting Commissioner.
Ad. & E.....	Adolphus and Ellis.
Alb. L. J.	Albany (New York) Law Journal.
Allen	Allen (Massachusetts).
Am. L. Reg.	American Law Register.
Am. L. Rev.	American Law Review.
Am. L. T.	American Law Times.
Am. St. Rep.	American State Reports.
Amer. Dec.	American Decisions.
Amer. Rep.	American Reports.
Ann. Pr.....	Annual Practice.
App. Cas.	Appeal Cases.
App. Div. N. Y.	Appeal Division (New York) Reports.
Asst. Comm.	Assistant Commissioner.
Atk.	Atkins.
B. & Ad.....	Barnewall and Adolphus.
B. & Cr.	Barnewall and Cresswell.
Barb. Ch.	Barbour's Chancery Reports (New York).
Barb. S. C. or Barb.....	Barbour's Supreme Court Reports (New York).
Barnard.....	Barnardiston.
Beav.	Beavan.
Bell.....	Bell's Crown Cases.
Beng. L. R. App.	Bengal Law Reports, Appendix.
Bing.	Bingham.
Biss.	Bissell (U. S. Circuit Court).
Bl. C. C.....	Blatchford (U. S. Circuit Court).
Bomb...	Bombay.
Bond	Bond (U. S. Circuit Court).
Bos.....	Bosworth (New York).
Bos. & P. N. R.	Bosanquet and Puller New Reports.
Brews.	Brewster (Pennsylvania).
Browne	Browne (Massachusetts).
Bush	Bush (Kentucky).
C. A.	Court of Appeal.
C. B.	Common Bench.
C. C. C.	Central Criminal Court.
C. C. C. Sess. Pap.	Central Criminal Court Sessions Papers.
C. C. R.	Court of Crown Cases Reserved.
C. & M.	Carrington and Marshman.

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

Eq. Rep.	Equity Reports.
Esp. N. P. C.	Espinasse, Nisi Prius Cases.
Ex.	Exchequer.
F. & F.	Foster and Finlason.
Fed. Rep.	Federal Reporter (U. S.).
Fla.	Florida Reports.
Foster Cr. Cas.	Foster, Crown Cases.
Ga.	Georgia Reports.
Giff.	Giffard.
Grant, Up. Can. Ch.	Grant, Upper Canada, Chancery.
Green	Green, New Jersey.
H. & M.	Hemming and Miller.
H. & N.	Hurlstone and Norman.
H. & Tw.	Hall and Twells.
H. & W.	Harrison and Wollaston.
H. L.	House of Lords.
H. L. C.	House of Lords Cases.
Hand	Hand (New York).
Hilt.	Hilton (New York).
Hoff.	Hoffman (New York).
Holmes	Holmes (U. S. Circuit Court).
Hopk.	Hopkins (New York).
How. App. Cas.	Howard's Appeal Cases (New York).
How. Pr.	Howard's Practice Cases (New York).
Hughes	Hughes (U. S. Circuit Court).
Hun.	Hun (New York).
Hyde	Hyde (Bengal).
Ill.	Illinois.
Ind.	Indiana Reports.
Ind. L. R.	Indian Law Reports.
Iowa	Iowa State Reports.
I. R. (preceded by 1894, or as the year may be).	Irish Reports (current series).
Ir. Ch.	Irish Chancery.
Ir. Eq.	Irish Equity.
Ir. Jur.	Irish Jurist.
J. & H.	Johnson and Hemming.
J. & S.	Jones and Spencer (New York).
J. P.	Justice of the Peace.
Jac.	Jacob.
Jac. & W.	Jacob and Walker.
Johns.	Johnson.
Journ. of Jurisp.	Journal of Jurisprudence (Scotch).
Jur.	Jurist.
K. & J.	Kay and Johnson.
Keyes	Keyes (New York).
Ky.	Kentucky Reports.
Kyshe	Straits Settlements Reports.
L. C.	Lord Chancellor.
L. G. R.	Local Government Reports.
L. JJ.	Lords Justices.
L. J. Bkptcy.	Law Journal, Bankruptcy.
L. J. Ch.	Law Journal, Chancery.
L. J. C. P.	Law Journal, Common Pleas.
L. J. Ex.	Law Journal, Exchequer.
L. J. K. B.	Law Journal, King's Bench.
L. J. M. C.	Law Journal, Magistrate's Cases.
L. J. N. of C.	Law Journal, Notes of Cases.

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

N. & P.	Neville and Perry.
Neb.	Nebraska Reports.
O. S.	Old Series.
Ohio St.	Ohio State Reports.
Ont.	Ontario Reports.
Oreg.	Oregon Reports.
P. R.	Patent Office Reports.
Pa. *or* Penn. St.	Pennsylvania State Reports.
Pac. C. L. J.	Pacific Coast Law Journal.
Paige	Paige (New York).
Peake	Peake, Nisi Prius Cases.
Pemb.	Pemberton on Judgments.
Penn. L. J.	Pennsylvania Law Journal.
Ph.	Phillips.
Phila.	Philadelphia Reports
Pick.	Pickering (Massachusetts).
Post	Post (Missouri).
Q. B.	Queen's Bench.
Q. B. (preceded by 1891, or as the year may be).	Law Reports, Queen's Bench Division (current series).
Q. B. D.	Queen's Bench Division.
Queens. L. J. Rep.	Queensland Law Journal Reports.
Q. O. R. K. B.	Quebec Official Reports, King's Bench.
R. I.	Rhode Island Reports.
R. & M.	Russell and Mylne.
Robertson	Robertson (New York).
Russ.	Russell.
Ry. Cas.	Railway Cases.
S. & S.	Simons and Stuart.
Sandf. Ch.	Sandford's Chancery Reports (New York).
Sandf. S. C.	Sandford's Supreme Court Reports (New York).
Sawy.	Sawyer (U. S. Circuit Court).
S. C. (preceded by 1908, or as the year may be).	Scottish Cases.
S. C. R.	Supreme Court Reports.
Scot. L. T.	Scottish Law Times.
Scot. L. Rep.	Scottish Law Reporter.
Scott, N. R.	Scott's New Reports.
Seton	Seton on Decrees.
Sickels	Sickels (New York).
Sim.	Simons.
E. D. Smith	E. D. Smith (New York).
Sol. J.	Solicitors' Journal.
St. Dig.	Stephen's Digest of Canadian Cases.
Story	Story (U. S. Circuit Court).
Sup. Ct.	Supreme Court.
Super. Ct.	Superior Court.
Swanst.	Swanston.
T. M. A.	Trade Marks Registration Act.
T. R.	Term Reports.
Tex.	Texas Reports.
Thomp. & C.	Thompson and Cook (New York).
Trade Marks	British and Foreign Journal of Commerce, Trade Marks, and International Exhibitions.
Trans. App.	Transcript Appeals (New York).
U. S.	United States Supreme Court Reports.
U. S. C. C., Dt. of —	United States Circuit Court, District of —.
U. S. Pat. Comm. Decis.	Decisions of the U. S. Commissioner of Patents.

U. S. Pat. Gaz.	United States Official Patent Gazette.
U. S. Sup. Ct.	United States Supreme Court.
V. & B.	Vesey and Beames.
V.-C.	Vice-Chancellor.
V. L. R. Eq.	Victoria Law Reports (New Series) Equity.
V. R. Eq.	Victoria Reports (First Series) Equity.
Va.	Virginia Reports.
Ves.	Vesey.
Vt.	Vermont Reports.
W. N.	Weekly Notes.
W. R.	Weekly Reporter.
W. Va.	West Virginia Reports.
W. & W. (I. E. & M.)	Wyatt and Webb's Victoria Reports (Insolvency, Ecclesiastical and Matrimonial).
W. W. & A'B. Eq.	Wyatt, Webb and A'Beckett's Victoria Reports (Equity).
W. A'B. & W. Eq.	Webb, A'Beckettand Williams' Victoria Reports (Equity).
Wallace	Wallace (U. S. Supreme Court).
Wall., Jr.	Wallace, Junior (U. S. Circuit Court).
Washb.	Washburn (Vermont).
Webs. P. C.	Webster, Patent Cases.
Wend.	Wendell (New York).
West. L. J.	Western Law Journal.
Wils.	Wilson.
Wils. (Ind.)	Wilson's Indianapolis Reports.
Wisc.	Wisconsin Reports.
Wood. & M.	Woodbury and Minot (U. S. Circuit Court).
Y. & C. Ch.	Younge and Collyer's Chancery Reports.

THE

LAW OF TRADE MARKS.

CHAPTER I.

GENERAL INTRODUCTION.

General principle of trade mark law.

The general principle upon which the Courts exercise jurisdiction in the case of trade marks is, that "a manufacturer who produces an article of merchandise which he announces as one of public utility, and who places upon it a mark by which it is distinguished from all other articles of a similar kind, with the intention that it may be known to be of his manufacture, becomes the exclusive owner of that which is henceforth called his trade mark. By the law of this country—and the like law prevails in most other civilised countries—he obtains a property in the mark which he so affixes to his goods. The property thus acquired by the manufacturer, like all other property, is under the protection of the law, and for the invasion of the right of the owner of such property the law affords a remedy similar in all respects to that by which the possession and enjoyment of all property is secured to the owners" (*a*). "A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person" (*b*). "Supposing the rival trader to have obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods, or from the higher price which the

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

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

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

Function of trade mark.

The function of the trade mark is to give the purchaser a satisfactory assurance of the make and quality of the article he is buying. Thus, it was said by Lord Cottenham, C. (*b*), "take a piece of steel: the mark of the manufacturer from whom it comes is the only indication to the eye of the customer of the quality of the article; so it is of blacking, or any other article of manufacture the particular quality of which is not discernible by the eye." It is on the faith of the mark being genuine, and representing a quality equal to that which he has previously found a similar mark to indicate, that the purchaser makes his purchase. "That, in truth," said James, L. J. (*c*), "is the meaning and object of a trade mark. It indicates this—that you may take this as a warranty that it has come from the particular manufacturer of the goods with which you have been hitherto pleased." So, again, it was said by Kay, J. (*d*)—"What does a trade mark mean? It

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

(*b*) In *Spottiswoode* v. *Clarke*, 2 Ph. 154. And see *Kidd* v. *Johnson*, 100 U. S. 617.

(*c*) *Massam* v. *J. W. Thorley's Cattle Food Co.* (2), 14 Ch. D. 748. And see *Amoskeag Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Holt* v. *Menendez*, 128 U. S. 182.

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

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

Mere statement of quality, no trade mark.

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

Exception.

Marks, however, which do serve to indicate the production of a certain manufacturer, though at the same time subject to variation for the purpose of denoting different qualities, are entitled to protection (*d*). And it may be observed that a symbol or word indicating quality in one class of goods need not necessarily do so in another (*e*).

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

(*b*) *Braham* v. *Bustard*, 1 H. & M. 447; *Raggett* v. *Findlater*, L. R. 17 Eq. 29; *In re Barrows*, 5 Ch. D. 353; *Spottiswoode* v. *Clarke*, 1 Coop. 264; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.*, 138 U. S. 537; *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460.

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

(*d*) *Hirst* v. *Denham*, L. R. 14 Eq. 542; *Ransome* v. *Graham*, 51 L. J. Ch. 897; *Moses* v. *Sargood*, Dig. 636; *Amoskeag Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417. And see *Wood* v. *Lambert*, 32 Ch. D. 247.

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

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 (*a*), though that is frequently 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 (*b*) it was held that, where one person manufactured cotton cloths, and another printed them, the mark was indicative of the printer and not of the original manufacturer. So a trade mark has been recognized as indicating the bleacher who finished the goods which another person had manufactured (*c*); and in the same way, one may serve to denote the importer (*d*) or exporter (*e*) of manufactured goods.

May be indicative of selector.

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

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 (*g*). A mere name, however, for a natural

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

(*b*) *Amoskeag Manufacturing Co.* v. *Garner* (1), 55 Barb. 151; R. Cox, 541. See *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298.

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

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

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

(*f*) *Hirsch* v. *Jonas*, 3 Ch. D. 584; *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278; *In re Apollinaris Co.*, (1891) 2 Ch. 186, 226, 230; *Leahy* v. *Glover*, 10 P. R. 141; *Benedictus* v. *Sullivan, Powell & Co.*, 12 P. R. 25; *Major Brothers* v. *Franklin & Son*, 25 P. R. 406; *Thomson & Co.* v. *Robertson*, Ct. Sess. Cas. 4th Ser. XV. 880; *Holt* v. *Menendez*, 128 U. S. 182. And see *Wood* v. *Lambert*, 32 Ch. D. 247; and *In re Wills* (2), (1893) 2 Ch. 262.

(*g*) *Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 242; *Apollinaris Co.* v. *Edwards*, Seton, 5th ed. 537 (Apollinaris Water); *Radde* v. *Norman*, L. R. 14 Eq. 348 (Leopoldshall Kainit); *Wheeler* v. *Johnston*, 3 L. R. Ir. 284 (Cromac Springs Water). And see the coal cases—*Braham* v. *Beachim*, 7 Ch. D. 848; *Davis* v. *Tylor*, Jessel, M. R., April 24th, 1879; *Lochgelly Co., Ld.* v. *Lumphinnans Iron Co.*, Ct. Sess. Cas. 4th Ser. VI. 482. See also *Major Brothers* v. *Franklin & Son*, 25 P. R. 406 (fruit and vegetables).

product which is available by all the world, cannot be exclusively appropriated by an individual, who possesses no exclusive access to its source (*a*).

Present definition.

For the purposes of trade mark registration, the previous law on this point is now summed up in express statutory form in sect. 3 of the Trade Marks Act, 1905—"A trade mark shall mean a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale."

Advantages of use of trade marks.

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

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

(*a*) *Young* v. *Macrae*, 9 Jur. N. S. 322 (Paraffin Oil); *Canal Co.* v. *Clark*, 80 U. S. 311 (Lackawanna Coal); *Montgomerie* v. *Donald & Co.*, Ct. Sess. Cas. 4th Ser. XI. 506 (Water of Ayr Stone). And see *Grand Hotel Co. of Caledonia Springs, Ld.* v. *Wilson*, (1904) A. C. 103.

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

(*c*) *Per* Lord Craighill in *Dunnachie* v. *Young & Sons*, Ct. Sess. Cas. 4th Ser. X. 874.

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

Southern v. *How.*

In the earliest case on record (*b*) damages were given for the infringement of a mark on cloth, though it is not clear from the reports whether the plaintiff was a 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. *How* (*d*). The decision seems in great measure to have been founded upon a dread of setting up a monopoly, the distinction between a trade mark and a patent not being clearly present to his lordship's mind.

Singleton v. *Bolton.*

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

Sykes v. *Sykes.*

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

Requisites to entitle to damages at Common Law.

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

(*a*) *Blanchard* v. *Hill*, 2 Atk. 484, 485.
(*b*) *Southern* v. *How*, Poph. 144; 3 Cro. 471; 2 Rolle, 28.
(*c*) 2 Atk. 484.
(*d*) Poph. 144.
(*e*) 3 Doug. 293.
(*f*) See *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. C. 523, and cases collected at p. 118, note (*d*).
(*g*) *Wilkie* v. *McCulloch*, Ct. Sess. Cas. 1st Ser. II. 413.
(*h*) *Sykes* v. *Sykes*, 3 B. & Cr. 541.
(*i*) See *per* Sir G. Mellish, L. J., in *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 454.

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

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

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

"But at law it was necessary to prove that an injury had been actually done; in equity it was enough to show that the defendant threatened to do, and would, if not prevented, do that injury.

(*a*) 5 C. B. 109.
(*b*) See, however, the Judicature Act of 1873, § 25, by which the rules of equity prevail.
(*c*) 8 App. Cas. 29.

Equity—*Millington* v. *Fox*.

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

Limits to Court's interposition.

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

Acquisition of trade marks.

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

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

(*b*) *Per* Wood, V.-C., in *Batty* v. *Hill*, 1 H. & M. 264. And see *Roper's, &c. Co.* v. *Copeman's, &c. Association, Limited*, 28 Sol. J. 218; *Native Guano Co.* v. *Sewage Manure Co.*, 8 P. R. 125; *Tallerman* v. *Dowsing Radiant Heat Co.*, (1900) 1 Ch. 1.

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

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

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

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

(*g*) § 2 of Amendment Act, 1876.

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

The Trade Marks Acts, 1875-7, were repealed, and replaced by the Patents Acts, 1883-1902 (*b*), which contained a wider and more comprehensive definition of a trade mark (*c*), but were in other respects substantially identical, so far as concerned the acquisition of trade marks, with the previous Acts (*d*). Since April 1st, 1906, the Act regulating the registration of trade marks has been the Trade Marks Act, 1905 (*e*).

Appropriation to special classes of goods.

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

Assignment and transmission.

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

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

(*b*) 46 & 47 Vict. c. 57; 48 & 49 Vict. c. 63; 51 & 52 Vict. c. 50; 2 Edw. 7, c. 34.

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

(*d*) See §§ 62–74.

(*e*) 5 Edw. 7, c. 15. See the summary of this Act beginning at p. 17.

(*f*) Trade Marks Act, 1875, § 2: Patents Act, 1883, § 65; Trade Marks Act, 1905, § 8.

(*g*) *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Merchant Banking Co.* v. *Merchants' Bank*, 9 Ch. D. 560; *Hart* v. *Colley*, 44 Ch. D. 193.

(*h*) Trade Marks Act, 1905, § 22. And see Patents Act, 1883, § 70; Trade Marks Act, 1875, § 2; *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Wellcome*, 32 Ch. D. 213; *In re Bolanachi's Empire Chocolate Co.*, 89 L. T. Jo. 273; *Thorneloe* v. *Hill*, (1894) 1 Ch. 569; *In re Harness*, 17 P. R. 40; *In re Johnson*, 26 P. R. 195; *Smith* v. *Fair*, 14 Ont. Rep. 729. And see *Hammond* v. *Malcolm, Brunker & Co.*, 9 P. R. 301, where an assignment of a trade mark with such portion of the goodwill as related to the goods to which the trade mark applied was held valid; and *In re Magnolia Metal Co.*, (1897) 2 Ch. 371, where the goodwill was only indirectly connected with the goods for which the trade mark was registered.

(*i*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Leather Cloth Co.* v. *American Leather Cloth Co.*, *ib.* 137; 11 H. L. C. 523; *Dixon* v. *Guggenheim*, 7 Phila. 408; R. Cox, 559; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *Kidd* v. *Johnson*, 100 U. S. 617.

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

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

Trade mark lost. Apart from the special provisions of the Trade Marks Act, 1905, 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 (*f*). But for general user to render a mark of common right, it must be used on the same goods as those for which an exclusive right to it is claimed (*g*). It was also held, before the passing of the Registration Acts, that if a person abandons a suit which he has undertaken to restrain infringement, he abandons his exclusive right (*h*).

Infringement. When once a person has acquired a right in the trade mark, any

(*a*) *Cotton* v. *Gillard*, 44 L. J. Ch. 90: *Pinto* v. *Badman*, 8 P. R. 181; *Hammond* v. *Malcolm*, *Brunker & Co.*, 9 P. R. 301.

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

(*c*) *Shipwright* v. *Clements*, 19 W. R. 599. And see cases collected at p. 117, note (*b*).

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

(*e*) *Ex parte Young; Re Lemon*, *Hart & Son*, Dig. 537. And see *Kelly* v. *Hutton*, L. R. 3 Ch. 703; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; and cases at p. 121, note (*f*); also the Bankruptcy Act, 1883, § 44 (iii). In America it has been considered a disputable question whether property in a trade mark is the subject of attachment or levy under execution (*Hegeman & Co.* v. *Hegeman*, 8 Daly, 6), or whether it will pass under a general assignment (*Milliken* v. *Dart*, 33 N. Y. Sup. Ct. 24).

(*f*) *Lea* v. *Millar*, Dig. 513. And so "Maizena"—*National Starch Manufacturing Co.* v. *Munn's Patent Maizena and Starch Co.*, (1894) A. C. 275: "Kaiser" spring water—*Luylies* v. *Hollender* (2), 24 Bl. C. C. 353; "Gold Leaf" Flour—*Partlo* v. *Todd*, 17 Can. Sup. Ct. 196; "Imperial Cough Drops"—*Watson* v. *Westlake*, 12 Ont. Rep. 449. And see *per* Sir G. Mellish, L. J., in *Ford* v. *Foster*, L. R. 7 Ch. 611; adopted by Lord Macnaghten in *Leahy* v. *Glover*, 10 P. R. 141. Also *Neva Stearine Co.* v. *Moseley*, 9 V. L. R. Eq. 98; *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 138 U. S. 537.

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

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

infringement 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 (*a*). Even if the purchaser is told that the goods are the goods of the actual seller, but the imitated mark is upon them, there is ground for interference, since the goods may be resold bearing the mark, but without the information necessary to correct the statement thereby made (*b*). There is infringement if ordinary purchasers purchasing with ordinary caution are likely to be misled (*c*): on the one hand, the Court will not strain its jurisdiction to protect fools and idiots (*d*); on the other hand, it will not require such minuteness of imitation as to deceive persons of unusual sagacity and information.

Remedies for infringement.

Infringement is criminally punishable under an indictment for obtaining money by false pretences (*e*), or in accordance with the special provisions of the Merchandise Marks Act, 1887 (*f*), expressly enacted to prevent such practices. The Common Law remedy is by an action on the case for damages caused by the offender's fraud (*g*). The equitable remedy is by injunction, together with an account, or damages, if preferred. The greater suitability of this form of remedy has occasioned the adjudication in Chancery of the great majority of trade mark cases, and the carrying into operation of the Trade Marks Registration Acts, 1875-7, was specially entrusted to the Chancery Division (*h*). This provision is not now repeated, but the great majority of such cases are still dealt with by the Chancery judges.

(*a*) See cases collected at p. 183, note (*b*).

(*b*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; and cases at p. 175.

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

(*d*) *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 447; *Payton* v. *Snelling*, 17 P. R. 48, 57 (*per* Romer, L. J.).

(*e*) See Ch. 5.

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

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

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

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

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 (*d*), 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" (*e*).

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 (*f*).

Unauthorised use of word "patent," &c.

A particular form of misstatement which has proved fatal in several cases has been the insertion or retention in a trade mark of the word "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 (*g*).

Distinction between trade mark and patent.

"Trade marks have sometimes been likened to letters patent and sometimes to copyrights, from both of which they differ in many respects" (*h*). "There is this difference between the case of a trade mark and that of a patent: in the former case the article sold is open to the whole world to manufacture, and the only right the plaintiff seeks is that of being able to say—'Don't sell any goods under my mark.' He may find his customers fall off in consequence of the defendant's manufacture; but it does

(*a*) *Rodgers* v. *Nowill*, 5 C. B. 109.
(*b*) 3 My. & Cr. 338.
(*c*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Cartier* v. *Carlile*, 31 Beav. 292; *Moet* v. *Couston*, 33 Beav. 578.
(*d*) See *Pidding* v. *How*, 8 Sim. 477; *Perry* v. *Truefitt*, 6 Beav. 66; and other cases in Ch. 7.
(*e*) *Per* Sir G. Mellish, L. J., in *Ford* v. *Foster*, L. R. 7 Ch. 611.
(*f*) *Ford* v. *Foster*, *ubi supra*.
(*g*) See the cases in Ch. 7.
(*h*) *Per* Lord Blackburn, in *Johnston* v. *Orr-Ewing*, 7 App. Cas. 219, 228.

not necessarily follow that the plaintiff can claim damages for every article manufactured by the defendant, even though it be under that mark. On the other hand, every sale without licence of a patented article must be a damage to the patentee" (*a*). In the case of a trade mark, "the property and right to protection is in the device or symbol which is invented and adopted to designate the goods to be sold, and not in the article which is manufactured and sold" (*b*). The broad difference between a patent and a trade mark is, therefore, that the public are prohibited and restrained from manufacturing any article protected by the former, so long as the protection exists, whereas the public are at full liberty to manufacture an unpatented article (*c*), and that according to the identical original process, and to say that they are so doing, and this is so whether the original makers use, or do not use, a trade mark upon their goods. What the subsequent manufacturers may not do is to put upon their goods the mark used by the original makers, so as to represent that such goods are the actual goods of the original makers, and not merely equivalent goods made by others. The benefit conferred upon the public by the communication of a new invention, which after a limited period all can use, is the consideration in respect of which a monopoly of the invention is granted to the inventor for that limited period (*d*). Any attempt, therefore, to prolong the term of the patent by means of a trade mark will be discouraged (*e*).

Trade mark distinguished from copyright.

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

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

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

(*c*) This is quite clear in America as well as in this country. See *Thomson* v. *Winchester*; 36 Mass. 214; R. Cox, 7; *Coffeen* v. *Brunton* (1), 4 McLean, 516; R. Cox, 82; *Manhattan Medicine Co.* v. *Wood*, 4 Cliff. 461, and many other cases. So also in Scotland, *Singer Manufacturing Co.* v. *Kimball and Morton*, Ct. Sess. Cas. 3rd Ser. XI. 267.

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

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

(*f*) *Farina* v. *Silverlock*, 6 De G. M. & G. 214; *Collins Co.* v. *Cowen*, 3 K. & J. 428: *Correspondent Newspaper Co.* v. *Saunders*, 11 Jur. N. S. 540; *Kelly* v. *Hutton*, L. R. 3 Ch. 703; *Dicks* v. *Yates*, 18 Ch. D. 76.

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

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

Trade marks of aliens protected.

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

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

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

(*c*) § 6.

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

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

Conflict of laws.

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

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

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

(*c*) *Collins Co.* v. *Coven*, 3 K. & J. 428; *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268; and cases at p. 99, note (*a*).

(*d*) *Taylor* v. *Carpenter* (1), 3 Story, 458; R. Cox, 14: and cases at p. 99, note (*a*).

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

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

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

(*h*) L. J. N. of C. 1857, p. 134.

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

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

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

In *Rodgers & Sons, Ld.* v. *Rottgen* (*a*), a German defendant was restrained from using a trade mark which he had registered in Germany, but which resembled the plaintiff's mark. In *Rey* v. *Lecouturier* (*b*), the Court of Appeal and House of Lords, while protecting in this country the rights of the original proprietors of a goodwill and trade marks which in France, the country of origin, had been held to have passed to other owners, were careful to point out that the French decisions did not affect, or purport to affect, the rights in this country. For registration in this country a title good in English law must be shown (*c*). It has also been held that user abroad is not such user as will bring the person using within the three-mark rule (*d*), and that a person who has not even an intention of using a trade mark in England cannot be a person aggrieved by a wrongful entry on the register (*e*); but the latter decision was reversed (*f*). Section 91 of the Patents and Designs Act, 1907, replacing sections 103 and 104 of the Patents Act, provides for the grant of privileges to foreigners and colonists in cases in which their governments give protection to British subjects.

Passing off.

Besides cases of infringement of trade marks proper, there are some other classes of cases nearly akin to the former, but differing from them in some important particulars, which yet require notice in connection with the subject of trade marks, as where there is an unfair competition in trade contrived, not by imitation of trade marks, but by other forms of representation that one man's goods are another's. This is what is known as "passing off." The term "substitution" is also sometimes employed where an order has been given for one article and another has been supplied. Such cases are governed by substantially identical principles with

mark by the sale in America of the article alleged to be an infringement that an injunction had been refused against the defendant's principal in Germany, first, because the question whether the alleged infringement was likely to impose upon the public depended upon the circumstances of the place, and, secondly, because the particular subject-matter of the two actions was not identically the same: *Hohner* v. *Gratz*, 50 Fed. Rep. 3.

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

(*b*) 25 P. R. 265; 27 *ib.* 268.

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

(*d*) *In re Münch*, 50 L. T. N. S. 12. And see *Berliner Brauerei Gesellschaft Tiroli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70; *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *Neuman* v. *Pinto*, 4 P. R. 508 (*per* Kekewich, J.); *In re Mews*, (1891) 1 Ch. 41; *Smith* v. *Fair*, 14 Ont. Rep. 729; *Ebrahim Currim* v. *Essa Abba Sait*, Ind. L. R. 24 Mad. 163.

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

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

those which regulate the law of trade marks, the decision of the Court of Appeal to the contrary (*a*) having been overruled by the House of Lords (*b*). But the injunction granted may differ in form, even though the modification may be productive of little or no practical benefit to the defendant (*c*).

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 (*d*), 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 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 (*e*); they are in fact included in, and valued as part of, the goodwill (*f*); severed from it they cannot exist (*g*).

The registration system.

The above general outline of the law of trade marks naturally leads to a consideration of the system of registration which now prevails. And first it is to be remembered that the law of trade mark registration is not equivalent to the law of trade marks. That which is used as a trade mark is still a trade mark, registered or unregistered. But unless that which is used as a trade mark is registered as a trade mark it cannot be pro-

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

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

(*c*) *E.g.*, the "Yorkshire Relish" case —*Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710. See *per* Lindley, L. J., at p. 79 of the report in C. A.

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

(*e*) § 22 of the Trade Marks Act, 1905; Rules 76—81 of the Trade Marks Rules, 1906. See also § 70 of the Patents Act, 1883, and § 2 of the Trade Marks Act, 1875.

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

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

tected as a trade mark, except in one case only, which will be explained presently. The difference is, that a trade mark which is entitled to protection as a trade mark cannot be imitated without infringement, whereas a trade mark which is not entitled to protection as a trade mark can only be protected in a passing-off action, in which the plaintiff has to prove, not merely that the mark has been copied, but that the mark in fact identifies his goods. Further than this, he must satisfy the Court that the defendant's conduct is calculated to deceive. It is no doubt true that even in an action for infringement of a trade mark this must be made out; but if the identical trade mark has been taken, and not merely a mark having a resemblance to it, infringement requires no further proof (*a*). Sect. 45 of the present Act expressly lays down that the passing-off action is unaffected by the provisions as to registration; but this has been already recognized by the Courts, *e.g.*, in the "Stone Ales" case (*b*), in which the words were removed from the register but protected by injunction simultaneously, and the "Yorkshire Relish" case, in which the words were similarly expunged (*c*), but were nevertheless protected in a passing-off action (*d*). Now for a trade mark to be protected as a trade mark it must be registered (sect. 42), with the one exception, that if the mark was in use before the 13th August, 1875 (the date of the first Trade Marks Registration Act), the proprietor can place himself in a position to have it protected as a trade mark if he applies for registration under the present Act and, failing to obtain registration, obtains a certificate of refusal. (Sect. 42.) It must be noticed that for this purpose it is not sufficient to have applied unsuccessfully for registration under one of the repealed Acts. The latitude provided by the present Act is greater than previously prevailed, and it is made an express condition of protection that an application shall have been made under the more generous conditions. Trade marks may therefore be summed up under three heads: (a) registrable trade marks, which must be registered if they are to be protected as trade marks; (b) non-registrable trade marks used before the 13th August, 1875, which can be protected as trade marks if tendered for registration

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

(*b*) *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217.

(*c*) *In re Powell*, (1893) 2 Ch. 388; (1894) A. C. 8.

(*d*) *Powell* v. *Birmingham Vinegar Brewery Co., Ltd.*, (1896) 2 Ch. 54; (1897) A. C. 710.

and refused; (c) non-registrable trade marks not used before the 13th August, 1875, which can only be protected in a passing-off action, this mode of protection being also open to marks falling within classes (a) or (b), but which have not been registered or tendered for registration.

What can be registered.

The advantage of being able to rely on registration, without the necessity of having to prove a case of common law fraud, is so obvious that all marks should be tendered for registration and, if possible, registered. Moreover, it is plainly of the first importance that any trader who is desirous of adopting a trade mark for his goods should adopt one which is capable of registration, and that he should put this to the test by applying for and obtaining registration before he risks his capital in building up a business in reliance on his right to protection for the mark on which it is to depend. For this purpose the first section of the Act which has to be considered is sect. 3, which contains the definitions of the expressions "mark," "trade mark," "registrable trade mark," and "registered trade mark." These definitions are as follows:—

"A 'mark' shall include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof."

"A 'trade mark' shall mean a mark used or proposed to be used upon or in connection with goods, for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale."

"A 'registrable trade mark' shall mean a trade mark which is capable of registration under the provisions of this Act."

"A 'registered trade mark' shall mean a trade mark which is actually upon the register."

The effect of this is that for the purposes of the Act a "mark" may be any of the various matters specified, and that to constitute such a mark a "trade mark" it must be used or intended to be used in trade in one or more of the modes specified, which include not merely marks indicative of manufacture, but also marks indicative of trading, wholesale or retail, and, further, marks indicative of certification, as provided by sect. 62. The definitions of "registrable" and "registered" trade marks call for no comment.

The next point is as to the conditions which entitle a mark to be regarded as a "registrable trade mark." These conditions are

laid down by sect. 9, by which such a mark "must contain or consist of at least one of the following essential particulars:—

"(1.) The name of a company, individual, or firm represented in a special or particular manner;

"(2.) The signature of the applicant for registration or some predecessor in his business;

"(3.) An invented word or invented words." As to this reference should be made to the "Solio" case (*a*) and the "Tachytype" case (*b*).

"(4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

"(5.) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1), (2), (3) and (4), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark;

"Provided always that any special or distinctive word or words, letter, numeral, or combination of letters or numerals, used as a trade mark by the applicant or his predecessors in business before the thirteenth day of August, one thousand eight hundred and seventy-five, which has continued to be used (either in its original form or with additions or alterations not substantially affecting the identity of the same) down to the date of the application for registration, shall be registrable as a trade mark under this Act.

"For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

"In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered."

The effect of this section is that a mark which falls within any of the first four sub-sections, or any other distinctive mark, not being a name, signature, or word or words, can be registered without more, as can an old mark which falls within the proviso

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

(*b*) *In re Linotype Co., Ltd.*, (1900) 2 Ch. 258.

which follows sub-sect. (5), but other marks consisting of a name, signature, or word or words, can only be registered by utilizing the special provisions of sub-sect. (5).

Names and words.

The first sub-section is not of much importance, as it only protects a particular manner of representation of a particular name, and not the name itself; and the same remark applies to sub-sect. (2). Sub-sects. (3) and (4) applying to words, and sub-sect. (5) so far as it relates to devices, labels, tickets and the like, are of greatly more consequence. But the really new provision is that contained in the latter part of sub-sect. (5), by which a name, signature, or word or words, which do not fall within any of the earlier sub-sections, can still be registered if an order can be obtained from the Board of Trade or the Court on what is termed a "special application." The applicant has the advantage of being able to select which tribunal he prefers (though if he selects the Board of Trade there is always the possibility that the case may be referred to the Court under sect. 59), but if he selects the Board of Trade, and they hear the case, their decision will be final; whereas if he selects the Court, and the decision is unfavourable, he will be able to appeal up to the House of Lords, if he thinks fit so to do. He will further have the very great advantage, whichever tribunal he selects, of being able to produce evidence of the extent to which actual user has rendered his mark in fact distinctive for the particular goods, although the mark must be "adapted to distinguish" them, a phrase to which somewhat excessive regard has been paid, seeing that it was put into the Act to meet the case of previously unused marks which could not be actually distinctive in fact before they had become known. In this respect the new Act is greatly to be preferred to those which went before it, which, except in case of marks used before the 13th August, 1875, paid no attention whatever to actual user or its result. As matters have hitherto stood, words which did not fall within a strict construction of the words of the Acts, even though they were absolutely distinctive of the products of particular traders, could not obtain registration unless they had been used alone as trade marks on the goods before the 13th August, 1875 (*e.g.*, "Stone Ales," "Yorkshire Relish"). Now such words can be and have been registered by leave of the Board of Trade or the Court (*a*).

(*a*) Many such trade marks, numbering hundreds, have been passed for registration by the Board. The cases which have come before the Court so

Cotton marks.

It should here be noted that the provisions which apply to trade marks generally are somewhat modified in the case of cotton marks, which will henceforth be governed by sect. 64, by sub-sect. (10) of which section no words, standing alone, are to be registered for cotton piece goods or cotton yarn; no line heading, standing alone, is to be registered for cotton piece goods; and no registration of a cotton mark is to give any exclusive right to the use of any word, letter, numeral, line heading, or any combination thereof.

Colour.

Reverting to trade marks generally, sect. 10 enables trade marks to be limited in whole or in part to one or more specified colours. This has been desired by traders, but except in rare cases not much use is likely to be made of it, seeing that it does not apply to word-marks, and that ordinary devices would be of little value if the same devices could be adopted by other traders if coloured differently.

Restrictions on registration.

Certain restrictions upon registration are imposed by sect. 11, which prohibits the registration as a trade mark, or part of a trade mark, of matter which is open to objection for the reasons therein stated, and Rules 11—16 authorize the registrar to refuse registration for various further reasons. In certain cases there defined the registrar may require consents to be furnished. Further objections arise where marks tendered for registration contain matter which invades the rights of other traders, but it will be more convenient to deal with this topic later on.

Classification of goods.

Under the new Act, as under all that have preceded it, a trade mark must be registered in respect of particular goods or classes of goods (sect. 8), but there is nothing to prevent the registration of the same mark for a variety of goods, or classes of goods, in which the applicant is trading or intending to trade. For the purpose of registration, goods are classified in fifty classes (Rule 5). The third schedule to the Rules sets out these classes, and the Guide to the classification (p. 463, *post*) serves as an index to them. Rule 16 contains special provision for cases in which the name or a description of any goods appears on a trade mark, in which cases the registrar may refuse to register the mark for any other goods unless the application states that the name or description varies.

Application for registration.

When a person claiming to be the proprietor of a trade mark is

far have not been numerous, but in several instances the applications have been successful. See notes to sect. 9 (5) of the Act in App. A.

desirous of obtaining registration, he must make an application under sect. 12 (1). Such applications (except in the case of Sheffield marks and cotton marks, under sects. 63 and 64) have to be made to the registrar at the Trade Marks Office, and the manner of application is laid down by Rules 17—28.

Procedure on application.

The procedure on receipt of the application is laid down by Rules 29—34. The registrar may refuse the application, or may accept it absolutely, or subject to conditions, amendments, or modifications. (Sect. 12 (2).) Such conditions may include the entry of disclaimers (sect. 15, Rule 34), but such disclaimers are now expressly limited, so as not to affect any rights of the proprietor of the mark except such as arise from the registration. (Sect. 15.) If the applicant desires to appeal against such refusal, or against the imposition of such conditions, amendments, or modifications, he may require the registrar to state in writing the grounds of his decision and the materials used by him. (Sect. 12 (3), Rule 33.) He may appeal either to the Board of Trade or to the Court at his option (sect. 12 (3)), but if he appeals to the Board of Trade the appeal may be referred to the Court. (Sect. 59.) If the Board of Trade hears the appeal, the decision will be final (sect. 59), but if the appeal is heard by the Court the usual opportunities for further appeals will be available. The appellate tribunal has the same power as the registrar to impose conditions, amendments, or modifications (sect. 12 (4)), and the appeal is to be heard on the materials stated by the registrar. (Sect. 12 (5).) If special leave is given to take further grounds of objection the applicant may withdraw his application without payment of costs. (Sect. 12 (5), Rule 128.) Sect. 12 (6) provides for the correction of errors in applications or amendments thereof at any time. Appeals to the Court are brought by way of motion. (Rule 121.) Appeals to the Board of Trade are in the manner provided for by Rules 122–7. All appeals must be brought within one month.

Special provision is made by Rules 35—41 for applications for the registration of a name, signature, or word or words, under sect. 9 (5).

Special provision is also made by Rules 42—46 for applications for the registration of certification marks under sect. 62.

Advertisement.

When an application has been accepted the registrar is required to cause it to be advertised, together with all the conditions to which it is subject. (Sect. 13.) Such advertisement is in the

Trade Marks Journal, and the manner of advertisement is defined by Rules 47—50. If no representation of the mark is inserted in the Journal, as, *e.g.*, in the case of colour marks or cotton marks, a reference is to be given to the place where a specimen is deposited for exhibition. (Rule 47.)

Opposition. So far the only cases which have been dealt with have been cases in which the applicant has simply had to satisfy the registrar or the appellate tribunal that his proposed mark complied with the conditions of the Act. But the rights of third parties also have to be considered, and provision for opposition by such third parties is made by sect. 14 and Rules 51—61. Any person may give notice of opposition within one month from the date of advertisement. (Rule 51.) Such notice is to be in writing, in the prescribed form, and is to state the grounds of opposition. There is no limitation of persons who may oppose, or of grounds of opposition (except in sect. 41). If it is intended to rely on registered marks, the numbers of such marks and the numbers of the Journals containing the advertisements are to be set out. (Sect. 14 (2), Rule 52.) The registrar sends a duplicate of the notice of opposition (furnished by the opponent) to the applicant, who is to send to the registrar within one month a written counter-statement of the grounds on which he relies. (Sect. 14 (3), Rule 53.) The registrar then sends a duplicate of the counter-statement (furnished by the applicant) to the opponent (sect. 14 (4)), who is to put in his evidence in chief by way of statutory declaration within one month. (Rule 54.) The applicant is to put in his evidence in answer by way of statutory declaration within one month (Rule 55), and the opponent then has fourteen days within which to put in his evidence in reply. (Rule 56.) The registrar has power at any time to give leave to file evidence upon terms (Rule 57), and he has, by Rule 99, general power to enlarge any time prescribed by the Rules. (See also Rule 60.) When the evidence is completed a date is fixed for the hearing. (Rule 59.) The hearing then takes place and the decision is given. (Sect. 14 (4).) The decision is subject to appeal to the Court or, with the consent of the parties, to the Board of Trade. (Sect. 14 (5).) The Board of Trade may hear the appeal or may refer it to the Court. (Sect. 59.) If it hears the appeal its decision is final. (Sect. 59.) If the appeal is heard by the Court further appeals are possible. The appellate tribunal has the same power as the

registrar to impose conditions on registration. (Sect. 14 (6).) Further material may be introduced on appeal by special leave (sect. 14 (7)), but if further grounds of objection are introduced by special leave of the appellate tribunal the applicant may withdraw his application without payment of costs. (Sect. 14 (8), Rule 128.) In any appeal the appellate tribunal may permit the mark to be modified in any manner not substantially affecting its identity. (Sect. 14 (9).) Power is now given to the registrar or the Board of Trade to make an order for costs. (Sect. 14 (10).) If an opponent or appellant, as the case may be, neither resides nor carries on business in the United Kingdom, the registrar or the appellate tribunal, as the case may be, may require him to give security for costs. (Sect. 14 (11), Rule 61.)

Registration.

When an application for registration has been accepted and has not been opposed, and the time for opposition has expired, or when there has been an opposition which has been decided in favour of the applicant, the registrar is (upon payment of the prescribed fee) to register the mark, and such registration is to date as of the date of the application. (Sect. 16, Rule 64.) But if a mark has been accepted in error, the acceptance may be withdrawn. (Rule 63.) On registration a certificate is to be issued. (Sect. 17, Rule 67.) If the applicant dies before registration, the successor to his business may be substituted for him. (Rule 66.)

Abandonment.

If registration of a trade mark is not completed within twelve months from the date of the application by reason of default on the part of the applicant, notice is to be given to the applicant and his agent, if he has one, and if, after fourteen days or such longer time as the registrar may allow, the registration is still not completed, the application is to be deemed to be abandoned. (Sect. 18, Rules 62, 99.)

Conflicting marks.

The registration of a trade mark which is identical with one already on the register in respect of the same goods, or which so nearly resembles such trade mark as to be calculated to deceive, is prohibited (sect. 19, but see sect. 41), and in such cases the mark ought to be rejected in the office without putting the previously registered proprietor to the trouble and expense of an opposition. It is of course impossible for the registrar to be fully informed as to the details of all trades, so that in many cases marks will be passed for advertisement which ought to have been stopped, but there will then be an opportunity for opposition in the usual way.

Where there is any serious doubt as to the two marks conflicting, it is thought that the applicant ought to have the benefit of the doubt, leaving it to the owner of the other mark to oppose if he thinks fit. In any case the Court can direct registration of identical or similar marks if it thinks fit to do so. The new law differs from the old in one important respect, viz., that for a mark to be stopped because of the presence of a similar mark on the register, it is now expressly provided that such stoppage is only to take place when the earlier mark belongs to a different proprietor. Consequently there is now nothing to prevent the same proprietor from registering any number of marks with the same essential particular, and in fact it is often convenient that this should be so. Another point to be noted is that in the case of an old mark, claimed as having been in use before the 13th August, 1875, there is no prohibition of registration on the ground of an identical or similar mark being on the register. Hitherto, similar old marks have been allowed to be registered up to three, after which the mark became common. It remains to be seen whether any such limit will be imposed in future, but it seems unlikely that many marks will be tendered for registration in the future with a claim of user for more than thirty-five years. The Court has now power (sect. 21) to provide for cases of honest concurrent user, *e.g.*, in different localities, by allowing registration of similar marks by different proprietors, subject to limitations in respect of mode or place of user or otherwise. This power was exercised by the Court in the early years of trade mark registration, without any precise legislative authority, but only in the case of old marks. Now it has become general. The case of each of several persons claiming to be the proprietor of the same mark, or similar marks, is provided for by sect. 20; but such cases can seldom arise, as the claims would have to be made practically simultaneously, otherwise one mark would be on the register and the later applications would in ordinary cases be refused.

Associated trade marks.

A group of sections which is substantially new consists of sects. 24—27, dealing with what the Act describes as "associated trade marks." The central idea is that while it is possible for the same proprietor to own a number of different registered marks, unlike one another, round each of which a distinct goodwill may quite possibly have grown up, it is also possible, and even probable, that the same proprietor may own a number of registered

marks which, while differing in various respects, may yet contain the same distinctive elements, so that any goodwill which attaches to one of them must necessarily attach, in some degree at all events, to all, so that it would be contrary to the whole spirit of the law of trade marks for such marks to change ownership except as a group. Suppose, for example, that a brewer had a number of different labels each containing the representation of a tiger and the words "Tiger Brand," but with different accompaniments, and also a number of other labels each containing the representation of a unicorn and the words "Unicorn Brand," there would be no harm in the "Tiger Brand" labels passing to A. and the "Unicorn Brand" labels to B., but it would never do to allow some of the tiger labels to go to A. and the rest to B. If that were to be so no one would be able to tell whose beer was indicated by the "Tiger Brand." The sections of the Act now under consideration provide that where marks are applied for which are so similar to one another that if used by different persons for the same goods deception would arise, such marks shall be treated as associated marks, and shall be assignable or transmissible only as a whole. (Sect. 27.) This same principle is applied whether the same person registers one mark first and applies afterwards to register another which is essentially the same (sect. 24), or if he registers a particular trade mark and also a more extended trade mark in which the first is included (sect. 25), or if he registers a series of trade marks which agree in the material particulars, while differing in other matters which do not substantially affect the identity of the mark. (Sect. 26.) This last provision appeared in a slightly different form in the Act of 1883, but in other respects this group of sections is new. Rule 65 gives practical effect to the principle laid down by requiring the registrar to note the number of each associated mark against the registration of each mark associated with it.

Sheffield marks.

The special provisions with regard to Sheffield marks for metal goods which were contained in the earlier Acts are repeated, with slight alterations, in sect. 63 of the new Act, and worked out by Rules 107—112. The general effect of the section and Rules is that for persons carrying on business in metal goods in Hallamshire, or within six miles thereof, the Cutlers' Company of Sheffield is substituted for the Registrar of Trade Marks, and provision is made for an interchange of information with regard to applica-

tions in respect of metal goods between the company and the registrar.

Cotton marks.

Somewhat similar provisions with regard to cotton marks are made by sect. 64 of the Act and Rules 113—120. In this case applications with respect to cotton marks are to be made to the Manchester Branch Office, superintended by the Keeper of Cotton Marks, who is to give all necessary information to the registrar. Cotton marks are defined by sect. 64 (1), (2) as trade marks for cotton goods, which have hitherto constituted classes 23, 24 and 25, "except such as may be prescribed." The Rules do not prescribe any exceptions, so that it may be taken that marks for any goods in any of the three classes named are cotton marks. It may be noted that sect. 64 (9) contains a provision to the effect that where a cotton mark tendered for registration has been used, the length of such user shall be stated in the application. No reason has been assigned why this useful stipulation has not been made to apply generally.

Certification marks.

A new and useful provision is made by sect. 62 for the admission to registration, by leave of the Board of Trade, of what are called in the heading to the section "Special Trade Marks," in the side-note to the section "Standardization, &c. Trade Marks," but better in sect. 3, "Certification Trade Marks." Such a mark is a mark used for the purpose of conveying to those who see it, not that the goods marked therewith are goods made or sold by the owner of the mark, but that the owner of the mark has examined the goods, and has affixed the mark for the purpose of certifying the result of such examination, in respect of the origin, material, mode of manufacture, quality, accuracy, or any other characteristic of the goods. Such marks would be the standard hall marks on plate. In such cases the marks may be registered, though there may be no goodwill attached to them, but they cannot be assigned or transmitted without the leave of the Board of Trade.

This concludes all that it seems necessary to say with respect to getting trade marks on the register. What remains is to consider what may be done in respect of them while they are there, how they are to be kept there, and how they are to be removed.

Assignment and devolution.

The new Act repeats the provision which has appeared in all Acts relating to trade mark registration, that a registered trade mark can be assigned and transmitted only in connection with the goodwill. (Sect. 22.) But express authority is given for the first

time for the goodwill for different countries to be split up, and for the right of user in any British possession or protectorate, or foreign country, to be assigned together with the goodwill of the business therein. Assignments and devolutions are to be entered in the register. (Sect. 33, Rules 76—81.) An assignor and assignee may apply jointly, or the assignee may apply alone. (Rules 76, 77.) On a goodwill becoming divided, by dissolution of partnership or otherwise, an apportionment of the registered trade marks may be sanctioned by the registrar, subject to the provisions of the Act as to associated trade marks. (Sect. 23, Rules 87—89.) The registrar's decision is subject to appeal to the Board of Trade (sect. 23), who may, if they think fit, refer it to the Court. (Sect. 59.)

Rights of registered proprietor.

The registered proprietor of a trade mark has the exclusive right to the use of the mark for the specified goods. (Sect. 39.) But where the same, or substantially the same, trade mark is registered for the same goods by different persons, neither of them is to have any exclusive rights against the other or others, except so far as their respective rights may have been defined by the Court (sect. 39), and no registration is to interfere with the *bonâ fide* use by any person of his own name or place of business, or of that of any of his predecessors in business, or of any *bonâ fide* description of the character or quality of his goods. (Sect. 44.)

Duration of registration.

The registration of a trade mark lasts for fourteen years, at the end of which time it comes to an end, unless it is duly renewed for another period of fourteen years. The procedure for obtaining renewal is set out in sects. 28—30 and Rules 68—75. If a registration is not renewed, and the mark is consequently removed from the register, marks similar to it are still not allowed to be registered for a year unless it is made out that the *bonâ fide* user of the removed mark had ceased for the two years immediately preceding the removal. (Sect. 31.)

Alteration by registrar.

The registrar has power, on application by the registered proprietor, to alter the registration of a trade mark in various respects, *i.e.*, by correcting an error in the name or address of the registered proprietor, by entering any change in the name or address of the registered proprietor (this meets the difficulty raised in *In re New Ormonde Cycle Co., Ltd.* (*a*)), by cancelling the registration, by

(*a*) (1896) 2 Ch. 520.

narrowing the goods for which the registration exists, by entering any disclaimer or memorandum which does not extend the registration rights. (Sect. 32, Rules 90—92, 82.) He may also allow the alteration of the mark itself in any respect which does not substantially affect its identity (sect. 34, Rules 93, 94)—a power which has hitherto been reserved for the Court. Any decision under either of these sections is subject to appeal to the Board of Trade, who may refer the appeal to the Court. (Sect. 59.)

Rectification by Court.

The Court may, under sect. 35, correct the register on the application of any person aggrieved in any of the following respects:—(a) by the non-insertion in or omission from the register of any entry (this does not extend to directing the registration of a mark, which must be obtained by means of the procedure provided for application and, if necessary, appeal) (*a*); (b) by any entry made in the register without sufficient cause; (c) by any entry wrongly remaining on the register; (d) by any error or defect in any entry in the register. The question who is a "person aggrieved" has been repeatedly considered by the Court, and reference may be made to *In re Riviere & Co.* (*b*), *In re Apollinaris Co.* (*c*), *In re Powell* (*d*), *In re Wright, Crossley & Co.* (*e*). The effect of these decisions is that a common informer is not a person aggrieved, but that any one is so who may possibly be injured by the continuance of the mark on the register. One way in which a mark is wrongly registered is where a mark is registered for goods on which there is no present intention of using it, such absence of intention being proved by failure for a substantial time to use it. This case was held to fall within sect. 90 of the Act of 1883, in *In re Batt & Co.* (*f*), *In re Suter Hartmann and Rahtjen's Composition Co.* (*g*), and *In re Hart* (*h*), and it is now expressly provided for by the introduction into sect. 35 of the words "any entry wrongly remaining on the register," and also by sect. 37, which is specially directed to this case. A new provision is that the registrar himself may apply for rectification in case of fraud in the registration or transmission of a registered trade mark. (Sect. 35 (3).) What is to be considered as "fraud" remains to be decided. An order

(*a*) See *In re Normal Co., Ltd.*, 35 Ch. D. 231.

(*b*) 26 Ch. D. 48; and on further hearing, 53 L. T. N. S. 237.

(*c*) (1891) 2 Ch. 186.

(*d*) (1893) 2 Ch. 388; (1894) A. C. 8.

(*e*) 15 P. R. 131, 377.

(*f*) (1898) 2 Ch. 432; (1899) A. C. 428.

(*g*) 19 P. R. 42.

(*h*) (1902) 2 Ch. 621.

for rectification is to be served upon the registrar, who is thereupon to rectify the register and, if he thinks the order should be made public, is to publish it in the *Trade Marks Journal*. (Sect. 35 (4), Rules 129, 130.) Another new provision is that a mark registered under an earlier Act is not to be removed from the register on the ground that it was not registrable under that Act if it would be registrable under the new Act. (Sect. 36.) This overrules one of the points decided in *In re Apollinaris Co.* (*a*). Again, it is provided (and in this respect the policy of the new Act is open to very grave question) that the original registration of a trade mark is, after the expiration of seven years from the date of such original registration (or seven years from the passing of the new Act, whichever shall last happen), to be taken to be valid in all respects unless the original registration was obtained by fraud, or unless the mark is objectionable for special grounds under sect. 11. (Sect. 41.) It will be observed that this provision only applies to the "original registration," so that it would still appear to be possible to obtain rectification on the ground that the entry is wrongly remaining on the register (sect. 35 (1)), as in the case of non-user for five years. (Sect. 37.) There is the further proviso that registration is not to entitle the registered proprietor to interfere with the use of a trade mark which was in use by others before his own registration. (Sect. 41.)

Remaining provisions.

The remaining provisions of the new Act and Rules deal chiefly with matters of practice and procedure, and need not be specially noticed here. It is, however, to be observed that in proceedings before the Court the registrar is no longer entitled as a matter of course to an order for his costs, which are in the discretion of the Court, though he is not liable to have to pay costs. (Sect. 48.) In practice the old rule will usually be followed.

International arrangements.

The sections of the Patents Acts, 1883—1902, relating to international and colonial arrangements (secs. 103, 104) were left standing by the Trade Marks Act, 1905, but those sections have since been replaced by secs. 88 and 91 of the Patents and Designs Act, 1907 (7 Edw. VII. c. 29).

Royal Arms.

The use of the Royal Arms is dealt with by sect. 68 of the new Act, which enables the improper use of such arms to be restrained by injunction. This is in addition to the provisions of sect. 90 of the Patents and Designs Act, 1907, which is now substituted for sect. 106 of the Patents Acts, previously unrepealed.

(*a*) (1891) 2 Ch. 186, 213.

CHAPTER II.

WHAT IS A TRADE MARK?

What is a trade mark?

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

A true trade mark must be affixed to the article.

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

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

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

(*b*) See the definition by the V.-C. of Ireland in *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; also *Jay* v. *Ladier*, 40 Ch. D. 649.

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

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

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

Registration gives exclusive right.

For a trade mark to be entitled to protection, it must therefore, apart from registration, not only be applicable, but be actually applied to a "vendible article" (*a*) in the market; the registration, however, of a trade mark gives an exclusive right to the use of the same, subject only to a few rare exceptions (*b*).

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

(*b*) T. M. A. 1905, § 39. See also 38 & 39 Vict. c. 91, § 9; 46 & 47 Vict. c. 57, § 75; 51 & 52 Vict. c. 50, §§ 17, 77. See also *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Batt & Co.*, (1898) 2 Ch. 432; (1899) A. C. 428. And this is so also in the United States. See *In re Dutcher Temple Co.*, U. S. Pat. Comm. Decis. 1871, 248.

Not every mark applied can be a trade mark.

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

Name and address of proprietor need not be stated.

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

(*a*) Cf. *Raggett* v. *Findlater*, L. R. 17 Eq. 29; *Braham* v. *Bustard*, 1 H. & M. 447; *In re Brandreth*, Dig. 626; *In re Crosfield*, 23 P. R. 837, and other cases.

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

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

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

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

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

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

Definition of trade mark in Merchandise Marks Act, 1862.

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

Definition in Patents Acts, 1883—1888.

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

Under the last mentioned Act the definition was as follows:—

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

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

(*a*) *Per* U. S. Commissioner in *In re Dutcher Temple Co.*, U. S. Pat. Comm. Decis. 1871, 248. And see *per* Lord Herschell in *Powell* v. *Birmingham Vinegar Brewery Co.*, (1897) A. C. 710.

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

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

(*d*) 25 & 26 Vict. c. 88, § 1.

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

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

(*g*) § 10.

(*h*) § 64.

(*i*) § 10.

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

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

(d) An invented word or invented words; or

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

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

(3) Provided as follows:—

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

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

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

Effect of this definition.

The effect of this definition was to restrict the variety of marks capable of adoption for the first time by a manufacturer, for he could not register or obtain protection under the Act for a new mark which did not comply with this definition by containing

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

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

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

Definition in Trade Marks Act, 1905.

Under the Act of 1905 the definition was very broadly recast, all in favour of applicants. It is now to be found in sections 3 and 9 of the Act, and is as follows:

"3. In and for the purposes of this Act (unless the context otherwise requires):—

A 'mark' shall include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof:

A 'trade mark' shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor

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

(*b*) Since this enactment a single distinctive letter or figure has been capable of being registered as an old trade mark, though this was not so under the Act of 1875: *In re Mitchell* (1), 7 Ch. D. 36.

(*c*) Patents Act, 1883, § 77.

of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale:

A. 'registrable trade mark' shall mean a trade mark which is capable of registration under the provisions of this Act.

9. A registrable trade mark must contain or consist of at least one of the following essential particulars:—

(1) The name of a company, individual or firm represented in a special or particular manner;

(2) The signature of the applicant for registration or some predecessor in his business;

(3) An invented word or invented words;

(4) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

(5) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the description in the above paragraphs (1), (2), (3) and (4), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark:

Provided always that any special or distinctive word or words, letter, numeral, or combination of letters or numerals used as a trade mark by the applicant or his predecessors in business before the thirteenth day of August, one thousand eight hundred and seventy-five, which has continued to be used (either in its original form or with additions or alterations not substantially affecting the identity of the same) down to the date of the application for registration shall be registrable as a trade mark under this Act.

For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered."

The distinctions between this definition and that which preceded it are numerous, and will quickly appear upon a comparison of the two. Attention may, however, be specially directed to

the fact that any distinctive mark, of whatever nature, may now be registered, if, in the case of words or names, the leave of the Board of Trade or the Court can be obtained. Also that the requirement of disclaimers has now disappeared, except when specially required under the provisions of section 15.

First class of trade marks.—A name.

In accordance with the above definition, the first species of trade marks consists of a name of a company, individual, or firm, represented in a special or particular manner.

How names differ from other trade marks.

There is between a name of an individual or firm used as a trade mark, and a fancy name or arbitrary symbol used for the same purpose, a broad distinction, which was early perceived, and which caused some difficulty in the universal acceptance of a name as an efficacious trade mark. This difference is that a name is in its very nature generic, and is properly applied to designate, not one individual in the world, but, it may be, many thousands, to all of whom it is equally appropriate. The addition of the Christian to the surname does, indeed, diminish the number of persons to whom the appellation belongs; but the Christian name is commonly abbreviated to an initial letter, and, in any case, the surname is the important part of the name, beyond which many persons do not care to investigate.

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

The impossibility of a single manufacturer being allowed to arrogate to himself the exclusive use of a name which he shares in common with many other persons is apparent; and from this circumstance the rule was deduced that while, as against persons bearing a different name, a manufacturer's right in his name trade mark is absolute and exclusive, as against persons bearing the same name no such exclusive right can be set up (*a*). Thus in *Dence* v. *Mason* (*b*), Malins, V.-C., held that during the continuance of the partnership between two persons named Mason and Brand they could not be prevented from using the latter's name in their business, notwithstanding that it was well known in connection

(*a*) *Burgess* v. *Burgess*, 3 De G. M. & G. 896, and *infra*, pp. 41, 42. See *Lazenby* v. *White* (1), 41 L. J. Ch. 354; *Massam* v. *Thorley's Cattle Food Co.* (1), 6 Ch. D. 574; *Turton* v. *Turton*, 42 Ch. D. 128; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Jamieson & Co.* v. *Jamieson*, 15 P. R. 169; *Valentine* v. *Valentine*, 31 L. R. Ir. 488; *McLean* v. *Fleming*, 96 U. S. 245; *Prince Metallic Paint Co.* v. *Carbon Metallic Paint Co.*, Dig. 573; *Aikins* v. *Piper*, 15 Grant Up. Can. Ch. 581; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540. And in the same way it seems that a manufacturer may put his address, the name of his mill, on his goods, though it may resemble the address on another man's goods: *Carmichael* v. *Latimer*, 11 R. I. 395.

(*b*) Dig. 531.

with a similar old-established business; and the Court of Appeal held (*a*) that the same would be the case if a new *bonâ fide* partnership should be formed. This rule must, however, be qualified by the statement that where a person uses his own name for the purpose of fraud, and satisfactory evidence of fraudulent intention can be produced, such unfair conduct will be restrained, even though the free use of the man's own name may be thereby hindered (*b*). And the Criminal Law also admits of the punishment of such fraudulent user of a man's own name (*c*).

Statements on this point.

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

Holloway v. *Holloway.*

In *Holloway* v. *Holloway* (*f*), the defendant, Henry Holloway, sold pills and ointment in packets and pots, similar to those in

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

(*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, pp. 93, 185; *Fullwood* v. *Fullwood* (2), 9 Ch. D. 176; *Massam* v. *Thorley's Cattle Food Co.* (2), 14 Ch. D. 748; *Pullar* v. *Pullar*, Fry, J., April 9th, 1883; *Warner* v. *Warner*, 5 Times L. R. 359; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *In re Hopkinson*, (1892) 2 Ch. 116; *Valentine Meat Juice Co* v. *Valentine Extract Co., Ld.*, 17 P. R. 673; *Walder* v. *Walder*, Dig. 372; *McLean* v. *Fleming*, 96 U. S. 245. And see cases collected at p. 291.

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

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

(*e*) 8 Daly, 375.

(*f*) 13 Beav. 209.

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

Burgess v. *Burgess*.

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

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

(*b*) And see *Hardy* v. *Cutler*, 3 U. S. Pat Gaz. 468. However, a son has no right to deceive the public by using his father's new name, after the father has assumed a different name from that to which the son is entitled: *Gourand* v. *Trust*, 10 N. Y. Sup. Ct. 627; but if the son has assumed the same fictitious name with the father, by the father's

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 this 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 (*a*); 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" (*b*); 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* (*c*), where the defendant had affixed to thread not of the plaintiff's make labels with the words "Ainsworth's Thread," it was argued that such a case was no case of trade mark, and that, this being so, it became necessary for the plaintiff to prove the *scienter* on the part of the defendant. Sir W. P. Wood, V.-C., however, declined to adopt that argument, and intimated that in his opinion a man's name was "as strong an instance of trade mark as could be suggested," adding that it was subject "only to this inconvenience—that if a Mr. Jones or a Mr. Brown relied on his name, he might find it a very inadequate security, because there might be several other manufacturers of the same name."

desire, the latter cannot afterwards interfere with the honest use of the fictitious name by the son: *England* v. *New York Publishing Co.*, 8 Daly, 375.

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

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

(*c*) L. R. 1 Eq. 518. See *In re Hopkinson*, (1892) 2 Ch. 116: *Monro* v. *Hunter*, 21 P. R. 296.

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 may be a true trade mark.

That inconvenience has now been removed as to new marks capable of being allowed by the registrar without the sanction of the Board of Trade or the Court by the requirement for the name claimed as a trade mark to be "represented in a special or particular manner" (*b*). For the future, a new trade mark consisting of a name and registered under section 9 (1) 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 (*c*). 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* (*d*), in which case the labels on the bottles containing the plaintiff's ink were printed in letters which are described as being in part white on a red ground, in part white on a blue ground, and in part blue on a white ground. This requirement, however, does not apply to old marks (*e*), and a manufacturer may still obtain protection for his name as an old mark though not printed in any particular or distinctive manner (*f*).

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

(*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. Cf. *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

(*b*) Trade Marks Act, 1905, § 9; Patents Acts, 1883—8, § 64; Trade Marks Act, 1875, § 10. And see *In re Gimaelis*, 6 P. R. 467; *In re Hannay*, 7 P. R. 46; also *In re Price's Patent Candle Co.*, 27 Ch. D. 681; *In re Edge*, 8 P. R. 207; *In re Bradley*, 9 P. R. 205; *In re Carroll*, 16 P. R. 82.

(*c*) See *per* Jessel, M. R., in *In re Horsburgh & Co.*, 53 L. J. Ch. 237. In the same way, the United States Statute of 1870, § 79, provided that the Commissioner of Patents should not receive and record any proposed trade mark which was merely the name of a person, firm, or corporation only, unaccompanied by a mark sufficient to distinguish it from the same name where used by other persons. And the Statute of 1881 provided by § 3, that "no alleged trade mark shall be registered which is merely the name of the applicant."

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

(*e*) Trade Marks Act, 1905, § 9; Patents Acts, 1883—1888, § 64; Trade Marks Act, 1875, § 10.

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

Special registration under Trade Marks Act, 1905, s. 9 (6).

Further, where the Board of Trade or the Court is satisfied that a name in plain type is, in fact, a distinctive mark by virtue of long and exclusive user, the name can be registered without distinguishing additions, the right of other persons of the same name to make a *bonâ fide* use of it being preserved by section 44. A number of such names have been registered in this way by leave of the Board of Trade.

The name need not be that of the actual manufacturer.

There is no provision which requires that the name selected as the trade mark shall be the name of the individual or firm by whom the goods to which the trade mark is to be attached are actually manufactured. Neither was this the case before the introduction of registration. 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*).

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

But where a name has once become a trade mark by registration, or, if used before the passing of the Trade Marks Registration Act of 1875, by actual user on a vendible article (*f*), since followed by registration or the procurement of a certificate of refusal to register, it is assignable (*g*), subject to a connection with the goodwill of the business (*h*), 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* (*i*), "1847, Rogers Bros. A. 1," in *Meriden Britannia Co.* v. *Parker* (*k*), "Thorley's Cattle Food" in *Massam* v. *J. W. Thorley's Cattle Food Co.* (2) (*l*), "Dr. C. McLane's Pills" in *McLean* v. *Fleming* (*m*). But it is a fraudulent act

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

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

(*g*) *Hall* v. *Barrows*, 4 De G. J. & S. 150; *The Leather Cloth Companies' case*, 1 H. & M. 271 (V.-C. Wood), and 11 H. L. C. 523 (Lords Cranworth and Kingsdown).

(*h*) Trade Marks Act, 1905, § 22; and see Patents Act, 1883, § 70; and Trade Marks Registration Act, 1875, § 2.

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

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

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

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

to purchase the right to use the name of a small maker because it happens to be identical with that of a maker of reputation (*a*).

Names of fancy personages.

Among trade marks used before the passing of the Trade Marks Act of 1875, instances are not unusual of marks consisting of a name which neither is nor ever has been borne by the present or any past manufacturer, but which either belongs to some person who actually exists or has existed, or to some imaginary or symbolical personage, or character from a book. Thus, the names "Victoria," "Albert," &c., are very commonly used on a great variety of articles; so too "Britannia," "Dolly Varden," &c. All such names, when of fictitious characters, were properly classed under sub-clause (c) of the amended § 64 (1) of the Act of 1888 (*b*), and can be registered under the present Act.

Name sometimes used alone.

In some cases the name constituting the trade mark is used alone, as "Wilkie" in *Wilkie* v. *McCulloch* (*c*), "Dent" in *Dent* v. *Turpin* (*d*), "Ramsay" in *Dixon* v. *Fawens* (*e*), "Howe" in *Howe* v. *Howe Machine Co.* (*f*), "Wedgwood" in *Wedgwood* v. *Smith* (*g*), "Hopkinson" and "J. J. Hopkinson" in *In re Hopkinson* (*h*).

Sometimes in combinations.

In other cases the name is used in combination with other letters, words, or figures, or combinations of letters, words, or figures; and the name of an inventor, discoverer, manufacturer, &c., "may make words distinctive which, without the name, would not be so" (*i*). Thus "Chubb's Patent-Lock Fire-proof Safe" (*k*). "Collins & Co. Hartford Cast Steel, Warranted" (*l*). "Taylor's Persian Thread" (*m*), "Stephens' Blue Black Writing Fluid" (*n*). "Thorley's Cattle Food" (*o*). Again, "J. Rodgers & Sons" was coupled with a crown between the initials of the sovereign (*p*), and "Ransomes & Co." was followed by "H. H. 6" (*q*).

(*a*) *Perks* v. *Hall & Co.*, W. N. 1881, p. 111; *Morrall, Ld.* v. *Hessin & Co.*, 19 P. R. 557; 20 *ib.* 429.

(*b*) See *In re Holt & Co.*, (1896) 1 Ch. 711 ("Trilby"); contrast *In re Harris*, 9 P. R. 492 ("Beatrice"); *In re Banks & James*, 12 P. R. 333 ("Shakespere"); *In re Carroll*, 16 P. R. 82 ("Princess Christian").

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

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

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

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

(*g*) Dig. 96.

(*h*) (1892) 2 Ch. 116. And see *Richards* v. *Williamson*, 30 L. T. N. S. 746; *Fullwood* v. *Fullwood*, W. N. 1873, pp. 93, 185; *Tonge* v. *Ward*, 21 L. T. N. S. 480; *Fullwood* v. *Fullwood* (2), 9 Ch. D. 176.

(*i*) *Fulton* v. *Sellers*, 4 Brews. 42.

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

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

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

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

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

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

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

But the mere combination of a name in the genitive case and in ordinary type with ordinary descriptive words does not constitute a registrable new trade mark. Thus "Gianaclis' Cigarettes" (*a*), "Edge's Filtered Blue" (*b*). But such marks may be allowed by the Board of Trade or the Court on a special application under sect. 9 (5) of the Act of 1905.

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 "the signature of the applicant for registration or some predecessor in his business." The signature of an individual or firm is in fact the name of the individual or firm printed or written in a "particular and distinctive manner," and as such, even before the Registration Acts, necessarily exhibited characteristics which could hardly be copied without the presumption being irresistible that the imitation was fraudulent and intended to invade the rights of the person whose signature was in question (*c*). In the cases of *Farina* v. *Silverlock* (*d*) and *Welch* v. *Knoll* (*e*) 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. Under the Act of 1875, § 10, there was no necessity for the signature to be that "of the individual or firm applying for registration thereof as a trade mark," but that was required by § 64, both as originally contained in the Act of 1883, and as amended by the Act of 1888; so that an individual or firm could not, under those Acts, register the signature of the person or firm to whose business he or they succeeded, unless that was an old mark, having been used as such before the passing of the Act of

161. And see *Green* v. *Folgham*, 1 S. & S. 398; *James* v. *James*, L. R. 13 Eq. 121; *Lazenby* v. *Lazenby*, Dig. 160; *Gillis* v. *Hall*, R. Cox, 596; also *Wilder* v. *Wilder*, Dig. 372 ("J. B. Wilder & Co.'s Stomach Bitters"); *Weston* v. *Hammons*, 2 V. L. R. Eq. 121 ("Weston's Wizard Oil"); *McLean* v. *Fleming*, 96 U. S. 245 ("Dr. C. McLane's Liver Pills"); *Davis* v. *Kennedy*, 13 Grant Up. Can. Ch. 523 ("Perry Davis' Vegetable Pain-Killer"); *Hostetter* v. *Vowinkle*, 1 Dill. 329; and *Hostetter* v. *Anderson*, 1 V. R. Eq. 7 ("Hostetter's Celebrated Stomach Bitters"); *Radway* v. *Coleman*, 15 Grant Up. Can. Ch. 50 ("Radway's Ready Relief"); *Chinn* v. *Thomas*, 5 V. L. R. Eq. 188 ("Hood & Co.'s Soluble Sheep Dip").

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

(*b*) *In re Edge*, 8 P. R. 207. And see *Pirie* v. *Goodall*, (1892) 1 Ch. 35; cf. *In re Colman*, (1891) 2 Ch. 115.

(*c*) Compare *Weingarten* v. *Bayer*, 22 P. R. 341, where the mark protected consisted of the descriptive words ("Erect Form Corset"), printed in a peculiar and distinctive scroll.

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

(*e*) 4 K. & J. 747. See *Massam* v. *Thorley's Cattle Food Co.* (1), 6 Ch. D. 574; *In re Farina* (2), 27 W. R. 156; *In re Farina* (3), Dig. 654; *In re Maignen*, 28 W. R. 750.

1875. This limitation is now removed by the Act of 1905, and the signature of a predecessor in business is again registrable. However, when the signature is once registered as a trade mark, whether with or without additions, it will descend and be assignable just as any other trade mark, without its new owner being liable to any imputation of representing the person whose signature is employed to be still in charge of the business, although formerly the use of a mark of this description might not improbably have been held to convey some such representation to the public. To a case of this description Lord Cranworth's observations very directly apply, when, speaking of a buyer of a business using the name of a former maker, he said (*a*), "the question in every such case must be whether the purchaser in continuing the use of the original trade mark would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same business as had been formerly carried on by the person whose name constituted the trade mark. In such a case I see nothing to make it improper for the purchaser to use the old trade mark, as the mark would in such a case indicate only that the goods so marked were made at the manufactory which he had purchased." The provision in the Acts of 1875 (*b*), 1883 (*c*) and 1905 (*d*), that a trade mark "shall be assigned and transmitted only in connexion with the goodwill of the business" will enable the purchaser to use the trade mark so acquired by him without his motives being open to question, and will at the same time insure that marked goods purchased by the public shall, except in cases of punishable infringement, be produced at the works from which they purport to have come.

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

Before proceeding to deal with trade marks consisting of words, letters or numerals, it will be convenient to refer to the very large group of marks which formed the third class under the Acts of 1883-8, and which were described as comprising "a distinctive device, mark (*e.g.*, brand, heading, label, or ticket." These varieties (except "mark") are all included in section 3 of the Act of 1905, and authorised by section 9 (5) to be registered, if distinctive.

(*a*) *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523.
(*b*) § 2.
(*c*) § 70.
(*d*) § 22.
(*e*) The word "mark" is omitted from § 3 of the Act of 1905 as being unnecessary.

Distinctiveness required.

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

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

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

"Device."

"Device" ordinarily means a picture, and includes such cases as where the mark was stamped on shirts (*b*) or other cotton goods (*c*), or imprinted on sticks of liquorice (*d*) or sealing wax (*e*), and, generally, any cases which did not come within the remaining and more exact terms.

"Brand."

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

"Heading."

"Heading" possibly applies to cases where, in addition to the ordinary label on the goods, there is a separate label affixed above it, on which the special mark is exhibited (*k*). But it more especially applies to the kind of marks applicable to the case of textile fabrics, in which a heading of special pattern is inwoven into the edge of the goods (*l*).

"Label."

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

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

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

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

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

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

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

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

(*h*) *Moet* v. *Clyhouse*, Dig. 533: *Moet* v. *Pickering*, 8 Ch. D. 372.

(*i*) *Firie* v. *Goodall*, (1892) 1 Ch. 35.

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

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

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

to packets of starch; in *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" 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*). In the case of textiles the "ticket" is gummed on to the fabric. Mere words do not constitute a distinctive device (*g*), or heading (*h*), or label, or ticket (*i*). "Ticket."

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 marks which will merit and receive protection.

"Device."

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

Examples.

Such marks are still frequently employed, and this clause specially includes them. To this class belong the marks of an anchor (*l*), an eagle (*m*), a lion (*n*), an elephant (*n*), a cross (*o*), a pyramid (*p*), a bell (*q*), a hand (*r*), a cock (*s*), a rising sun (*t*), or a triangle (*u*).

(*a*) 19 L. T. N. S. 626.
(*b*) 36 L. J. Ch. 504.
(*c*) L. R. 11 Eq. 446.
(*d*) 11 L. J. Ch. 90.
(*e*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.
(*f*) *Hirst* v. *Denham*, L. R. 14 Eq. 542.
(*g*) *Ex parte Stephens*, 3 Ch. D. 659.
(*h*) *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288.
(*i*) *Great Tower St. Tea Co.* v. *Smith*, 6 P. R. 165.
(*k*) As to this Freemasons' emblem, it has been held in the United States that it is so generally appropriated to a special purpose as not to be registrable by a private firm, even in combination: *In re Tolle*, 2 U. S. Pat. Gaz. 415. But this decision was not followed in *In re Thomas*, 14 U. S. Pat. Gaz. 821, or *Ex parte King* (2), 46 U. S. Pat. Gaz. 119, though in *Ex parte Smith* (3), 16 U. S. Pat. Gaz. 764, registration was refused to the word "Masonic."
(*l*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185.
(*m*) *Standish* v. *Whitwell*, 14 W. R. 512.
(*n*) *Henderson* v. *Jorss*, Dig. 198.
(*o*) *Cartier* v. *Carlile*, 31 Beav. 292; *Cartier* v. *Westhead*, Dig. 199; *Cartier* v. *May*, Dig. 200.
(*p*) *Bass* v. *Dawber*, 19 L. T. N. S. 626.
(*q*) *Bell, Black & Co.* v. *Bell & Co.*, Dig. 514.
(*r*) *Allsopp* v. *Walker*, Dig. 515.
(*s*) *In re Walkden Aërated Waters Co.*, 54 L. J. Ch. 394.
(*t*) *Morse* v. *Worrell*, 10 Phila. 168.
(*u*) *In re Worthington*, 14 Ch. D. 8.

A crest

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 is now by reference to the Register of Trade Marks.

Portrait.

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

Initials.

Before the Trade Marks Act of 1875 a trade mark might consist of initials, either alone or in combination with other ingredients (*f*). Under that Act and the Acts of 1883-8 it was 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, brand, heading, label, or ticket." Where the letters were combined together into the form of a monogram, or enclosed within a distinctive border, or were in any other way used in such a combination as to be distinguishable from the same letters used in the plain ordinary way, it might have been supposed that a device or mark would be constituted capable of registration; but in *Lucke* v. *Webster* (*g*), Sir G. Jessel, M. R., while admitting to registration as an old mark a monogram on a shield, suggested that he could not have done so if it had been a new mark. Under the Act of 1905 the

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

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

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

(*d*) *Ex parte Sullivan & Burke*, 16 U. S. Pat. Gaz. 765: *Ex parte Pace*, *Talbot & Co.*, *ib.* 909.

(*e*) *Rowland* v. *Michell*, (1897) 1 Ch. 71; and see *Richmond Nervine Co.* v. *Richmond*, 159 U. S. 293.

(*f*) See pp. 90, 91, *infra*.

(*g*) Jessel, M. R., April 4th, 1879.

case is otherwise, and initials can be registered, if distinctive (*a*). In the American case of *United States* v. *Marble* (*b*), the Commissioner of Patents considered that the letters "W. G." in a monogram were registrable as a trade mark.

Marks with a mechanical purpose.

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

Marks representing the article.

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

(*a*) See *In re Birmingham Small Arms Co., Ld.*, 24 P. R. 563; *Bouke, Roberts, & Co.* v. *W. A. Wayland & Co.*, 26 P. R. 251, 691.

(*b*) 22 U. S. Pat. Gaz. 1366.

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

(*d*) *Popham* v. *Wilcox*, 66 N. Y. 59.

(*e*) *In re Pratt & Farmer*, 10 U. S. Pat. Gaz. 866.

(*f*) *Tucker Manufacturing Co.* v. *Boyington*, 9 U. S. Pat. Gaz. 455.

(*g*) *Ex parte Halliday Brothers*, 16 U. S. Pat. Gaz. 560.

(*h*) *Ex parte Smith* (2), 16 U. S. Pat. Gaz. 679; and see *Merriam* v. *Famous Shoe and Clothing Co.*, 47 Fed. Rep. 411; *Merriam* v. *Texas Siftings Publishing Co.*, 49 Fed. Rep. 944. But this rule does not appear to be of universal application. See *Frost* v. *Rindskopf*, 42 Fed. Rep. 408; *Harris Drug Co.* v. *Stucky*, 46 Fed. Rep. 624. Cf. *Fish Brothers Wagon Co.* v. *La Belle Wagon Works*, 82 Wisc. 546; 33 Am. St. Rep. 72.

In *In re James* (*a*) an application was made for the removal from the register of a trade mark for black lead, which consisted of the representation of a dome-shaped cylinder of black lead, on the ground that the trade mark was simply a pictorial description of the goods in the form in which they were usually sold; but the decision of Pearson, J., allowing the application, was reversed by the Court of Appeal. This was principally on the ground that the black lead was not necessarily sold in that shape, and that the mark had sometimes been applied and might properly be applicable to blocks of black lead in any shape; and the Court did not actually decide what would be done if the trade mark had consisted of a pictorial representation of the goods in the only shape in which they could be made, but the inclination of the Court of Appeal would appear to have been rather in the direction above suggested. In 1889 the Comptroller-General signified his intention not to accept as trade marks from that date pictorial representations of the goods to which they were to be applied (*b*). No prohibition of this kind, however, appears in the present rules or instructions.

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

In *Harter* v. *Souvazoglu* (*c*) the trade mark consisted of a certain combination of purple, pink, and green threads, nine stripes in three gradations, which were woven as a heading into cotton goods, which were forwarded to the markets of Turkey and the Levant. The owners of this mark having filed a bill for an injunction against a rival trader who had copied the mark, Sir C. Hall, V.-C., held "that a heading could be the subject of a trade mark, that the evidence in the case showed that this heading was distinguished from others in Turkey, and that it had become a trade mark, although it was sometimes associated with stamps on the goods, of the lion and the sun, and other devices. Customers had bought goods because of this particular heading, and he therefore considered that the plaintiffs who had adopted it were entitled to the protection they asked, and that no other persons could use it" (*d*). Line-headings cannot now be registered for cotton piece goods (*e*).

(*a*) 33 Ch. D. 392. And see *Ripley* v. *Bandey*, 14 P. R. 591, compromised on appeal, *ib.* 914.

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

(*c*) W. N. 1875, pp. 11, 101.

(*d*) And see *per* Sir G. Jessel, M. R., in *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434. Also *Carver* v. *Bowker*, Dig. 581, and *Robinson* v. *Finlay*, 9 Ch. D. 487, where a heading of coloured threads formed a part of the combination mark, though not mentioned in the report. The heading is practically always an element in the combination of markings on cotton piece goods.

(*e*) Act of 1905, s. 64 (10).

Fancy words.

Coming now to word marks, the first point to be noticed is that under the Act of 1875 no such mark could be registered at all unless used before Aug. 13th, 1875. This prohibition was regarded by traders as intolerable, and to meet their demands the words "fancy word or words not in common use" were introduced into § 64 of the Act of 1883.

Requirements.

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

Fancy words defined.

As to what is meant by "a fancy word or fancy words," it was at first very generally supposed, and was so held by Chitty, J. (*a*), and Bacon, V.-C. (*b*), that the term would include any word fancifully applied, such as would have been protected by the Courts irrespective of any Registration Act. The Court of Appeal, however, took a more stringent view of the meaning of the phrase, and the effect to be given to it was defined with reasonable clearness. Thus, in the leading case on the subject (*c*), Cotton, L. J., said, "To be registered, the word must be a 'fancy word'; and in order to come within that description it must be a word which obviously cannot have reference to any description or designation of where the article is made, or of what its character is"; and Lindley, L. J., said, "To be a 'fancy word' the word must either have to ordinary English people, to whom the Act is addressed, no meaning, like the word 'Eureka,' or the word 'Acilyton,' or, if it has any meaning at all, it must be obviously non-descriptive (*d*) when used as a trade mark." And Lopes, L. J., added, "A word to be a 'fancy word' must be obviously meaningless as applied to the article in question. It must be a word fanciful in its application to the article to which it is applied, in the sense of being so obviously and notoriously inappropriate as neither to be deceptive nor descriptive, nor calculated to suggest deception or description. Further than that, the word must have

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

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

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

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

an innate and inherent character of fancifulness, which must not depend on evidence (*a*), and cannot be supported by evidence, to show that in fact it is neither deceptive nor descriptive, nor calculated to be deceptive or descriptive. A fancy word must speak for itself: it must be a fancy word of its own inherent strength." Again, in *Waterman* v. *Ayres* (*b*), Fry, L. J., after expressing his concurrence in the definitions given above, added further, "That which is the only name of a thing cannot, it seems to me, be a fancy word with regard to it. The word 'spade' describes the thing. You can never take the word 'spade' and call it a fancy word for the thing." And in another case (*c*) Chitty, J., said that, "in reference to an article produced in a foreign country and imported into England, where it was previously unknown and without a name, the word used in that foreign country as the common term to describe or denote the article is not a fancy word within the meaning of the Act."

Only six "fancy words" upheld.

The effect of these statements was so to narrow and restrict the meaning of the phrase that in nearly all the cases in which the question of "fancy word" was brought before the Court the decision was adverse to the claimant. In fact, in only six cases (*d*), one of which was afterwards disapproved (*e*), was the word upheld; whereas in many cases it was disallowed on the ground of descriptiveness or suggestion of descriptiveness (*f*).

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

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

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

(*d*) **Words held to be "fancy words"**: *In re Stapley & Smith*, 29 Ch. D. 877 ("Alpine" cotton); *Slazenger* v. *Malings*, W. N. 1885, p. 124 ("The Lawford" racquet); *In re Burgoyne*, 6 P. R. 227 ("Oomoo" wine); *In re Densham*, (1895) 2 Ch. 176 ("Mazawattee" tea); *In re Bovril Trade Mark*, (1896) 2 Ch. 600 ("Bovril"); *In re Burroughs, Wellcome & Co*, (1901) 1 Ch. 736 ("Tabloid").

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

(*f*) **Words which have been held not to be "fancy words"**: *In re Price's Patent Candle Co.*, 27 Ch. D. 681 ("National Sperm" candles); *In re Friedlander*, W. N. 1885, p. 85 ("Zephyr Asiatic Walnut Pipe"); *In re Harden Star, &c. Co., Ld.*, 3 P. R. 132 ("Hand Grenade Fire Extinguisher"); *In re Van Duzer*, 34 Ch. D. 623 ("Melrose Favourite Hair Restorer"); *In re Leaf, Sons & Co.*, 31 Ch. D. 632 ("Electric Velveteen"); *In re Arbenz*, 35 Ch. D. 248 ("Gem" air-guns); *Leer* v *Goodwin*, 36 Ch. D. 1 ("The Self-Washer"); *Tougood Bros.* v. *Pirie & Sons, Ld.*, 4 P. R. 67 ("The Jubilee Note" paper); *In re Ainslie & Co.*, 4 P. R. 212 ("Ben Ledi" whiskey); *In re Laing*, L. J. N. of C. 1887, p. 102 ("Glengowrie Blend of Fine Old Highland Whiskey"); *In re Hanson*, 37 Ch. D. 112 ("Red, White, and Blue" label tea); *In re Sanitas Co., Ld.*, 4 P. R. 533 ("Sanitas" medicines); *In re Waterman*, 39 Ch. D. 29 ("Reversi" game); *In re Davis & Co.*, 6 P. R. 207 ("Rokõl" beer); *Humphries* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820 ("Herbalin" medicine); *In re Californian Fig Syrup Co.*, 40 Ch. D. 620 ("Syrup of Figs"); *In re Jackson & Co.*, 6 P. R. 80 ("Kokoko" cotton piece goods); *In re Thompson & Co.*, 6 P. R. 213 ("Manor" tin plates); *In re Grossmith*, 6 P. R. 180 ("Enollio" toilet cream); *Great Tower Street Tea Co.*

It is, however, to be observed that the 'Mazawattee,' 'Bovril' and 'Tabloid' decisions might well have been adverse to the trade mark owners if the Courts had, at those later dates, been disposed to show as great severity as in some of the previous cases.

"Distinctive."

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

"Not in common use."

The further requirement that fancy words must be "not in common use" was interpreted by Chitty, J. (*d*), to mean that they must not be in common use in the trade with respect to which it is sought to appropriate them; and though other judges have rather avoided expressing an opinion as to the meaning of the phrase, it would appear that this is the true meaning to be attached to it. The fact that a word may have been generally used and have acquired a descriptive signification in one trade may well leave it "obviously meaningless" in another. In Scotland, Lord Craighill (*e*) seems to have taken substantially the same view as Chitty, J., for he says that the term "'common use,' as

v. *Smith*, 6 P. R. 165 ("Tower Tea"); *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274 ("Washerine" soap); *In re Vignier*, 6 P. R. 490 ("Monobrut" champagne); *In re Batt & Co.*, 6 P. R. 493 ("The Brymbo Special" iron); *In re Hannay*, 7 P. R. 46 ("Electroid" anti-fouling composition); *Stuart & Co.* v. *Scottish Val de Travers Paving Co., Ld.*, Ct. Sess. Cas. 4th Ser. XIII. 1 ("Granolithic" artificial stone); *In re Apollinaris Co.*, (1891) 2 Ch. 186, 221 ("Apollinaris," "Friedrichshall," and "Hunyadi Janos" mineral waters and products); *In re Edge*, 8 P. R. 207 ("Filtered Blue"); *Pirie* v. *Goodall*, (1892) 1 Ch. 35 ("Parchment Bank" paper); *Hodgson* v. *Sinclair*, 9 P. R. 22 ("Britannia" soap); *In re Paine* (1), 9 P. R. 130 ("John Bull Brand" beer); but see *Paine* v. *Daniells*, (1893) 2 Ch. 567; *In re Harris*, 9 P. R. 492 ("Beatrice" shoes); *In re Lloyd*, 10 P. R. 281 ("Carnival" cigarettes); *In re Talbot*, 11 P. R. 77 ("Emolliolorum" saddle paste); *In re Banks & James*, 12 P. R. 333 ("Shukspere" cigars); *In re Thompson*, 13 P. R. 35 ("Roadster" boots); *In re Davis*, 14 P. R. 903 ("Compactum" umbrellas); *Meaby & Co.* v. *Triticine, Ld.*, 15 P. R. 1 ("Triticumina" food); *In re Gestetner*, (1907) 2 Ch. 478; (1908) 1 Ch. 513 ("Cyclostyle" stationery).

(*a*) See *Wood* v. *Lambert*, 32 Ch. D. 257; *Waterman* v. *Ayres*, 39 Ch. D. 29; *In re Jackson & Co.*, 6 P. R. 80; *In re Apollinaris Co.*, (1891) 2 Ch. 186; *In re Magnolia Metal Co.*, (1897) 2 Ch. 371. See *In re Philippart*, 25 P. R. 565.

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

(*c*) As to the great importance of this expression, see *In re Crosfield*, 26 P. R. 561, 837; *In re Cassella*, 27 P. R. 453.

(*d*) *In re Stapley & Smith*, 29 Ch. D. 877; *In re Burgoyne*, 6 P. R. 272. Compare *Great Tower Street Tea Co.* v. *Smith*, 6 P. R. 165; and *In re Banks & James*, 12 P. R. 333.

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

employed in the statute, does not necessarily import that the word must have been used commonly by all members of the community, or by people in all parts of the country. What is enough, in my opinion, to establish common use, in the sense of the statute, is this: if it shall be shown that the word has been commonly used by persons who had occasion to use it, and who are connected more or less directly with the use of the commodity to which the word has been applied." Conversely it was laid down by Kekewich, J., that if words were in common use generally, they were in common use within the meaning of the Statute (*a*).

Invented words.

The stringent interpretation placed by the Courts upon the phrase "fancy words" rendered the concession to commercial requirements intended to be made by the Act of 1883 practically valueless, and accordingly a departmental committee was appointed by the Board of Trade, over which Lord Herschell presided, and, following upon their report (*b*), the phrase "fancy word or words not in common use" was replaced in the Act of 1888 by the following terms:—

"(d) an invented word or invented words; or

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

In the Act of 1905 the phrase "an invented word or invented words" appears again without alteration, and these marks constitute the next class. The introduction of this expression into the Act of 1888 was generally considered to have been intended to bring within its scope, and to render registrable as new marks, such words as "Washerine" (*c*) and "Monobrut" (*d*), which were rejected as fancy words, or as "Pectorine" (*e*), "Lactopeptine" (*f*), "Valvoline" (*g*), which were not submitted to that test. The judges were, however, unable to remove from their minds the impression produced upon them by the rigidity with which the term "fancy word" had been construed, and which had been carried so far as to exclude from registration, not merely words which contained direct statements as to the

(*a*) *In re Paine* (1), 9 P. R. 130.
(*b*) See Appendix G.
(*c*) *Borland & Co.* v. *Broxburn Oil Co.* (2), 42 Ch. D. 274.
(*d*) *In re Vignier*, 6 P. R. 490.
(*e*) *Smith* v. *Mason*, W. N. 1875, p. 62.
(*f*) *Carnrick* v. *Morson*, L. J. N. of C. 1877, p. 71.
(*g*) *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288.

character or quality of the goods, but even invented words which had never been heard of before, but which were supposed to contain some remote suggestion of descriptiveness. Under the influence of this impression, they applied to this class of "invented words" the same prohibition of any reference to the character or quality of the goods which was contained in the succeeding clause of the Act relating to existing words, and having so introduced this prohibition they construed it with no less strictness than had previously been adopted in the case of "fancy words." In this way "Satinine" was rejected as a trade mark for starch, soap, blue, and similar goods (*a*). "Emolliolorum" for saddle paste (*b*). "Somatose" for an extract of meat (*c*). On the other hand "Mazawattee" was approved for tea (*d*), and "Kynite" for explosives (*e*). Finally the refusal of the Courts to register the invented word "Solio" for photographic paper (*f*) led to the question being submitted to the House of Lords, with the result that a decision was obtained from the highest tribunal that the term "invented word" in the later Act is to be construed without reference to the decisions on "fancy word" in the earlier Act, and that the prohibition of descriptiveness is not to be extended from the clause of the statutory definition relating to known words, where it was placed by the Legislature, to the clause relating to "invented words," where the Legislature omitted it. In fact in such cases the only question which has to be determined is, as stated by Lord Herschell in the "Solio" case, "whether the word sought to be registered is an 'invented word.' In one of the cases on this subject, Lord Justice Kay said: 'There is extremely little invention in the matter.' It may be that the word 'Satinine,' which was there in question, was objectionable on other grounds; but if the word be an 'invented' one, I do not think the *quantum* of invention is at all material. An invented word is allowed to be registered as a trade mark, not as a reward of merit, but because its registration deprives no member of the community of the rights which he possesses to use the existing vocabulary as he pleases. It may no doubt sometimes be difficult to determine whether a word is an invented word or not. I do not think the combination of two English words is an invented

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

word, even although the combination may not have been in use before, nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form (*a*). Again, I do not think that a foreign word is an invented word, simply because it has not been current in our language. At the same time, I am not prepared to go so far as to say that a combination of words from foreign languages so little known in this country that it would suggest no meaning except to a few scholars might not be regarded as an invented word."

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

To entitle a word to registration as an invented word it has been laid down by Cozens-Hardy, J., that it is not necessary that the applicant should be the true and first inventor—in the case in question the applicants had acquired the word from an American company—or that there should have been no prior publication within the jurisdiction, if substantially there has been no user in this country (*d*); and by Swinfen Eady, J., that, if a word is really an invented word when adopted as a trade mark, the mark does not become invalidated merely because of an interval between its first user and its registration (*e*). But it has been

(*a*) Thus "Bioscope" (*Warwick Trading Co.* v. *Urban*, 21 P. R. 240), "Haematogen" (*Hommel* v. *Gebrüder Bauer & Co.*, 21 P. R. 576), and "Gramophone"—27 P. R. 689, were held not to be invented words, as being known. On the other hand, "Savonol" (*J. C. & J. Field & Co.* v. *Wagel Syndicate*, 17 P. R. 266), and "Kodak" (*In re Kodak, Ld.*, 20 P. R. 337), have been held to be invented words.

(*b*) 13 P. R. 447.

(*c*) 15 P. R. 151. On this principle, "Uneeda" (*In re "Uneeda" T. M.*, (1902) 1 Ch. 783; "Absorbine" (*Christy & Co.* v. *Tipper & Son*, (1903) 1 Ch. 1; "Panoram" (*In re Kodak, Ld.*, 20 P. R. 337); "Diabolo" (*In re Philippart*, 25 P. R. 565); "Orlwoola" (*In re Orlwoola, Ld.*, 26 P. R. 850), have been held not entitled to registration. And see *Kirstein, Sons & Co.* v. *Cohen Bros.*, 39 Can. Sup. Ct. 286; *Ruffell* v. *Registrar of Deeds*, Cape Good Hope, 16 S. C. R. 141. Compare *In re Verschure and Zoon*, 22 P. R. 568, where "Vezet," which was said to be the Dutch way of pronouncing the letters VZ, was admitted to registration, the applicants undertaking not to claim any exclusive right to the letters.

(*d*) *In re Linotype Co.*, (1900) 2 Ch. 238.

(*e*) *In re Kodak, Ld.*, 20 P. R. 337.

said by Warrington, J., that a word to be invented must be newly coined, as was said by Lord Herschell and Lord Macnaghten in the "Solio" case; that it must not be an old word which is used for the first time in a new sense or an adjective which is used for the first time as a substantive; and that it must be coined for the first time for the purpose of its use as a trade mark in this country; and, while accepting the general observations of Cozens-Hardy, J., in *In re Linotype Co.*, he expressed a doubt whether the word must not be newly coined substantially at the date at which the application for registration is made, since otherwise it might get into common use between the time when it was first used and the time when the application was made for registration, and in this way the applicant might establish a legally enforceable monopoly in a word which had become part of the common stock of the English language (*a*). It may, however, be expected that words which have not become known in this country except in connection with the applicant's goods will seldom be rejected.

Non-descriptive words.

The next class of marks, as described in § 9 (4) of the Act of 1905, comprises "a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname." This definition is enlarged from the Act of 1888 by the introduction of the word "direct" and the reference to the ordinary signification of the word, and modified by the additional exclusion of surnames, which are left to be dealt with by the Board of Trade or the Court under sub-s. (5). This includes such terms as "Pharaoh's Serpents" toys (*b*), "United Service" soap (*c*), and "Charter Oak" stoves (*d*). Accordingly under this heading the words "Brownie" and "Bullseye" have been held good as applied to photographic films (though "Panoram" as so applied was held bad as descriptive) (*e*), "Quaker" as applied to spirits (*f*), "Motorine" for lubricating oil for motors (*g*). Geographical words remain excluded (*h*), as they had already been under the meaning given by the Courts to the term "fancy words."

(*a*) *Hommel* v. *Gebrüder Bauer & Co.*, 21 P. R. 576.

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

(*c*) *Feld* v. *Lewis*, Seton, 6th ed.

(*d*) *Fitley* v. *Fassett*, 44 Mo. 173.

(*e*) *In re Kodak, Ld.*, 20 P. R. 337.

(*f*) *In re Ellis & Co.*, 21 P. R. 617.

(*g*) *In re Compagnie Industrielle des Pétroles*, (1907) 2 Ch. 435.

(*h*) See *In re Apollinaris Co.*, (1891) 2 Ch. 186, 221 ("Apollinaris," "Friedrichshall," and "Hunyadi Janos" mineral waters and products).

Geographical words.

The question what is a geographical word is, however, not always easy of solution. Thus, in *In re Salt* (*a*), the word "Eboline" was held to be geographical, as being the name of the Italian town of "Eboli" with an ordinary suffix, though the word had been composed in ignorance of the existence of the town. Again, many words are used as names of places, while their original signification has no geographical reference at all. Such a case was that of "Magnolia" (*b*), which was the name of many small American towns and villages, yet was considered to be registrable, the geographical allusion not being generally understood in this country. The effect of this decision appears to be that a word is not to be regarded as geographical unless its primary signification is geographical, or unless it has become recognised in this country as a geographical word, and the reference in the new section to the "ordinary signification" has now made this distinction statutory.

Non-geographical words.

With reference to existing words free from any geographical meaning, the question still remains whether they have or have not any reference to the character or quality of the goods. That this question will be looked into very closely may be assumed from the cases cited above with respect to "invented words." And this seems very reasonable, for the right of the public to use descriptive words in a descriptive sense ought to be strictly maintained, as was pointed out by Lord Herschell in the "Solio" case (*c*), and their right to do so is now preserved, notwithstanding registration, by sect. 44 of the Act of 1905. Whether it was necessary to discover a descriptive allusion in all the cases in which the Court discovered it may perhaps be doubted, but it is clear from the decision of the House of Lords that no non-invented word which really is descriptive will be allowed to be registered as a new trade mark since August, 1875 (*d*), unless the sanction of the Board of Trade or the Court is obtained under sect. 9 (5). Where, however, a name which is not naturally descriptive, such

(*a*) (1894) 3 Ch. 166.

(*b*) *In re Magnolia Metal Co.*, (1897) 2 Ch. 371. See also *In re Apollinaris Co., Ld.*, (1891) 2 Ch. 186.

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

(*d*) See *In re Linotype Co.*, 14 P. R. 900 ("Typograph"); *In re Harrison & Crosfield*, 18 P. R. 34 ("Nectar" for tea); *In re Kodak, Ld.*, 20 P. R. 337 ("Panoram" for photographic films); *Christy & Co.* v. *Tipper & Son*, (1904) 1 Ch. 696; (1905) 1 Ch. 1 ("Absorbine"); *In re Printing Machinery Co., Ld.*, 23 P. R. 38 ("Century" for machinery); *In re Philippart*, 25 P. R. 365 ("Diabolo").

as "Magnolia," has been given to a new article, that application of the word does not necessarily cause it to have reference to the character or quality of the goods, though if the word has come to be known as the name of the article, irrespective of the manufacturer, it may become open to objection on the ground that it has ceased to be distinctive (*a*).

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

Old marks.

Marks which come within any of the above classes are capable of registration, whether they were used before the passing of the Trade Marks Registration Act, 1875, or not; but many valuable trade marks adopted and used before any precise definition was provided are not included in any of these classes, and would consequently be deprived of the benefits of the Act, unless some special provision were made for their protection. To meet this case it was provided, by § 64 (3) (ii) of the Acts of 1883-88 (*c*), that "any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures, used as a trade mark before the 13th day of August, 1875, may be registered as a trade mark under this part of this Act." And this provision in favour of old marks is repeated in sect. 9 (5) of the Act of 1905, with some revision of language. The words now run—"any special or distinctive word or words, letter, numeral, or combination of letters or numerals used by the applicant or his predecessors in business before the 13th day of August, 1875, which has continued to be used (either in its original form or with additions or alterations not substantially affecting the identity of the same) down to the date of the application for registration." It is thus now sufficient for the mark to be either *special or distinctive*, and *immaterial alterations will not affect* its registrability, but the user must have continued down to the date of application.

Old word-marks.

By far the most important description of marks included in this class is that defined as "any special or distinctive word or words used as a trade mark before the 13th day of August, 1875," which brings within the scope of the Act the numerous varieties of words which were used as old marks, whether they come within the defi-

(*a*) *In re Magnolia Metal Co.*, (1897) 2 Ch. 371.
(*b*) *In re Holt*, (1896) 1 Ch. 711.
(*c*) And see Trade Marks Registration Act, 1875, § 10.

nitions applicable to new marks or not. With respect to them, three conditions are prescribed. First, the word or words must be "special or distinctive"; secondly, they must have been used as a trade mark before the passing of the Act of 1875; and, thirdly, that user must have continued down to application.

"Used as a trade mark."

Passing over for the moment the question what words can be properly regarded as special or distinctive, it seems convenient first to consider here the further requirement that the word or words shall have been "used as a trade mark before the 13th day of August, 1875."

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

There must, then, have been user of the word or other mark before August 13th, 1875, and such user must have been user as a trade mark, and not as a descriptive term relating to the character or pattern of the goods or the like (*c*). The word or other mark

(*a*) (1891) 2 Ch. 522, 532.

(*b*) (1893) 2 Ch. 388; affirmed (1894) A. C. 8. And see *Day* v. *Riley*, 17 P. R. 59.

(*c*) *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288; *In re Harrison, McGregor & Co.*, 42 Ch. D. 691; *Richards* v. *Butcher* (2), (1891) 2 Ch. 522; *In re Powell* (2), (1893) 2 Ch. 388; (1894) A. C. 8; *John Dewar & Sons, Ld.* v. *Dewar*, 17 P. R. 341; *Day* v. *Riley*, 17 P. R. 517.

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

(*a*) *In re Palmer* (3), 24 Ch. D. 504; *In re Royal Baking Powder Co.*, W. N. 1880, p. 49; *In re Hayward & Sons*, 54 L. J. Ch. 1003; *In re Charlton & Dugdale*, 53 L. T. N. S. 337; *In re Perry Davis & Son*, 15 App. Cas. 316; *In re Grossmith*, 6 P. R. 180; *In re Dunn*, 41 Ch. D. 439; *In re Apollinaris Co.*, (1891) 2 Ch. 186; *In re Kinahan*, 10 P. R. 393; *In re Powell* (2), (1893) 2 Ch. 388; (1894) A. C. 8. The same rule applies to a device claimed as an old mark: *Baker* v. *Rawson*, 45 Ch. D. 519, 528, 532; *In re Fuente*, (1891) 2 Ch. 166; *In re Heddle*, 20 P. R. 599.

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

(*c*) *In re Palmer* (3), 24 Ch. D. 504; *In re Charlton & Dugdale*, 53 L. T. N. S. 337; *In re Perry Davis & Son*, 5 P. R. 333; 15 App. Cas. 316; *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217. And see *Louise & Co., Ld.* v. *Gainsborough*, 20 P. R. 61, 67.

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

(*e*) *In re Charlton & Dugdale*, 53 L. T. N. S. 337.

(*f*) *In re Hodson, Tessier & Co.*, 86 L. T. N. S. 188.

(*g*) *In re Münch*, 50 L. T. N. S. 12; *In re Riviere & Co.*, 26 Ch. D. 48; *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288 (*per* Fry, L. J.); *Berliner Brauerei Gesellschaft Tivoli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70; *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *Smith* v. *Fair*, 14 Ont. Rep. 729; *Chas. Beyer & Co.* v. *Strauss, Adler & Co.*, Cape Good Hope, 24 S. C. R. 27. But see *In re Eastman*, W. N. 1880, p. 128.

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

(*i*) *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *Norman* v. *Pinto*, 4 P. R. 508 (*per* Kekewich, J.); *In re Meus*, (1891) 1 Ch. 41.

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

"Special or distinctive."

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

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

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

(*c*) The definition there referred to is that contained in the Trade Marks Act, 1875, § 10 (3).

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

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

(*f*) And see *per* Fry, L. J., in *Waterman* v. *Ayres*, 39 Ch. D. 29; *Richards* v. *Butcher* (2), (1891) 2 Ch. 522; *In re Hopkinson*, (1892) 2 Ch. 116; *In re Magnolia Metal Co.*, (1897) 2 Ch. 371; *Bourne* v. *Swan & Edgar*, (1903) 1 Ch. 211. And see *In re Philippart*, 25 P. R. 565.

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

else's. The manufacture may or may not be new, but that is the sort of distinction contemplated by the statute." Now, for purposes of trade mark registration, the statutory definition of "distinctive" is "adapted to distinguish" (*a*).

Wood v. Lambert.

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

Leniency of Courts.

In the majority of the cases in which the validity and right to registration of a word claimed as an old mark have been considered, the question has turned on the user or non-user as a trade mark before the 13th of August, 1875; but when the question has turned on the words being distinctive or otherwise, the Courts have shown themselves far more leniently disposed than in the case of "fancy words," and words which must have been refused registration as "fancy words" have been recognised as registrable in the character of "special and distinctive words" (*c*). In fact,

(*a*) Act of 1905, § 9 (5). See *In re Crosfield*, 26 P. R. 561, 837; *In re Castella*, 27 P. R. 453.

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

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

in some of these cases the words have been so far descriptive as to cause a reasonable doubt whether the leniency shown was not excessive.

Descriptiveness fatal.

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

Descriptive words.

When, however, a word is purely descriptive, that is to say, when it expresses accurately and appropriately the material or mode of composition of the goods to which it is affixed, then, unless the exclusive manufacture of such goods is protected by a patent, and the same result cannot be attained without infringement of the patent, all the world has the right to make and sell such goods; and further, when the goods are manu-

Killer" medicines seems to have been thought too descriptive, though there were other reasons for invalidating the trade mark. And see *Wright, Crosby & Co.* v. *Royal Baking Powder Co.*, Cape of Good Hope, 15 S. C. R. 9, where "Royal" was held inadmissible for registration as an old mark.

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

(*b*) That is unless the matter is brought before the Board of Trade or the Court on a special application under § 9 (5) of the Act of 1905, in which case the tribunal has power to deal with the case as the facts require. (*In re Crosfield*, 26 P. R. 837.) See, in particular, *per* Moulton, L. J. As to protection of a descriptive word which has acquired a secondary signification, see *per* Lord Herschell in *Reddaway* v. *Banham*, 1896 A. C. 199 at pp. 212—13.

(*c*) *E.g.*, in *Waterman* v. *Ayres*, 39 Ch. D. 29; *In re Sanitas Co., Ld.*, 11 P. R. 533; *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274; *In re Vigour*, 6 P. R. 490; *Stuart & Co.* v. *Scottish Vale de Travers Paving Co., Ld.*, Ct. Sess. Cas. 4th Ser. XIII. 1.

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

factured and in course of sale, the vendor not only has the right, but is in duty bound to describe them, for the proper information and protection of the public, in such manner as will convey the most correct idea. Hence the original maker can claim no exclusive right in the properly descriptive name; nor would it be in accordance with the principles of equity that he should be able to do so, for, as was well said by Mr. Justice Strong, in the Supreme Court of the United States (*a*), "Equity will not enjoin against telling the truth" (*b*).

Young v. *Macrae*.

The reasoning of Wood, V.-C., in *Young* v. *Macrae* (*c*), affords a good example of the just way of considering cases of this description. In that case the plaintiffs, who held a patent for manufacturing a kind of oil which they called "Paraffin oil," filed a bill against the defendant, who sold a substance which he styled "Kerosene oil," or "American Paraffin oil." The case coming on on motion for injunction, the Vice-Chancellor said, "In the patent the process is described as 'a distillation of coal so as to obtain oil containing paraffin, and from this oil I obtain paraffin.' So he calls it paraffin oil because it contains paraffin. Here is a well-known substance called 'paraffin.' A chemist discovers that by the same process by which paraffin is produced, an oil containing paraffin, and from which paraffin can again be produced, is obtainable. Therefore, it being an oil containing paraffin, and producing paraffin, he calls it 'paraffin oil.' It is not a fanciful or whimsical name, but it describes the thing which he has produced. A man cannot take out a patent for a natural substance, but he can take out a patent for arriving at that natural substance, and he may christen it, putting aside all other people having called it by that name." The Vice-Chancellor then put the case of a man extracting sugar from beet-root by a patented process, and calling the extract "beet-root sugar" for a period of ten years. In such a case, when beet-root sugar was asked for, it would be known that his was meant,

(*a*) *Canal Co.* v. *Clark*, 80 U. S. 311; *Poulton & Son* v. *Kelley & Son*, 21 P. R. 392; *Grand Hotel Co. of Caledonia Springs, Ld.* v. *Wilson*, (1904) A. C. 103. See *Cellular Clothing Co.* v. *Maxton & Murray*, (1899) A. C. 326.

(*b*) If, however, the effect of using a descriptive word is to cause the person to whom it is used to believe that the goods came from a source which is not the true one, it is fallacious to say that the person so using it with knowledge of the effect is telling the truth: *per* Lord Herschell in *Reddaway* v. *Banham*, (1896) A. C. 199.

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

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 (*c*); but that he had there had it proved that the name 'paraffin oil' had long been known as the scientific name of the article, and that the defendant could not well have called it anything else."

Name become *publici juris*.

Again, a word which was first applied to, or was even invented for the sole and express purpose of designating a sub-

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

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

(*c*) So in *Eno* v. *Stephens*, Dig. 609, the term "Fruit Salt" was protected at the instance of the person who was the first to use it. And see *In re Dunn*, 41 Ch. D. 439; 15 App. Cas. 252; also *Siegert* v. *Findlater*, 7 Ch. D. 801; *Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. D. 834; *Grezier* v. *Aubran*, 13 P. R. 1; *In re Barrel Trade Mark*, (1896) 2 Ch. 600; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710; *Rockingham Rail. Co.* v. *Allen*, 12 Times L. R. 345; *Parsons* v. *Gillespie*, 15 P. R. 57; *Daniel* v. *Whitehouse*, (1898) 1 Ch. 685; *In re Chesebrough Mfg. Co.*, (1902) 2 Ch. 1; *In re Philippart*, 25 P. R. 565; *Rey* v. *Lecouturier*, (1908) 2 Ch. 715; *In re Gramophone Co., Ld.*, 27 P. R. 689; *Canal Co.* v. *Clark*, 80 U. S. 311; and *Schendel* v. *Silver*, 70 N. Y. Sup. Ct. 330, as to a name which is appropriated to an article.

stance or composition may prove, on investigation, to have ceased to retain the characteristic, which it once possessed, of conveying the idea of the goods being of a particular manufacture; in which case the person who first used the word, though its inventor, will cease to have any exclusive rights in it, since it will have become purely descriptive of an article which all may freely make (*a*). The name thus becomes *publici juris*, and not only can be, but ought to be, employed by all who manufacture and sell an article which they are at perfect liberty to manufacture and sell, and of which the name in question is generally recognized as the appropriate designation. This point is well stated by Lord Selborne, C., in *Singer Manufacturing Co.* v. *Loog* (3) (*b*), where he says, "The reputation acquired by machines of a particular form or construction is one thing; the reputation of the plaintiffs, as manufacturers, is another. If the defendant has no right under colour of the former to invade the latter, neither have the plaintiffs any right under colour of the latter to claim (in effect) a monopoly of the former. If the defendant has a right to make and sell, in competition with the plaintiffs, articles similar in form and construction to those made and sold by the plaintiffs, he must also have a right to say that he does so, and to employ for that purpose the terminology common in his trade, provided always that he does this in a fair, distinct and unequivocal way."

Effect of registration under the former Acts.

The registration as a trade mark of a name of this description somewhat complicated the question under the Acts prior to 1905, as registration of a trade mark was, under those Acts, *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 (*c*); but the wording of the Acts was entirely directed to the registration of "a trade mark," the exclusive use of "a trade mark," &c., and since a name which had become *publici juris*,

(*a*) *E.g.*, "Worcestershire Sauce"—*Lea* v. *Millar*, Dig. 513; *Lea* v. *Deakin*, 11 Biss. 23; "Gem" air-guns, *In re Arbenz*, 35 Ch. D. 248; "Maizena," *National Starch Manufacturing Co.* v. *Munn's Patent Maizena and Starch Co.*, (1894) A. C. 275; "Magnolia" Metal, *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 P. R. 389; "Winser" Sewer-trap interceptors, *Winser & Co., Ld.* v. *Armstrong & Co.*, 16 P. R. 167; "Neva Stearine" candles, *Neva Stearine Co.* v. *Moulding*, 9 V. L. R. Eq. 98; "Fly Poison Pads," *Wilson* v. *Lyman*, 25 Ont. App. Rep. 303.

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

(*c*) Patents Act, 1883, § 76.

whether registered or not, could not be a "trade mark" within the definition section of the Acts, because it contained nothing distinctive, it seemed that, at all events within the five years, this enactment did not preclude a defence on the ground that the name so registered was in fact no trade mark, and had been registered, or was continued on the register, by error. However, whether that be so or not, it was repeatedly decided that five years' registration could not protect a mark which had been registered as a trade mark, but was invalid by reason of its being descriptive or otherwise, from being removed from the register (*a*): and the remarks of Mellish, L.J., in *Ford* v. *Foster* (*b*), appear to have remained applicable. "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 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 fraudu-

(*a*) *In re Palmer* (1) and (3), 21 Ch. D. 47; 24 *ib.* 504; *In re Lloyd & Sons*, 27 Ch. D. 646; *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Wragg*, 29 Ch. D. 551; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Spencer*, 54 L. T. N. S. 659; *In re Apollinaris Co.*, (1891) 2 Ch. 186; *Richards* v. *Butcher* (2), (1891) 2 Ch. 522; *In re Hall*, 19 P. R. 569. And it has been so held also in Victoria: *Lewis* v. *Klauprotb*, 11 V. L. R. 214; *Wolfe* v. *Alsop*, 12 V. L. R. 421; *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752. The wisest course to take in such a case was no doubt to apply to rectify the register by the removal of the offending mark - *e.g.*, *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288.

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

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

lent use of the trade mark, the right to the trade mark must be gone" (*a*).

Under the Act of 1905, registration, if valid, gives the registered proprietor the exclusive right to the use of the mark (*b*), and in all legal proceedings relating to the mark, the fact of registration is *prima facie* evidence of the validity of the registration (*c*). This phraseology seems to preserve the right to question the validity of the mark without rectification, if the presumption in its favour can be set aside, but it is obvious that the only prudent course in such a case is for the party attacked to apply for the removal of the mark from the register, if not too late, having regard to the provisions of sect. 41, by which, after seven years from the 11th August, 1905, rectification will only be possible within seven years from the date of registration under the limited conditions therein specified.

Effect of registration under the Act of 1905.

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

The three-mark rule.

(*a*) For instances of marks proved to be common to particular trades, see note (*b*) to § 71 of the Patents Act, 1883, *infra*.

(*b*) T. M. A., 1905, § 39.

(*c*) T. M. A., 1905, § 40.

(*d*) *In re Walkden Co.*, 54 L. J. Ch. 394; *In re Powell* (1), Dig. 589; *In re Hyde & Co.*, 51 L. J. Ch. 395; *In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *Ex parte Sales, Pollard & Co.*, Dig. 629; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *In re Brook*, 26 W. R. 791; *In re Hudson, Tissier & Co.*, 86 L. T. 188; *Benbow* v. *Low* (4), 44 L. T. N. S. 875; *In re Sone & Fleming Manufacturing Co.*, 30 Ch. D. 505; *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *In re Bancroft & Co.*, 5 P. R. 209; and see *Board & Son* v.

case (*a*) three substantially identical marks, of which two were old and one was new, and in another case (*b*) three substantially identical *new* marks, were allowed to be registered for the same goods by different traders with consent of all the parties concerned. The provision in § 74 of the Patents Act, 1883, that any device which was before August 13th, 1875, publicly used by more than three persons on the same or a similar description of goods should, for the purposes of the section (*i.e.*, for the purpose of registration as an addition to a trade mark, exclusive rights therein being disclaimed) be deemed common to the trade in such goods (*c*), was derived from this rule. It is now possible, under sects. 19—21 of the Act of 1905, for concurrent registration of even identical new marks to be allowed under certain circumstances.

Name indicative of a principle of construction.

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

Articles made according to a patented process.

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

Thom & Cameron, 23 P. R. 509; 24 P. R. 697. The rule does not apply in New South Wales: *Blogg* v. *Anderson*, N. S. W. 21 L. R. Eq. 238.

(*a*) *In re Walkden Co.*, 51 L. J. Ch. 394.

(*b*) *In re Vegaras*, Hall, V.-C., June 3rd, 1881.

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

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

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

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

The sewing-machine cases.

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

(*a*) *Per* Treat, J., in *Singer Manufacturing Co.* v. *Stumpe*, 2 McCrary, 512. And see *Edelsten* v. *Vick*, 11 Hare, 78; *Young* v. *Macrae*, 9 Jur. N. S. 322; *Green* v. *Rooke*, W. N. 1872, p. 49; *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298; *Same* v. *Anderson*, W. N. 1883, p. 185; *Lazenby* v. *White*, 41 L. J. Ch. 354; *Condy* v. *Mitchell*, 37 L. T. N. S. 766; *James* v. *James*, L. R. 13 Eq. 421; *Chearin* v. *Walker*, 5 Ch. D. 850; *Massam* v. *Thorley's Cattle Food Co.* (1), 6 Ch. D. 574; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. D. 834; *In re Ralph*, 25 Ch. D. 194; *In re Leonard & Ellis*, 26 Ch. D. 288, *per* Cotton, L. J.; *Native Guano Co., Ld.* v. *Sewage Manure Co.*, 8 P. R. 125; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 400; *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 P. R. 289; *In re Davis*, 14 P. R. 903; *Meaby & Co.* v. *Triticine, Ld.*, 15 P. R. 1; *Magnolia Metal Co.* v. *Tandem Smelting Co.*, 17 P. R. 477; *In re Formalin Hygienic Co.*, 17 P. R. 486; *Cropper Minerva Machines Co.* v. *Cropper, Charlton & Co.*, 23 P. R. 388; *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, 23 P. R. 761; 24 P. R. 572; *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.*, 24 P. R. 641; *In re Gestetner*, (1907) 2 Ch. 478; (1908) 1 Ch. 513; *In re E. M. Borden's Patent Syndicate, Ld.*, 26 P. R. 205; *Canal Co.* v. *Clark*, 80 U. S. 323, *per* Strong, J.; *Goodyear Rubber Co.* v. *Goodyear India Rubber Glove Manufacturing Co.*, 128 U. S. 598; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169. See *In re Eastman*, W. N. 1880, p. 128, in which registration was granted to a name which had been used for soap made under a patent.

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

(*c*) 2 Ch. D. 431.

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

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

(*f*) 8 Biss. 181.

(*g*) 2 McCrary, 512.

(*h*) 11 Fed. Rep. 706.

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

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

And it has further been decided in America that a patented instrument for distinguishing a manufacturer's goods—*e.g.*, a special tin tag or ticket—cannot be recognised as a trade mark during the continuance of the patent (*g*), and that the special shape of an article made under a patent is similarly incapable of individual appropriation (*h*). But it has been held in this country that during the continuance of a patent an injunction may be granted in one action, where the evidence warrants it, not only for infringement of the patent but also for passing off by describing the spurious article as of the pattern of the patented article (*i*).

New name for new article.

And even where no patent is obtained, "it is to be observed that the person who produces a new article, and is the sole maker of it, has the greatest difficulty (if it is not an impossibility) in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from" (*k*). Thus it was held by the Court of Appeal that a

(*a*) 41 Ohio St. 127.
(*b*) Ct. Sess. Cas. 3rd Ser. XI. 267.
(*c*) 10 P. R. 297. And see *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169; and *Singer Manufacturing Co.* v. *Bent*, 163 U. S. 205.
(*d*) 8 App. Cas. 376.
(*e*) See *Singer Mfg. Co.* v. *British Empire Mfg. Co.*, 20 P. R. 313; *Daimler Motor Car Co.* v. *British Motor Traction Co.*, 18 P. R. 380; *Daimler Motor Co.* (1904), *Ld.* v. *London Daimler Co.*, 24 P. R. 379; *A. Boake Roberts & Co., Ld.* v. *Wayland*, 26 P. R. 251; *Hornsby* v. *Hudson*, N. S. W. L. R. 11 Eq. 148.
(*f*) *Adee* v. *Peck Bros. & Co.*, 48 U. S. Pat. Gaz. 823.
(*g*) *Lorillard* v. *Pride*, 28 Fed. Rep. 434.
(*h*) *Wilcox & Gibbs Sewing Machine Co.* v. *Gibbon's Frame*, 21 Bl. C. C 431; *Brill* v. *Singer Manufacturing Co.*, 41 Ohio St. 127. So also in this country *Edge* v. *Niccolls*, C. A., Nov. 22, 1910.
(*i*) *Poulton & Son* v. *Kelley & Son*, 21 P. R. 392; cf. *Hill* v. *Thomas*, 23 P. R. 375.
(*k*) *Per* Fry, J., in *Siegert* v. *Findlater*, 7 Ch. D. 801. And see *Linoleum Manufacturing Co.* v. *Nairn*, *ib.* 834; *Waterman* v. *Ayres*, 39 Ch. D. 29; *Barlow*

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

Actual fraud.

This rule, however, will of course not enable rival traders after the expiration of the patent, or the discovery of the secret, to represent their goods as the goods of the original manufacturer, and the Court will, in the exercise of its general jurisdiction for the repression of fraud, award an injunction or damages in a case of fraud in which, but for the fraud, no remedy would have been given. Thus, for instance, in a case in which the

& Jones, Ld. v. *Johnson & Co.*, 7 P. R. 395, 400; *Winser & Co., Ld.* v. *Armstrong & Co.*, 16 P. R. 167; *Cellular Clothing Co.* v. *Maxton & Murray*, (1899) A. C. 326, 344; *In re Formalin Hygienic Co.*, 17 P. R. 486; *Electromobile Co.* v. *British Electromobile Co.*, 24 P. R. 689; 25 P. R. 149; *Hommel* v. *Gebrüder Bauer & Co.*, 21 P. R. 576; *R.* v. *Cruttenden*, 10 Ont. L R 80; *In re Gramophone Co., Ld.*, 27 P. R. 689; *Marshall* v. *Hawkins*, 4 N. Z. L. R. Sup. Ct. 59.

(*a*) *In re Leonard & Ellis*, 26 Ch. D. 288.

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

(*c*) *In re Cheeseborough Mfg. Co.*, (1902) 2 Ch. 1; and see *Daimler Motor Co.* (1904), *Ld.* v. *London Daimler Co., Ld.*, 24 P. R. 379.

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

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

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

(*a*) *Cocks* v. *Chandler*, L. R. 11 Eq. 446. And see *Reddaway* v. *Banham*, (1896) A. C. 199; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710; *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169; *Singer Manufacturing Co.* v. *Bent*, 163 U. S. 205. The presumption of fraud may, however, be refuted, as by a fair statement of the maker's own name; *Browne* v. *Freeman*, 12 W. R. 305.

Descriptive words.

(*b*) **The following are cases in which words have been held to be descriptive:**—*Thomson* v. *Winchester*, 36 Mass. 214 ("Thomsonian Medicines"); *Fetridge* v. *Wells*, R. Cox, 180 ("Balm of Thousand Flowers"); *Wolfe* v. *Goulard*, 18 How. Pr. 64 ("Schiedam Schnapps"); *Burke* v. *Cassin*, 45 Cal. 467 (do.); *Wolfe* v. *Hart*, 4 V. L. R. Eq. 125 (do.); *Wolfe* v. *Alsop* (1), 10 V. L. R. Eq. 41 (do.); (2) 12 V. L. R. 421 (do.); *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752 (do.); *Young* v. *Macrae*, 9 Jur. N. S. 322 ("Paraffin Oil"); *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298 ("Liebig's Extract of Meat"); *Same* v. *Anderson*, W. N. 1883, p. 185 (do.); *Canal Co.* v. *Clark*, 80 U. S. 311 ("Lackawanna" coal); *Rowland* v. *Breidenbach*, Dig. 386 ("Macassar" oil); *James* v. *James*, L. R. 13 Eq. 421 ("Lieut. James' Horse Blister"); *Green* v. *Rooke*, W. N. 1872, p. 49 ("Golden Ointment"); *Browne* v. *Freeman*, 12 W. R. 305 ("Chlorodyne"); *Bulloch, Lade & Co.* v. *Gray*, 19 Journ. of Jurisp. 218 ("Loch Katrino" whiskey); *Siegert* v. *Findlater*, 7 Ch. D. 801; and *Siegert* v. *Abbott*, 79 N. Y. Sup. Ct. 243 ("Angostura Bitters"); *In re Horsburgh*, 53 L. J. Ch. 237 ("Valvoline" oil); (but see *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288); *In re Saunion & Co.*, Dig. 625 ("Anglo-Portugo" oysters); *In re Brandreth*, Dig. 626 ("Porous" plasters); *Linoleum Manufacturing Co.* v. *Nairn*, 7 Ch. D. 834 ("Linoleum"); *Lazenby* v. *White*, 41 L. J. Ch. 354 ("Harvey's Sauce"); *Wotherspoon & Co.* v. *Gray & Co.*, Ct. Sess. Cas. 3rd Ser. II. 38 ("Victoria" lozenges); *Lamplough* v. *Beedzler*, C. A., Nov. 12th, 1880 ("Pyretic Saline"); *Day* v. *Neale*, Bacon, V.-C., May 24th, 1881 ("White Chemical Extract," "Brown Chemical Extract," "Red Paste," "Red Drench," "Gaseous Fluid," &c.); *In re Price's Patent Candle Co.*, 27 Ch. D. 681 ("National Sperm" candles); *In re Hudson*, 32 Ch. D. 311 ("Carbolic Acid Soap Powder"); *In re Atkins Filter & Engineering Co., Ld.*, 3 P. R. 164 ("The Sanitary Filter, easily cleaned"); *Native Guano Co., Ld.* v. *Sewage Manure Co.*, 8 P. R. 125 ("Native Guano"); *Schove* v. *Schmincke*, 33 Ch. D. 546 ("Castle Album"); *Watt* v. *O'Hanlon*, 4 P. R. 1 ("Old Innishowen" whiskey); *Symington & Co.* v. *Footman, Pretty & Co.*, 56 L. T. N. S. 696 ("Guaranteed Corset"); *In re Perry Davis & Son*, 5 P. R. 333; 15 App. Cas. 316 ("Pain-Killer" medicines); *In re Dunn*, 41 Ch. D. 439; 15 App. Cas. 252 ("Fruit Salt"); *In re Ralph*, 25 Ch. D. 194 ("The Home-washer"); *Goodyear Rubber Co.* v. *Goodyear India-rubber Glove Manufacturing Co.*, 128 U. S. 598 ("Goodyear Rubber"); *Kerry* v. *Les Sœurs de l'Asile de la Providence*, 2 St. Dig. 726 ("Syrup of Red Spruce Gum"); *McCall* v. *Theal*, 28 Grant Up. Can. Ch. 48 ("Bazaar Patterns" for clothing); *Montgomerie* v. *Donald & Co.*, Ct. Sess. Cas. 4th Ser. XI. 506 ("Water of Ayr" stone); *Stuart & Co.* v. *Scottish Val de Travers Paving Co., Ld.*, Ct. Sess. Cas. 4th Ser. XIII. 1 ("Granolithic" arti-

or registered as special and distinctive. The Act establishing registration "takes nothing away from anybody. It confers, upon certain conditions and under particular circumstances, rights which, but for the Act of Parliament, would not be as clearly asserted, but it takes nothing away. Any man who has a right to a trade mark has his trade mark just the same after the passing of the Trade Marks Registration Act as he had before. Only, if the persons enjoying the trade mark have been so numerous

ficial stone); *Lewis* v. *Klapproth*, 11 V. L. R. 214 ("Borax Soap"); *Hop Bitters Manufacturing Co.* v. *Luke*, 10 V. L. R. (Eq.) 234 ("Hop Bitters"); *Hop Bitters Manufacturing Co.* v. *Wharton*, 10 V. L. R. (L.) 337 (do.); *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540 ("Iron Bitters"); *Parsons* v. *Gillespie*, 17 N. S. W. R. (Eq.) 227; (1898) App. Cas. 239 ("Flaked Oatmeal"); *Sparks* v. *Harper*, 3 Queensl. L. J. Rep. 158; *ib.* 201 ("French Coffee"); *Hommel* v. *Gebrüder Bauer & Co.*, 21 P. R. 576; 22 P. R. 43 ("Hæmatogen" drug); *In re Philippart*, 25 P. R. 565 ("Diabolo" tops); *Wright, Crossley & Co.* v. *Royal Baking Powder Co.*, Cape Good Hope, 15 S. C. R. 3 ("Royal" Baking Powder); *Peek, Frean & Co.* v. *Carr & Co.*, Cape Good Hope, 15 S. C R 172 ("Café Noir" biscuits); *Wardon & Pegram* v. *Cantrell & Cochrane*, Cape Good Hope, 18 S. C. R. 142 ("Club" soda-water); *Legg* v. *Finlay*, Cape Good Hope, 18 S. C. R. 107 ("Irish Crown" soap); *Southall & Co.* v. *Cuthbert & Co.*, Cape Good Hope, 18 S. C. R. 453 ("Lightfoot" boots); *Rex* v. *Cruttenden*, 10 Ont. L. R. 80 ("Glycothymoline" drug); *Asbestos & Asbestic Co.* v. *William Sclater Co.*, 10 Q. O. R. Q. B. 165 ("Asbestic" wall plaster); *In re Gramophone Co., Ld.*, 27 P. R. 689. And see cases as to "fancy words," *supra*, p. 54.

In the following cases descriptiveness has either not been alleged or has been held not to be established, and the words have been treated as distinctive words:—*Pidding* v. *How*, 6 Sim. 477 ("Howqua's Mixture"); *Perry* v. *Truefitt*, 6 Beav. 56 ("Medicated Mexican Balm"); *Taylor* v. *Carpenter* (1), 3 Story, 458 ("Persian Thread"); S. C. (2), 2 Wood. & M. 1 (do.); S. C. (3), 2 Sandf. Ch. 603 (do.); *Taylor* v. *Taylor*, 2 Eq. Rep. 290 (do.); *Hine* v. *Lart*, 10 Jur. 106 ("Ethiopian" stockings); *Davis* v. *Kendall*, 2 R. I. 566 ("Pain-Killer" medicine); *Davis* v. *Kennedy*, 13 Grant Up. Can. Ch. 523 (do.) (but see *In re Perry Davis & Son*, 5 P. R. 333; 15 App. Cas. 315); *R.* v. *Dundas*, 6 Cox, 380 ("Everett's Premier" blacking); *Braham* v. *Bustard*, 1 H. & M. 447 ("Excelsior" soap); *McAndrew* v. *Bassett*, 4 De G. J. & S. 380 ("Anatolia" liquorice); *Faber* v. *Hovey*, Dig. 481 ("Star" pencils); *Ford* v. *Foster*, L. R. 7 Ch. 611 ("Eureka" shirts); *Hirst* v. *Denham*, L. R. 14 Eq. 542 ("Turin," "Sefton," "Leopold," "Liverpool," cloth); *Sternberger* v. *Thalheimer*, 3 U. S. Pat. Gaz. 120 ("Centennial" clothing); *In re Bush & Co.*, 10 *ib.* 164 ("Centennial" wines); *Kidd & Co.* v. *Mills, Johnson & Co.*, 5 *ib.* 337 ("Magnolia," "Dave Jones" whiskey); *Morse* v. *Worrell*, 10 Phila. 168 ("Rising Sun" stove polish); *Cotton* v. *Gillard*, 44 L. J. Ch. 90 ("Licensed Victuallers' Relish"); *Smith* v. *Mason*, W. N. 1875, p. 62 ("Pectorine" medicine); *Rudam* v. *Shaw*, 28 Ont. R. 612 ("Microbe Killer"); *Grillon* v. *Guénin*, W. N. 1877, p. 14 ("Tamar Indien" lozenges); *Carnrick* v. *Morson*, Dig. 543 ("Lactopeptine" medicine); *Eno* v. *Stephens*, Dig. 609 ("Fruit Salt"), (but see *In re Dunn*, 41 Ch. D. 439; 15 App. Cas. 252); *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57 ("Family Salve"); *Rosing* v. *Atkinson*, 27 Sol. J. 534 ("Edelweiss" perfume); *Berliner Brauerei Gesellschaft Tivoli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70 ("Tivoli" lager beer); *In re Eastman*, W. N. 1880, p. 128 "Kitchen Crystal Soap"); *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288 ("Valvolino" oil) (but see *In re Horsburgh*, 53 L. J. Ch. 237); *Holt* v. *Menendez*, 128 U. S. 182 ("La Favorita" flour); *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395 ("Osman" towels). Cf. *In re Magnolia Metal Co.*, (1897) 2 Ch. 371, where a word not *per se* descriptive was held not distinctive on the ground that it had become descriptive,

Distinctive words.

that it is impossible to say that any of them, or all of them together, had an exclusive right to it, then they shall not have the benefit of the registration, which would give an exclusive right" (*a*).

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" (*b*), "gold medal" (*c*). The objection, however, will not prevail where the class is very limited (*d*).

Adjective denoting quality only, no trade mark.

"Terms which designate merely the name, quality, kind, size, number, or elements of an article, or have become its proper appellation, or that merely describe it, or direct the mode of its use, purely generic and geographical terms, and the necessary and common uses in which the English language and arabic numerals are employed by people to express their ideas and feelings and to tell the truth, are common property which all may use, but which none may exclusively appropriate as a trade mark, or acquire as absolute individual property" (*e*). Consequently, an ordinary adjective in the common language of the country, descriptive of the quality of the article, and not designating it to be of the manufacture of a certain individual or establishment, as "standard" (*f*), "superior" (*g*), "superfine" (*g*), "nourishing" (*h*), 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" (*i*), "A 1" (*k*), "Best six-cord"—"200 yds." (*l*).

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

(*b*) *Batty* v. *Hill*, 1 H. & M. 264. See *Roper's, &c. Co.* v. *Copeman's, &c. Association, Ld.*, 28 Sol. J. 218; *In re Bryant & May, Ld.*, 8 P. R. 69; *Louise & Co.* v. *Gainsborough*, 20 P. R. 61; *In re Printing Machinery Co.*, 23 P. R. 38; *Wright, Crossley & Co.* v. *Royal Baking Powder Co.*, Cape Good Hope, 15 S. C. R. 9.

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

(*d*) *Dent* v. *Turpin*, 2 J. & H. 139. And see p. 124, note (*i*).

(*e*) *Per* Kentucky Court of Appeal in *Avery & Sons* v. *Meikle & Co.*, 27 U. S. Pat. Gaz. 1027. See *In re Crosfield*, 26 P. R. 561, 837.

(*f*) *Standard Co.* v. *Standard Co.*, P. C. Nov. 3, 1910.

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

(*h*) *Raggett* v. *Findlater*, L. R. 17 Eq. 29; and see *Spottiswoode* v. *Clarke*, 1 Coop. 254.

(*i*) *Candee, Swan & Co.* v. *Deere & Co.*, 54 Ill. 439; 5 Amer. Rep. 125; and see *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sand. S. C. 599; R. Cox, 87; *Same* v. *Trainer*, 101 U. S. 51; *Burke* v. *Cassin*, 45 Cal. 467; 13 Amer. Rep. 204; *Stokes*

Notes (*k*) (*l*), see next page.

Marks denoting maker as well as quality.

But in some of the American cases the principle appears to have been carried to an extent which is unreasonable, and which has not been and would not be recognised in this country, the rule having been laid down too generally that every word or symbol which serves to indicate quality is incapable of appropriation as a trade mark, the qualification being omitted that, if such word or symbol also serves to indicate a particular manufacturer, the mark may be a good trade mark. In *Amoskeag Manufacturing Co.* v. *Trainer* (*a*) the Supreme Court of the United States itself appears to have decided in favour of the wider rule. There the plaintiff company manufactured cotton tickings, and sold the different qualities under different labels, of which the one affixed to the best quality of the goods bore a combination device, in which the prominent and conspicuous feature consisted of the letters "A. C. A." Those letters had for many years been recognised as indicating that the goods to which they were attached were of the plaintiff company's manufacture, and also of the best quality of the goods so manufactured, and the plaintiffs' user of the letters had been substantially exclusive. In an action, however, brought against defendants who had sold similar goods of their own manufacture under a label containing the same letters in a conspicuous place, the Supreme Court held that, the letters being indicative of quality, no protection could be given. All trade marks, however, which are of any value at all, denote that the goods to which they are attached are of good quality, and by far the greater number of large manufacturing firms use a variety of trade marks, which they apply to goods of different descriptions or qualities, or intended for different markets; and possibly the explanation of the decision may be that the Court really considered that the letters, though only used by the plaintiffs, indicated nothing beyond quality (*b*).

Such marks valid.

It seems clear that the English rule that combinations of letters, or words, or symbols, which indicate that the goods to which they

v. *Landgraff*, 17 Barb. 308: R. Cox, 137; *Kinney* v. *Allen*, 1 Hughes, 106; *In re Eagle Pencil Co.*, 10 U. S. Pat. Gaz. 981; *Osgood* v. *Allen*, 1 Holmes, 185; *Carver* v. *Bowker*, Dig. 581; *Avery* v. *Meikle*, 27 U. S. Pat. Gaz. 1027; *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 138 U. S. 537; *Barlow* v. *Gobindram*, Ind. L. R. 24 Calc. 364,

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

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

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

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

are applied have been manufactured by a particular person or firm, may constitute valid and registrable trade marks, notwithstanding that they also indicate the quality or pattern of the goods as compared with other goods of the same makers (*a*), is preferable to that which appears to have been formulated in some of the American Courts. Thus, in *Hirst* v. *Denham* (*b*), different fancy patterns of the plaintiff's cloth were marked with different names, each of which was protected; in *Moses* v. *Sargood, Ewen & Co.* (*c*), the plaintiff's clothing was marked with a number of crowns, varying from one to six, according to quality; in *Ransome* v. *Graham* (*d*), the plaintiff's ploughs were marked with the letters "R. N." and an additional letter or numeral, varied according to pattern and quality (*e*). In the Indian case of *Taylor* v. *Virasami* (*f*) the plaintiff's shirtings were marked with scimitars, varying in number from two to five, according to quality. Even in some of the American Courts the English rule has been recognised, and it was well stated by the Supreme Court of Rhode Island (*g*) as follows:—"Undoubtedly, if it be assumed that a given mark indicates quality only, and not origin, it will follow that purchasers of goods so marked have not been misled thereby into the supposition that they were buying a plaintiff's goods, and hence he would show no cause for relief. . . . . But it by no means follows as a rule of law that marks indicating style or quality may not also indicate origin, and thus be a subject of trade mark. . . . . A person may have different symbols for different grades of goods, which will indicate both quality and origin with respect to the goods so marked. A manufacturer may adopt such symbols, not simply to mark a style or quality, but *his* style and *his* quality as well. He is entitled to have his style and his quality protected from misrepresentation, and to have the benefit of any favourable reputation they may have gained."

Marks denoting quality in only one trade.

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

(*a*) *Ransome* v. *Graham*, 51 L. J. Ch. 897.
(*b*) L. R. 14 Eq. 542.
(*c*) Dig. 636.
(*d*) 51 L. J. Ch. 897.
(*e*) And see *In re Brook*, 26 W. R. 791; *Mitchell* v. *Henry*, 15 Ch. D. 181; *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 412, 415; and *per* Pearson, J., in *Wood* v. *Lambert*, 32 Ch. D. 247.
(*f*) Ind. L. R. 6 Mad. 108.
(*g*) In *American Solid Leather Button Co.* v. *Anthony*, 15 R. I. 338.
(*h*) *In re English*, U. S. Pat. Comm. Decis. 1870, 142.

Deceptive marks.

Again, a trade mark which contains false representations, so as to deceive the public, will not be protected in equity as a valid trade mark (*a*), and cannot be registered as such under the Trade Marks Act, 1905 (*b*). In short, as was said by Wallace, J., in *Ginter* v. *Kinney Tobacco Co.* (*c*), "no principles are better settled in the law of trade marks than that a generic name, or a name merely descriptive of the ingredients, quality, or characteristics of an article of trade, cannot be the subject of a trade mark; and that the use of a name or term which is likely to deceive the public in reference to the components or nature of the article to which it is applied will not be tolerated." But more collateral misrepresentations do not disqualify (*d*).

Marks which are either descriptive or deceptive.

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

(*a*) *Pidding* v. *How*, 8 Sim. 477; *Perry* v. *Truefitt*, 6 Beav. 66; *Flavel* v. *Harrison*, 10 Hare, 467: *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137; *Morgan* v. *McAdam*, 36 L. J. Ch. 228; *Lewis's* v. *Goodbody*, 67 L. T. N. S. 194; *In re Hill*, 10 P. R. 113.

(*b*) See § 11, and *In re Edge*, 8 P. R. 207.

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

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

(*e*) Dig. 625.

(*f*) 34 Ch. D. 631. See the observations of Moulton, L.J., in *In re Orlwoola, Ld.*, 26 P. R. 850, and compare *Free Fishers & Dredgers of Whitstable* v. *Elliott*, W. N. 1888, p. 27: and see *In re Hannay*, 7 P. R. 46; *In re Edge*, 8 P. R. 207: *Parsons* v. *Gillespie*, 17 N. S. W. R. (Eq.) 227: (1898) A. C. 239; *Wolff* v. *Nopitsch*, 18 P. R. 27; *Peak, Frean & Co.* v. *Carr & Co.*, Cape Good Hope, 15 S. C. R. 172.

(*g*) *E.g.*, *In re American Sardine Co.*, 3 U. S. Pat. Gaz. 495 ("American Sardines"); *Ex parte Marsching & Co.*, 15 *ib.* 294 ("French" paints); *Ex parte Knapp*, 16 *ib.* 318 ("London" animal foods); *Ginter* v. *Kinney Tobacco Co.*, 12 Fed. Rep. 782 ("Straight-cut" cigarettes).

article, it will not be treated as deceptive. Thus the name "Edelweiss" was allowed to be appropriated to scent not derived from that flower, it being well known that the edelweiss yields no perfume (*a*).

Extravagance an advantage in word trade marks.

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

Words specially invented.

In many cases the word used as a trade mark is an entirely new word, invented for the occasion by the manufacturer of the material or composition to which it is applied, and such a name may be registered and otherwise treated as a valid trade mark (*c*). Thus "Pectorine" (*d*) and "Lactopeptine" (*e*) have been protected as names for medical compounds; "Solio" for photographic paper (*f*); "Kodak" for cameras and accessories (*g*); "Tachytype" for typographical machines (*h*). "Chlorodyne" (*i*) was only not protected because the proprietor, on a mistaken view of his rights, consented to have his bill for an injunction dismissed with costs. Invented words were, however, occasionally refused registration as "fancy words" under § 64

(*a*) *Rosing* v. *Atkinson*, 27 Sol. J. 534. And see *In re Densham*, (1895) 2 Ch. 176.
(*b*) *Young* v. *Macrae*, 9 Jur. N. S. 322.
(*c*) See T. M. Act, 1905, § 9. replacing Patents Act, 1883, § 64, as amended by the Act of 1888.
(*d*) *Smith* v. *Mason*, W. N. 1875, p. 62.
(*e*) *Carnrick* v. *Morson*, L. J. N. of C. 1877, p. 71.
(*f*) *In re Eastman Co., Ld.*, (1898) A. C. 571.
(*g*) *Eastman Co., Ld.* v. *Griffiths Corporation, Ld.*, 15 P. R. 105; *In re Kodak, Ld.*, 20 P. R. 337.
(*h*) *In re Linotype Co., Ld.*, 17 P. R. 380.
(*i*) *Browne* v. *Freeman*, 12 W. R. 305.

of the Act of 1883, where they were considered to suggest a description of the article—*e.g.*, "Washerine" soap (*a*), "Monobrut" champagne (*b*); and Jessel, M. R., treated "Valvoline" oil as descriptive (*c*), though Lord Selborne (*d*) and a United States circuit judge (*e*) have thought differently.

Existing words composing a word trade mark.

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

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,

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

(*b*) *In re Vignier*, 6 P. R. 490. See also *Christy* v. *Tipper*, 21 P. R. 97, 755, ("Absorbine").

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

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

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

(*f*) See *Newman* v. *Alvord*, R. Cox, 413, in which Daniels, J., said that "any member of the community, whose interests and business may be promoted by doing so, should be at liberty to apply even names and words in common use to the products of his industry, in such a manner as to indicate their origin or particular manufacture, where such application will not intrench upon and will be in no way included in their use by the public. By doing so, the rights of no member of the community can be in any manner infringed, and no public inconvenience whatever can be occasioned by it. The public will still be left at full liberty to use such words or terms as they were used before; while for a special purpose a new office or purpose may be imposed upon them;" *Osgood* v. *Allen*, 1 Holmes, 185, in which Shepley, J., said that "words or devices may be adopted as trade marks, which are not original inventions of the one who adopts and uses them. Words in common use may be adopted, if at the time of adoption they were not used to designate the same or similar articles of production;" *Lea* v. *Wolff*, 15 Abb. Pr. N. S. 1; *Ex parte Palmer*, U. S. Pat. Comm. Decis. 1871, 289; *M'Lean* v. *Fleming*, 96 U. S. 245; *Smith* v. *Woodruff*, 48 Barb. 438; and *Ex parte Halliday Brothers*, 16 U. S. Pat. Gaz. 500.

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

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

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

(*k*) *Field* v. *Lewis*, Dig. 280; *Marcovitch* v. *Bramble, Wilkins & Co.*, Dig. 595 ("Vanity Fair" cigarettes); *Davis* v. *Kennedy*, 13 Grant Up. Can. Ch. 523 ("Pain-Killer" medicine); *Crawford* v. *Shattock*, 13 Grant Up. Can. Ch. 149 ("Imperial" soap); *Degraves* v. *Whiteman*, 5 V. L. R. Eq. 304 ("Cascade" ale); *Weston* v. *Hemmons*, 2 V. L. R. Eq. 121 ("Wizard" oil); *Kidd* v. *Johnson*, 100 U. S. 617 ("Magnolia" whiskey); *Faber* v. *Hovey*, Dig. 481 ("Star" pencils).

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" (*a*), in which advertisements no exclusive rights can be claimed, as was expressly decided by the Court of Appeal in *Cheavin* v. *Walker* (*b*), 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* (*c*), the use of the words "graduated, grooveless, drill-eyed, ground-down" needles was also accompanied by that of the maker's name, and this being obviously imitated by the defendant, the injunction was granted.

Words taken from the dead languages.

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

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" (*h*) was allowed to be a good trade mark, though the defendant was held not to have infringed; and "Tamar Indien" (*i*) was actually protected. In *In re Rotherham* (*k*), an Arabic word, used by way

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

(*b*) 5 Ch. D. 850. And see *Blackwell* v. *Crabb*, 36 L. J. Ch. 504; *S. T. Midgley & Sons, Ld.* v. *Morris & Cowdery*, 21 P. R. 314 ("Fair-wear or a free pair," as applied to boots); *Wertheimer* v. *Stewart, Cooper & Co.*, 23 P. R. 481, where a novel and peculiar scheme of advertising was copied by the defendants. Compare *Walter* v. *Ashton*, (1902) 2 Ch. 282; also *Lever* v. *Goodwin*, 4 P. R. 492.

(*c*) 18 Beav. 164.

(*d*) *Brahom* v. *Bustard*, 1 H. & M. 447.

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

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

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

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

(*i*) *Grillon* v. *Guénin*, W. N. 1877, p. 14. And see *Caruncho* v. *Stephenson*, 25 Sol. J. 929 ("Intimidad" cigars); *Holt* v. *Menendez*, 128 U. S. 182 ("La Favorita" flour); *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268 ("Chartreuse" liqueur).

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

of a pun, was held to be entitled to registration as a good trade mark, though the Commissioners of Patents had directed the registrar to the contrary.

Foreign words in their ordinary signification.

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

Gout v. *Aleploglu.*

Broadhurst v. *Barlow.*

In *Broadhurst* v. *Barlow* (*d*), the case was again a far more

(*a*) 6 Beav. 69; 5 Leg. Obs. 496.
(*b*) 5 Leg. Obs. 496.
(*c*) See *per* Sir G. Turner, L. J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Perks* v. *Hall & Co.*, W. N. 1881, p. 111.
(*d*) W. N. 1872, p. 212; and L. J.

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 (*a*). The defendants were discovered to be preparing Spanish shirting for export, similarly marked, except that there were five lines instead of four, and that an elephant was used in place of the lion. Wickens, V.-C., held that "though an elephant was used by the defendants, the three sentences in the same languages in the same order was an infringement of the plaintiffs' rights," and he therefore granted the injunction to restrain the use of the words in the three languages in the order used by the plaintiffs.

Conclusion.

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

Geographical names.

Under the head of "distinctive words" should be included trade marks consisting of geographical names. Prior to the Act of 1905 it was indispensable, if registration of such a name was desired, to prove user as a trade mark before August 13th, 1875, for such words were not allowed to be registered as new marks. This was so under the Act of 1875, because that Act did not allow any mere words to be registered as new marks (*c*); under

N. of C. 1872, p. 183. There have been numerous unreported cases with reference to cotton goods to the same effect.

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

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

(*c*) Trade Marks Act, 1875, § 10.

the Act of 1883, because the construction placed on the term "fancy word" was such as to exclude geographical names (*a*); under the Act of 1888, because such names were expressly excluded from registration as new marks (*b*). Under the Act of 1905 geographical names may be registered on a special application under sect. 9 (5) if the Board of Trade or the Court allows the application to proceed (*c*). But it seems that where a geographical name has been used *per se* as a trade mark before August 13th, 1875, and is not in common use, it may be recognised as a "special and distinctive" word (*d*). When geographical names are used as trade marks they are in that application to be understood, not as ascribing the goods to which they are affixed to any special section of the earth's surface, but as expressing the works at which, or the manufacturer by whom, those goods have been produced. So Wood, V.-C., in the "Anatolia" liquorice case (*e*), said that "the plaintiffs had established beyond all doubt the connection of their name with that mark, that was beyond dispute," and that "he could not treat the word as being otherwise than a designation mark, which the plaintiffs had caused to be attached to that particular article of liquorice which they so manufactured, and which they had a right to consider, in that qualified sense, property." Lord Westbury, C., in that case strongly confirmed the opinion of the Vice-Chancellor; and in the later case of *Wotherspoon* v. *Currie* (*f*), where

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

(*b*) Patents Act, 1888, § 10.

(*c*) *In re Apollinaris Brunnen*, (1907) 2 Ch. 178 ("Apollinaris"); *In re National Starch Co.*, (1908) 2 Ch. 698 ("Oswego"); *In re California Fig Syrup Co.*, 26 P. R. 846 ("California Syrup of Figs").

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

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

(*f*) L. R. 5 H. L. 508. See also *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217 ("Stone Ales"); *Huntley & Palmer* v. *Reading Biscuit Co.*, 10 P. R. 277 ("Reading" biscuits); *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710 ("Yorkshire Relish"); *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893 ("Hunyadi" water); *Bewlay & Co.* v. *Hughes*, 15 P. R. 290 ("Dindigul" cigars); *In re Clement & Cie.*, (1900) 1 Ch. 114 (Vin de "St. Raphael"); *Worcester Royal Porcelain Co., Ld.* v. *Locke & Co.*, 19 P. R. 479 ("Worcester" china). And see *Reddaway* v. *Banham*, (1896) A. C. 199;

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

Rules as to geographical names.

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

Rockingham Rail. Co. v. *Allen*, 12 Times L. R. 345; *Rose* v. *McLean Publishing Co.*, 24 Ont. App. R. 240.

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

(*b*) *Hine* v. *Lart*, 10 Jur. 106. And see *In re Clement & Cie.*, (1900) 1 Ch. 114 (Vin de "St. Raphael").

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

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

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

(*f*) *Radde* v. *Norman*, L. R. 14 Eq. 348. And see *Apollinaris Co.* v. *Edwards*, Seton, 6th ed., 626; and *Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 242 ("Apollinaris Water"); *Lea* v. *Millar*, Dig. 513 ("Worcestershire Sauce"); *Powell* v. *McNully*, Dig. 526, and *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54: (1897) A. C. 710 ("Yorkshire Relish"); *Siegert* v. *Findlater*, 7 Ch. D. 801 ("Angostura Bitters"); *Kinney* v. *Basch*, Dig. 542 ("St. James's Cigarettes"); *Wheeler* v. *Johnston*, 3 L. R. Ir. 284 ("Cromac Springs"); *Davis* v. *Tylor*, Jessel, M. R., April 24th, 1879 ("Ferndale" coal); *Lochgelly Co., Ld.* v. *Lumphinnans Iron Co.*, Ct. Sess. Cas. 4th Ser. VI. 482 ("Lochgelly" coal); *Blair* v. *Stock*, 52 L. T. N. S. 123 ("Strathmore" whiskey); *Grezier* v. *Autran*, 13 P. R. 1 ("Chartreuse" liqueur); *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893 ("Hunyadi" water); see *Wolff* v. *Nopitsch*, 18 P. R. 27; *Rey* v. *Lecouturier*, (1908) 2 Ch. 715.

(*g*) "Property in the word for all purposes cannot exist": *per* Lord Westbury, C., *McAndrew* v. *Bassett*, 4 De G. J. & S. 380. In *Watt* v. *O'Hanlon*, 4 P. R. 1, the words "Old Innishowen" were held to be descriptive of a particular quality of whiskey, and an injunction was refused. And see *Rugby*

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 (*a*). But by English law he cannot stamp that name on his goods in the character of a trade mark of his own. In *Seixo* v. *Provezende* (*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 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 appropriated (*g*), and that anyone who manufactures at a place

Portland Cement Co. v. *Rugby & Newbold Portland Cement Co.*, 8 P. R. 241; 9 P. R. 46; *Whitstable Oyster Fishery Co.* v. *Hayling Fisheries, Ld.*, 17 P. R. 461; 18 P. R. 434; *Elgin National Watch Co.* v. *Illinois Watch Case Co.*, 179 U. S. 665.

(*a*) Thus, in *Braham* v. *Beachim* (1), 7 Ch. D. 848, an injunction was only granted to restrain the defendants from describing their coal as "Radstock" until they had some justification for so describing it, and when that justification could be produced, no relief was granted against them. And so in *Free Fishers & Dredgers of Whitstable* v. *Elliott*, W. N. 1888, p. 27. But this course was not taken in *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217, *q. v.* See *Braham* v. *Beachim* (2), Dig. 633; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Bewlay & Co.* v. *Hughes*, 15 P. R. 290; *Grand Hotel Co. of Caledonia Springs, Ld.* v. *Wilson*, (1904) A. C. 103; *Van Zeller* v. *Mason, Cattley & Co.*, 25 P. R. 37; *Helidon Spa Water Co.* v. *Hamlyn Spa Water Co.*, 29 V. L. R. 182.

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

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

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."

Words disentitled to protection.

In addition to deceptive words, no other words, the use of which would be deemed disentitled to protection in a court of justice, can be registered (*a*). This prohibition excludes three classes of words, the first consisting of such as ascribe to the goods some characteristic which they do not possess (*b*), the second of such as are objectionable on the ground of irreverence or immorality (*c*), and the third of such as would cause confusion with the goods of another firm (*d*).

Letters and figures.

The provision inserted in favour of old marks in § 9 of the Trade Marks Act, 1905, replacing § 64 of the Patents Acts, 1883—1888, also includes "any special or distinctive letter, numeral (*e*), or combination of letters or numerals, used as a trade mark before August 13th, 1875." It will be observed that the wording of this part of the section differs considerably from that of the corresponding part of § 10 of the Registration Act, 1875, the object being to bring all old trade marks composed of letters, numerals, or combinations within the scope of the provisions for registration, an object which the original section had failed to achieve (*f*).

Letters.

Letters, generally in the form of initials, have, with or without additions, frequently been treated as trade marks. Among the earliest of these cases are *Motley* v. *Downman* (*g*) and *Millington* v. *Fox* (*h*); 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 (*i*). In *Crawshay* v. *Thompson* (*k*), "W. C." in an oval was employed, and infringement being alleged through the

(*a*) See T. M. Act, 1905, § 11, replacing Patents Acts, 1883—8, § 73.

(*b*) *E.g.*, the word "Worcester" as applied to American goods: *In re Royal Worcester Corset Co.*, 26 P. R. 185.

(*c*) *E.g.*, the words "Elijah's Manna" refused by the Board of Trade: *In re Postum Cereal Co.*, Nov. 12th, 1906.

(*d*) *E.g.*, "Fruit Salt" (*Eno* v. *Dunn*, 15 A. C. 252); "Motricine" (*In re Compagnie Industrielle des Petroles*, 24 P. R. 505); and see *In re Albert Baker & Co., Ld.*, 25 P. R. 513, at p. 525.

(*e*) In the earlier Acts the word was "figure." See *Ex parte Stephens*, 3 Ch. D. 659.

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

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

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

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

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

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

(*a*) 15 Ir. Ch. 75.
(*b*) 3 My. & Cr. 1.
(*c*) 3 My. & Cr. 338.
(*d*) *Hopkins* v. *Hitchcock*, 14 C. B. N. S. 65.
(*e*) *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Barrows* v. *Pelsall Coal & Iron Co.*, Dig. 530.
(*f*) *In re Barrows*, 5 Ch. D. 353.
(*g*) *Cartier* v. *Carlile*, 31 Beav. 292; *Cartier* v. *Westhead*, Dig. 199; *Cartier* v. *May*, Dig. 200.
(*h*) *Moet* v. *Clybouw*, Dig. 533; *Moet* v. *Pickering*, 8 Ch. D. 372.
(*i*) See *Ex parte Young*, Dig. 537 ("L. H. & S."); *Carver* v. *Bowker*, Dig. 581 ("R. H."); *Ransome* v. *Graham*, 51 L. J. Ch. 897 ("R. N."); *Bayer* v. *Connel* (2), 16 P. R. 157: *Aërated Bread Co*, *Ld.* v. *Aërated Bakeries* (*Manchester*), *Ld.* ("A. B. C."), Eady, J., Oct. 22nd, 1909; Neville, J., Nov. 20th, 1909; *Maréchal* v. *McColgan* ("G. B. D."), 18 P. R. 262; *Birmingham*

Conclusion.

In the result, while letters used as a trade mark for the first time since the Act of 1875 must, if sought to be registered under the Acts prior to that of 1905, have been combined with some distinctive feature (*a*), it seems clear that, if used as such before the Act of 1875, they would, even standing alone, have been entitled to protection, though probably not as against persons having them for their initials and using them without fraud (*b*). Now letters can be registered, if distinctive, without any special application to the Board of Trade or the Court, under § 9 (5) of the Act of 1905 (*c*). But this does not apply to cotton marks (*d*).

Single letters.

The Trade Marks Registration Act of 1875, § 10, only authorised the registration of letters by the use of the term "any special and distinctive combination of figures or letters"; and in *In re Mitchell* (1) (*e*), Hall, V.-C., felt himself compelled to hold that a single letter, however long and exclusively used by an applicant for registration, was not within the section, and was incapable of registration. Now, however, the wording of the present Act, as did that of the Patents Acts, 1883-8, permits in express terms the registration of a "letter" as an old mark, so that the difficulty is removed. And, further, the present Act permits its registration as a new mark. But in either case the letter will, of course, have to be proved to be special or distinctive. In America, the single letter "D" in a lozenge has been admitted to registration (*f*), notwithstanding the decision in *Ferguson* v. *Davol Mills* (*g*) with respect to the letter "K" enclosed in circular lines—a decision which appears to have been founded on the mistaken interpretation of the expressions used in *Amoskeag Manufacturing Co.* v. *Spear* (*h*), previously referred to. So in

Small Arms Co., Ld. v. *Webb & Co.*, 24 P. R. 27 ("B. S. A."); *In re Birmingham Small Arms Co., Ld.*, 24 P. R. 563; *A. Boake, Roberts & Co., Ld.* v. *Wayland* ("K. M. S."), 26 P. R. 251; *Provident Chemical Works* v. *Canada Chemical Co.*, 4 Ont. L. R. 545; *Doran* v. *Hogadore*, 11 Ont. L. R. 321; *Boudier* v. *Depatie*, 3 Dorion, 233 ("G. B. D."). See also *In re Brook*, 26 W. R. 791; *Candee* v. *Deere*, 54 Ill. 439; *Amoskeag Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Frank* v. *Sleeper*, 150 Mass. 583; *Frankau* v. *Pope*, 11 Cape Good Hope, 209.

(*a*) See *Chas. Bayer & Co.* v. *Strauss, Adler & Co.*, Cape Good Hope, 24 S. C. R. 27, a decision under a corresponding section in the Colonial Act.

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

(*c*) *E.g.*, "B. S. A.": *In re Birmingham Small Arms Co.*, 24 P. R. 563.

(*d*) See T. M. A. 1905, § 64 (10) (c).

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

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

(*g*) 2 Brews. 314.

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

New South Wales a single letter may be registered as a trade mark (*a*).

In *Rosenthal* v. *Reynolds* (*b*), where a trader registered as a new mark a device with initial letters added, but disclaimed the right to the exclusive use of the added matter, it was held by North, J., that a rival trader could not be restrained on motion from using the same initials in a similar position upon similar goods as being calculated to deceive, but this case has been questioned in Scotland by the Lord President in *Bayer* v. *Baird* (*c*), and the latter view is now expressly recognised by the Trade Marks Act, 1905, s. 15, which provides that no disclaimer upon the register shall affect any rights of the proprietor of the trade mark other than such as arise out of the registration of the mark. Disclaimers.

Numerals could only be registered under the former Acts as part of a new mark when combined with some essential particular (*d*); but provision was made for the registration of a single numeral or a combination of numerals, when it was used as an old mark and was special and distinctive, and in America a numeral may be registered as a trade mark (*e*). There does not, however, appear to be any case in which the English Courts have recognised a mere numeral or combination of numerals, standing alone, as sufficiently special and distinctive to constitute a trade mark (*f*); and in *Carver* v. *Bowker* (*g*), Little, V.-C. of Lancaster, held that that could not be; and in *Kinney* v. *Basch* (*h*) and *Burton* v. *Stratton* (*i*) the American Courts seem to have been of the same opinion. The use of numerals is, however, common in some trades, especially in the cotton trade, in which the usual combination marks generally include some arbitrary number or numbers termed "range numbers"; and there have been cases, in Numerals.

(*a*) *Hornsby* v. *Hudson*, 11 N. S. W. L. R. Eq. 148.

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

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

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

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

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

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

(*h*) Dig. 542.

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

England (*a*), America (*b*) and India (*c*), in which the imitation of numbers has been restrained. In such cases, however, either the numerals have been parts of combination marks (*d*), or they have been printed in a special and distinctive colour and configuration (*e*), or they have been selected in so arbitrary a manner that they conveyed no idea of number (*f*), or there has been an evident intention to commit a fraud (*g*); and it is apprehended that if a case were to occur in which the plaintiff's numeral was printed in an ordinary style, and the defendant could show any reason for desiring to use the number in the course of his business, which was not necessarily attributable to a wish to appropriate the plaintiff's custom, no relief would be granted against him (*h*). Now a numeral, if proved to be distinctive, can be registered under the present Act as an old or new mark, and the registrar has allowed such registration to be effected (*i*). For cotton marks, however, no registration is to give any exclusive right to the use of a numeral (*k*). Apart from registration it is apprehended that the use of any number so as to pass off A.'s goods for B.'s will be restrained.

Combinations of letters and figures.

A special and distinctive combination of letters or numerals may also be recognised as an old mark (*l*), and though the con-

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

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

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

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

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

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

(*g*) *Gillott* v. *Kettle*, 3 Duer, 624; *Gillott* v. *Esterbrook*, 48 N. Y. 374; *Boardman* v. *Meriden Britannia Co.*, 35 Conn. 402; *Kinney* v. *Basch*, Dig. 542.

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

(*i*) *E.g.*, the No. "40" has been registered by the Chillington Co. for hoes.

(*k*) T. M. A. 1905, § 64 (10) (c).

(*l*) Patents Acts, 1883—8, § 64; the words are not repeated, but may be implied in T. M. A. 1905, § 9 (5).

tention might possibly have been raised that this did not include a combination of one letter and one figure, as "A 1," or of several letters with one figure (*a*), or of one letter with several figures, the intention of the words is so obviously comprehensive that it does not appear likely that the contention could succeed. Under the present Act such a combination, if distinctive, can be registered even as a new mark.

Trade marks under § 91 of the P. & D. Act, 1907.

This completes the list of trade marks specifically embraced within § 64 of the Patents Acts, 1883—1888 (*b*); but it is desirable to refer here to § 91 of the Patents and Designs Act, 1907, replacing §§ 103 and 104 of the Act of 1883, by which subjects or citizens of foreign states or British possessions to which those sections have been made applicable by Order in Council are entitled to certain privileges in the registration of trade marks; and it is provided that "any trade mark the registration of which has been duly applied for in the country of origin may be registered" under the Act. This provision contains no reference to the definition section, but that section says explicitly that "a registrable trade mark must contain or consist of at least one" of the specified essential particulars, so that it would appear that a foreign trade mark, whether actually registered or tendered for registration in the foreign country or not, ought not to be registered here unless the requirements of § 9 are satisfied, and this is, in effect, the result of the decisions under the former Acts (*c*). The contrary view would inflict great hardship on British subjects, seeing that in many foreign countries registration is regarded as a mere record of claim, conferring no rights, with the result that almost anything tendered for registration is registered there, so that to admit such marks to the British register would often confer a monopoly in the most ordinary English words.

Combination marks.

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

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

(*b*) For the special provisions of the T. M. A. 1905, see *infra*.

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

(*d*) *Carter* v. *Bowker*, Dig. 581; *Robinson* v. *Finlay*, 9 Ch. D. 487: *Pinto* v. *Badman*, 8 P. R. 181, 191; *In re Bradley*, 9 P. R. 205; and see *In re Smokeless Powder Co.*, (1892) 1 Ch. 590; *In re Clement & Cie.*, (1900) 1 Ch. 114. Cf. *In re Bryant & May, Ld.*, 8 P. R. 69; *Pirie* v. *Goodall*, (1892) 1 Ch. 35.

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

Certification marks.

An official stamp or brand can never become an ordinary private trade mark (*d*). But certification marks are now capable of registration under sect. 62 of the Act of 1905.

Colour.

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

Price.

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

Shape of barrel, &c.

In America a particular shape of barrel, bottle, box, parcel, &c., containing goods is no trade mark for the goods contained in it (*k*); nor is the representation of such barrel, bottle, box, or parcel a trade mark for such goods (*l*), though the fraudulent imitation of it will be restrained (*m*). Nor is a mechanical convenience not used for purposes of identification, such as a strip of tobacco rolled round the mouthpiece of cigarettes (*n*),

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

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

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

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

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

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

(*g*) *In re Robinson*, 29 W. R. 31.

(*h*) T. M. A. 1905, § 10.

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

(*k*) *Moorman* v. *Hoge*, 2 Sawy. 78 (a barrel); *Harrington* v. *Libby*, 14 Bl. C. C. 128 (a collar box); *Sawyer* v. *Horn*, 4 Hughes, 239; *Ball* v. *Siegel*, 116 Ill. 137. See *In re Kane & Co.*, 9 U. S. Pat. Gaz. 105; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Hoyt* v. *Hoyt*, 143 Penn. St. 623; 24 Am. St. Rep. 575; *Babbit* v. *Brown*, 75 N. Y. Sup. Ct. 515; *Fischer* v. *Blank*, 138 N. Y. 244; *N. K. Fairbank Co.* v. *R. W. Bell Manufacturing Co.*, 77 Fed. Rep. 869; *Lafean* v. *Weeks*, 177 Pa. 412. Compare the English cases of *Ripley* v. *Griffith*, 19 P. R. 590; *J. B. Williams Co.* v. *H. Bronnley & Co.*, 26 P. R 481; *J. B. Williams Co.* v. *J. B. Newbery & Son, Ld.*, 26 P. R. 489.

(*l*) *Ex parte Halliday Brothers*, 16 U. S. Pat. Gaz. 500. Compare *James* v. *Parry*, L. R. 33 Ch. D. 392.

(*m*) *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392, *et passim*. See cases collected at p. 165.

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

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

Mark may be consumed with the article.

If a mark is in other respects a good trade mark, the fact that it is consumed with the article to which it is attached is no objection to its validity (*l*). Thus, a mark impressed on a cake of soap.

Any distinctive mark can be registered under T. M. A. 1905, § 9 (5).

Attention must lastly be directed to the special provisions of sect. 9 (5) of the Act of 1905, by which *any* distinctive mark can be registered, provided that if the mark consists of a name, signature, or word or words, other than such as are included in sect. 9 (1—4), the Board of Trade or the Court can be induced to make an order permitting the application to proceed. Under this provision many names and words have been permitted to proceed to registration on proof of their practical distinctiveness, notwithstanding that registration could not possibly have been allowed under any previous Act. In order for an application for the registration of a word to be brought within sub-sect. (5) of sect. 9 at all, the word must be one which is *primâ facie* descriptive in some degree, as otherwise it would come within sect. 9 (4) (*m*).

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

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

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

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

(*e*) *Davis* v. *Davis*, 27 Fed. Rep. 490.

(*f*) *Lorillard* v. *Pride*, 28 *ib.* 434.

(*g*) *Lorillard* v. *Wight*, 15 *ib.* 383.

(*h*) *Per* Johnson, J., in *Fairbanks* v. *Jacobus*, 14 Bl. C. C. 337.

(*i*) *Lowell Manufacturing Co.* v. *Larned*, Dig. 428.

(*k*) *Ex parte Straiton & Storm*, 18 U. S. Pat. Gaz. 923.

(*l*) *In re Gordon*, 12 *ib.* 517. And see *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 441.

(*m*) See notes to § 9 (5) of the Act in Appendix A.

CHAPTER III.

ACQUISITION, TRANSFER, AND DISCONTINUANCE OF TRADE MARKS.

1. *Acquisition.*

Who may acquire.

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

Aliens.

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

(*a*) See Interpretation Act, 1889, § 19, for definition of person, also § 1.
(*b*) 3 K. & J. 428.

mitted 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*).

Where no user in England.

When no goods bearing the foreign trade mark have been sold in this country, the trade mark can have acquired here no reputation for its foreign owner, so that it would appear doubtful whether the protection extended to foreign trade mark owners should be afforded in cases where there has been no user in this country, and the mark does not expressly state a foreign origin. In such a case the first person to use the mark in the United Kingdom is the first person to gain a reputation for it here (*b*). But foreign or colonial marks can be registered in England, and special provisions with regard to them are contained in § 91 of the Patents and Designs Act, 1907.

Sovereigns.

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

(*a*) See also *Collins Co.* v. *Brown*, 3 K. & J. 423; *Collins Co.* v. *Walker*, 7 W. R. 222; *Collins Co.* v. *Reeves*, 28 L. J. Ch. 56; *Howe* v. *McKernan*, 30 Beav. 547; *National Folding Box & Paper Co.* v. *National Folding Box Co.*, 43 W. R. 156; *La Société Anonyme des Anciens Etablissements* v. *Panhard et Levassor Motor Co., Ld.*, (1901) 2 Ch. 513; *Grant* v. *Levitt*, 18 P. R. 361; *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268. See also *Ebrahim Currim* v. *Essa Abba Sait*, 24 Madr. 163. So in Scotland the trade marks or names of American manufacturers have been protected: *Singer Manufacturing Co.* v. *Kimball & Morton*, Ct. Sess. Cas. 3rd Ser. XI. 267. The same rule obtains in America: *Taylor* v. *Carpenter*, 3 Story, 458; R. Cox, 14; Same v. Same, 2 Wood. & M. 1; R. Cox, 32; Same v. Same, 11 Paige, 292; R. Cox, 45; *Coats* v. *Holbrook*, 2 Sandf. Ch. 586; R. Cox, 20; *Lemoine* v. *Ganton*, 2 E. D. Smith, 343; R. Cox, 142; *Lacroix* v. *May*, 15 Fed. Rep. 236. And the infringement of a British trade mark has been criminally punished in Missouri: *State of Missouri* v. *Gibbs*, 56 Mo. 133. In India protection is afforded to British trade marks: *Orr-Ewing* v. *Chooneeloll Mullick*, Cor. 150; *Orr-Ewing* v. *Grant, Smith & Co.*, 2 Hyde, 185; and in Canada also the trade marks of aliens are protected: *Davis* v. *Kennedy*, 13 Grant, Up. Can. Ch. 523.

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

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

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

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

Certification marks. But an association or person who undertakes the examination of any goods in respect of origin, material, mode of manufacture, quality, accuracy, or other characteristic, and uses a mark upon or in connection with the goods to certify the result of such examination, can now register such certification mark, with the permission of the Board of Trade (*d*).

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

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

(*b*) *Hirsch* v. *Jonas*, 3 Ch. D. 584; *Heiniger* v. *Droz*, 25 Bom. 433; *Vadilal* v. *Burditt & Co.*, 30 Bom. 61; *Swift* v. *Peters*, 11 U. S. Pat Gaz. 1110.

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

(*d*) T. M. A. 1905. § 62.

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

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

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

Such marks would probably now be treated in this country as certification marks, and be registrable under sect. 62 of the Act.

Chartered accountants.

Where there were three bodies of professional accountants, incorporated respectively by Royal Charter as the Society of Accountants in Edinburgh, the Institute of Accountants in Glasgow, and the Society of Accountants in Aberdeen, and the members of these bodies habitually used the initials "C.A." (for "chartered accountant"), the members of another body of accountants, incorporated under the Companies Acts, and not by Royal Charter, as the Corporation of Accountants, Limited, were restrained by the Court of Session from using the same initials "C.A." (for "corporate accountant") (*a*). So in this country, where a society called the Society of Accountants and Auditors was incorporated in 1885 to provide a central organisation for accountants and auditors, and to elevate the status of the profession by establishing a system of examinations, and the members of the society had become known in business circles as incorporated accountants, and in 1905 a company called the London Association of Accountants, Limited, was incorporated with similar objects, an injunction was granted (1) against a member of the London association to restrain him from calling himself "incorporated accountant," either with or without the addition of the words "London Association of Accountants, Limited," and (2) against the association to restrain them from holding out that their members were entitled to use any such designation in such a way as to lead to the belief that their members were members of the older society (*b*).

Length of user formerly required.

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

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

(*b*) *Society of Accountants and Auditors* v. *Goodway*, 24 P. R. 159. But in *Society of Architects* v. *Kendrick*, W. N. 1910, p. 113, the defendant was not restrained from using the letters "M.S.A.," which were used by members of the plaintiff society.

(*c*) In *Hine* v. *Lart*, 10 Jur. 106, Shadwell, V.-C. of England, thought that the imitation by a defendant of a plaintiff's trade mark afforded a presumption of that mark having acquired a reputation. And see *Dixon* v. *Jackson*,

would raise a presumption that the defendant in adopting a similar mark had done so with the intention of availing himself of that reputation to divert to himself the plaintiff's custom, or at all events that the plaintiff ought to show that he had used the mark long enough to render it probable that such a reputation had been acquired (*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 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*). "As soon as a trade mark has been so applied in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes, to that extent, the exclusive property of the firm, and no one else has a right to copy it, or even to appropriate any part of it, if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the trade mark belongs" (*d*). There must, however, have been a real user (*e*).

Wrongful user gives no title.

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

Ct. Sess. Cas., 3rd Ser. 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* Hall, V.-C., in *Cope* v. *Evans*, L. R. 18 Eq. 138. And see *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hyde, 185. Compare the observations of Romer, L. J., in *Payton* v. *Snelling*, 17 P. R. 48, at pp. 54—5, with respect to get-up.

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

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

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

B.'s discontinuance, on account of the wrongful inception of his user (*a*).

Acquisition by common repute.

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

How property in a trade mark acquired.

Lord Westbury, C., said, in *McAndrew* v. *Bassett* (*d*), that an element of the right to property in a trade mark might be represented as being the fact of the article being in the market as a vendible article with that stamp or trade mark at the time when the defendants imitated it; and he went on: "The essential ingredients for constituting an infringement of that right probably would be found to be no other than these: first, that the mark has been applied by the plaintiffs properly (that is to say, that they have not copied any other person's mark, and that the mark does not involve any false representation) (*e*); secondly, that the article so marked is actually a vendible article in the market; and, thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description" (*f*). Intentional fraud is, however, clearly not necessary (*g*).

The mark must be on a vendible article.

From this judgment it follows, and it was expressly recognized in *Maxwell* v. *Hogg* (*h*), 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 (*i*). And in the last-mentioned case it was held that no

(*a*) *O'Rourke* v. *Central City Soap Co.*, 26 Fed. Rep. 576; *Parlett* v. *Guggenheimer*, 67 Md. 542. And see *In re Johnson*, 26 P. R. 195.

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

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

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

(*e*) Compare T. M. A. 1905, §§ 11, 19, and §§ 72, 73, 86 of the Patents Act, 1883. And see *In re Heaton*, 27 Ch. D. 570, and *O'Rourke* v. *Central City Soap Co.*, 26 Fed. Rep. 576: with which compare *Symonds* v. *Greene*, 28 Fed. Rep. 834.

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

(*g*) See chapter on "Infringement."

(*h*) L. R. 2 Ch. 307. And see *In re Verity*, 19 P. R. 56.

(*i*) And see *per* Willes, J., in *Lawson* v. *Bank of London*, 18 C. B. 84; also *Civil Service Supply Association* v. *Dean*, 13

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 (*a*). Moreover, user must be as of a trade mark, and not as of a mere descriptive term (*b*).

Acquisition by registration.

By the Trade Marks Registration Act, 1875, now repealed, a new manner of acquiring a right to a trade mark was introduced, and with respect to new marks substituted for the earlier method. By the Patents Acts, 1883—1888 (*c*), which took the place of the Act of 1875, no infringement of a registrable trade mark could be restrained or civilly punished, unless the mark had been registered. For five years after registration the fact of registration was to be *primâ facie* evidence of the right of the registered proprietor to the exclusive use of the trade mark (*d*), or, in other words, it qualified him for taking proceedings against infringers (*e*); after five years had expired from the date of registration, the fact of registration became conclusive evidence of his right to the mark (*f*) in any action brought by him (*g*), though the mark was still liable to removal from the register in proceedings taken for

Ch. D. 512; *In re Simpson, Davies & Sons*, Jessel, M. R., Jan. 12th, 1881; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *Rowley* v. *Houghton*, 2 Brews. 303; R. Cox, 486; *Bowman* v. *Floyd*, 85 Mass. 76; *McLean* v. *Fleming*, 96 U. S. 245; *St. Louis Piano Manufacturing Co.* v. *Merkel*, 1 Mo. App. 305; *Avery & Sons* v. *Meikle & Co.*, 27 U. S. Pat. Gaz. 1027; *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183; *Schneider* v. *Williams*, 44 N. J. (Eq.) 391; *Jaeger's, &c. Co.* v. *Le Boutillière*, 54 N. Y. Sup. Ct. 521; *McCall* v. *Theal*, 28 Grant, Up. Can. Ch. 48; *William Rogers Manufacturing Co.* v. *Rogers & Spurr Manufacturing Co.*, 11 Fed. Rep. 495; *Sheppard & Co.* v. *Stuart & Peterson*, 13 Phila. 117. As to the difficulty of acquiring a right of trade mark in a name applied to a patented article, see p. 72, *ante*.

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

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

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

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

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

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

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

that purpose, if it was registered wrongfully (*a*). Registration protected the trade mark in all sizes and in all colours, whether registered in colour (*b*) or not (*c*). In the case of trade marks in use before August 13th, 1875, application had to be made for registration, and if that was refused, a certificate of refusal could be obtained, which preserved to the applicant whatever rights he would have had independently of the Act (*d*).

Under T. M. A., 1905.

Under the Trade Marks Act, 1905, the distinction between marks which have been on the register for five years and those which have been registered for a shorter period is removed, and, subject to the provisions of § 41 and to any limitations and conditions entered on the register, registration gives an exclusive right (*e*). But this does not operate as against persons who have used the mark from an earlier date than the registered proprietor (*f*). After seven years from the date of registration, the original registration has to be taken as valid, unless it was obtained by fraud or unless the mark offends against § 11 of the Act (*f*). In order for a certificate of refusal to be obtained, it has now to be proved, not only that the mark is an old mark, but also that an application for registration has been made under the present Act and refused (*g*). Registration does not interfere with any *bonâ fide* user of a name, address, or description of goods (*h*). But a "passing off" action may still be brought in any suitable case (*i*).

Registration before user.

In several cases under the earlier Acts (*k*) doubts were expressed whether a trade mark could be registered before it had been used, the doubt being founded on the old principle that a right in a trade mark could only be acquired by its being attached to vendible goods in the market, until which was the case user by others could lead to no deception; but these doubts were set at rest by

(*a*) *In re Palmer* (1), 21 Ch. D. 47; S. C. (3), 24 *ib.* 504; *In re Leonard & Ellis*, 26 Ch. D. 288; *In re Lloyd & Sons*, 27 Ch. D. 646; *In re Wragg*, 29 Ch. D. 551; *Edwards* v. *Dennis*, 30 Ch. D. 454; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Spencer*, 54 L. T. N. S. 659; 3 P. R. 73; *In re Apollinaris Co.*, (1891) 2 Ch. 186; *In re Verity*, 19 P. R. 58. And so in Victoria: *Lewis* v. *Klapproth*, 11 V. L. R. 214; *Wolfe* v. *Alsop* (2), 12 V. L. R. (E.) 421; *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752.

(*b*) See § 67.

(*c*) *Nuthall* v. *Vining*, C. A. Jan. 21st, 1880.

(*d*) § 77.

(*e*) § 39.

(*f*) § 41.

(*g*) § 42.

(*h*) § 44.

(*i*) § 45.

(*k*) *In re Anderson*, 54 L. J. Ch. 1084; *Edwards* v. *Dennis*, 30 Ch. D. 354; *In re Lyndon*, 32 Ch. D. 109.

In re Hudson (*a*), where the Court of Appeal came to a clear decision that registration before user was allowable. It is now expressly provided that "a 'trade mark' shall mean a mark used or proposed to be used" (*b*). Where, however, it is proved that a mark which it is sought to register without prior user is not intended to be used by the applicant, but that the proposed registration is directed to a different end, registration will be refused (*c*). And if a mark has been registered, it can be removed from the register for non-user (*d*).

Goods classified.

A trade mark must be registered as belonging to particular goods or classes of goods (*e*), as arranged in the Third Schedule to the Rules; the class to which the goods belong being determined, in case of doubt, by the registrar (*f*). This requirement is no alteration of the rules of the pre-existing law, but is merely a statement of one of those rules as bearing upon registration under the Act. It had been already fully recognised that a particular trade mark could be protected as such only in connection with particular goods or classes of goods. Thus Lord Westbury, C., says, "Property in a trade mark is the right to the exclusive use of some mark, name, or symbol in connection with a particular manufacture or vendible commodity; consequently the use of the same mark in connection with a different article is not an infringement of such a right of property" (*g*). And again, "An iron-founder who uses a particular mark for his manufactures in iron could not restrain the use of the same mark when impressed upon cotton or woollen goods; for the property in a trade mark consists in the exclusive right to the use of that mark as applied to some particular manufacture" (*h*). 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,

(*a*) 32 Ch. D. 311.
(*b*) T. M. A., 1905, § 3.
(*c*) *In re Apollinaris Co.*, (1891) 2 Ch. 186, 234; *In re Batt & Co.*, (1898) 2 Ch. 432.
(*d*) § 37.
(*e*) § 8.
(*f*) Rule 5.
(*g*) *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137.
(*h*) *Hall* v. *Barrows*, 4 De G. J. & S. 150.

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 (*a*).

Limit of rights acquired by user.

As a result of the rule that a trade mark can only be acquired by user in respect of the goods on which it has been used, it has been decided that the use of a mark before August 13th, 1875, on certain descriptions of goods gives no right to have it registered in respect of other descriptions of goods, except as a new mark; so that although the mark may have been long used in respect of some goods, it will be refused registration in respect of different goods or classes of goods (though of a somewhat similar character), if it conflicts with another mark already registered therefor (*b*), or if for any reason it is not registrable as a new mark. If, however, it has been used for goods which, though not identical, were yet substantially the same as those for which it is claimed, registration may be allowed (*c*). And it has been held in America, with apparently good reason, that a mark which is descriptive, and therefore incapable of registration, when applied to one variety of goods, may be open to no such objection when applied to another variety of goods (*d*). Similarly, a mark may be in general use in connection with a variety of goods, and yet be perfectly good and distinctive in connection with particular goods on which there has been no such user. Thus it has been said in the Privy Council (*e*) that "the acquisition of an exclusive right to a mark or name in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of a totally different character, and such use by others can as little interfere with his acquisition of the right."

New user of old mark may be infringement.

As a consequence of the rule that user only gives a right to the mark in respect of the goods for which it has been used, the user of a mark in connection with goods different from those in respect

(*a*) *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518. And see *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 443; *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank, Ld.*, 9 *ib.* 560; *In re Lake & Elliott*, 20 P. R. 605.

(*b*) *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *Edwards* v. *Dennis*, 30 Ch. D. 454. And see *In re Braby & Co.*, 21 Ch. D. 223; also *In re Lyndon*, 32 Ch. D. 109, *per* Pearson, J.

(*c*) *Jackson & Co.* v. *Napper*, 35 Ch. D. 162. And compare *Collins Co.* v. *Ames & Sons*, 20 Bl. C. C. 542.

(*d*) *In re English*, U. S. Pat. Comm. Decis. 1870, 142; *In re Dick & Co.*, 9 U. S. Pat. Gaz. 538; *George* v. *Smith*. 52 Fed. Rep. 830.

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

of which it has previously been used, though of a somewhat similar character, may amount to an infringement of the rights of another person who has had an earlier user in respect of those different goods. Thus in *Moses* v. *Sargood* (*a*) it was held to be an infringement of the plaintiffs' rights for the defendants, who had previously only exported goods unmade up, and used their trade mark upon such goods, to begin to export and to use their trade mark upon ready-made clothing, having regard to the fact that the plaintiffs had been in the habit of exporting and using a somewhat similar trade mark upon made-up goods. And in *Upper Assam Tea Co.* v. *Herbert & Co.* (*b*) the proprietors of a mark which had been used and registered for coffee were restrained from applying it to tea, though in the same class, having regard to the fact that a similar mark had been used and registered for tea by another firm.

Wide registration, but limited user.

Again, though by § 75 of Patents Act, 1883, registration (*c*) of a trade mark was to be deemed to be equivalent to public use of the trade mark, it was held by the Court of Appeal that if a trader had registered a mark for a variety of goods, and had only used it in connection with some of them, he was not entitled to restrain the use by another trader of a somewhat similar mark in connection with the goods for which his mark had not been used (*d*). So also where a trade mark has been registered for a variety of goods, though it contains indications that it is only applicable to some of such goods, and it has only been used as registered in respect of such limited description of goods, it will not be protected in respect of other goods for which it is registered, even though the essential parts of it may have been used in respect of such other goods (*e*). Upon the same principle, where a mark registered for tobacco generally was used for cigars only, the consent of the owner to the registration of a similar mark by a rival trader for packet tobacco was held not to estop him from restraining an infringement of his mark in respect of cigars (*f*). In *Batt's case* (*g*) it was laid down by the Court of

(*a*) Dig. 636.

(*b*) 7 P. R. 183.

(*c*) Afterwards "application for registration," § 17 of the Patents Act, 1888.

(*d*) *Edwards* v. *Dennis*, 30 Ch. D. 454. Cf. *Phillips* v. *Ogden*, 12 P. R. 325.

(*e*) *Hargreave* v. *Freeman*, (1891) 3 Ch. 39.

(*f*) *Benedictus* v. *Sullivan, Powell & Co.*, 12 P. R. 25. See *Phillips* v. *Ogden*, 12 P. R. 325; *In re Banks & James*, 12 P. R. 333; *Freeman Bros.* v. *Sharpe Bros. & Co., Ld.*, 16 P. R. 205.

(*g*) (1898) 2 Ch. 432.

Appeal that a man could not properly register a trade mark for goods in which he did not deal or intend to deal, meaning by intending to deal, having at the time of registration some *definite and present intention to deal in certain* goods, or descriptions of goods, and not a mere general intention of extending his business at some future time to anything which he might think desirable. This decision was affirmed by the House of Lords (*a*), and it is now provided by sect. 3 of the Trade Marks Act, 1905, that a trade mark must be "used or proposed to be used." Numerous marks have been removed from the register, or limited to certain goods, for non-user (*b*), and a special provision with respect to this is now to be found in sect. 37 of the Act.

Mark only protected for goods for which registered.

Another question which has been raised, bearing on this point, is whether a mark which has been registered for some of the goods in a class can be protected for other goods in the class, as having been used in respect of them; and it appears that, having regard to § 8, by which a trade mark must be registered for particular goods or classes of goods, a trade mark which is registered only for particular goods in a class cannot be regarded as registered for other goods, whether in the same or a different class (*c*), or entitled to protection *quâ* trade mark in respect of such other goods; and in *Hart* v. *Colley* (*d*), North, J., decided in favour of the view here suggested. Passing off by means of imitation of an unregistered mark can, however, be restrained (*e*).

Provisions in the Act of 1905.

By § 19 the registration of a mark identical with, or nearly similar to a mark already registered, is prohibited, not generally, but in connection with such goods or description of goods as those in respect of which the mark already on the register is registered. And, with a view to the protection of the public, this prohibition is extended over a period of one year after the removal of the mark once registered from the register for non-payment of a

(*a*) (1899) A. C. 428.

(*b*) *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Apollinaris Co.*, (1891) 2 Ch. 186; *In re Valentine Extract Co., Ld.*, 18 P. R. 175; *In re Hart*, 19 P. R. 569; *In re Suter Hartmann & Rahtjen's Composition Co.*, 19 P. R. 42; *Anglo-Swiss Condensed Milk Co.* v. *Pearks, Gunston & Tee*, 20 P. R. 509; 21 P. R. 261; *In re Ralph*, 25 Ch. D. 194; *In re Ashton*, 48 W. R. 389; *In re Paine & Co., Ld.*, 25 P. R. 329.

(*c*) See *Goodfellow* v. *Prince*, 35 Ch. D. 9; and *Richards* v. *Butcher* (1), 7 P. R. 288.

(*d*) 44 Ch. D. 193.

(*e*) § 45. And see *Jay* v. *Ladler*, 40 Ch. D. 649.

renewal fee, during which period of one year the removed mark in question is to be still deemed to be registered, unless disuser for two years is proved (*a*).

Steps necessary to obtain registration: The application.

A person desirous of having his trade mark registered must send an application to the registrar in the prescribed form (*b*), together with the prescribed number (*c*) of representatives (*d*) of the trade mark. When a representation cannot be given in the usual manner, a specimen or copy of the trade mark may be supplied instead (*e*). The application must state the particular goods or classes of goods in connection with which the applicant desires the trade mark to be registered (*f*). Words in other than Roman characters must have a translation supplied, and a translation may be required by the registrar in all cases of foreign words (*g*). Applications for registration in classes 23, 24, or 25, are to be sent to the Manchester Branch Office (*h*).

When mark is an old mark.

When the mark is claimed as an old mark—*i.e.*, a mark used before the passing of the Trade Marks Registration Act, 1875 (August 13th, 1875)—the facts as to such prior user are to be stated (*i*), and it is essential that the mark should be claimed and registered precisely in the form in which it has been used (*k*). In such cases a statutory declaration verifying the old user is not prescribed by rule, but the registrar is entitled (*l*) to require, and frequently does require, such a declaration to be made by some one acquainted with the facts, and the existence of such a declaration on the files of the office is rather advantageous to the proprietor of the trade mark. If such a declaration is called for, the facts which it must verify are that the mark applied for (which it is well to exhibit to the declaration) has, in the exact form shown, and by itself, been used as a trade mark by the applicant (and his predecessor in business, if so) within the United

(*a*) § 31.

(*b*) Form T. M. No. 2 in the Second Schedule to the Rules; or Form T. M. No. 5 if the application is a special one under § 9 (5); or Form T. M. No. 6 if the mark is a certification mark under § 62. See § 12 (1) and Rules 17—28, 35, 42, 43. The Rules now in force are the Rules of 1906.

(*c*) See Rules 21, 22. Applications for the registration of a series of marks under § 26 are governed by Rule 27.

(*d*) For form of Additional Representation, see Form T. M. No. 3.

(*e*) See Rule 26.

(*f*) § 8.

(*g*) Rule 28.

(*h*) § 64 (3).

(*i*) Rule 20.

(*k*) See p. 62, *supra*, and note (*q*) to § 64 of the Patents Act, 1883. Immaterial additions or alterations do not affect the claim to old user: T. M. A. 1905, § 9 (5).

(*l*) Rule 20.

Kingdom, in respect of the exact goods for which registration is sought, continuously since a specified date before the 13th day of August, 1875, and that save the said mark there did not appear upon the said goods, or upon the packages, &c. containing them, any device, words, numerals, letters, or other particulars whatsoever.

When by firm.

When the application is made by a firm or partnership it may be signed by some one or more members of the firm or partnership, as the case may be (*a*).

When by a body corporate.

When the application is made by a body corporate, it may be signed by the secretary or other principal officer of such body corporate (*a*).

Manner of making application.

The application and all other communications between the applicant and the registrar may be made by or through a duly authorised agent (*b*), and may be sent by a prepaid letter through the post (*c*). If the applicant is abroad at the time of his application, and is not claiming under an international convention, he must give an address for service within the United Kingdom (*d*).

Advertisement, &c.

All that remains to be done by the applicant for registration, after sending in his application, is to await an acknowledgment of its receipt by the registrar (*e*), and then to furnish the registrar with the means of inserting in the official paper the necessary advertisement of the application (*f*).

Registration.

At the expiration of one month from the date of the advertisement, and subject to any proceedings which may have been taken, the registrar is, if satisfied of the applicant's title, to register the trade mark (*g*) as from the date of the application for registration (*h*), and upon registration is to issue a certificate thereof to the applicant with a reference to the advertisement (*i*).

In case of applicant's death.

If an applicant dies between application and registration the registration may be completed in the name of the successor to the goodwill of his business (*k*).

Special applications.

In case of special applications under sect. 9 (5), the course of procedure is laid down by rules 42-6. The application is made

(*a*) Rule 17.
(*b*) Rules 10, 17.
(*c*) Rule 7.
(*d*) Rule 9.
(*e*) Rule 19.
(*f*) Rules 47—50.
(*g*) Rules 63, 64.
(*h*) § 16.
(*i*) Rule 67. See Form O. No. 2.
(*k*) Rule 66.

to the registrar, who transmits it to the Board of Trade, with a report made by him thereon, a copy of which report is also sent to the applicant. Then a statement of case, setting out the grounds on which the application is supported, is submitted by the applicant to the Board of Trade, which usually calls for evidence in the form of statutory declarations. When this has been supplied the Board either passes the mark for registration at once, or gives the applicant an opportunity of being heard in support of it, or refers the application to the Court. If the application is allowed to proceed, by the Board of Trade or by the Court, as the case may be, the mark is advertised and the application proceeds in the usual way, and is open to opposition by any party interested (*a*).

Sheffield and Cotton marks.

Trade marks applied for in respect of goods within the Cutlers' Company's Acts (*b*) are governed by special rules (*c*); and so are marks on cotton goods, known as "cotton marks," which are dealt with at Manchester (*d*).

Series of marks.

Where it is desired to register a number of trade marks which, while resembling each other in the material particulars thereof (*e*), yet differ in respect of statements of the goods for which they are to be used, or of numbers, or price, or quality, or names of places, or other non-distinctive matter, or colour, they may be registered as a series in one registration, each of the marks being treated as separately registered, except for purposes of assignment and transmission, the marks being all associated (*f*).

Disclaimers.

Under the Patents Acts, additions which were common to the trade might be registered together with trade marks, but such common elements had to be disclaimed by the appellant (*g*). Disclaimers may still be called for, when needful (*h*), but under the present practice these are seldom required.

Alternative marks.

No provision is made in the British Acts for registering alternative marks, as has sometimes been done in America, *e.g.*, where

(*a*) *E.g.*, *In re Crosfield*, 26 P. R. 561, 837.

(*b*) See Appendix K., *infra*.

(*c*) § 63 and Rules 107—112.

(*d*) § 64 and Rules 113—120.

(*e*) See § 9 as to essential particulars.

(*f*) § 26 and Rule 27. This practice is not new. See note (*a*) to § 66 of the Patents Acts, and note (*c*) to § 72 of the same Acts, *infra*.

(*g*) § 74 of Patents Acts. The practice of requiring common parts of marks or additions to marks to be disclaimed was not new. See *per* Jessel, M. R., in *In re Kuhn & Co.*, 53 L. J. Ch. 238; and *per* Kay, J., in *In re Hayward & Sons*, 54 L. J. Ch. 1003; and *In re Davies*, before Chitty, J., March 9th, 1885. Also notes to § 74 of the Patents Acts, and note (*e*) to § 72, *infra*. And it exists in America also: *Harris Drug Store* v. *Stucky*, 46 Fed. Rep. 624.

(*h*) § 15.

a trade mark was registered as consisting either of the figure of a lion, or the word "lion," or both (*a*). But the registration of a series of marks has to some extent the same effect, and in any case there is seldom any difficulty in registering alternative marks separately. If the mark is used for various goods, and the description of the goods appears in the mark in differing words, it may be registered with the name of one variety of goods inserted, but with a statement that the description varies (*b*).

Colour.

Trade marks may now be registered in colour, and the effect of such registration is no longer to limit the protection conferred by registration to the one colour in which the registration has been effected, unless the applicant elects to limit his registration to one or more specified colours (*c*).

Registration by deposit.

Provision is made by the rules for registration by deposit in cases where such a course is rendered necessary by the nature of the trade mark (*d*).

Refusal to register.

Registration is by no means a necessary consequence of application. The registrar may refuse to grant registration if he thinks fit (*e*), or if he thinks the use of the mark would be contrary to law or morality (*f*), and he must refuse registration where the same or a similar mark is already registered for the same goods (*g*), or where a mark calculated to deceive is offered for registration (*h*). Where the refusal is made in the exercise of a discretion vested in the registrar, he is not to exercise that discretion adversely to the applicant until he has had an opportunity of being heard personally, or by his agent (*i*), and if he does, in his discretion, refuse to register, he must, on request, state his reasons in writing, and there is an appeal to the Board of Trade (*k*), who may, if they think fit, refer the appeal to the Court (*l*), or the applicant may elect to appeal direct to the Court (*k*).

When, as frequently happens, a mark tendered for registration is objected to by the registrar, *e.g.*, on the ground that it does not

(*a*) *In re Weaver*, 10 U. S. Pat. Gaz. 1. And see *Ex parte Roth Grocery Co.*, 62 *ib.* 315; *Ex parte Kinney*, 72 *ib.* 1349; *Ex parte Lazarus, Schwarz & Lipper*, 64 *ib.* 1396.

(*b*) Rule 16.

(*c*) § 10 of the T. M. A. 1905; also § 67 of the Patents Acts.

(*d*) See Rule 26.

(*e*) § 12 (2).

(*f*) § 11.

(*g*) § 19.

(*h*) § 11.

(*i*) § 53, and Rules 31, 32.

(*k*) § 12 (3). See Rules 121—127.

(*l*) § 59. "The Court" is the High

come within the definition of registrable marks in § 9, or on the ground that it too closely resembles some other mark or marks already on the register (*a*), the proper course for the applicant to take, if he desires to persevere with the application, is to apply for a hearing before the registrar, who may, and frequently does, waive all or some of the objections raised to the registration. The application for a hearing must be made within one month after the objection is notified (*b*). If an appeal against an adverse decision is contemplated, it is imperative on the applicant to take a hearing before the registrar, in order that the case may be fully considered before it goes further (*c*).

Opposition to application.

Even if the registrar is willing to treat the application as unobjectionable, any person (*d*) may give notice of opposition at the Patent Office within one month or such further time as the registrar may allow, after the advertisement, and the applicant is then allowed one month for sending in a counter-statement, or the registrar may extend the time. If no such counter-statement is sent, the application is deemed to be withdrawn; if it is sent, the person giving notice of opposition will be furnished with a copy of it, and the registrar will then hear the case (*e*): but his decision is to be subject to an appeal to the Court or, with the consent of the parties, to the Board of Trade (*f*), who may, if it appears expedient, refer the appeal to the Court (*g*).

Limited registration.

In deciding whether registration is to be allowed or not, the Court has frequently granted the application in such a limited

Court of Justice (§ 3), the Chancery Division being no longer specified; but recourse is still had to that Division. In the case of applications at the Manchester Office "the Court" is the Lancaster Palatine Chancery (§ 71). When the registration is objected to on the ground that the mark tendered for registration is not qualified for registration, "the first duty cast upon the Court is to ascertain whether some one or more than one of the essential particulars of a trade mark, as defined by the Act, is found to exist, so that the mark may be described with the one or more than one essential particular or particulars which distinguish it." *Per* Lord Cairns, C., in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 484.

(*a*) § 19.

(*b*) Rule 31.

(*c*) Rule 122.

(*d*) It need not be the proprietor of a registered mark. In *In re Simpson, Davies & Sons* (2), Jessel, M.R., Jan. 12th. 1881, the proprietors of a trade mark registered for coal in Class 4 successfully opposed the registration of a similar mark for railway waggons in Class 22, the opponents' coal being carried in and sold out of waggons.

(*e*) The practice in such cases is prescribed by § 14, and Rules 51—61.

(*f*) § 14 (5).

(*g*) § 59. As to the old practice, see *Ex parte Stephens*, 24 W. R. 819; *In re Salamon*, Dig. 569; *In re Johnston*, 43 L. T. N. S. 672; *In re Simpson, Davies & Sons*, 15 Ch. D. 525. As to costs, see *In re Brandreth*, 9 Ch. D. 618; *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278.

form as to obviate the risk of its clashing with the mark which is considered to be resembled (*a*). Thus registration has been granted in such a form as to be partial in respect of the mark itself which is registered (*b*), or of the goods for which it is registered (*c*), or of the manner of user in respect of colour (*d*), or otherwise (*e*), or of the locality within which it is to be used (*f*), or of the persons against whom it is to be protected (*g*). In case of honest concurrent user the Court has now power to permit registration, subject to such conditions and limitations, if any, as to mode or place of user or otherwise, as it may think it right to impose (*h*).

Conflicting claims.

Again, where each of several persons claims the same trade mark the registrar may refuse to register any of them until their rights have been determined by the Court, or have been settled by agreement in a manner approved by him or (on appeal) by the Board of Trade (*i*).

Alteration of registered trade mark.

Subsequently to registration, the registrar has power to amend the registration in specified respects, on request, but not so as to extend the rights given by the existing registration (*k*). If he refuses, an appeal may be brought (*l*).

No trust entered on register.

No notice of any trust, expressed, implied, or constructive, can be received by the registrar, or entered in the register (*m*).

(*a*) See as to the growth of this form of registration, *per* Jessel, M. R., in *In re Kuhn & Co*, 53 L. J. Ch. 238.

(*b*) See note (*e*) to § 72 of the Patents Acts, and *In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *In re Hoyle & Sons, Ld.* (2), Chitty, J., Nov. 30th, 1883; *In re Hayward & Sons*, 54 L. J. Ch. 1003; *In re Davies*, Chitty, J., March 9th, 1885.

(*c*) See note to § 65 of the Patents Acts, *infra*. The registration should always be so limited. See *Edwards* v. *Dennis*, 30 Ch. D. 454; *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454; *In re Butt & Co.*, (1898) 2 Ch. 432; (1899) A. C. 428; *In re Suter, Hartmann & Ruhtjen's Composition Co., Ld.*, 19 P. R. 42; *In re Hart*, 19 P. R. 569; *In re Paine & Co., Ld.*, 25 P. R. 329.

(*d*) *In re Johnson, Philpott & Co.*, North, J., Feb. 21st, 1888; *In re Jeffrey & Co.*, Stirling, J., May 18th, 1888.

(*e*) See note (*e*) to § 72 of the Patents Acts, *infra*; and *In re Whiteley*, 43 L. T. N. S. 627; *In re Sykes*, *ib.* 626; *In re Farina* (3), Dig. 654.

(*f*) *In re Rabone*, Dig. 643; *In re Keep Bros.*, 26 Ch. D. 187; *In re Mitchell & Co.*, 28 Ch. D. 666; *In re Johnson, Philpott & Co.*, North, J., Feb. 21st, 1888; *In re Steel*, Chitty, J., Jan. 12th, 1893. But registration with such limitations was later not regarded with favour: *In re Dewhurst & Sons, Ld.*, (1896) 2 Ch. 137.

(*g*) *Ex parte Hemming & Son*, Jessel, M. R., April 27th, 1881.

(*h*) § 21.

(*i*) § 20.

(*k*) § 32. And see *In re Dewhurst*, Jessel, M. R., June 11th, 1880, and cases collected in the note to sect. 92 of the Patents Acts.

(*l*) *E.g.*, *In re Carron Co.*, 27 P. R. 412.

(*m*) § 5. See *In re Mitchell & Co.* 28 Ch. D. 666; *In re De Otaduy*, L. J. N. of C. 1885, p. 155.

2. *Transfer.*

Assignment and transmission.

A trade mark is capable of being assigned during the life of its proprietor, and of being transmitted at his death; but it can be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered (*a*), and "an assignee has no exclusive right to a trade mark unless the assignment is of a business co-extensive with the trade mark as registered" (*b*). Associated marks can only be assigned and transmitted as a whole (*c*).

Trade mark cannot be severed from goodwill.

Even apart from the Act, there is no doubt that the trade mark cannot be severed from and used independently of the goodwill. If that could be done, the *indicium* of genuineness might only serve to mislead. This view was clearly put by Lord Westbury, C., in the *Leather Cloth Companies' case* (*d*), when he suggested the case of a firm of clothiers in Wiltshire, trading as A. B. & Co. for fifty years, and acquiring a great reputation for their broad cloth marked "A. B. & Co. Wilts"; then, he asked, supposing A. B. & Co. to discontinue their business, and to sell the right to use the mark to C. D. & Co., clothiers in Yorkshire, would the latter be protected in equity in their claim to the exclusive use of the mark? and he answered the question in the negative. So in *Pinto* v. *Badman* (*e*), Fry. L. J., said: "By the English law, can a trader, who has used a brand upon a particular article, and who continues to manufacture that article, alienate that brand to another person, so as to give the alienee any right whatever? It appears to me that upon first principles he can have no such right. The brand is an indication of origin, and if you transfer the indication of origin, without transferring the origin itself, you are transferring a right, if any right at all, to commit a

(*a*) § 22. See *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Ex parte Lawrence Bros.*, 44 L. T. N. S. 98; *In re Wellcome*, 32 Ch. D. 213; *In re Harness*, 17 P. R. 40; *In re Johnson*, 26 P. R. 195.

(*b*) *Per* Fry, L. J., in *Edwards* v. *Dennis*, 30 Ch. D. 454. If a trade mark registered in respect of an extensive class of goods is assigned together with the goodwill of a business concerned in some only of such goods, the assignment of the trade mark would apparently be valid *pro tanto*.

(*c*) § 27.

(*d*) 4 De G. J. & S. 137. And see *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *In re Harness*, 17 P. R. 40; *Ullmann* v. *Leuba*, 25 P. R. 673; *In re Johnson*, 26 P. R. 195; *Smith* v. *Fair*, 14 Ont. Rep. 729; *Gegg* v. *Bassett*, 3 Ont. L. R. 263; *In re Rowley & Pyne*, 9 V. L. R. (L.) 397.

(*e*) 8 P. R. 181, 194. And see *Thorneloe* v. *Hill*, (1894) 1 Ch. 569.

fraud upon the public, and such right is not recognised by the law of England."

Trade mark passes with goodwill.

To such an extent is a trade mark an accessory of the goodwill, that in *Shipwright* v. *Clement* (*a*), Malins, V.-C., held that in the sale of the latter the trade mark would pass, whether specially mentioned or not (*b*).

Same principle adopted in America.

In a case before the New York Court of Appeals (*c*), the expression was adopted that "a property in trade mark might be obtained by transfer from him who had made the primary acquisition, though it was essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trade mark had been attached." In another American case (*d*), the statement that the "property or right to a trade mark might pass by an assignment or by operation of law," was followed by this limitation, "to any one who took at the same time the right to manufacture or sell the particular merchandise to which the trade mark had been attached." And in the case of *Kidd* v. *Johnson* (*e*), the Supreme Court of the United States laid down that "as distinct property, separate from the article created by the original producer or manufacturer, a trade mark may not be the subject of sale. But when it is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred, either by contract or operation of law, to others, the right to the use of the trade mark may be lawfully transferred with it. Its subsequent use by the person to whom the establishment is transferred is considered as only indicating that the goods to which it is affixed are manufactured at the same place, and are of the same character, as those to which the mark was attached by its original designer."

Personal trade mark.

It is possible that occasionally, though rarely, a trade mark may be so framed as not to be merely a simple indication of quality, or a guide to the place of manufacture, but to have the effect of ascribing the article to which it is attached to the personal skill or supervision of an individual. In such a case the question arises

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

(*b*) And see *Churton* v. *Douglas*, Johns. 174; *In re Roger* (2), 12 P. R. 149; *Currie* v. *Currie*, 15 P. R. 339; *Mitchell* v. *Joshua Bros.*, 17 V. L. R. 736.

(*c*) *Congress & Empire Spring Co.* v. *High Rock Congress Spring Co*, 45 N. Y. 291; R. Cox, 599.

(*d*) *Dixon Crucible Co.* v. *Guggenheim*, 2 Brews. 321; R. Cox, 559.

(*e*) 100 U. S. 617.

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. A striking example of a case of this kind is that relating to the "Chartreuse" liqueur, which was manufactured by the monks of the Order under a jealously-guarded secret (*a*).

Not assignable.

The considerations which occur in cases where such a contention is set up are well stated by the Supreme Court of Massachusetts (*b*) in the following terms:—"There may, no doubt, be cases where the personal skill of an artist or artisan may so far enter into the value of a product that a trade mark bearing his name would, or at least might, imply that his personal work or supervision was employed in the manufacture; and in such cases it would be a fraud upon the public if the trade mark should be used by other persons, and for this reason such a trade mark would be held to be unassignable. . . . But, on the other hand, the usages of trade may be such that no such inference would naturally be drawn from the use of a trade mark which contains a person's name, and that all that purchasers would reasonably understand is that goods bearing the trade mark are of a certain standard, kind, or quality, or are made in a certain manner, or after a certain formula, by persons who are carrying on the same business that formerly was carried on by the person whose name is in the trade mark."

Name of former proprietor.

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

(*a*) *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268.

(*b*) *Hoxie* v. *Chaney*, 143 Mass. 592.

(*c*) *Sherwood* v. *Andrews*, 3 Amer. L. Reg. N. S. 588. And see *Partridge* v. *Menck*, 2 Sandf. Ch. 622; *Carmichel* v. *Latimer*, 11 R. I. 395; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Horton Manufacturing Co.* v. *Horton Manufacturing Co.*, 18 Fed. Rep. 816.

(*d*) *Bury* v. *Bedford*, 4 De G. J. & S. 352; *Churton* v. *Douglas*, Johns. 174;

When trade mark is personal.

It is, however, conceivable that a trade mark may be "so completely personal as of necessity to import that the goods sold under it have been manufactured by a particular individual" (*a*), as if it contains not only the name of the proprietor, but also some reference to his personal qualifications or supervision (*b*), or an allusion to particular workmen in his employ (*c*), in which case the mark will already become deceptive even while the business remains in the same hands, if the proprietor should cease to give his personal attention or to employ the same workmen. And in *Manhattan Medicine Co.* v. *Wood* (*d*), the Supreme Court of the United States said that "if one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public and attempting to pass upon them goods as possessing a quality and merit which another's skill has given to similar articles, and which his own manufacture does not possess in the estimation of purchasers. To put forth a statement, therefore, in the form of a circular or label attached to an article, that it is manufactured in a particular place by a person whose manufacture there had acquired a great reputation, when in fact it is manufactured by a different person at a different place, is a fraud upon the public which no Court of Equity will countenance (*e*).

No protection of deceptive marks.

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

The objection to the use of a trade mark become deceptive,

Hall v. *Barrows*, 4 De G. J. & S. 150; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. C. 523; *Massam* v. *J. W. Thorley's Cattle Food Co.* (2), 14 Ch. D. 748; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; and the American cases of *McLean* v. *Fleming*, 96 U. S. 245; *Filkins* v. *Blackman*, 13 Bl. C. C. 440; and many others; and the Canadian case of *Gaye* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306.

(*a*) *Per* Turner, L. J., in *Bury* v. *Bedford*, 4 De G. J. & S. 352.

(*b*) *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453; *Pinto* v. *Badman*, 8 P. R. 181, 187.

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

(*d*) 108 U. S. 218. See also *In re Hill*, 10 P. R. 113.

(*e*) See *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268.

(*f*) *Hall* v. *Barrows*, 4 De G. J. & S. 150. See, too, the Clothiers' case, suggested by him in the *Leather Cloth Co.'s case*, 4 De G. J. & S. 137; and the remarks of Lord Cranworth in that case in the House of Lords, 11 H. L. C. 523; and those of the L. JJ. in *Bury* v. *Bedford*, 4 De G. J. & S. 352. And see *Pinto* v. *Badman*, 8 P. R. 181, 187.

which, independently of statute, applied rather to the use of the mark assigned than to the power of assigning it (*a*), should now, as it appears, more properly apply to the registration of the assignee or transmittee, by which the latter acquires, at least, a *primâ facie* right to practise deceit. The Act, indeed, contains no provision expressly directed to meet a case of this kind, the 11th 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, and it may be expected that such elements in a trade mark as would impede this assignability will very rarely survive the original process of registration now necessary. An example of such survival may, however, be found in the "Chartreuse" case (*b*), in which the marks contained the emblems of the monastic order by which the liqueur was manufactured. It was, however. held in this case that the goodwill had not passed.

Trade marks generally transferable.

Subject only to the provision prohibiting the severance of a trade mark from the goodwill of the business with which it is connected, the trade mark is freely assignable. "The right to a trade mark may, in general, treating it as property, or an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser" (*c*). If this were not so, the value of a very valuable and important part of the goodwill of the business carried on by a person (*d*) would

(*a*) *Per* Turner, L. J., in *Bury* v. *Bedford*, 4 De G. J. & S. 352.

(*b*) *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268.

(*c*) *Per* Lord Cranworth in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523. And see *per* V.-C. Wood in *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; also *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306; and the clear and full statement by Daly, C. J., in *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1. It was said by Shipman, J., in the American case of *Filkins* v. *Blackman*, 13 Bl. C. C. 440, that "the right to the use of a trade mark cannot be so enjoyed by an assignee that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached;" and this agrees with the view taken in *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268, where the secret of manufacture had not been disclosed.

(*d*) Compare the observations of Wood, V.-C., as to the sale of a trade name, involving the same considerations, in *Churton* v. *Douglas*, Johns. 174; also *Shipwright* v. *Clements*, 19 W. R. 599.

be seriously diminished. And for a similar reason, and in the interest alike of the owner of a trade mark himself and of his assignee, the original owner will, subsequently to assignment, be restrained from the use of his former trade mark, equally with persons who have never had an interest in it (*a*). Nor after that event does he retain any power of conferring on another a right to use it (*b*). The same will be the case if the sale has been made, not by the owner himself, but by his trustee in bankruptcy (*c*). In the sale of a business a trade mark will pass to the purchaser without special mention (*d*).

Registration of subsequent proprietor.

When a person becomes entitled to a registered trade mark by assignment or transmission, or other operation of law, the way in which he has to obtain the registration of himself as the proprietor is by sending to the registrar a request to that effect, which may either be made by himself and his predecessor in title jointly, or by himself alone. In the former case a declaration in support of the application need only be furnished if required; in the latter case a statement of the particulars relating to the title must be supplied and, if this is satisfactory, the statement must be verified by declaration (*e*).

Transmission on bankruptcy.

On the owner of a trade mark becoming bankrupt, his trade mark is transmitted with his business to his representative in bankruptcy, and will, together with the business and goodwill, be dealt with by him (*f*); and it cannot be objected to an assignment of a trade mark by the trustee in bankruptcy of the owner that the goodwill has ceased because the trustee does not himself carry on the business (*g*). Similarly on the winding up of a company the trade mark will pass with the goodwill of the business to the liquidator (*h*). But, apart from the statutory provisions regu-

(*a*) *Bury* v. *Bedford*, 4 De G. J. & S. 352. And see *Churton* v. *Douglas*, Johns. 174.

(*b*) *Sohl* v. *Geisendorf*, 1 Wils. (Ind.) 60; *Filkins* v. *Blackman*, 13 Bl. C. C. 440.

(*c*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Melrose Drover* v. *Heddle*, Ct. Sess. Cas. 5th Ser. IV. 1120; *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1.

(*d*) *Shipwright* v. *Clements*, 19 W. R. 599; and see cases collected at p. 117, note (*b*).

(*e*) See Rules 76—81, and Forms T. M. Nos. 16—19.

(*f*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *Bury* v. *Bedford*, 4 De G. J. & S. 352; *Ex parte Young*, Dig. 537; *Rogers* v. *Taintor*, 97 Mass. 291; *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1; *Warren* v. *Warren Thread Co.*, 134 Mass. 247. And see *Longman* v. *Tripp*, 2 Bos. & P. N. R. 67; and *Ex parte Foss*, 2 De G. & J. 230.

(*g*) *Hammond* v. *Malcolm Brunker & Co.*, 9 P. R. 301.

(*h*) *In re Bolanachi's Empire Chocolate Co.*, 89 L. T. (J.) 273.

lating registration, it seems that a trade mark which owes its value to its owner's personal skill will not pass; and in the American case of *In re Swezey and Dart* (*a*) an insolvent trader was directed to be examined for the purpose of ascertaining whether the value of the mark was owing to such skill or to the general working of the factory. And it has been held in America that an assignee in bankruptcy cannot sell a trade secret or a trade mark of which the main feature is the bankrupt's name, so as to restrict the bankrupt's right to use it (*b*); and also that where one of the partners in a solvent firm becomes bankrupt, his interest in the name or trade mark of the firm cannot be sold, on the ground that his right is only to an undivided part of the mark, and that this is of no value apart from its connection with the goodwill (*c*).

Formation of partnership or joint-adventure.

Upon the formation of a partnership, one member of which is the proprietor of a trade mark, the trade mark will, in the absence of express provisions, or tacit acquiescence by the other partners in the previous owner's retention of his trade mark (*d*), pass into and become part of the partnership assets, for the trade mark is but an element of the trade (*e*). In that case it seems that the partner who has newly acquired an interest in the trade mark will be entitled to registration as joint proprietor with his partner who is already on the register. And where, without the actual formation of a partnership, three persons agreed to carry on business in common, one manufacturing, another acting as exporting agent, and the third as consignee and merchant at Rangoon, it was held on appeal that neither had an exclusive right to the combination of marks used on the goods which had passed through this course, though some of the marks in the combination had been used separately by one of the three before the arrangement between them was made; the decision being based on the fact that the combination as a whole had come to denote goods which had passed through the hands of all three (*f*). In the same way, where an Italian firm of fruit exporters and an English firm of merchants

(*a*) 62 How. Pr. 215.

(*b*) *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453; *Iowa Seed Co.* v. *Dorr*, 70 Iowa, 481.

(*c*) *Taylor* v. *Bemis*, 4 Biss. 406.

(*d*) *Kidd* v. *Johnson*, 100 U. S. 617, practically reversing *Kidd & Co.* v. *Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337. Cf. *Sauche* v. *Electrolibation Co.*, 60 *ib.* 1189.

(*e*) *Bury* v. *Bedford*, 4 De G. J. & S. 352, *per* Turner, L. J. And see *Condy* v. *Mitchell*, 37 L. T. N. S. 268; *ib.* 766.

(*f*) *Robinson* v. *Finlay*, 9 Ch. D. 487. Compare *In re Jones*, 53 L. T. N. S. 1.

entered into a joint adventure consisting in the export from Italy and the importation into and sale in England of Italian produce, and certain marks were used upon the fruits which had passed through this course of trade, the marks were ordered to be placed in the joint names (*a*).

Dissolution of partnership.

Upon the dissolution of a partnership among whose property a trade mark is included, whether that dissolution be brought about by the mutual agreement of the partners or by the death of one of them, the trade mark, as forming part of the partnership assets, and also on account of its close connection with the goodwill of the business, must be treated in the same way as the business and goodwill are treated, unless there is an express agreement for its discontinuance. If the business and goodwill are sold, the trade mark will be included in the sale (*b*); if the share of the retiring or deceased partner is, by arrangement, taken over by the continuing or surviving partner or partners, the retiring or deceased partner's interest in the trade mark passes with his share in the business, and must be included in the valuation of that share (*c*); if the partners merely agree to divide the partnership assets, so that each in effect carries on the same business, though they carry it on severally instead of jointly, then each is at liberty to use the mark as he did before (*d*). Thus, where H. B. Condy had brought into a partnership formed between himself and one Mitchell certain trade marks, which consisted in part of the former's name, it was held that after the dissolution, on which the goodwill became divisible in equal shares between the partners, Mitchell was equally entitled with Condy to continue to use the trade mark (*e*). And where certain partners sold to their co-partner their interest in the business premises and in certain personal

(*a*) *In re "Tarantella" Marks*, 27 P. R. 573.

(*b*) *Bradbury* v. *Dickens*, 27 Beav. 53; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Banks* v. *Gibson*, 34 Beav. 566.

(*c*) *Banks* v. *Gibson*, 34 Beav. 566; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Hazard* v. *Caswell*, 93 N. Y. 259; *Gaye* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306.

(*d*) *Banks* v. *Gibson*, 34 Beav. 566. And see *Bond* v. *Milbourn*, 20 W. R. 197; *Vadilal* v. *Burditt & Co.*, 30 Bom. 61; *Robinson* v. *Finlay*, 9 Ch. D. 487. In *In re Jones*, 53 L. T. N. S. 1, it was held that neither of the parties to a joint adventure was entitled, after this had come to an end, to use or register the joint trade marks as against the others.

(*e*) *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766. And see *Caswell* v. *Hazard*, 121 N. Y. 484; 18 Am. St. Rep. 333, which shows that in such cases neither partner may use his own name in such a way as to interfere with the use of the firm name by the other.

property connected with the business, but not their interest in the goodwill or trade mark, it was held in America that they retained their right to use the trade mark concurrently with their former co-partner (*a*).

Transmission on death.

Where a trade mark has been transmitted by the death of the registered proprietor, his legal personal representative will be recognised as having the title to the mark. So long since as the reign of King Geo. II., Lord Hardwicke, C., decided (*b*) 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 (*c*). Where letters of administration to a person who had adopted a trade mark for an article of his invention had not been taken out, it was held that his son could not, by merely continuing to make the article and use the trade mark after his father's death, acquire a right in the trade mark so as to be entitled to prevent another person from using it; still less could a purchaser of the son's business do so (*d*). But a rather different view of the results of such a proceeding has been taken in America (*e*).

Bequest of trade mark.

The proprietor of a trade mark may bequeath it according to pleasure (*f*), but this is subject to the provisions prohibiting its transmission otherwise than in connection with the goodwill of his business (*g*), and associated trade marks can only be transmitted as a whole (*h*).

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 (*i*), and concurrent rights may similarly arise by reason of concurrent substantial user by

(*a*) *Hower* v. *Dannenhoffer*, 82 N. Y. 499; *Hazard* v. *Caswell*, 93 N. Y. 259.

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

(*c*) Thus, in *Croft* v. *Day*, 7 Beav. 84: 28 Leg. Obs. 378, the successful plaintiffs were the executors of the former proprietor of the business and trade mark. See *In re Farina* (4), 44 L. T. N. S. 99; *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268.

(*d*) *Hovenden* v. *Lloyd*, 18 W. R. 1132. And see *Singleton* v. *Bolton*, 3 Doug. 293.

(*e*) *Pratt's Appeal*, 117 Penn. St. 401.

(*f*) *Dent* v. *Turpin*, 2 J. & H. 139; *M'Lean* v. *Fleming*, 96 U. S. 245.

(*g*) § 22.

(*h*) § 27.

(*i*) *Hine* v. *Lart*, 10 Jur. 106; *Dent* v. *Turpin*, 2 J. & H. 139; *Banks* v. *Gibson*, 34 Beav. 566. And see *Southorn* v. *Reynolds*, 12 L. T. N. S. 75; *In re Roger*, 12 P. R. 149; *Pratt's Appeal*, 117 Penn. St 401; *Waukesha Hygeia Springs Co.* v. *Hygeia Sparkling Distilled Water Co.*, 63 Fed. Rep. 438, 443; *Batchelor* v. *Thomson*, 86 Fed. Rep. 630.

more firms than one (*a*). In such a case Stirling, J., held that the registrar ought not to register each of the claimants (*b*), but the present Act provides that the registrar *may* refuse to register any of them until their rights have been determined by the Court or have been settled by agreement in a manner approved by him, or (on appeal) by the Board of Trade (*c*). Where one of the claimants has got on to the register, the registrar cannot register the other without the leave of the Court (*d*); neither can he do so where either application is opposed (*e*), until the opposition has been disposed of.

Position of subsequent proprietors.

By the 4th section of the Act of 1875, it was provided that every proprietor registered in respect of a trade mark subsequently to the first registered proprietor was, as respected his title to that trade mark, to stand in the same position as if his title were a continuation of the title of the first registered proprietor (*f*). This section is not re-enacted, but there appears to be no doubt that in ordinary cases the result will be the same as if it had been.

3. *Discontinuance.*

When trade mark protected.

In order for a trade mark to be entitled to protection as such, and apart from passing off, it is now necessary either that the trade mark shall be registered, or, if an old mark incapable of registration is in question, that registration under the present Act shall have been refused (*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, at the end of which time it may be renewed for a further period of fourteen years on payment of the prescribed fee, and in the same way from time to time for further periods of fourteen years. In default of renewal the mark is removed from the register (*h*). No difficulty need in ordinary cases be

(*a*) *In re Powell*, Dig. 589; *In re Jelley, Son, & Jones*, 51 L. J. Ch. 639; *Benbow* v. *Low* (4), 44 L. T. N. S. 875; *Day* v. *Neale*, Bacon, V.-C., May 24th, 1881; *In re Hodson, Tessier & Co.*, 86 L. T. N. S. 188; *Edge & Sons, Ld.* v. *Gallon*, 17 P. R. 557; *Goodwin* v. *Ivory Soap Co.*, 17 P. R. 689; 18 P. R. 389; *In re Lyle & Kinahan, Ld.*, 24 P. R. 249; and other cases on the Three Mark Rule. See note (*e*) to § 72 of Patents Acts, *infra*.

(*b*) *In re Ehrmann*, (1897) 2 Ch. 495.

(*c*) § 20.

(*d*) § 19.

(*e*) § 14.

(*f*) Compare *Horenden* v. *Lloyd*, 18 W. R. 1132.

(*g*) §§ 42, 45.

(*h*) §§ 28—31, Rules 68—75.

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

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 registrar, if he is satisfied that it is just so to do, on payment of an additional fee (*a*).

Must be a vendible article with trade mark attached.

Independently of registration no trade mark can exist as such unless there is actually existent in the market a vendible article to which the mark is in some way affixed or attached (*b*), though it is not necessary for the mark to be externally visible—*e.g.*, where it is placed on the bottom of a wine cork, which is not seen until the bottle is bought and opened (*c*).

Effect of registration.

The necessity of proving the existence of such an article so marked, in the case of registered marks, now no longer exists, since registration, if valid, gives an exclusive right (*d*). If, however, a mark somewhat similar to, but not identical with, the registered mark has been used on goods on which the registered mark has never been used, though they are covered by the registration, the Court may decline to recognise the probability of deception (*e*). But in the case of old marks, it seems that a certificate of refusal will not entitle the unsuccessful applicant to his remedy, if discontinuance can be established. The 34th Rule under the Act of 1875 contained provisions intended to prevent the continuance of restrictions which no longer served any useful purpose, and this was put into practice in the case of *In re Ralph* (*f*). It has not been re-enacted; but since, by § 22, a trade mark is determinable with the goodwill, the Court has jurisdiction under § 35 to remove from the register, on the

(*a*) § 30, Rule 73.

(*b*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Edwards* v. *Dennis*, 30 Ch. D. 454; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284. And see *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434. In *Cotton* v. *Gillard*, 44 L. J. Ch. 90, the plaintiffs had bought from the trustee in bankruptcy the interest of the bankrupt in a certain sauce and in his trade mark, but the sauce being compounded according to a secret which the trustee could not communicate, Sir G. Jessel, M. R., held that the plaintiffs could not use or protect the trade mark. In *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268, the defendants had in France obtained possession of the plaintiffs' business, but not of their trade secret, and it was held by the C. A. and H. L. that the defendants were not entitled to use the plaintiffs' trade marks or trade name in England.

(*c*) *Moët* v. *Pickering*, 8 Ch. D. 372; *Moët* v. *Clybouw*, Dig. 533. But see *In re Kinahan*, 10 P. R. 393.

(*d*) § 39.

(*e*) *Edwards* v. *Dennis*, 30 Ch. D. 451; *Hargreave* v. *Freeman*, (1891) 3 Ch. 39. Cf. *Phillips* v. *Ogden*, 12 P. R. 325: *Board & Son* v. *Huddart*, 21 P. R. 149; *Finlay* v. *Shamrock Co.*, 22 P. R. 301.

(*f*) 25 Ch. D. 194.

application of any person aggrieved, a trade mark which has lost its right to existence by the discontinuance of its proprietor's business (*a*). The continued registration of such a mark would be an "entry wrongly remaining on the register," and in many cases the provisions of § 37 would be directly applicable in addition.

Abandonment by disuse.

"That the right to use a trade mark may be lost by abandonment or disuse is too clear to need argument or the support of authority" (*b*), and the neglect on the part of the owner which is fatal to his exclusive right may either take the shape of cessation of user on his own part, or of the growth of a concurrent right in others. Each of these depends upon intention. "To constitute abandonment" (*i.e.*, by cessation of user) "an intention to abandon must be shown. Mere non-user of a trade mark can no more be said to constitute abandonment than the mere non-user of a right to foul a stream belonging to a mill as an easement can be said to constitute an abandonment of the easement" (*c*). But when the word claimed as a trade mark had not been used during a period of eleven years, and the sale of the article on which it had been used had been discontinued, and the labels on which it had appeared had been destroyed, it was held that there had been abandonment (*d*).

Abandonment by permitting infringements.

"The question of abandonment" (*i.e.*, by non-interference with infringers) "is one of intention, and the burden of establishing it lies upon the party who affirms it," said an American judge (*e*); and in the same way it was said in the High Court of Bengal (*f*) that the right of property in a trade mark acquired by user "would continue until it had been proved by evidence that the proprietor had abandoned it." In particular, where the trade mark owner is ignorant of infringements taking place, it will not be held that he has abandoned his rights because of his failure to enforce them,

(*a*) See *In re Batt*, (1898) 2 Ch. 432.

(*b*) *Per* Hughes, J., in *Blackwell* v. *Dibrell*, 14 U. S. Pat. Gaz. 633. See *Lavergne* v. *Hooper*, Ind. L. R. 8 Mad. 149.

(*c*) *Per* Chitty, J., in *Monson & Co.* v. *Boehm*, 26 Ch. D. 398. It would be evidence of intention to abandon if a trade mark owner were to break up his moulds and erase the mark from his books and lists: *Ib.* See *In re Hart*, 19 P. R. 569; *Louise & Co., Ld.* v. *Gainsborough*, 20 P. R. 61; *Blogg* v. *Anderson*, N. S. W. 21 L. R. Eq. 238; *Saxlehner* v. *Eisner*, 179 U. S. 19.

(*d*) *In re Grossmith*, 6 P. R. 180; *Daniel* v. *Whitehouse*, (1898) 1 Ch. 685, 689. And see *In re Ashton*, 48 W. R. 389.

(*e*) Morris, Comm., in *Julian* v. *Hoosier Drill Co.*, 75 Ind. 408, in which a delay of three years was held not to amount to abandonment.

(*f*) In *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hyde, 185, *per* Levinge, J.

that failure being due to his ignorance of what was going on (*a*); but it may be assumed that there must be reasonable diligence shown in the defence of his rights. In *Barlow & Jones, Limited* v. *Johnson & Co.* (*b*), it was held that the owners of a name and trade mark were not debarred from enforcing their rights because, after detecting a former infringement and obtaining the undertaking of the infringer to discontinue the infringement, they had allowed a small quantity of the infringing goods to be sold in the market under the imitated name and trade mark and had themselves purchased some of such goods.

Distinctive words become descriptive.

With respect to trade marks consisting of words which originally were distinctive, it has occasionally happened that they have ceased to denote the manufacture of any particular person, and have become simply descriptive of a certain article or a certain principle of manufacture. When that has become the case, such words have ceased to be capable of protection as trade marks, having become *publici juris*, open to the use of all (*c*). But a composite mark is not abandoned by isolated words or symbols contained in it being used by others (*d*); and it has been held in America that where a word has been properly appropriated as a trade mark, and has not been formally abandoned, use in a descriptive sense by persons other than the proprietor does not make it open to the public (*e*). Where a name, which it has been attempted to appropriate as a trade mark, has been in fact descriptive throughout, the case can hardly be said to have arisen of a discontinuance of a trade mark, inasmuch as it was invalid originally (*f*).

(*a*) *Weldon* v. *Dicks*, 10 Ch. D. 247; *In re Farina* (2), 27 W. R. 456; *Monson & Co.* v. *Boehm*, 26 Ch. D. 398; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 408; *Blogg* v. *Anderson*, N. S. W. 21 L. R. Eq. 238; *Saxlehner* v. *Eisner*, 179 U. S. 19.

(*b*) 7 P. R. 395, 408. And see *Ripley* v. *Bandey*, 14 P. R. 591, 944.

(*c*) *Per* Mellish, L. J., in *Ford* v. *Foster*, L. R. 7 Ch. 611. And see *Wheeler & Wilson Manufacturing Co.* v. *Shakespeare*, 39 L. J. Ch. 36; *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298; *Same* v. *Anderson*, W. N. 1883, p. 185; *Lazenby* v. *White*, 41 L. J. Ch 354; *In re Hyde & Co.*, 7 Ch. D. 724; *Browne* v. *Freeman*, W. N. 1873, p. 178; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395; *In re Wills*, (1893) 2 Ch. 262; *National Starch Manufacturing Co.* v. *Munn's Patent Maizena & Starch Co.*, (1894) A. C. 275; *In re Magnolia Metal Co.*, (1897) 2 Ch. 371; *Lea* v. *Millar*, Dig. 513; *Nera Stearine Co.* v. *Mourling*, 9 V. L. R. (E.) 98; *Wilson* v. *Lyman*, 25 Ont. App. R. 303; *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 138 U. S. 537.

(*d*) *Sohl* v. *Geisendorf*, 1 Wils. (Ind.) 60; *Filley* v. *Child*, 16 Bl. C. C. 376.

(*e*) *Celluloid Manufacturing Co.* v. *Cellonite Manufacturing Co.*, 32 Fed. Rep. 94; *Saxlehner* v. *Eisner*, 179 U. S. 19.

(*f*) *Young* v. *Macrae*, 9 Jur. N. S. 322; *Raggett* v. *Findlater*, L. R. 17 Eq. 29; *In re Horsburgh*, 53 L. J. Ch. 237; *Rou-*

The three-mark rule.

In this connection the "three-mark rule," as it is called, becomes of importance. This rule originated in the discovery—soon after the Act of 1875 came into operation—that the same or substantially the same trade mark was in many instances in use by more firms than one, generally carrying on business in different parts of the country; and in order to avoid injustice being done in such cases the rule was laid down by the Commissioners of Patents, and acted on in various decisions of the Courts, that where two or three firms could prove that they had used the same or substantially the same mark on the same or substantially the same goods, to a substantial extent, before the passing of the Act of 1875, each should be allowed to register; but that where the mark had been used by more than three firms it was common to the trade (*a*); and on this principle it has been held that various marks were common in different trades (*b*).

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

In *Braham* v. *Bustard* (*c*) and *Ford* v. *Foster* (*d*) 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 abandonment of the manufacturer's right in those appellations when used without the name, but that the manufacturer remained entitled to his essential mark (*e*). In *Lea* v. *Millar* (*f*) it was held that, in addition to the evidence as to the common use of the alleged trade mark by persons other than the plaintiff, the fact that the plaintiff had recently adopted a new label upon his goods, on the ground that his existing label did not afford sufficient protection, was a public abandonment of the latter. And in *Manhattan Medicine Co.* v. *Wood* (*g*). it was held that a trade mark had been lost by abandonment, a new form of bottle and label having been adopted in place of the old ones. An exclusive right to a mark may be lost by its owner using it habitually and exclusively upon goods which pass through other persons' hands so that they acquire a right in it (*h*); and it would appear that notwithstanding certain American decisions (*i*) to the effect

land v. *Breidenbach*, Dig. 386; *In re Leonard & Ellis*, 26 Ch. D. 288; *Bulloch, Lade & Co.* v. *Gray*, 19 Journ. of Jurisp. 218. And see p. 76, note (*b*), *supra*.

(*a*) See note (*e*) to § 72 of Patents Acts, *infra*.

(*b*) See notes to § 74 of Patents Acts, *infra*.

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

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

(*e*) And see *Worcester Royal Porcelain Co.* v. *Locke & Co.*, 19 P. R. 479; *Hornsby* v. *Hudson*, N. S. W. 11 L. R. Eq. 148.

(*f*) Dig. 513. (*g*) 108 U. S. 218.

(*h*) *Robinson* v. *Finlay*, 9 Ch. D. 487.

(*i*) *Pike Manufacturing Co.* v. *Cleveland Stone Co.*, 35 Fed. Rep. 896; *Sheppard & Co.* v. *Stuart & Peterson*, 13 Phila. 117.

that the habitual addition to a label of the name of the merchant to whom the goods are supplied does not deprive the owners of the label of their right to it, yet such a practice would cause the label to lose its distinctive character as indicating its proprietor's goods (*a*).

Abandonment by dismissal of suit.

In *Browne* v. *Freeman* (*b*) it was held that the plaintiff, having previously commenced a suit against an infringer of his trade mark, and then having got his bill dismissed with costs in consequence of being advised that his right was doubtful, had lost all rights in the trade mark. Under the registration system such a loss of trade mark can seldom occur, except in the case of unregistered though certified marks, since the rights of a proprietor of a registered mark are such that it is impossible to suppose that in many cases such a proprietor would resign his claims without a struggle. With respect to marks unregistered, or even uncertified, there is nothing in the Act to prevent proof of the imitation of such marks being given in support of an action for passing off.

Infringement of disused mark.

In *Lemoine* v. *Gamlon* (*c*), a plaintiff was allowed to recover nominal damages for the infringement by the defendant of a trade mark which the plaintiff had formerly used, but had ceased to use for a year. And it has also been held by the United States Commissioner of Patents that a person who, after having acquired certain rights in a trade mark, has discontinued his business for several years, recovers, on again commencing business, superior rights in the trade mark to those possessed by another person who has used the mark during the period of discontinuance (*d*).

Effect of removed mark.

By § 31, a registered trade mark removed from the register for non-renewal is, for the purpose of any application for registration during one year next after the date of such removal, to be deemed to be a trade mark already registered, unless it is shown to the satisfaction of the registrar that there had been no *bonâ fide* trade user of such trade mark during the two years immediately preceding such removal.

Cancellation.

By § 32, power is given to the registrar, upon a proper application, to cancel the entry of a trade mark on the register, and to strike out any goods or classes of goods (*e*).

(*a*) *Wood* v. *Lambert*, 32 Ch. D. 247.
(*b*) 12 W. R. 305. And see W. N. 1873, p. 178. See *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748.
(*c*) 2 E. D. Smith, 343; R. Cox, 142.
(*d*) *Armistead* v. *Blackwell*, 1 U. S. Pat. Gaz. 603.
(*e*) See notes to § 91 of Patents Acts; also Rules 90—92.

CHAPTER IV.

INFRINGEMENT.

Requisites for infringement.

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

Fact of infringement.

Assuming, then, the validity of the trade mark and the rights of the plaintiff therein to be established, the next and most important point for the plaintiff to prove is the fact of infringement. The plaintiff has no right to say that the defendant shall not sell exactly the same article, better or worse, or an article looking exactly like his own unpatented article; but he has a right to say that the defendant shall not sell such article in such a way as to steal (so to call it) the plaintiff's trade mark, and make purchasers believe that it is the manufacture to which that trade mark was originally applied (*c*). In the language of the Common Law, the defendant has no right to sell his goods "as and for" those of the plaintiff (*d*): and "where it is shown that a dealer has the imitated article in his store, and offers it for sale as genuine, even though but a single sale is proved (*e*), that is sufficient to sustain an

(*a*) As to this, see *Witthaus* v. *Braun*, 11 Md. 303; *Popham* v. *Wilcox*, 38 N. Y. Super. Ct. 274; *Weston* v. *Ketcham* (1), 39 *ib.* 54; and (2), 51 How. Pr. 455; and *Compagnie Laferme* v. *Hendricks*, Dig. 512.

(*b*) See *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; and *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137.

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

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

(*e*) See *Boudier* v. *Depatie*, 3 Dorion, 233. Cf. *Leahy* v. *Glover*, 10 P. R. 141, where it was held that an isolated case of misrepresentation by an employee who had acted without the employer's sanction and had since left his service, was not of itself enough to support an injunction against the employer. See *infra*, p. 209.

injunction against a continuance of the wrong, and an action for such injunction will not be defeated solely on the ground that on the day it is brought the dealer happens not to have any of the article on hand" (*a*).

Fraudulent intention.

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

First purchaser not deceived.

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

Early doctrine in Chancery.

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

(*a*) *Per* the New York Court of Appeals in *Low* v. *Hart*, 90 N. Y. 457.

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

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

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

(*e*) *Sykes* v. *Sykes*, 3 B. & Cr. 541: and see *Chappell* v. *Davidson*, 2 K. & J. 123; *Rose* v. *Loftus*, 47 L. J. Ch. 576: *Orr-Ewing & Co.* v. *Johnston & Co.*, 7 App. Cas. 219; *Balfour & Co.* v. *Kilburn & Co.*, 1 Hyde, 270.

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

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

Same injury caused, whether actual fraud or not.

It is, however, apparent that the seriousness of the injury inflicted on the manufacturer who has acquired a reputation for excellence in a particular class of goods, denoted by a special trade mark, by the offering for sale in the market of other goods, side by side with his, bearing the same mark, is not affected by the question whether such rival goods are made and marked by a person who is aware of the reputation of the original goods and desirous of attracting to himself some of the profits of that reputation, or by one who is actuated by no such motives, and is even ignorant of the prior use of the mark. As Lord Cairns, C., said, in a well-known case (*c*):—"A man may take the trade mark of another ignorantly, not knowing it was the trade mark of the other; or he may take it in the belief, mistaken but sincerely entertained, that in the manner in which he is taking it he is within the law, and doing nothing which the law forbids; or he may take it knowing it is the trade mark of his neighbour, and intending and desiring to injure his neighbour by so doing. But in all these cases it is the same act that is done, and in all these cases the injury to the plaintiff is just the same." "If a man has acquired legitimately a right to the property in an exclusive use of a name, it is of small account to him, should it be invaded, whether the invasion comes from a purpose to deceive, or from ignorance, or inadvertence, or an honest misconception of the relative rights of the parties; and the law ought not to permit, and will not permit, the continuance of the invasion, whatever may have been its origin" (*d*). The first maker is defrauded, even though his rival's conduct be not intentionally fraudulent.

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

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

(*c*) *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 391.

(*d*) *Per* Lord O'Hagan, *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 396; and see *per* Cotton, L.J., in *Singer Manufacturing Co.* v. *Loog* (3), 18 Ch. D. 412; *Bourne* v. *Swan & Edgar*, (1903) 1 Ch. 211.

Later doctrine in Chancery.

In 1838, Lord Cottenham, C., awarded a perpetual injunction in a case in which he rejected any imputation of intentional fraud (*a*), and this is not now necessary to obtain redress in equity. The principles in accordance with which relief will be given in equity were summed up as follows by Lord Westbury, C.:—"At Law the proper remedy is by action on the case for deceit, and proof of fraud on the part of the defendant is of the essence of the action; but this Court will act on the principle of protecting property alone, and it is not necessary for the injunction to prove fraud in the defendant, or that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by loss of custom is sufficient to support his title to relief. Neither will the plaintiff be deprived of remedy in Equity, even if it be shown by the defendant that all the persons who bought from him goods bearing the plaintiff's trade mark were well aware that they were not of the plaintiff's manufacture. If the goods were so supplied by the defendant for the purpose of being sold again in the market the injury to the plaintiff is sufficient. Again, it is not necessary for relief in Equity that proof should be given of persons having been actually deceived, and having bought goods with the defendant's mark, under the belief that they were of the manufacture of the plaintiff, provided that the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other" (*b*). It is not necessary for the plaintiff to show that the defendant knew whose trade mark his resembled (*c*), nor, in fact, to show that the defendant knew that his trade mark resembled any existing mark (*d*). "The action of the Court must depend upon the right of the plaintiff, and the injury done to that right. What the motive of the defendant may be, the Court has very imperfect means of knowing. If he was ignorant of the plaintiff's rights in the first instance, he is, as soon as he becomes acquainted with them and perseveres in infringing upon them, as

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

(*b*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185. That the rule of the Court of Chancery was as here stated, was recognised by the Court of Queen's Bench in *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537. And see *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639.

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

(*d*) *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Burgess* v. *Hills*, 26 Beav. 244; *Harrison* v. *Taylor*, 11 Jur. N. S. 408; *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hyde, 185. And see *per* Cotton, L. J., in *Singer Manufacturing Co.* v. *Loog* (3), 18 Ch. D. 412.

culpable as if he had originally known them" (*a*). 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" (*b*); and even if a person who has in his possession a quantity of goods bearing a spurious trade mark, is not intending to sell them or part with them, but to use them for his own consumption, relief may be granted against him (*c*).

Indulgence to innocent offender.

It was, however, suggested by Lord Romilly, M. R., that the Court would not require a person to completely change a trade mark which he had taken *bonâ fide*, and without any intention of deception. but which did in point of fact resemble the trade mark of another person, since the complete change of trade mark might be of serious consequence to the unintentional offender (*d*); and it seems that an innocent licensee from a registered proprietor who was deemed from his conduct to have previously made over his rights in his trade mark to another person in whose employment he was, is entitled to some consideration upon an interlocutory application (*e*). Again, it has been held in America that a plaintiff may lose by delay his right to an injunction against an innocent vendor of goods spuriously marked, whatever might be the case with regard to the guilty manufacturer (*f*).

Fraudulent intention, as affecting account, or damages.

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

(*a*) *Per* Lord Cairns, C., in *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376, 391. And see *In re Paine* (2). (1893) 2 Ch. 567.

(*b*) *Per* Stuart, V.-C., in *Clement* v. *Maddick*, 1 Giff. 98: *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434; *Rose* v. *Loftus*, 47 L. J. Ch. 576; *Upmann* v. *Forester*, 24 Ch. D. 231; *Couen* v. *Hulton*, 46 L. T. N. S. 897; *Lewis's* v. *Goodbody*, 67 L. T. N. S. 194; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54, (1897) A. C. 710; *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893. The same principle holds good in Ireland: *Bodega Co., Ld.* v *Owens*, 6 P. R. 236: in Scotland: *Crawford* v. *Bernard*, 11 P. R. 580: in the United States: *McLean* v. *Fleming*, 96 U. S. 245: and other cases; in India: *Balfour & Co.* v. *Kilburn & Co.*, 1 Hyde, 270; *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hydo, 185; *Graham & Co.* v. *Kerr, Dods & Co.*, 3 Beng. L. R. App. 4; and in Australia: *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216; *Hennessy* v. *Hogan*, 6 W. W. & A'B. Eq. 225.

(*c*) *Upmann* v. *Forester*, 24 Ch. D. 231. But see *Upmann* v. *Currey*, 29 Sol. J. 735; and *American Tobacco Co.* v. *Guest*, (1892) 1 Ch. 630.

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

(*e*) *Lewis's* v. *Goodbody*, 67 L. T. N. S. 194.

(*f*) *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29.

(*g*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578;

Note (*h*), see next page.

Fraudulent intention in case of delay.

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

In other respects.

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

Circumstances pointing to fraudulent intention.

In default of direct proof of fraudulent intention, there are various circumstances which may serve to point to the conclusion that such intention has existed; thus, the continuing to use a mark after objections raised (*d*); the exact imitation of peculiar characteristics (*e*); the addition to an existing mark of a feature taken from the plaintiff's mark (*f*); the imitating changes intro-

Slazenger v. *Spalding*, 27 P. R. 20. See *Rose* v. *Loftus*, 47 L. J. Ch. 576. As to the practice in the United States, see *Oakes* v. *Tonsmierre*, 49 Fed. Rep. 447.

(*b*) See *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639, where the principles applicable to an action for damages and an action for an injunction are discussed at length by Lopes, L. J.: *Faber* v. *D'Utassey*, 11 Abb. P. R. N. S. 399; *Weed* v. *Peterson*, 12 Abb. P. R. N. S. 178.

31 L. T. N. S. 285. And see *McLean* v. *Fleming*, 96 U. S. 245, where an injunction which had been granted was confirmed by the U. S. Supreme Court, notwithstanding a delay of many years.

(*b*) L. R. 14 Eq. 348. And see *Payton* v. *Snelling*, 17 P. R. 48, 56: affirmed, (1901) A. C. 308; *Chivers* v. *Chivers & Co.*, 17 P. R. 420, 427.

(*c*) L. R. 18 Eq. 138. And see *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Goodall* v. *Wilkinson*, 90 L. T. (Journal) 357; 91 *ib.* 29; *Wilson* v. *Mayfield*, L. J. N. of C. 1875, p. 51; *McLean* v. *Fleming*, 96 U. S. 245.

(*d*) See *per* Lord Cairns in *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; and *per* Cotton, L. J., and Lord Blackburn in *Singer Manufacturing Co.* v. *Loog* (3), 18 Ch. D. 395; 8 App. Cas. 15. Also *Williams* v. *Osborne*, 13 L. T. N. S. 498; *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434; *In re Paine* (2), (1893) 2 Ch. 567; *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236; *Walker* v. *Alley*, 13 Grant, Up. Can. Ch. 366: *Hoit* v. *Menendez*, 128 U. S. 182, and many other cases.

(*e*) *Hine* v. *Lart*, 10 Jur. 106; *County Chemical Co., Ld.* v. *Frankenburg*, 21 P. R. 722; *McLean* v. *Fleming*, 96 U. S. 245: *Davis* v. *Reid*, 17 Grant, Up. Can. Ch. 69.

(*f*) *Dixon* v. *Jackson*, Ct. of Sess. Cas. 3rd Ser. V. 326 (a star added); *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417.

duced by the plaintiff (*a*); or imperfections in the mode of marking so as to more closely resemble the plaintiff's mark (*b*); the removal, one by one, of points of difference, which originally served to distinguish the defendant's mark from the plaintiff's (*c*); the marking goods in obedience to an order to imitate the plaintiff's mark (*d*); the giving orders for that to be done (*e*); the adoption of an essential part of the plaintiff's mark, with a trifling and colourable alteration (*f*); the placing of a word resembling the plaintiff's word on the same spot on an article of the same shape (*g*); the statement that the sources from which both plaintiff and defendant derive their raw material, and after which the plaintiff's works are named, are the defendant's sole property (*h*); the use on the goods of the name of a town where the defendant does not carry on business but the plaintiff does (*i*); the copying directions for use (*k*); the giving thanks to the plaintiff's customers for past favours (*l*); the adoption of a similar type to the plaintiff's (*m*); the use of large type for a catch-word (*n*); or of small type for a word showing the article not to be the

(*a*) *Braham* v. *Beachim* (1), 7 Ch. D. 848; *Siegert* v. *Findlater*, *ib.* 801.

(*b*) *Hubbuck* v. *Brown*, 17 P. R. 638, 648.

(*c*) *Farina* v. *Cathery*, L. J. N. of C. 1867, p. 134; *Brown* v. *Mercer*, 37 N. Y. Super. Ct. 265; *Bell, Black & Co.* v. *Bell & Co.*, Dig. 514: *Reynolds & Son* v. *Walker*, 87 L. T. (Journal) 93.

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

(*e*) *Godillot* v. *Hazard*, 81 N. Y. 263; *Twentsche Stoom Bleekery Goor* v. *Ellinger & Co.*, 26 W. R. 70.

(*f*) *Radde* v. *Norman*, L. R. 14 Eq. 348 ("Leopoldsalt" for "Leopoldshall"); *Derby Photographic Dry Plate Co.* v. *Pollard, Graham & Co.*, 2 Times L. R. 276 ("Derwent" for "Derby"); *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434; *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217 (a T for a cross); *Davis* v. *Reid*, 17 Graut, Up. Can. Ch. 69; *Balfour & Co.* v. *Kilburn & Co.*, 1 Hyde, 270: and many other cases.

(*g*) *Slazenger & Sons* v. *Feltham & Co.*, 6 P. R. 531; *Munday* v. *Carey*, 22 P. R. 273; *Doren* v. *Hogadore*, 11 Ont. L. R. 318; *R.* v. *Autier*, 6 Q. O. R. (Q. B.) 146; *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, 32 Can. Sup. Ct. 315.

(*h*) *Wheeler* v. *Johnston*, 3 L. R. Ir. 284.

(*i*) *Anheuser Busch Brewing Association* v. *Piza*, 23 Bl. C. C. 245; *Southern White Lead Co.* v. *Carey*, 25 Fed. Rep. 125.

(*k*) *Franks* v. *Weaver*, 10 Beav. 297; *Selon* v. *Senate*, Dig. 18; *Yonatt* v. *Wayard*, 1 Jac. & W. 394: *Blofeld* v. *Payne*, 4 B. & Ad. 410. And see *Van Oppen & Co., Ld.* v. *Van Oppen*, 20 P. R. 617.

(*l*) *Mogford* v. *Courtenay*, 45 L. T. N. S. 303; *Walker* v. *Alley*, 13 Grant, Up. Can. Ch. 366.

(*m*) *Weingarten* v. *Bayer*, 22 P. R. 341: *India Rubber Comb Co.* v. *Rubber Comb & Jewellery Co.*, 45 N. Y. Super. Ct. 258; *Potter* v. *McPherson*, 28 N. Y. Sup. Ct. 559.

(*n*) *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Metzler* v. *Wood*, 8 Ch. D. 606; *Dence* v. *Mason* (1), Dig. 534: *Otard, Dupuy & Co.* v. *Otard de Montebello Cognac Co.*, 9 Times L. R. 295; 10 *ib.* 67: *Bayer* v. *Baird*, 15 P. R. 615: *Worcester Royal Porcelain Co., Ld.* v. *Locke & Co.*, 19 P. R. 479; *Reddaway* v. *Frictionless Engine Packing Co., Ld.*, 19 P. R. 505; *Singer Mfg. Co.* v. *British Empire Mfg. Co., Ld.*, 20 P. R. 313; *Foot* v. *Lea*, 13 Ir. Eq. 484.

original (*a*); the imitation of numbers (*b*) or initials (*c*) used by the plaintiff; the imitation of the barrels (*d*), or bottles (*e*), containing the plaintiff's article; the use of emblems specially indicative of the plaintiff (*f*); the buying up and using the plaintiff's old bottles (*g*); the pasting of a slip containing the plaintiff's name on the defendant's bottles (*h*); the use by the defendant of a name not his own (*i*), possibly under the authority of some person who bore the same name as the plaintiff (*k*); 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 (*l*); the addition of "and Co." after the name (*m*); the alteration of a name acquired by purchase with the goodwill of a business, so as to assimilate it to the name of another firm carrying on a similar business (*n*); the removal into the plaintiff's neighbourhood (*o*); the adoption of a name of a manufactory similar to that used by

(*a*) *Day* v. *Banning*, C. P. Coop. 489; *Glenny* v. *Smith*, 2 Dr. & Sm. 476; *Hookham* v. *Pottage*, L. R. 8 Ch. 91; *Robineau* v. *Charbonnel*, W. N. 1876, p. 160; *Dence* v. *Mason* (1), Dig. 534; 41 L. T. N. S. 573; *Singer Manufacturing Co.* v. *Spence*, 10 P. R. 293, 306; *Reddaway* v. *Frictionless Engine Packing Co., Ld.*, 19 P. R. 505; *Barberry's* v. *Raper & Pulleyn*, 23 P. R. 122; *Chubb* v. *Priest*, 1 L. T. 142; *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216.

(*b*) *Humphreys' Specific Homœopathic Medicine Co.* v. *Wenz*, 14 Fed. Rep. 250.

(*c*) *Bayer* v. *Baird*, 15 P. R. 615; *Bayer* v. *Connell* (2), 16 *ib.* 157.

(*d*) *Moorman* v. *Hoge*, 2 Sawy. 78; *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392.

(*e*) *Henry* v. *Price*, 1 Leg. Obs. 364; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Day* v. *Riley*, 17 P. R. 517; *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268; *Congress Co.* v. *High Rock Co.*, 45 N. Y. 291; *Wilder* v. *Wilder*, Dig. 372; *Wolfe* v. *Hart*, 4 V. L. R. Eq. 125; *Fullwood* v. *Fullwood* (1), W. N. 1873, pp. 93, 185; *Grezier* v. *Autran*, 13 P. R. 1.

(*f*) *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268.

(*g*) *Rose* v. *Henley*, Dig. 551; *Allen* v. *Richards*, 26 Sol. J. 658; *Hostetter* v. *Anderson*, 1 V. R. Eq. 7.

(*h*) *Cusenier* v. *Gaiety Bars and Restaurant Co., Ld.*, 19 P. R. 357.

(*i*) *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Barber* v. *Manico*, 10 P. R. 93; *Holloway* v. *Cleat*, 20 P. R. 525.

(*k*) *Morrall* v. *Hessin*, 19 P. R. 557; 20 P. R. 429; *Holloway* v. *Cleat*, 20 P. R. 525; *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450; 12 Amer. Rep. 401; *Perks* v. *Hall & Co.*, W. N. 1881, p. 111; *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215; *Edge* v. *Harrison*, 8 P. R. 74; and see cases at p. 291, note (*d*).

(*l*) *Croft* v. *Day*, 7 Beav. 84 (Day & Martin); *Moët* v. *Clybaux*, Dig. 533 (M. & C.). And see *Schweitzer* v. *Atkins*, 37 L. J. Ch. 817; *Hallett* v. *Cumston*, 110 Mass. 29; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888; *Rendle* v. *Rendle & Co.*, 63 L. T. N. S. 94; *Edge* v. *Harrison*, 8 P. R. 740.

(*m*) *Churton* v. *Douglas*, Johns. 174; *Fullwood* v. *Fullwood* (1), W. N. 1873, pp. 93, 185; *Holt* v. *Smith*, 4 Times L. R. 329; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888; *Van Oppen & Co., Ld.* v. *Van Oppen*, 20 P. R. 617; see *Joseph Rodgers & Sons, Ld.* v. *Simpson*, 23 P. R. 297.

(*n*) *Holt* v. *Smith*, 4 Times L. R. 329. And see *National Folding Box and Paper Co.* v. *National Folding Box Co.*, 43 W. R. 156.

(*o*) *Lee* v. *Haley*, L. R. 5 Ch. 155; *Fullwood* v. *Fullwood* (1), W. N. 1873, pp. 93, 185.

another, and placing it on goods, but keeping it out of the Directory (*a*); the making an improper use of the defendant's relationship to the plaintiff (*b*); the claiming untruly to be the sole proprietor (*c*); the making an unfair reference to a former partnership (*c*); the making an intentional misstatement as to the date of the commencement of a business (*d*), or as to prizes gained at an exhibition (*e*); the false pretence of an appointment as purveyor to a royal personage (*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*). So, again, if the defendant has ventured to display at a public exhibition goods bearing the mark to which exception is afterwards taken (*g*); or if he has truly stated the connection between himself and the original adopter of the trade mark (*h*); or if, when using bottles moulded with the plaintiff's name, which have come into his possession without fraud, he places his own labels on the bottles in place of the plaintiff's (*i*).

(*a*) *Rodgers* v. *Rodgers*, 31 L. T. N. S. 285.

(*b*) *Gouraud* v. *Trust*, 10 N. Y. Sup. Ct. 627. And see *Otard Dupuy & Co.* v. *Otard de Montebello Cognac Co.*, 9 Times, L. R. 295; 10 *ib.* 67.

(*c*) *Wolfe* v. *Alsop*, 10 V. L. R. (E.) 41.

(*d*) *Fullwood* v. *Fullwood* (2), 9 Ch. D. 176; *Blackwell* v. *Armistead*, 5 Amer. L. T. 85.

(*e*) *Cave* v. *Myers*, Dig. 304.

(*f*) *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 444; so, too, in *Chavarin* v. *Walker*, 5 Ch. D. 850, where the goods were stated to be manufactured by the defendants. And see *Beard* v. *Turner*, 13 L. T. N. S. 746; *Baggett* v. *Findlater*, L. R. 17 Eq. 29; *Singer Manufacturing Co.* v. *Loog* (3), 18 Ch. D. 395; *Packham & Co.* v. *Sturgess & Co.*, 15 P. R. 669; *Parsons* v. *Gillespie*, 17 N. S. W. Rep. Eq.) 227; (1898) A. C. 239. But compare *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; *Perry* v. *Truefitt*, 6 Beav. 66; *Braham* v. *Bustard*, 1 H. & M. 447; *Ford* v. *Foster*, L. R. 7 Ch. 611; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Reuhardt* v. *Spalding*, 49 L. J. Ch. 57; *Henderson* v. *Jorss*, Dig. 198; *Hubbuck* v. *Brown*, 17 P. R. 148, 638; *Cooper* v. *Macianghlan*, 18 P. R. 380; 19 P. R. 27; *Schweppes, Ld.* v. *Gibbens*, 22 P. R. 113, 601; *King* v. *Gillard*, 22 P. R. 327; *Singer Manufacturing Co.* v. *Kimball & Morton*, Ct. Sess. Cas., 3rd ser. XI. 267; *Lea* v. *Wolff*, 46 How. Pr. 157; *Field* v. *Lewis*, Dig. 280; *Rose* v. *Loftus*, 47 L. J. Ch. 576; *Eno* v. *Stephens*, Dig. 609; *Knowlan* v. *Bolton*, 15 Ir. Ch. 75; *Whitney* v. *Huckling*, 5 Grant, Up. Can. Ch. 605; *Lewis* v. *Klapproth*, 11 Viet. L. R. 214; *Wilson* v. *Lyman*, 25 Ont. App. R. 303.

(*g*) *Beard* v. *Turner*, 13 L. T. N. S. 746.

(*h*) *Emerson* v. *Badger*, 101 Mass. 82; *Gilman* v. *Hunnewell*, 122 *ib.* 139.

(*i*) *Rose* v. *Loftus*, 47 L. J. Ch. 576;

Where mark registered, infringement must be of mark as registered.

When infringement of a registered trade mark is in question, the point is, not whether there has been infringement of the mark which the plaintiff has used in his business, but whether there has been infringement of the mark which he has actually registered. Thus, Jessel, M. R., said, in *Ellis & Sons* v. *Ruthin Soda Water Co.* (*a*), "As I understand the Trade Marks Act, if you come for trade mark and not for actual fraud, you can only sue in respect of what you had registered as a trade mark." And in considering whether there has been infringement of the registered mark, it is necessary to see whether the essential particular in that registered mark has been imitated. Thus it was held by Jessel, M. R., in *In re Horsburgh* (*b*), that there was no conflict between two marks which combined substantially the same descriptive word with different devices, since the essential particulars, the devices, being different, it was immaterial that the marks resembled each other in a non-essential feature. If the registered trade mark has not been infringed, a passing-off action may still succeed on grounds apart from the registration.

Burden of proof.

When a defendant has not used the registered mark, but something considered to be similar to it, the plaintiff has to satisfy the Court that the use of this is calculated to deceive (*c*), but when the defendant has taken the material and essential part of the plaintiff's trade mark, the burden is upon the defendant to disprove the probability of deception, not upon the plaintiff to prove it (*d*).

Infringement of names as old marks.

With respect to trade marks used before the passing of the Trade Marks Registration Act, 1875, and consisting of a name printed or stamped in ordinary characters, which might be the case independently of the Act, and which may still be protected as trade marks if registered as old marks (*e*), or under the special provisions of § 9 (5) of the Trade Marks Act, 1905, it has been

Barrett v. *Gomm*, 74 L. T. (Journal) 388; *Barrett* v. *White*, North, J., May 12th, 1883; *Woolley & Son* v. *Morrison*, 21 P. R. 63: *Donohue* v. *Cherry*, 26 P. R. 545.

(*a*) Jessel, M. R., Nov. 21st, 1879. And see *Nuthall* v. *Vining*, C. A., Jan. 21st, 1880; *Lamplough* v. *Bedzler*, C. A., Nov. 12th, 1880; *Russell & Sons, Ld.* v. *Smith*, Jessel, M. R., June 18th, 1880; *In re Lyndon*, 32 Ch. D. 109: *Crawford* v. *Bernard*, 11 P. R. 580.

(*b*) 53 L. J. Ch. 227. And see *Lucke* v. *Webster*, Jessel, M. R., April 4th, 1879: *In re Loftus*, (1894) 1 Ch. 193.

(*c*) *Per* Cotton, L. J., in *Edwards* v. *Dennis*, 30 Ch. D. 454.

(*d*) *Ford* v. *Foster*, L. R. 7 Ch. 611; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434.

(*e*) *In re Hopkinson*, (1892) 2 Ch. 116.

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 (*a*), but that, on the other hand, where he does bear that name, such evidence must be produced (*b*); and, in the same way, where two firms have become entitled to use the same trade mark or firm name, it is only in a case of fraud that an injunction will be granted; and an allegation that the defendants use the mark on inferior goods is not sufficient, since, if they have the right to use it, they can use it as they please (*c*).

Infringement of names as new marks.

With respect to names first used as trade marks after the passing of the Act of 1875, and registered as being "represented in a special and particular manner" (*d*), the mere use of the same name is no infringement, unless the special and particular manner is also copied, in which case evidence of actual intentional fraud will be unnecessary, whatever may be the name of the infringer. Similarly, the registration by a trader of a facsimile of his own signature will not prevent another trader of the same name from using, as a trade mark, a facsimile of his signature (*e*).

Colour.

In the same way, where a trade mark has been registered for specified colours under § 10, or where a trade mark consisting of the coloured threads which form the heading to a piece of stuff (*f*), or of the representation of a coin (*g*), or of any other mark in which colour is essential, and which would lose its distinctiveness by being registered in the ordinary way, has been registered by deposit, it will not be infringed unless the colour and arrangement have been imitated. But, where the trade mark does not substantially consist in colour, and has been registered

(*a*) *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *McLean* v. *Fleming*, 96 U. S. 245.

(*b*) *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Turton & Sons, Ld.* v. *Turton*, 42 Ch. D. 128; *Valentine* v. *Valentine*, 31 L. R. Ir. 488; *Jamieson & Co.* v. *Jamieson*, 15 P. R. 169; *McLean* v. *Fleming*, 96 U. S. 245. And see *Saunders* v. *Sun Life Assurance Company of Canada*, (1894) 1 Ch. 537; *Braun Chemical Co.* v. *Meyer*, 139 U. S. 540.

(*c*) *Rogers* v. *Taunton*, 97 Mass. 291; *Emerson* v. *Badger*, 101 *ib.* 82. See *Caulshad* v. *Tibbetts*, 51 Fed. Rep. 852.

(*d*) Trade Marks Act, 1905, § 9, replacing Patents Acts, 1883—1888, § 64. And see *In re Gimmacles*, 6 P. R. 467; *In re Hannay*, 7 P. R. 16; *In re Edge*, 8 P. R. 207.

(*e*) *Crawford* v. *Bernard*, 11 P. R 580.

(*f*) *Mitchell* v. *Henry*, 15 Ch. D. 181.

(*g*) *In re Robinson*, 29 W. R. 31. And see *In re Horsburgh*, 53 L. J. Ch. 237. In America it has been held that where the identical form, size, colour, and style of a numeral registered as a trade mark had been copied, an infringement had been committed, although it would have been no infringement to have used the numeral without copying those peculiarities: *Kinney* v. *Allen*, 1 Hughes, 106.

in the ordinary way, then, though the mark has been registered in colour, the exclusive right to use the mark in any colour is now given to the registered proprietor (*a*).

Mode of comparing uncoloured marks.

When it is alleged that a trade mark registered without colour has been infringed, it has been said that the proper manner of comparing the two trade marks is to compare their designs in the same size and free from colour, and that similarities in respect of colour in actual use should only be regarded in order either to prove fraud or to turn the scale when the question of infringement, leaving colour out of sight, is very difficult to decide (*b*). Where the plaintiffs had used a label for coffee, coloured red, white and blue, and containing the words "red, white and blue label," and had registered it without colour, the use by others of labels similarly coloured and containing the words was restrained (*c*). Another mode of comparing two trade marks is to compare the designs in the same colour (*d*), but this is more appropriate to cases of opposed registration. When the case is one of passing off, and not of trade mark proper, the colour is sometimes of much importance.

What is infringement.

The real question which the Court has to try in a case of alleged infringement of trade mark, is whether what the defendant has done is calculated to deceive, whether there is so much imitation that goods bearing the one mark may be readily mistaken for goods bearing the other, and whether a more careful inspection than an ordinary purchaser would be likely to give is necessary to distinguish the mark and appearance of the former goods from those of the latter (*e*).

Croft v. Day.

In *Croft* v. *Day* (*f*), it was remarked by Lord Langdale, M. R., that two things were necessary for the accomplishment of a fraud such as was there contemplated: "First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; and, secondly, a sufficient distinctive individuality must be preserved, so as to pro-

(*a*) T. M. Act, 1905, § 10, replacing Patents Act, 1883, § 67.

(*b*) *Per* Ct. of App. in *Nuthall* v. *Vining*, C. A., Jan. 21st, 1889. Cf. *In re La Société Anonyme des Verreries de l'Etoile*, (1894) 2 Ch. 26; *In re Turner*, 11 P. R. 37; *Jarrett* v. *British North Borneo Cigar Co.*, 37 Sol. J. 116.

(*c*) *Hanson* v. *British Tea and Trading Association, Ld.*, Bacon, V.-C., April 9th, 1884; C. A., June 19th, 1884. The same trade mark was afterwards refused registration under the Patents Act, 1883: *In re Hanson*, 37 Ch. D. 112.

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

(*e*) See *per* Bynum, J., in *Blackwell* v. *Wright*, 73 N. Car. 310.

(*f*) 7 Beav. 84.

cure for the person himself the benefit of that deception which the general resemblance was calculated to produce. To have a copy of the thing would not do, for, though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which was improperly sought to be sold. For the accomplishment of such a fraud it was necessary in the first instance to mislead the public, and in the next place to secure a benefit to the party practising the deception by preserving his own individuality" (*a*). In that case, however, a deliberate attempt was made to represent the defendant's establishment as the plaintiff's, and the injury done to the plaintiff by the sale of goods bearing the spurious marks instead of his genuine goods is ordinarily sufficient to entitle him to his remedy, independently of any habit induced in the customer to resort to the defendant instead of to the plaintiff.

Tests of infringement.

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

Actual deception.

In the first place, where one person has adopted the trade mark of another, or a mark nearly resembling it, and there is evidence of actual deception—that is to say, that any one has in fact been thereby induced to buy the defendant's goods as being the goods of the plaintiff—the question of resemblance has been decided by the test of facts, and the Court will restrain the defendant without further inquiry (*b*), unless it is clearly of opinion that the resemblance is so slight that no rational person ought to have been deceived (*c*). It is not, indeed, necessary that there shall have been actual deception (*d*), or damage sustained (*e*); but since, unless that can be proved, the case which the Court has to try is a hypothetical case, in which honest evidence as to the likelihood of deception, even if it is admitted at all, which is now rarely the case, can in all probability be procured on both sides (*f*), it is

(*a*) And see *Edelsten* v. *Vick*, 11 Hare, 78; *Rowley* v. *Houghton*, 2 Brews. 303; R. Cox, 486; *Enoch Morgan's Sons' Co.* v. *Schwachofer*, 55 How. Pr. 37.

(*b*) *Cope* v. *Evans*, L. R. 18 Eq. 138. And see *Woollam* v. *Ratcliff*, 1 H. & M. 259; *McLean* v. *Fleming*, 96 U. S. 245; *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392; *Kinney* v. *Basch*, Dig. 542.

(*c*) *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512. Cf. *St. Mungo Co.* v. *Viper Co.*, 27 P. R. 420.

(*d*) *Abbott* v. *Bakers & Confectioners' Tea Association*, W. N. 1871, p. 207; *Field* v. *Lewis*, Dig. 280. And see *Filley* v. *Fassett*, 44 Mo. 173; R. Cox, 530; *Dixon Crucible Co.* v. *Guggenheim*, 2 Brews. 321; R. Cox, 559; and many other cases both in the United Kingdom and the United States.

(*e*) *Braham* v. *Beachim* (1), 7 Ch. D. 848.

(*f*) *North Cheshire & Manchester Brewery Co.* v. *Manchester Brewery Co.*, (1899)

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 (*a*).

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 (*b*). 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 (*c*); and

A. C. 83; *Payton* v. *Snelling*, (1901) A. C. 308; *Alaska Packers' Association* v. *Crooks*, 18 P. R. 129; *Bourne* v. *Swan & Edgar*, (1903) 1 Ch. 211; *Cropper Minerva Machines Co.* v. *Cropper, Charlton & Co.*, 23 P. R. 388; *Apollinaris Co.* v. *Duckworth*, 23 P. R. 540; *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *R.* v. *Autier*, 6 Q. O. R. (Q. B.) 146. In *J. C. & J. Field, Ld.* v. *Wagel Syndicate, Ld.*, 16 P. R. 654, the Court viewed with approval an agreement to limit the number of expert witnesses to be called on each side, and this has sometimes been done. But there may be circumstances in which much weight will be given to expert evidence: *Mitchell* v. *Henry*, 15 Ch. D. 181; *In re Worthington*, 14 Ch. D. 8; *In re Christianson*, 3 P. R. 51; *London General Omnibus Co.* v. *Lavell*, (1901) 1 Ch. 135. In *Wallace & Co.* v. *King & Co.*, Bomb. High Ct., April 30th, 1879, it was held in the High Court of Bombay that evidence given by European witnesses in Bombay and Manchester as to the probability of deception, was not admissible under the Indian Evidence Act, the witnesses not being experts, and the question not being one of science or art.

(*a*) *Lee* v. *Haley*, L. R. 5 Ch. 155; *Care* v. *Myers*, Dig. 304.

(*b*) See *Cartier* v. *Carlile*, 31 Beav. 292; *Cope* v. *Evans*, L. R. 18 Eq. 138; *Slater, Rodger & Co., Ld.* v. *Stodart*, 26 P. R. 192.

(*c*) *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; *Wylam* v. *Clarke*, W. N. 1876, p. 68; *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Wilson* v. *Maxfield*, L. J. N. of C. 1875, p. 51; *Degraves* v. *Whiteman*, 5 V. L. R. Eq. 304; *Lamplough* v. *Bedzler*, C. A., Nov. 12th, 1880; *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Dawes* v. *Davies*, Dig. 426; *Prince Metallic Paint Co.* v. *Carbon Metallic Paint Co.*, Dig. 573; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *Chinn* v. *Thomas*, 5 V. L. R. Eq. 188; *Goodwin* v. *Fanning*, 24 Sol. J. 690; *Amoskeag Manufacturing Co.* v. *Trainer*, 101 U. S. 51; *Talbot* v. *Webley*, 3 P. R. 276; *Beddoe & Sons* v. *Boyd*, 4 P. R. 310; *Vageler Co.* v. *Middleton*, 81 L. T. (Journal) 45 (where the plaintiffs sold "St. Jacob's Oil," and the defendants sold "St. Joseph's Oil"); *Waterman* v. *Ayres*, 39 Ch. D. 29; *Great Tower St. Tea Co.* v. *Smith*, 6 P. R. 165; *Goodall* v. *Wilkinson*, 90 L. T. (Journal) 357; 91 *ib.* 29; *Rugby Portland Cement Co.* v. *Rugby & Newbold Portland Cement Co.*, 8 P. R. 241; 9 P. R. 46; *Leahy* v. *Glover*, 10 P. R. 141; *Smith* v. *Curran*, 13 P. R. 108; *Covie* v. *Herbert*, 14 P. R. 436; *California Fig Syrup Co.* v. *Taylor's Drug Co.*, 14 P. R. 564; *Parsons* v. *Gillespie*, (1898) A. C. 239; *Clark* v. *Sharp*, 15 P. R. 141; *Lever* v. *Bedingfield*, 16 P. R. 3; *Chameleon Co., Ld.* v. *Marshall, Ld.*, 17 P. R. 527; *Alaska Packers' Association* v. *Crooks*, 18 P. R. 129; *Goodwin* v. *Ivory Soap Co.*, 18 P. R. 387; *Bass, Ratcliff & Gretton, Ld.* v. *John Davenport & Sons' Brewery, Ld.*, 19 P. R. 129; *Lambert & Butler, Ld.* v. *Goodbody*, 19 P. R. 377; *Bourne* v. *Swan & Edgar*, (1903) 1 Ch. 211; *N. K. Fairbank Co.* v. *Cocos Butter Manufacturing Co.*, 21 P. R. 23; *Dawson* v. *Stewart*, 22 P. R. 250; *Schweppes, Ld.* v. *Gibbens*, 22 P. R. 113, 601; *Star Cycle Co.* v. *Frankenburg*, 23 P. R. 337; 24 P. R. 44; *Hennessy & Co.* v. *Keating*, 25 P. R. 125; *Aquascutum, Ld.* v. *Cohen & Wilks*, 26 P. R. 651; *St. Mungo Co.* v. *Viper Co.*, 27 P. R. 420; *Hopton Wood Stone Firms, Ld.* v. *Gething*, 27 P. R. 605; *Gillett* v. *Lumsden Brothers*, 8 Ont.

if he "cannot allege and prove that the public are deceived, or that there is a reasonable probability of deception, he has no right to interfere with the use of the name by others" (*a*). But where this burden is discharged, the defendant's conduct "cannot be justified by showing that the device or inscription upon the imitated mark is ambiguous, and capable of being understood by different persons in different ways" (*b*), or by showing that the infringing mark, when taken in connection with its surroundings or get-up, is not an imitation (*c*).

If it is shown that both marks have been used for a number of years and no case of actual deception can be produced, it is strong to show that deception is not probable; and where this circumstance existed, and it was further proved to the satisfaction of the judge that the one mark was not copied from the other, but had an independent origin, and fraud on the part of the defendant was negatived, no injunction was granted, the defendant undertaking to discontinue a doubtful detail in his mark (*d*); and where the only probability of deception arose from the use of the words "guinea gold," which were contained in two labels registered by the plaintiff and defendant respectively in the same year, and both marks had been used for fourteen years before action brought, an injunction was refused (*e*).

When is deception probable.

It is obvious that in these cases questions of considerable nicety may arise; and in the language of Lord Cranworth, C., in *Seixo* v. *Provezende* (*f*). "it is hardly necessary to say that, in order to

L. R. 168; *Wilson* v. *Lyman*, 25 Ont. App. R. 303; *Jones* v. *Petersen & Co.*, Cape Good Hope, 20 S. C. R. 399; *Kirstein, Sons & Co.* v. *Cohen Brothers*, 39 Can. Sup. Ct. 286; *Liggett & Myers' Tobacco Co.* v. *Finzer*, 128 U. S. 182; *Morse* v. *Martin*, Can. Sup. Ct. Cas. Dig. 509; *Marshall* v. *Haukins*, 4 N. Z. L. R. Sup. Ct. 59; *Griffiths* v. *Frankenburg*, 27 P. R. 733. And see *Martell* v. *Paarl Berg Wine & Spirit Co.*, 12 Cape Good Hope, 326.

(*a*) *Per* Lord Watson in *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 39. And see *Slater, Rodger & Co., Ld.* v *H. Stodart & Co.*, 26 P. R. 192. Thus, "Vinealis" as applied to a sherry was held not to come too near to "Wincaruis" as applied to a red wine: *Coleman* v. *Brown*, 16 P. R. 619; "Cocosoline" to "Cottoline": *N. K. Fairbank Co.* v. *Cocos Butter Manufacturing Co.*, 21 P. R. 23; "Colonial" to "Colonel" for golf balls: *St. Mungo Co.* v. *Viper Co.*, 27 P. R. 420.

(*b*) *Per* Lord Selborne, C., in *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 18. So in *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888.

(*c*) *Jarrett* v. *British North Borneo Cigar Co.*, 37 Sol. J. 116.

(*d*) *Baker* v. *Rawson*, 45 Ch. D. 519; see 60 L. J. Ch. 49. And see *Phillips* v. *Ogden*, 12 P. R. 325; *In re Talbot*, 11 P. R. 77, *per* Stirling, J.; *Hennessy & Co.* v. *Keating*, 25 P. R. 125, 361.

(*e*) *Phillips* v. *Ogden*, 12 P. R. 325. And see *In re Phillips*, 26 P. R. 121; *Jones* v. *Petersen & Co.*, Cape Good Hope, 20 S. C. R. 399; *Exshaw & Co.* v. *Van Ryn Wine & Spirit Co.*, Cape Good Hope, 21 S. C. R. 267.

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

entitle a party to relief, it is by no means necessary that there should be absolute identity (*a*). What degree of resemblance is necessary, is, from the nature of things, a matter incapable of definition *à priori* (*b*). All that Courts of Justice can do is to say that no trader can adopt a trade mark so resembling that of a rival as that *ordinary purchasers, purchasing with ordinary caution*, are likely to be misled (*c*).

"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 (*d*). The rule so restricted would

(*a*) As to this, see *per* Lord Chelmsford in *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; and *per* Malins, V.-C., in *Anglo-Swiss Condensed Milk Co.* v. *Swiss Condensed Milk Co.*, W. N. 1871, p. 163. And see *post*, p. 152, note (*i*), and p. 153, note (*a*).

(*b*) What will constitute infringement is not to be defined. See *per* Stawell, C. J., in the Sup. Ct. of Victoria in *Hennessy* v. *White*, 6 W. W. and A'B. Eq. 216.

(*c*) As to this criterion, see *Archbold* v. *Sweet*, 1 Mo. & Rob. 162; *Shrimpton* v. *Laight*, 18 Beav. 164; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523 (*per* Lord Cranworth); *Bernard* v. *Pillow*, W. N. 1868, p. 91; *Anglo-Swiss Condensed Milk Co.* v. *Swiss Condensed Milk Co.*, W. N. 1871, p. 163; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Abbott* v. *Bakers & Confectioners' Association, Ld.*, W. N. 1872, p. 31; L. J. N. of C. 1871, p. 199; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376, 392, 394; *London & County Banking Co.* v. *Hampshire & North Wilts Bank*, Dig. 618; *Moses* v. *Sargood*, Dig. 636; *In re Worthington*, 14 Ch. D. 8; *Liebig's Extract of Meat Co.* v. *Anderson*, W. N. 1883, p. 185; *In re Christiansen*, 3 P. R. 54; *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454; *Lever* v. *Goodwin*, 36 Ch. D. 1; *Steinway & Sons* v. *Henshaw*, 5 P. R. 77; *Upper Assam Tea Co.* v. *Herbert & Co.*, 7 P. R. 183; *Jarrett* v. *British North Borneo Cigar Co.*, 37 Sol. J. 116; *Eno* v. *Dunn*, 10 P. R. 261; *Liebig's Extract of Meat Co.* v. *Chemists' Co-operative Society*, 13 P. R. 736; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710; *Clark* v. *Sharp*, 15 P. R. 141; *Alaska Packers' Association* v. *Crooks*, 18 P. R. 129; *Singer Manufacturing Co.* v. *British Empire Manufacturing Co., Ld.*, 20 P. R. 313; *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216; *Hennessy* v. *Hogan*, *ib.* 225; *McLean* v. *Fleming*, 96 U. S. 245; *Davies* v. *Davies*, Dig. 426; *Colman* v. *Crump*, 70 N. Y. 573; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Wolfe* v. *Hart*, 4 V. L. R. Eq. 125; *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417; *Ex parte Kennedy*, 9 V. L. R. (L.) 335; *Champion* v. *Smith*, 21 N. S. W. R. (Eq.) 110; *Nami Chand* v. *Wallace*, 34 Calc. 495; *R.* v. *Autier*, 6 Q. O. R. (Q. B.) 146; *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460. In *Singer Manufacturing Co.* v. *Loog* (3) (8 App. Cas. 18), Lord Selborne, C., says, "The imitation of a man's trade mark, in a manner liable to mislead the unwary, cannot be justified by showing either that the device or inscription upon the imitated mark is ambiguous, and capable of being understood by different persons in different ways, or that a person who carefully and intelligently examined and studied it might not be misled." Compare *Payton* v. *Snelling*, 17 P. R. 18; affirmed (1901) A. C. 308; *Payton* v. *Titus Ward & Co.*, 17 P. R. 58; *Imperial Tobacco Co.* (*of Great Britain and Ireland*), *Ld.* v. *Parnell & Co.*, 21 P. R. 368, 398; *National Cash Register Co.* v. *Theenan*, 24 P. R. 211. But it has often been said that in considering this question the Court will have regard to the class of customers who would be likely to buy the goods in respect of which the infringement is alleged, *e.g.*, *In re Pianotist Co., Ld.*, 23 P. R. 774; *Aquascutum, Ld.* v. *Cohen & Wilks*, 26 P. R. 651; *St. Mungo Co.* v. *Viper Co.*, 27 P. R. 420; *Nami Chand* v. *Wallace*, 34 Calc. 495. Purchasers of gold ingots or motor cars will be assumed to be more careful buyers than children or servants who buy matches or soap by the pennyworth.

(*d*) See *Moses* v. *Sargood*, Dig. 636;

be of no practical use. If a purchaser looking at the article offered to him would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the Court considers the use of such a mark to be fraudulent. But I go farther. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of *any mark which will cause his goods to bear the same name in the market* (*a*), may be as much a violation of the rights of that rival as the actual copy of his device."

Read v. *Richardson*, 45 L. T. N. S. 54: *Ascough* v. *Johnson & Co.*, 3 Times L. R. 735; *Hubbuck* v. *Brown*, 17 P. R. 638, 645; *de Kuyper* v. *N. & G. Baird, Ld.*, 20 P. R. 581; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218; *Pinto* v. *Badman*, 8 P. R. 181, 189; *Cochrane* v. *McNish*, (1896) A. C. 225; *Mitchell* v. *Joshua Bros.*, 17 V. L. R. 736; *R.* v. *Antier*, 6 Q. O. R. (Q. B.) 148; *Nami Chand* v. *Wallace*, 34 Calc. 495; *Doran* v. *Hogadore*, 11 Ont. L. R. 321.

(*a*) Thus, where the plaintiff's yarn had become known as "Bhe Hathi," or "two elephant" yarn, from the representation of two elephants on the trade mark, the defendants were restrained from using two different elephants (*Orr-Ewing & Co.* v. *Johnston & Co.*, 7 App. Cas. 219); where the plaintiff's beer was known as "Dog's Head Beer," the defendants were restrained from using on their beer the head of a different kind of dog from that used by the plaintiffs (*Read* v. *Richardson*, 45 L. T. N. S. 54); where the plaintiff's clothing was known as "Crown Clothing," from the use of a royal crown, the defendants were restrained from using an imperial crown between two standards (*Moses* v. *Sargood*, Dig. 636). So, in *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185, where the plaintiff's wire had acquired the name of "Anchor Wire," because of his trade mark being an anchor, the defendant was restrained from using an anchor in conjunction with a crown. See *Cartier* v. *Carlile*, 31 Beav. 292: *Cartier* v. *Westhead*, Dig. 199; *Cartier* v. *May*, Dig. 200 ("Cross Cotton"): *In re Jelley, Son & Jones*, 51 L. J. Ch. 639 ("Dog brand Files"): *In re Whitley*, 43 L. T. N. S. 627 ("Globe Steel"); *In re Rahone*, Dig. 643 ("Lion" edge tools); *In re Worthington*, 14 Ch. D. 8 ("Triangle Beer"); *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454 ("Milkmaid" or "Dairymaid Brand"); *In re Baschiera & Co.*, 33 Sol. J. 469 ("Lion" matches); *Wilkinson* v. *Griffiths*, 8 P. R. 370 ("Red Medal" Polish); *In re Société Anonyme des Verreries de l'Etoile*, (1894) 2 Ch. 26 ("Star brand" glass); *In re Deuhurst & Sons, Ld.*, (1896) 2 Ch. 137 ("Golden Fan" cotton); *Hodgson* v. *Kynoch, Ld.*, 15 P. R. 465 ("Lion" soap); *London Road Car Co.* v. *Era Omnibus Association*, Times, June 23, 1898; *ib.* April 28, 1899 ("Flag" omnibuses); *Price's Patent Candle Co., Ld.* v. *Joyes' Sanitary Compounds Co., Ld.* ("Ship brand" soap), 19 P. R. 17: *Baird & Son* v. *Haddart*, 21 P. R. 149; and *Baird & Son* v. *Thom & Cameron*, 24 P. R. 697 ("Cat and Barrel" gin); and see *Star Cycle Co., Ld.* v. *Frankenburgs*, 23 P. R. 337: 24 P. R. 46, 408: *Nitedals Tändstikfabrik* v. *R. Lehmann & Co.*, 25 P. R. 793: *Aquascutum, Ld.* v. *Cohen & Wilks*, 26 P. R. 651: *Taylor* v. *Virasami*, Ind. L. R. 6 Mad. 108 ("Talwar" shirtings); *Smith* v. *Fair*, 14 Ont. Rep. 729 ("Red Seal" cigars); *Reimers, Van Laer & Co.* v. *Fehr*, 9 Cape Good Hope, 115. But in *Curtis, Harvey & Co.* v. *Kraft, Meyer & Co.*, Chitty, J., June 16th, 1882, it was thought that the German words "Diamant Pulver" were not likely to be mistaken for the English words "Diamond Powder." And see *In re Wills*, (1893) 2 Ch. 262. See also *McLean* v. *Fleming*, 96 U. S. 245; *Barsalou* v. *Darling*, 9 Can. Sup. Ct. 677: *Price's Patent Candle Co.* v. *Everitt*, 11 Cape Good Hope, 213; *Doran* v.

Deception of ultimate purchaser.

"The principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else" (*a*), and as the natural consequence of marking goods so as to cause them to bear the same name in the market as those of a well-known firm is to deceive the ultimate purchaser, such deception will be restrained, even though the original purchaser is not deceived (*b*). "No man is entitled to represent his goods as being the goods of another man, and no man is permitted to use any mark, sign or symbol, device, or other means, whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate customer" (*c*). "If a man does that, the natural consequence of which (although it does not deceive the person with whom he deals, and is therefore no misrepresentation to him) is to enable that other person to deceive and pass off his goods as somebody else's, for that he is answerable. But this is confined to those things which in their necessary or natural uses accompany the things sold. For instance, the corks of champagne bottles marked 'Moet and Chandon' must be in the bottles sold, and must accompany the bottles. They must necessarily accompany the thing to the retail buyer, and so must labels to be put on the bottles. The very reason for their existence is that they must be put on the bottles, and if they are deceptive and fraudulent, then the person who prepares them is answerable for it. Such things must not be used if their natural and legitimate consequence is, not to deceive the person to whom they are sold, but

Hogadore, 11 Ont. L. R., 321; *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, 32 Can. Sup. Ct. 315.

(*a*) *Per* Lord Halsbury, C., in *Reddaway* v. *Banham*, (1896) A. C. 199, at p. 204.

(*b*) See *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15; *Orr-Ewing & Co.* v. *Johnston & Co.*, 7 App. Cas. 219; *In re Christiansen*, 3 P. R. 54; *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454; *Wilkinson* v. *Griffith*, 8 P. R. 370; *Edge* v. *Johnson*, 9 P. R. 134; *Brinsmead* v. *Brinsmead*, 12 Times L. R. 631; 13 *ib.* 3; *Reddaway* v. *Banham*, (1896) A. C. 199; *Grezier* v. *Autran*, 13 P. R. 1; *Cochrane* v. *McNish*, (1896) A. C. 225; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710; *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417; *Manockji Petit Manufacturing Co., La.* v. *Mahalaxmi Spinning & Weaving Co., Ld.*, Ind. L. R. 10 Bomb. 617; *Sparks* v. *Harper*, 3 Queens. L. J. 158, 201.

(*c*) *Per* James, L. J., in *Singer Manufacturing Co.* v. *Loog* (3), 18 Ch. D. 412: adopted by Lord Macnaghten in *Reddaway* v. *Banham*, (1896) A. C. 179. And see *Reddaway* v. *Frictionless Engine Packing Co., Ld.*, 19 P. R. 505.

to enable the purchaser to pass off the goods as being the goods of other persons" (*a*).

Deception by get-up of goods.

And the same principle of preventing that which would deceive the ultimate purchaser is observed where the probability of deception arises, not from the imitation of a trade mark proper, but from copying the peculiar get-up of the plaintiff's goods or from some similar act. In *Lever* v. *Goodwin* (*b*) the plaintiffs' soap was got up in a special manner, which had been copied somewhat nearly by the defendants; and Chitty, J., said, "The law applicable to the case is plain: it is founded on fraud. The simplest case is where the seller misrepresents to the buyer that the goods which are being offered for sale are the goods, not of the person who made them, but of some other manufacturer. That is a case merely between the buyer and the seller. Then comes the case where the manufacturer, by devices which are to accompany the goods on their sale in the market, gets them up in such a form as to be calculated to deceive the ultimate buyer into the belief that the goods which he, the manufacturer, is putting on the market are the goods of some other maker. Here, generally speaking, a double fraud is committed: first, there is the fraud which is perpetrated on the ultimate buyer; and, secondly, there is a fraud perpetrated on the other manufacturer, who loses part of his trade. In this class of cases the trade is seldom deceived; the retail dealers know from whom they are buying, and if there is a fraudulent device, they are rarely taken in by it. But in such a case the manufacturer puts an instrument of fraud into their hands. Now, it has been said more than once in this case, that the manufacturer ought not to be held liable for the fraud of the ultimate seller—that is, the shopkeeper or the shopkeeper's assistant; but that is not the true view of the case. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchasers" (*c*).

(*a*) *Per* Cotton, L. J., in S. C., 18 Ch. D. 422.

(*b*) 4 P. R. 492 (Chitty, J.; 36 Ch. D. 1 (C. A.). And see *Colman* v. *Farrow & Co.*, 15 P. R. 198; *Day* v. *Riley*, 17 P. R. 517; *R. J. Elliott & Co.* v. *Hodgson*, 19 P. R. 518; *County Chemical Co.* v. *Frankenburg*, 21 P. R. 722; *Helidon Spa Water Co.* v. *Hamlyn Spa Water Co.*, 29 V. L. R. 182; *Bryant & May* v. *Heyde*, N. S. W. 7 L. R. Eq. 72; *Lever Bros.* v. *Nammeei*, Cape Good Hope, 17 S. C. R. 507; *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Saxlehner* v. *Eisner*, 179 U. S. 19.

(*c*) And see *Grezier* v. *Autran*, 13 P. R. 1; *Bayer* v. *Baird*, 15 P. R. 615; *Joseph Rodgers & Sons, Ld.* v. *Hearnshaw*, 23 P. R. 349; *Jameson* v. *Dublin Distillers' Co.*, (1900) 1 I. R. 43.

So, in another case (*a*), Kekewich, J., said "The plaintiffs are entitled to have their trade mark protected; and, further than that, they are entitled to have their business protected to this extent, that if any person has used the words which they employ, so as to pass off, or so as to tend to pass off, the goods of that other person as the goods of the plaintiffs, then the plaintiffs are entitled, apart from their trade mark, to insist that that should be restrained." And in *Barlow & Jones, Ld.* v. *Johnson & Co.* (*b*), Bowen, L. J., said, "It is an injury to take a name understood in the trade as connoting a particular maker, and to sell goods under it which are not that maker's make; and it is an injury none the less because the immediate vendee is not deceived. If the probable and natural result is that the immediate vendee, though not deceived himself, will use the name so as to deceive others—his ulterior vendees—it is an injury to take the name and use it in that way, and it is a fraud in equity if it is known by the person who takes it that that will be the ultimate and probable result" (*c*).

Infringement of essential part, or of combination.

The infringement of a trade mark may consist in the adoption of the essential part of the plaintiff's trade mark by the defendant, as the word "Eureka" (*d*), or "Glenfield" (*e*), or "Apollinaris" (*f*). And where there is no imitation of the essential part, a resemblance in particulars common to the trade does not constitute an infringement (*g*). But, on the other hand, the in-

(*a*) *Sanitas Co., Ld.* v. *Condy*, 4 P. R. 530. And see, *per* Kay, J., in *In re Sanitas Co., Ld.*, 4 P. R. 533.

(*b*) 7 P. R. 395, 419.

(*c*) And see *Wilkinson* v. *Griffith*, 8 P. R. 370; *Edge* v. *Johnson*, 9 P. R. 134; *Singer Manufacturing Co.* v. *Spence*, 10 P. R. 297; *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 163 U. S. 169.

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

(*e*) *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508. And see *Jamieson & Co.* v. *Jamieson*, 15 P. R. 169.

(*f*) *Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 242; *Siegert* v. *Ehlers*, Dig. 432; and *Siegert* v. *Findlater*, 7 Ch. D. 801 ("Angostura Bitters"); *Eno* v. *Stephens* Dig. 609 ("Fruit Salt"); *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57 ("Family Salve"); *Berliner Brauerei Gesellschaft Tivoli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70 ("Tivoli" beer); *Slazenger* v. *Malings*, W. N. 1885, p. 124 ("The Lawford" racquet); *Compania General de Tabacos* v. *Rehder*, 5 P. R. 61 ("Cavite" cigars); *Laurie* v. *Baker*, 2 P. R. 213 "Patent cups"); *Grezier* v. *Ziemer & Co.*, 89 L. T. (Journal) 117, and *Roy* v. *Leonturier*, 25 P. R. 265; 27 *ib.* 268 ("Chartreuse" liqueur); *Cochrane* v. *McNish*, (1896) A. C. 225 ("Club" soda water); *Davis* v. *Kennedy*, 13 Grant, Up. Can. Ch. 523 ("Painkiller"); *Crawford* v. *Shattock*, *ib.* 149 ("Imperial" soap). See also, *per* Cotton, L. J., in *In re Leonard & Ellis*, 26 Ch. D. 288; *Vulcan Match Co.* v. *Jobson & Co.*, 1 Kyshe, 650.

(*g*) *Lucke* v. *Webster*, Jessel, M. R., April 4th, 1879; *In re Horsburgh*, 53 L. J. Ch. 237; *Rugby Portland Cement Co.* v. *Rugby & Newbold Portland Cement Co.*, 8 P. R. 241; 9 *ib.* 46; *Leahy* v. *Glover*, 10 P. R. 141; *Lever* v. *Bedingfield*, 16 P. R. 3; *Jamieson* v. *Jamieson*, 15 P. R. 169; *Payton* v. *Snelling*, 17

fringement may consist in the imitation of the general appearance of the plaintiff's mark, and where both trade marks are of a composite character, it is possible that, though no one particular mark has been exactly imitated, or the principal mark which has been reproduced cannot, for some reason or other, be protected as a trade mark, the combination may be very similar and likely to deceive, and will therefore be restrained by injunction (*a*).

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" (*b*). It is seldom that the mark employed by the infringer does correspond in all respects with that

P. R. 48; affirmed, (1901) A. C. 308; *Payton & Co., Ld.* v. *Titus Ward & Co.*, 17 P. R. 58; *Thomas Hubbuck & Son, Ld.* v. *Brown*, 17 P. R. 638; *Marshall* v. *Sidebotham*, 18 P. R. 43; *Alaska Packers' Association* v. *Crooks*, 18 P. R. 129; *Hennessy & Co.* v. *Dompé*, 19 P. R. 333; 20 P. R. 175; *Imperial Tobacco Co. (of Great Britain and Ireland), Ld.* v. *Parnell & Co.*, 21 P. R. 368, 598; *B. Warsop & Sons, Ld.* v. *Warsop*, 21 P. R. 481; *King & Co., Ld.* v. *Gillard & Co., Ld.*, 21 P. R. 589: 22 P. R. 327; *Colley's Patents, Ld.* v. *British Patent Perforated Paper Co.*, 21 P. R. 689; *Schweppes, Ld.* v. *Gibbens*, 22 P. R. 113, 601; *Same* v. *Biscombe*, *ib.* 121, 603; *Hennessy & Co.* v. *Keating*, 25 P. R. 125, 361; *Slater, Rodger & Co. Ld.* v. *Stodart*, 26 P. R. 192; *J. B. Williams Co.* v. *H. Bromley & Co.*, 26 P. R. 481; *J. B. Williams Co.* v. *J. B. Newbery & Co.*, 26 P. R. 489: *Aquascutum, Ld.* v. *Cohen & Wilks*, 26 P. R. 651; *Wallace & Co.* v. *King & Co.*, Bomb. High Ct., April 30th, 1879: *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Stachelberg* v. *Ponce*, 128 U. S. 686; *Marshall* v. *Hawkins*, 4 N. Z. L. R. Sup. Ct. 59.

(*a*) *Abbott* v. *Bakers & Confectioners' Tea Association*, W. N. 1871, p. 207; *ib.* 1872, p. 31: *Hargreaves* v. *Smith*, Dig. 338: *Lazenby* v. *Lazenby*, Dig. 160; *In re Barker & Son*, 53 L. T. N. S. 23; *Compania General de Tabacos* v. *Rehder*, 5 P. R. 61; *Great Tower Street Tea Co.* v. *Langford & Co.*, 5 P. R. 66; *Ascough* v. *Johnson & Co.*, 3 Times L. R. 735; *Pinto* v. *Badman*, 8 P. R. 181, 183; *Rowland* v. *Michell*, 13 P. R. 457; *Liebig's Extract of Meat Co.* v. *Chemists' Co-operative Society*, 13 P. R. 635 (with which compare *Lever* v. *Bedingfield*, 16 P. R. 3); *Colman* v. *Farrow & Co.*, 15 P. R. 198; *Price's Patent Candle Co., Ld.* v. *Ogston & Tennant, Ld.*, 26 P. R. 797; *Wright, Crossley & Co.* v. *Blezard*, 27 P. R. 299: *Ralli* v. *Fleming*, Ind. L. R. 3 Calc. 417; *Whitney* v. *Hickling*, 5 Grant, Up. Can. Ch. 605; *Davis* v. *Reid*, 17 *ib.* 69; *Hop Bitters Manufacturing Co.* v. *Wharton*, 10 V. L. R. (L.) 377; *Martell* v. *Paarl Berg Wine & Spirit Co.*, 12 Cape Good Hope, 326: *Badische Anilin & Soda Fabrik* v. *Manekji Shapurji Katrak*, Ind. L. R. 17 Bomb. 581; *California Fig Syrup Co.* v. *E. Worden & Co.*, 86 Fed. Rep. 212. But see *Blackwell* v. *Crabb*, 36 L. J. Ch. 504.

(*b*) *Per* Lord Chelmsford in *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508. And see *Moses* v. *Sargood*, Dig. 636; *In re Farina* (2), 27 W. R. 456; *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216; *Hennessy* v. *Hogan*, *ib.* 225; *McLean* v. *Fleming*, 96 U. S. 245; *Wolfe* v. *Hart*, 4 V. L. R. Eq. 125: *Heyde* v. *Wittkowski*, 5 N. S. W. Rep. (E.) 74: *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72; *Nemi Chand* v. *Wallace*, 34 Calc. 495.

of the person whose rights he is attacking; the usual practice is to introduce some colourable variation, which may supply the infringer with a plausible excuse for his fraud. "In every case," however, "the Court must ascertain whether the differences are made *bonâ fide* in order to distinguish the one article from the other; whether the resemblances and the differences are such as naturally arise from the necessity of the case, or whether, on the other hand, the differences are simply colourable, and the resemblances are such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance which is of primary importance for the Court to consider, because if the Court finds, as it almost invariably does find in such cases as this, that there is no reason for the resemblance, excepting for the purpose of misleading, it will infer that the resemblance is adopted for the purpose of misleading" (*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*), "Murrilo" of "Muralo" (*g*), "Cocoine" of "Cocoaine" (*h*), "Bovina" of "Bovilene" (*i*). Again, a beehive was held to be a colour-

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

(*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*, L. J. N. of C. 1877, p. 71.

(*g*) *Muralo Co.* v. *Taylor*, 27 P. R. 261.

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

(*i*) *Lockwood* v. *Bostwick*, 2 Daly, 521; R. Cox, 555. Other instances are:—"Schrewsbury-Marchal Patent Thread" put for "Shrewsbury, Marshall & Co. Patent Thread," *Marshall* v. *Ross*, L. R. 8 Eq. 651, "Burgiss" for "Burgess," *Burgess* v. *Hills*, 26 Beav. 244; "Genuine" for "Guinness," *Guinness* v. *Heap*, Dig. 617; "Derwent" for "Derby," *Derby Photographic Dry Plate Co.* v. *Pollard*, *Graham & Co.*, 2 Times L. R. 276; "Consanitas" for "Sanitas," *Sanitas Co., Ld.* v. *Condy*, 4 P. R. 195, 530; "Apollinis" for "Apollinaris," *Apollinaris Co., Ld.* v. *Herrfeldt*, 4 P. R. 478; "Steinberg" for "Steinway," *Steinway & Sons* v. *Henshaw*, 5 P. R. 77; "Demotic" for "Demon," *Slazenger & Sons* v. *Feltham & Co.*, 6 P. R. 531; "El Divino" and "El Destinacion" for "El Destino," *Pinto* v. *Trott*, 8 P. R. 173; *Pinto* v. *Badman*, 8 P. R. 181; "Margarita," for "Flor de Margaretta," *Benedictus* v. *Sullivan*, *Powell & Co.*, 12 P. R. 25; "Stafford" for "Trafford," *Smith* v. *Carron Co.*, 13 P. R. 108; "Savoline" for "Savonol," *J. C. & J. Field & Co., Ld.* v. *Vogel Syndicate, Ld.*, (1900) 1 Ch. 651; "St. Ives" for "St. Ivel" cheeses, *Aplin & Barratt* v. *Richards*, 20 P. R. 799: "Securine" for "Secotine" cement, *McCue, Steenson & Orr, Ld.* v. *Nichols & Co.*, 21 P. R. 15; "Iron Oxide" for "Iron Ox" tablets, *Iron Ox Remedy Co., Ld.* v. *Co-operative Wholesale*

able imitation of a boll of a similar shape, similarly printed on a label (*a*). Where dealers in condensed milk had adopted, for what they called their "Standard" brand, a trade mark which consisted of a representation of a standard divided into four quarters, which respectively contained four well-known trade marks of other firms in the same trade, the use of the composite mark was restrained on motion by the owners of two of the marks copied (*b*).

In *Seixo* v. *Provezende* (*c*) the plaintiff, a Portuguese nobleman and wine grower, sold his wine in casks branded on the head *Seixo* v. *Provezende.*

Society, Ld., 24 P. R. 425; *Iron Ox Remedy Co., Ld.* v. *Leeds Industrial Co-operative Society, Ld.*, 24 P. R. 434; "Dr. Wilson's Pink Pills for Anæmic People" for "Dr. Williams' Pink Pills for Pale People," *Dr. Williams' Medicine Co.* v. *Tothill*, Cape Good Hope, 20 S. C. R. 483; and see *Dr. Williams' Medicine Co.* v. *Alexander*, Cape Good Hope, 22 S. C. R. 589; "Holsteter & Smyte" for "Hostetter & Smith," *Hostetter* v. *Voeinkle*, 1 Dill. 329; "Rogers & Son" for "J. Rodgers & Sons," *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29; "Andrew Coe's Superphosphate of Lime" for "Coe's Superphosphate of Lime," *Coe* v. *Bradley*, 3 *ib.* 541; "Star" for "Stark," *Gardner* v. *Bailey*, Dig. 365; "Wamyesta" for "Wamsutta," *Wamsutta Mills* v. *Allen*, 12 Phila. 535. On the other hand, "Ivy," as applied to soap, was held not infringed by "Ivory," *Goodwin* v. *Ivory Soap Co.*, 18 P. R. 389; nor "Glacier" (transparent paper) by "Glazine," *M'Caw, Stevenson & Orr* v. *Lee*, 23 P. R. 1; nor "Shuron" (sureon) by "Stay-on" as applied to eyeglasses, *Kirstein, Sons & Co.* v. *Cohen Bros.*, 39 Can. Sup. Ct. 286.

(*a*) *Bell, Black & Co.* v. *Bell & Co.*, Dig. 514. Other instances are:—A crown with "B. B. S." in italics put for a crown with "B. B. H." in Roman characters, *Barrows* v. *Pelsall Coal & Iron Co.*, Dig. 530; a volcano with a man coming out of it and the words "Volcanic Paraffin Matches" for a volcano with the words "The Vulcan Paraffin Matches," *Vulcan Match Manufacturing Co.* v. *Kloss & Co.*, Pearson, J., June 22nd, 1883; a device of a diamond with a K in the centre for a device of a plain diamond, *Curtis & Harvey* v. *Pape*, 5 P. R. 146; "Rottgen" with two crosses for "Rodgers" with a star and a cross, *Rodgers & Sons, Ld.* v. *Rottgen*, 5 Times L. R. 678; an ace of spades for an ace of clubs coupled with imitation of the letterpress, *Munday* v. *Carey*, 22 P. R. 273; a label bearing the device of a cathedral with a river and bridge by another label representing the same group of objects, *Price's Patent Candle Co., Ld.* v. *Ogston & Tennant, Ld.*, 26 P. R. 797; a pelican with an inscription in gold on a green ground for a crane with an inscription in gold on a green ground, *Balfour & Co.* v. *Kilburn & Co.*, 1 Hyde, 270; an orb rising over a piece of water with the words "Rising Moon Stove Polish" for an orb with rays rising over a piece of water with the words "Rising Sun Stove Polish," *Morse* v. *Worrell*, 10 Phila. 168; a sprig of grape vine for a sprig of hop vine, *Hop Bitters Manufacturing Co.* v. *Wharton*, 10 V. L. R. (L.) 371; a unicorn's head for a horse's head similarly arranged, *Barsalou* v. *Darling*, 9 Can. Sup. Ct. 677; three Rs arranged triangularly in a triangle for three Bs similarly arranged in a diamond, *Frankau* v. *Pope*, 11 Cape Good Hope, 209. But in *McCartney* v. *Garnhart*, 45 Mo. 593, it was held that two picks with a pair of scales, and the words "J. H. Garnhart's Old Bourbon," were not too similar to two anchors and the initials "S. McC." Where the infringement consisted in a general resemblance between labels on "Old Bachelor" tobacco and "Old Coon" tobacco, it was held that the wrong was not remedied by printing across the former the words "Not Old Coon": *McCann* v. *Anthony*, 21 Mo. App. 83.

(*b*) *Schnitzer & Co.* v. *Piggott, Cockson & Co.*, and *Anglo-Swiss Condensed Milk Co.* v. *Same*, Bacon, V.-C., July 12th, 1884. See Grocer for 1884, p. 37.

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

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

Wotherspoon v. Currie.

In *Wotherspoon* v. *Currie* (*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 connection with starch had the effect of inducing people to buy the defendants' manufacture, under the impression that it was the plaintiffs', and that there was a colourable imitation of the mark to which the plaintiffs were entitled (*b*).

If the defendant makes use of a name which is the plaintiff's registered trade mark, it is none the less an infringement if he adds the word "Quality" or "Model" or some similar word (*c*).

Similarity of packing or get-up.

Where the goods of one manufacturer are so packed or arranged as externally to resemble those of others engaged in the same trade, as where starch was put up commonly in the trade in packets of a certain colour and appearance, the similarity common to all does not of itself expose the manufacturer to an action, but it makes it incumbent upon him to take care that his distinguishing mark is really distinguishing (*d*). And where a plaintiff has

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

(*b*) See also *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217; *Grezier* v. *Antran*, 13 P. R. 1; *Barclay & Co.* v. *Hughes*, 15 P. R. 290; *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268.

(*c*) *E.g.*, *Vacuum Oil Co., Ld.* v. *Gooch*, 27 P. R. 76; *Bechstein* v. *Barker*, 27 P. R. 484. Cf. *Armstrong Oiler Co., Ld.* v. *Patent Axle-box Co., Ld.*, 27 P. R. 362, where oilers were sold as "Armstrong Type Oilers" to customers who knew that the goods were not the plaintiffs', and the defendants escaped.

(*d*) See *per* Lord Hatherley, C., *Wotherspoon* v. *Currie*, 5 H. L. 508; also *Colman* v. *Farrow & Co.*, 15 P. R. 198; *Payton & Co.* v. *Snelling, Lambard & Co., Ld.*, (1901) A. C. 308; *Payton & Co.* v. *Titus Ward & Co.*, 17

been in the habit of packing or getting up his goods in a peculiar and distinctive manner (*a*), he will be entitled to restrain another from imitating his packages (*b*), even though his actual trade mark is bad (*c*); and the imitation of bottles (*d*) or barrels (*e*) of a peculiar design, such as is used only by the plaintiff, will afford a strong presumption that fraud is intended. As Cotton, L. J., said in *Lever* v. *Goodwin* (*f*), "there may be no monopoly at all in the individual things, but if they are so combined by the defendants as to pass off the defendants' goods as the plaintiffs', then the defendants have brought themselves within the old Common Law doctrine, in respect of which Equity will give to the aggrieved party an injunction, in order to restrain the defendants from passing off their goods as those of the plaintiffs." A good example of this is where the defendants closely imitated the pictorial cards on which the plaintiffs' combs were sold, the combs themselves also being similar (*g*). It has been held in America (*h*) that a label, on which is a representation of a box filled with cakes of soap, wrapped in variously coloured paper wrappers and arranged in a particular way, is not infringed by offering for sale boxes containing cakes of soap so wrapped and arranged.

Not conclusive.

However, where a defendant had, in obedience to express directions, put up his silk in imitation of the plaintiff's bundles, his

P. R. 58; *Imperial Tobacco Co. (of Great Britain and Ireland), Ld.* v. *Parnell & Co.*, 21 P. R. 368, 598; *Schweppes, Ld.* v. *Gibbens*, 22 P. R. 113, 601; *King & Co., Ld.* v. *Gillard & Co.*, 22 P. R. 139; *Burford, Ld.* v. *Mowling*, 8 C. L. R. 100; *Helidon Spa Water Co.* v. *Hanlon Spa Water Co.*, 29 V. L. R. 182. And see *Wurm* v. *Webster*, 21 P. R. 373, where the complaint was as to the imitation of a uniform for a band.

(*a*) See *Packham & Co.* v. *Sturgess & Co.*, 15 P. R. 669, 673, as to the importance of the get-up being special and peculiar; also *County Chemical Co., Ld.* v. *Frankenburg*, 21 P. R. 722.

(*b*) *Great Tower Street Tea Co.* v. *Langford & Co.*, 5 P. R. 66; *Ascough* v. *Johnson & Co.*, 3 Times L. R. 735; *Edge* v. *Harrison*, 8 P. R. 74, 79; *Liebig's Extract of Meat Co.* v. *Chemists' Co-operative Soc.*, 13 P. R. 737; *Knott* v. *Marshall*, W. N. 1891, p. 214; *Jones* v. *Hallworth*, 14 P. R. 225; *Colman* v. *Farrow & Co.*, 15 P. R. 198; *Hodgson* v. *Kynoch, Ld.*, 15 P. R. 465; *Payton & Co., Ld.* v. *Snelling, Lambard & Co.*, 16 P. R. 283; *Day* v. *Riley*, 17 P. R. 517; *Adolph Frankau & Co., Ld.* v. *Plueger*, 26 P. R. 741; *Lever Bros.* v. *Nannucci*, Cape Good Hope, 17 S. C. R. 507; *Edge* v. *Niccolls*, 27 P. R. 671; reversed, C. A., Nov. 22nd, 1910.

(*c*) *Lever* v. *Goodwin*, 36 Ch. D. 1; *Day* v. *Riley*, 17 P. R. 517; *McCall* v. *Theal*, 28 Grant, Up. Can. Ch. 48; *Smith* v. *Fair*, 14 Ont. Rep. 729; *Sparks* v. *Harper*, 3 Queensland L. J. 158, 201; *Mitchell* v. *Joshua*, 17 V. L. R. 736.

(*d*) *Henry* v. *Price*, 1 Leg. Obs. 364; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Fullwood* v. *Fullwood* (1), W. N. 1873, p. 185; *Grezier* v. *Antran*, 13 P. R. 1; *Mitchell* v. *Joshua*, 17 V. L. R. 736; *Saxlehner* v. *Eisner*, 179 U. S. 19.

(*e*) *Cook* v. *Starkweather*, 13 Abb. Pr. N. S. 392. See *Moorman* v. *Hoge*, 2 Sawy. 78.

(*f*) 36 Ch. D. 1. And see *Bayer* v. *Baird*, 15 P. R. 615.

(*g*) *Parker* v. *Satchwell*, 17 P. R. 713; 18 *ib.* 299.

(*h*) *Davis* v. *Davis*, 27 Fed. Rep. 490.

execution of the order was held not to be conclusive against him (*a*). So, too, where a defendant packed inferior brandy in the plaintiff's cases at the express request of an agent of the plaintiff, who was seeking to entrap him, Malins, V.-C., refused the injunction with costs (*b*).

User in posters, circulars, &c.

It seems that a trade mark consisting of a device, which causes the trader's goods to be known by a particular name, may be infringed by a poster bearing a similar device (*c*), but it has been held in Scotland that a word registered as a trade mark is not infringed by its being used in circulars and advertisements in a properly descriptive sense (*d*).

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 (*e*), or, at least of so similar a description that they may fairly be supposed to be of the same manufacture as the goods to which the mark is properly applied (*f*).

No infringement where registration wider than user.

And where a trader has registered a trade mark for an extensive class of goods, but has only used it for a small part of the goods in the class, another person does not infringe his rights by using

(*a*) *Woollam* v. *Ratcliff*, 1 H. & M. 259. And see *Frese* v. *Bachof* (1), 13 Bl. C. C. 234; *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721: 9 *ib.* 601.

(*b*) *Hennessy* v. *Kennett*, Dig. 556. But in the Indian case of *Orr-Ewing* v. *Choonedoll Mullick*, Cor. 150, the defendant was restrained, though there was no evidence of his having sold the spurious goods (which he had bought ready marked) to any one but the plaintiff's agent.

(*c*) See *Price's Patent Candle Co., Ld.* v. *Jeyes' Sanitary Compounds Co., Ld.*, 19 P. R. 17; *Bourne* v. *Swan & Edgar*, (1903) 1 Ch. 211; *Anglo-Swiss Condensed Milk Co.* v. *Pearks, Gunston & Tee*, 20 P. R. 509; 21 P. R. 261; *Star Cycle Co.* v. *Frankenburgs*, 24 P. R. 46, 405: *Charles P. Kinnell & Co.* v. *Ballantine*, 26 P. R. 13.

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

(*e*) *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Moses* v. *Sargood*, Dig. 636: *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Whiteley*, 43 L. T. N. S. 627; *In re Rahone*, Dig. 643; *In re Ashton*, Hall, V.-C., Feb. 26th, 1881; *Colman* v. *Crump*, 70 N. Y. 573.

(*f*) *Eno* v. *Dunn*, 15 App. Cas. 252: *Eastman Photographic Materials Co.* v. *Griffiths' Cycle Corp.*, 15 P. R. 105: *Premier Cycle Co., Ld.* v. *Premier Tube Co., Ld.*, 12 Times L. R. 181; *Dunlop Pneumatic Tyre Co., Ld.* v. *Dunlop-Truffault Cycle Co., Ld.*, 40 Sol. J. 544: *Same* v. *Dunlop Lubricant Co.*, 16 P. R. 12: *Chameleon Co., Ld.* v. *Marshalls, Ld.*, 17 P. R. 527; *Valentine Meat Juice Co.* v. *Valentine Extract Co.*, 17 P. R. 673: *Boord* v. *Huddart*, 21 P. R. 149; *Finlay* v. *Shamrock Co.*, 22 P. R. 301; *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co., Ld.*, 23 P. R. 761; 24 P. R. 572; *Lucas, Ld.* v. *Fabry Automobile Co, Ld.*, 23 P. R. 33; *Turner's Motor Manufacturing Co., Ld.* v. *Miesse Petrol Car Syndicate, Ld.*, 24 P. R. 572; *Scottish Union and National Insurance Co.* v. *Scottish Union Insurance Co.*, 25 P. R. 560; 26 P. R. 105: *Warwick Tyre Co., Ld.* v. *New Motor Co., Ld.*, 27 P. R. 161. See *In re Gutta Percha Co. of Toronto, Ld.*, 26 P. R. 84, 428: *Wamsutta Mills* v. *Allen*, 12 Phila. 535.

a somewhat similar mark on goods also in the class, but substantially different from the goods on which the registered proprietor has used it. This was so laid down by the Court of Appeal in *Edwards* v. *Dennis* (*a*), in which Cotton, L. J., said, "no doubt the intention of the Trade Marks Act of 1875 is to give a right to what is on the register so as to enable a person who has been registered for five years as the proprietor of a trade mark to maintain an action against any other person taking or infringing that trade mark: but when the alleged infringement consists in using, not the exact thing upon the register, but something similar to it, the Court must, in considering whether there has been an infringement or not, proceed upon the old principle, which prevailed both at law and in equity before the Act, that a man is not to pass off his goods as the goods of another. At common law the man thus injured might obtain damages, and in equity the more effectual protection of an injunction."

Rights of agent of foreign firm.

In the case of *Apollinaris Co., Ld.* v. *Scherer* (*b*) the plaintiffs, an English company, had obtained from one Saxlehner, the proprietor of a spring in Hungary, called the "Hunyadi Janos" spring, the exclusive right to export the water to the United States and to use the name there. Saxlehner sold the water in Europe under a label which stated that it was not meant for export to America, and the plaintiffs sold the water in the United States under a label which stated that they were the sole exporters. The defendant bought genuine water in Europe under labels bearing Saxlehner's caution, and sold it in the United States as "Hunyadi Janos" water: and it was held that the Apollinaris Co. was entitled to no relief against him, the Court being of opinion that genuine water, rightfully bought, might be sold under its proper name anywhere, and that the arrangement between the Apollinaris Co. and Saxlehner was not binding on persons who were no parties to it.

Rights of lessee of spring.

On the other hand, it has been held (*c*) that the concessionnaire of a spring for a term is not entitled, at all events during the term, to open another spring in the same neighbourhood, and sell

(*a*) 30 Ch. D. 454. And compare *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454; *Hargreave* v. *Freeman*, (1891) 1 Ch. 39; *Phillips* v. *Ogden*, 12 P. R. 325; *In re Butt & Co.*, (1898) 2 Ch. 432.

(*b*) 23 Bl. C. C. 459. And see *In re Apollinaris Co.*, (1891) 2 Ch. 186, 226, 230.

(*c*) *Hill* v. *Lockwood*, 32 Fed. Rep. 389.

the water derived therefrom under the same name as the water derived from the first spring, and in competition with that water.

Sale of materials under name.

Where the plaintiff's article was known as "Hostetter's Stomach Bitters," and the defendants sold materials which they alleged could be used in the production of that article, no relief was granted, there being no allegation that the defendants had done more than this, or that they were engaged with others in a scheme of fraud (*a*).

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 (*b*); but it is no infringement to use in an honest way a mark which has failed to obtain protection in the hands of another trader by reason of that trader's misstatements; and an infringer of the mark as subsequently used by the honest trader cannot escape by setting up the prior user of the dishonest trader (*c*).

Infringement by use of a registered mark.

Registration of a trade mark which resembles a prior trade mark which is registered, so nearly as to be calculated to deceive, does not prevent the owner of the prior mark from obtaining an injunction to restrain its use (*d*). Where the plaintiff's mark had been registered for an extensive class of goods, and the defendant's mark had been registered for a class which overlapped the plaintiffs' but had been used only for goods distinct from theirs, on the defendant beginning to use his mark on goods included in his registration, but similar to those for which the plaintiffs' mark had been registered and used, his registration was rectified by limiting it to the distinct goods, and an injunction was granted as to the goods on which he was newly using it (*e*). Again, where the proprietors of a mark registered for coffee in 1876 began, in 1889, to apply it to tea, they were restrained from so doing on motion by the proprietor of a similar mark registered for tea in 1877 (*f*).

(*a*) *Hostetter* v. *Fries*, 21 Bl. C. C. 339.

(*b*) *Lemoine* v. *Ganton*, 2 E. D. Smith, 313; R. Cox, 142. But see *Symonds* v. *Greene*, 28 Fed. Rep. 834.

(*c*) *Parlett* v. *Guggenheimer*, 67 Md. 542, with which compare *O'Rourke* v. *Central City Soap Co.*, 26 Fed. Rep. 576.

(*d*) *Read* v. *Richardson*, 45 L. T. N. S. 54; *Goodwin* v. *Venning*, 24 Sol J. 690. Compare *Phillips* v. *Ogden*, 12 P. R. 325. And in New South Wales the use of a registered mark has been restrained: *Harris* v. *Ogg*, 5 N. S. W. Rep. (E.) 114: *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72.

(*e*) *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454.

(*f*) *Upper Assam Tea Co.* v. *Herbert & Co.*, 7 P. R. 183.

Infringement by improper use of genuine mark, or on maker's inferior goods.

It is an infringement to use a genuine trade mark of a manufacturer upon goods not of his production (*a*); and it is no less an infringement to use it upon goods of a quality to which he did not intend it to be applied, even though the goods upon which the infringer uses it are of the make of the owner of the mark (*b*). But where goods have been purchased in bulk, the purchaser is entitled to resell them retail under the name given to them by the manufacturer (*c*).

Moulded bottles.

In some cases a rather difficult question has arisen with respect to the use of bottles moulded with the plaintiff's name or trade mark. Where such bottles have been systematically bought up and refilled with spurious waters, &c., so as to pass them off as being of the plaintiff's manufacture, an injunction will be granted to restrain the continuance of the fraud (*d*): but where the bottles have been bought by the defendant in the ordinary course of his business they have become his property, though they bear the plaintiff's trade mark (*e*), and it does not appear that he will be restrained from using what he has bought, merely because the bottles are moulded, so long as he uses them in a fair manner, and places on them his own adhesive labels (*f*). There does not, indeed, seem to be a clear decision on the point, as the question has not been raised free from complications. Thus, in *Barrett* v. *Gomm* (*g*), the Court of Appeal held that no injunction could be granted against soda-water manufacturers whose labels were found to be placed on two bottles of soda-water moulded with the plaintiff's name and trade mark, but in this case there was no evidence

(*a*) *Barnett* v. *Leuchars*, 13 L. T. N. S. 195 (boxes for "Pharaoh's Serpents"): *Richards* v. *Williamson*, 30 L. T. N. S. 716 (gun stamps): *Hennessy* v. *Rohmann*, 36 L. T. N. S. 51: *Hennessy* v. *Cooper*, Dig. 549 (cases for brandy): *Hennessy* v. *Neary*, 19 P. R. 36: *John Jameson, Ld.* v. *Clarke*, 19 P. R. 255: and see *Major Bros.* v. *Franklin & Son*, 25 P. R. 406: *Bass* v. *Laidlaw* (2), 26 P. R. 211.

(*b*) *Hennessy* v. *Kennett*, Dig. 556: *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216: *Hennessy* v. *Hogan*, *ib.* 225 (cases intended for brandy of superior quality used for brandy of inferior quality): *Gillott* v. *Kettle*, 3 Duer, 624: R. Cox, 148 (labels indicating superior pens placed on boxes of inferior ones): *Thacher* v. *Levy*, 23 P. R. 117: *Kirker, Greer & Co., Ld.* v. *Mayman*, N. S. W. 1 S. R. (Eq.) 73: *Ingram* v. *India Rubber, Gutta Percha and Telegraph Co., Ld.*, 29 W. L. R. 172. And see *John Jameson, Ld.* v. *Clarke*, 19 P. R. 255; *Palestine Wine and Trading Co., Ld.* v. *J. Cohen & Co.*, 23 P. R. 568.

(*c*) *Candy & Mitchell* v. *Taylor & Co.*, 56 L. T. N. S. 891.

(*d*) *Rose* v. *Henley*, Dig. 551; *Allen* v. *Richards*, 26 Sol. J. 658: *Hostetter* v. *Anderson*, 1 V. R. Eq. 7.

(*e*) *Idris & Co.* v. *Ward*, C. A. Feb. 4th, 1889.

(*f*) *Welch* v. *Knott*, 4 K. & J. 747: *Rose* v. *Loftus*, 47 L. J. Ch. 576. See, however, *Wood* v. *Burgess*, 24 Q. B. D. 162, a case under the Merchandise Marks Act, 1887: also *Burns* v. *Turner*, Ct. Sess. Cas. 4th Ser. XXV. 38.

(*g*) 71 L. T. (Journal) 388.

to show that the soda-water in the bottles was of the defendant's manufacture, or that the defendants had filled or sold them. The Master of the Rolls (Sir G. Jessel), however, stated that if some of the plaintiff's engraved bottles had come fairly into the defendants' possession, they would have been entitled to refill and sell them, at all events if they had placed on them their own adhesive labels, so as to cover the plaintiff's name and trade mark. And this opinion appears to have been adopted by North, J., in *Barrell* v. *White* (*a*), but it has not met with universal acceptance (*b*).

Infringement by engraver.

It is an infringement for an engraver to prepare and supply to one person printing-blocks engraved with the trade mark, or an important part of the trade mark of another, inasmuch as the piracy would be impossible without the blocks; and Shadwell, V.-C. of England, went so far as to say that if a thing contained twenty-five parts, and one only was taken, such an imitation would be sufficient to contribute to a deception, and the law would hold those responsible who had contributed to the fraud (*c*). 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 (*d*). 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 (*e*).

Untrue allegation of registration.

It does not appear that the position of a defendant in an action for infringement is altered for the worse by the fact of his having alleged his trade mark to be registered, before it in fact was so (*f*);

(*a*) North, J., May 12th, 1883. See also *Woolley & Son* v. *Morrison* (Sc.), 21 P. R. 63; *Donohoe* v. *Cherry* (Ir.), 26 P. R. 545; and in the Cape Colony: *United Tobacco Companies* v. *Crook*, 25 Cape Good Hope S. C. R. 343; and in Australia, *Jones* v. *Gedge*, 9 C. L. R. 262; and see the cases under the Merchandise Marks Act, 1887, *infra*.

(*b*) See *Thwaites* v. *McEvilly* (Ir.), 21 P. R. 397; *Barr & Co.* v. *Muir & Dougal* (Sc.), 21 P. R. 665; *Burn* v. *Stone*, 27 Times L. R. 6. So in New South Wales: *Holbrooks, Ld.* v. *Parry*, 18 N. S. W., W. N. 98; and *Champion* v. *Smith*, 21 N. S. W. L. R. (Eq.) 110.

(*c*) *Guinness* v. *Ulmer*, 10 L. T. O. S. 127; *Saxlehner* v. *Eisner*, 179 U. S. 19.

(*d*) *Farina* v. *Silverlock*, 1 K. & J. 509; 6 De G. M. & G. 214; 4 K. & J. 650; *Jameson* v. *Johnston*, 18 P. R. 259; *De Kuyper* v. *Witteman*, 23 Fed. Rep. 871; *Holt* v. *Menendez*, 128 U. S. 182.

(*e*) *Farina* v. *Silverlock*, 6 De G. M. & G. 214.

(*f*) *Ellis & Sons* v. *Ruthin Soda Water Co.*, Jessel, M. R., Nov. 21st, 1879.

but by so doing he will expose himself to penalties under § 67 of the Trade Marks Act, 1905 (*a*).

Use by a trade-mark owner of his mark upon another's goods.

It seems that a trader is entitled to place his trade mark on articles not of his own make, unless there is some trade custom or contract that he shall not do so, and to remove the maker's mark for the purpose of substituting his own, and that such a course would not be actionable (*b*). Nor is there any reason why it should be so. The maker's mark has already performed its function when the goods are sold, and when it is removed from the goods the maker ceases to be responsible for the guarantee implied by its presence on them. The purchaser, by substituting his own mark, undertakes the responsibility for the quality of the goods, which are, in effect, selected and guaranteed by him (*c*), and his right to have a selection mark of his own is recognised in terms by § 3 of the Trade Marks Act, 1905.

(*a*) See also § 3 (1) (e) of the Merchandise Marks Act, 1887.

(*b*) See *Johnson* v. *Raylton*, 7 Q. B. D. 438. Compare *Starey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90.

(*c*) See *Hirsch* v. *Jonas*, 3 Ch. D. 584; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Apollinaris Co.*, (1891) 2 Ch. 186, 225, 230, 235; *Leahy* v. *Glover*, 10 P. R. 141; *In re Wills* (2), (1893) 2 Ch. 262.

CHAPTER V.

THE CRIMINAL PROSECUTION.

Remedies for fraudulent imitations.

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

Infringement of trade mark not forgery at Common Law.

At Common Law the imitation of a trade mark or of a trade wrapper is not a forgery. "A forgery must be of some document or writing" (*b*); "it is the forging of a false document to represent a genuine document" (*c*). In a case in which the prisoner had imitated the label used on Borwick's baking powder, and was indicted for forgery (*d*), the Court of Crown Cases Reserved, consisting of Pollock, C. B., Willes and Byles, JJ., and Bramwell and Channell, BB., decided that the conviction for forgery was not sustainable, though an indictment for false pretences would have been good. The grounds of the decision are thus stated by Bramwell, B.: "I think that this was not a forgery. Forgery supposes the possibility of a genuine document, and that the false document is not so good as the genuine document, and that the one is not so efficacious for all purposes as the other. In the present case, one of these documents is as good as the other: the one asserts what the other does; the one is as true as the other: but one gets improperly used. But the question is whether the document itself is a false document. It is said that the wrapper is so like one used by somebody else, that it may mislead; but that

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

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

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

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

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 was made a misdemeanour, and the Criminal Law made to cover such offences as those committed in *R.* v. *John Smith* (*d*) and *R.* v. *Closs* (*e*). And this is so now under the Merchandise Marks Act, 1887 (*f*).

What offences are punishable under the Merchandise Marks Act, 1887.

By that Act (*g*) the following offences are made punishable:—

1. Forging a trade mark registered in the United Kingdom

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

(*b*) D. & B. 460; 7 Cox, 494. 25 & 26 Vict. c. 68, § 7, now provides for spurious pictures with a forged signature.

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

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

(*e*) D. & B. 460; 7 Cox, 494. See *R.* v. *Lloyd* (Recorder of Birmingham, Oct. 13th, 1881), in which the infringement of a gunmaker's trade mark was punished under the Merchandise Marks Act, 1862, with six months' imprisonment. In *R* v. *Willis*, C. C. C., September 21st, 1885, Hawkins, J., inflicted six years' penal servitude on a person who had offered for sale watches of base metal thinly coated with gold and bearing a forged Goldsmiths' Hall mark. In *R.* v. *Boyes*, C. C. C., April 6th, 1886, the Recorder of London inflicted four months' imprisonment without hard labour for imitation of the prosecutor's perfumes, bottles, and labels. In *R.* v. *Pemberton*, 20 Iron. 110, the defendant had forged the "Low Moor" trade mark on iron tubes not of the Low Moor Co.'s material or manufacture, and Day, J., inflicted three months' imprisonment without hard labour. See *Cooper* v. *Hamilton*, 6 N. Z. L. R. 598, as to the practice in New Zealand.

(*f*) 50 & 51 Vict. c. 28. And see notes to this Act, *infra*.

(*g*) As to this Act generally, see *Gridley* v. *Swinborne*, 5 Times L. R. 71; *Wood* v. *Burgess*, 24 Q. B. D. 162; *Storey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 99; *R.* v. *Lipton*, 32 L. R. Ir. 115; *Kirshenboim* v. *Salmon & Gluckstein*,

or protected in any British possession or foreign state to which § 103 or 104 of the Patents Act, 1883 (*a*), has been made applicable (*b*).

2. Falsely applying to goods any trade mark as above, or any mark so nearly resembling such a trade mark as to be calculated to deceive (*c*).
3. Making any die, block, machine, or other instrument for the purpose of forging or of being used for forging a trade mark as above (*d*).
4. Applying (*e*) to goods any false trade description (*f*)—*i.e.*, any description, statement, or other indication, direct or indirect—
   (a) As to the number, quantity, measure, gauge or weight of any goods (*g*); or
   (b) As to the place or country in which any goods were made or produced (*h*); or
   (c) As to the mode of manufacturing or producing any goods (*i*); or
   (d) As to the material of which any goods are composed (*k*); or
   (e) As to any goods being the subject of an existing patent, privilege, or copyright (*l*): or

(1898) 2 Q. B. 19; *Coppen* v. *Moore* (1), (1898) 2 Q. B. 300; *ib.* 306; *Christie, Manson & Woods* v. *Cooper*, (1900) 2 Q. B. 522; *Cameron* v. *Wiggins*, (1901) 1 Q. B. 1; *Haddow* v. *Neilson*, Ct. of Sess. Cas. 5th Ser. II. 19; *Thwaites* v. *McErilly*, 21 P. R. 397; *North Eastern Breweries, Ld.* v. *Gibson*, 91 L. T. N. S. 78: *Fowler* v. *Cripps*, (1906) 1 K. B. 16. Also the notes to the Act in Appendix H.

(*a*) Now § 91 of the Patents and Designs Act, 1907.

(*b*) §§ 2 (1) (a), 3 (1) and 4.

(*c*) §§ 2 (1) (b), 3 (1), 5 and 6. And see *Copley* v. *Kirk*, 84 L. T. (Journal) 140.

(*d*) §§ 2 (1) (c), 4 and 6.

(*e*) *Coppen* v. *Moore* (1), (1898) 2 Q. B. 300; *Langley* v. *Bombay Tea Co.*, (1900) 2 Q. B. 460; *Lord Advocate* v. *Jacobs*, (1908) S. C. 90; and *Lord Advocate* v. *Suits, Ld.*, *ib.* 1163.

(*f*) §§ 2 (1) (d), 3, 5 and 6. Compare § 18.

(*g*) See *R.* v. *Sherwood*, 7 Cox, 270; *R.* v. *Ragg*, 8 Cox, 265; *R.* v. *Lee*, 9 Cox, 460; *R.* v. *Ananiadi*, Manchester Police Court, July 30th, 1889; *Hooper* v. *Balfour*, 62 L. T. N. S. 646: *Budd* v. *Lucas*, (1891) 1 Q. B. 408; *R.* v. *Lipton*, 32 L. R. Ir. 115; *R.* v. *Manoukian*, Manchester Police Court, May 10th, 1898; *Star Tea Co.* v. *Whitworth*, 91 L. T. N. S. 87; *Langley* v. *Bombay Tea Co.*, (1900) 2 Q. B. 460.

(*h*) See § 7, with respect to watches: and see *R.* v. *Lipton*, 32 L. R. Ir. 115: *Bischop* v. *Toler*, 65 L. J. M. C. 1: *Coppen* v. *Moore* (1), (1898) 2 Q. B. 300; *Williamson* v. *Tierney*, 83 L. T. N. S. 592; *Cameron* v. *Wiggins*, (1901) 1 K. B. 1; *Davenport* v. *Apollinaris Co., Ld.*, 89 L. T. N. S. 19: *R.* v. *Butcher*, 1 Cr. App. R. 54; *R.* v. *Phillips*, 2 Cr. App. R. 295; *Hooper* v. *Riddle*, 21 Cox, 177; *Watson* v. *Dr. Jaeger's Sanitary Woollen System Co.*, 13 Times L. R. 150.

(*i*) See *R.* v. *Lipton*, 32 L. R. Ir. 115: *Kirshenboim* v. *Salmon & Gluckstein*, (1898) 2 Q. B. 19.

(*k*) See *Morgan* v. *McAdam*, 36 L. J. Ch. 228; *Fowler* v. *Cripps*, (1906) 1 K. B. 16; *Meadows* v. *Catesby*, 107 L. T. (Journal) 440: *Davenport* v. *Apollinaris Co.*, 89 L. T. N. S. 19.

(*l*) See § 89 of the Patents and Designs

(f) As to the person or firm who manufactured any goods (*a*);

which is false in a material respect as regards the goods to which it is applied (*b*).

5. Disposing of or having in possession any die, block, machine, or other instrument for the purpose of forging a trade mark as above (*c*).
6. Causing any of the above things to be done (*d*).
7. Selling, or exposing for or having in possession for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark as above or false trade description is applied, or to which any trade mark as above or mark so nearly resembling such a trade mark as to be calculated to deceive, is falsely applied (*e*).
8. Procuring, counselling, aiding, abetting, or being accessory to, from within the United Kingdom, the commission without the United Kingdom of any such act as above (*f*).
9. Falsely representing that any goods are made by a person holding a Royal warrant, or for the service of His Majesty, or of any of the Royal Family, or any Government department (*g*).

Additions to and alterations of trade marks.

By § 4 (b) it is made forgery of a trade mark to falsify a genuine trade mark, whether by alteration, addition, effacement, or otherwise.

Forgery at Common Law.

At Common Law "it is forgery to alter a material part of a true instrument" (*h*). 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 (*i*). And "the making of any false instrument which is the subject of forgery, with a fraudu-

Act, 1907, replacing § 105 of the Patents Act, 1883; and *R.* v. *Wallis*, 3 P. R. 1; *R.* v. *Crampton*, 3 P. R. 367; *R.* v. *Morris*, Great Marlborough Street Police Court, December 16th, 1886: *R.* v. *Townsend*, 13 P. R. 265.

(*a*) See *Haddow* v. *Neilson*, Ct. of Sess. Cas. 5th Ser. II. 19; *Thwaites* v. *McEvilly*, 21 P. R. 397; *North Eastern Breweries, Ld.* v. *Gibson*, 91 L. T. N. S. 78; *Burns* v. *Turner*, Ct. of Sess. Cas. 4th Ser. XXV. 38; *Donohoe* v. *Cherry*, 26 P. R. 545; *Stone* v. *Burn*, 27 Times L. R. 6. And see *post*, Appendix II.

(*b*) §§ 2 (1) (d), 3, 5 and 6. Compare § 18.

(*c*) §§ 2 (1) (e), 3 (1) and (4).

(*d*) §§ 2 (1) (f) and 6.

(*e*) § 2 (2). See *Christie* v. *Foster Brewing Co., Ld.*, 18 V. L. R. 292, where it was held that a corporation might be guilty of offences under the corresponding Victorian Act, and the meaning of "having goods in possession for sale" was discussed.

(*f*) § 11: *R.* v. *Manoukian* (2), Manchester Police Court, September 8th, 1903.

(*g*) § 20. And see Trade Marks Act, 1905, § 68, and Patents and Designs Act, 1907, § 90, as to wrongful assumption of the Royal Arms.

(*h*) 2 East, P. C. 978.

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

lent intent, although in the name of a non-existing person, is as much a forgery as if it had been made in the name of one who was known to exist, and to whom it was due" (*a*). "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" (*b*).

Defences. The defences to a charge of one of the above offences are set out, as to Nos. 1 to 6, in § 2 (1) (*c*); as to No. 7, in § 2 (2). A special defence is also provided by § 6 for persons who are charged with having committed offences 2, 3, 4 or 6, when they were in fact employed in the ordinary course of their business.

Penalties. The penalties for offences Nos. 1 to 8 are set out in § 2 (3); as to No. 9, in § 20.

Expressions generally understood may be employed. It is not an offence for persons to use any trade description *lawfully and generally applied, at the passing of the Act* (*d*), to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods (*e*), when the description is so applied. Thus, patent leather, patent thread (*f*), patent pins (*g*), patent isinglass (*h*). But there is a special requirement, when the name of a place or country is stated in a misleading way, that the place of origin shall be stated (*i*).

Official prosecutions. By the Merchandise Marks Act, 1891 (*k*), the customs entry relating to imported goods is, for the purposes of the Act of 1887, to be a trade description applied to the goods (*l*); and provision is made for official prosecutions by the Board of Trade (*m*). By the Merchandise Marks Act, 1894 (*n*), the powers conferred by the Act of 1891 upon the Board of Trade may be exercised by the Board of Agriculture in certain cases.

(*a*) *R.* v. *Elsworth*, 2 East, P. C. 957. And see *R.* v. *Lewis*, Foster, Cr. Cas. 116; *R.* v. *Avery*, 8 C. & P. 596; *R.* v. *White*, 72 C. C. C. Sessions Papers, 222.

(*b*) *Per* Grose, J., in *R.* v. *Collicott*, 2 Leach, 1048, a Stamp case.

(*c*) See *Copley* v. *Kirk*, 84 L. T. (Journal) 140.

(*d*) For a defence on this ground to succeed, it must be proved that the required circumstances existed at the date of the Act; subsequent common user will not do. In *R.* v. *Rylands*, Times, April 9th and Dec. 9th, 1909 (the "Witney Blanket" case), a defence failed on this ground.

(*e*) § 18. See the Memorandum at p. 718 issued by the Customs authorities.

(*f*) *Marshall* v. *Ross*, L. R. 8 Eq. 651.

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

(*h*) *Gridley* v. *Swinborne*, 5 Times L. R. 71.

(*i*) § 18.

(*k*) 54 & 55 Vict. c. 15.

(*l*) § 1.

(*m*) § 2.

(*n*) 57 & 58 Vict. c. 19.

In Ireland the Department of Agriculture has corresponding powers under the Merchandise Marks (Ireland) Act, 1909 (*a*).

Civil remedy not affected by conviction.

A conviction under these Acts does not relieve the defendant from any civil proceedings (*b*).

Where deception succeeds, indictment for false pretences will lie.

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

Convictions.

"There is no difference in principle between a misrepresentation of a mark, and one that an acceptance was the acceptance of John Jones or any other person" (*c*): 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* (*d*), 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. 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" (*e*). The prisoner was convicted. In *R.* v. *Smith* (*f*), the conviction for forgery being quashed, the prisoner afterwards pleaded guilty to an indictment for false

(*a*) 9 Edw. 7, c. 24.
(*b*) § 19 of the principal Act.
(*c*) *Per* Kelly, C. B., in *R.* v. *Sutcr & Coulson*, 10 Cox, 577.
(*d*) 6 Cox, 380.
(*e*) It was also held that an offer to sell on sale or return was immaterial, the actual bargain being for cash.
(*f*) D. & B. 566; 8 Cox, 32.

pretences (*a*). In *R.* v. *Suter & Coulson* (*b*), 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 (*c*).

R. v. *Bryan.*

Question as to misrepresentation of quality.

The case of *R.* v. *Bryan* (*d*) gave rise to some differences of opinion in respect to the Law of False Pretences. The prisoner in that case was found by the jury to have obtained money from pawnbrokers on spoons which he had fraudulently represented to have as much silver on them as Elkington's "A" spoons. They also found that he had represented the foundations to be of the best material, knowing that to be untrue, and that in consequence of this he obtained the moneys mentioned in the indictment. The Recorder of London reserved the case for the consideration of the Court of Crown Cases Reserved. Twelve judges heard the case, and of these ten held that the conviction must be quashed, Willes, J., and Bramwell, B., dissenting. The language employed by some of the judges on that occasion, and in particular by Lord Campbell, C.J. (*e*), led to an impression that in the opinion of the judges it was impossible to convict under the Statute of False Pretences, when the misrepresentation had reference only to quality and not to substance: that is to say, that where, for instance, an infinitesimal quantity of gold was found in a ring represented to be of eighteen-carat gold, the presence of that infinitesimal quantity of gold prevented the false representations from supporting a criminal charge (*f*). Where the jewellery contained no metal of the kind specified, the prisoner was convicted (*g*). Anticipating such a result, Bramwell, B.,

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

(*b*) 10 Cox, 577.

(*c*) And in *R.* v. *Gray & Gosling*, Dig. 183, the imitation of Messrs. Allsopp's labels was punished; and in *R.* v. *S. Jones*, Dig. 182, the imitation of Mr. Borwick's wrappers. See, too, *R.* v. *Closs*, D. & B. 460; 7 Cox, 494.

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

(*e*) 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."

(*f*) *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.

(*g*) *R.* v. *Roebuck*, 7 Cox, 126; D. & B. 24. And see *R.* v. *Ball*, C. & M.

said (*a*) that the result of the decision would be that the prisoner would be indictable if Elkington's spoons had half an ounce and his none, but not if Elkington's had one ounce, and his a quarter of an ounce.

The interpretation thus put upon the decision in *R.* v. *Bryan* was unfortunate, tending, as it did, to encourage an idea of fraud being possible with impunity; and some of the judges who had decided *R.* v. *Bryan* (*a*) took opportunities of explaining what the real principle of the judgment was (*b*). It was also difficult to reconcile such a conclusion with such cases as those in which the prisoner sold a cheese by means of the representation that a taster taken from a cheese of superior quality was in fact taken from the one in question (*c*). 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 (*d*).

R. v. *Ardley.*

The whole question is now fully explained and set at rest by the judgment in *R.* v. *Ardley* (*e*). 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* (*f*). 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

249; *R.* v. *Stevens*, 1 Cox, 85; and *R.* v. *Priestley*, 63 C. C. C. Sessions Papers, 541.

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

(*b*) 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.

(*c*) *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.

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

(*e*) L. R. 1 C. C. R. 301; 12 Cox, 23. Compare *R.* v. *Foster*, 13 Cox, 393.

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

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

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

Intentional misstatement as to fact punishable.

From this case it follows that where a person has made a false statement in regard to a specific question of fact, knowing that statement to be false, with intent to defraud, and he does defraud by means of that statement, then, even though the statement

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

have reference to the quality of the article, he will be liable to be convicted (*a*).

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* (*b*).

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 (*c*).

False pretences as to registration of trade marks.

By § 67 of the Trade Marks Act, 1905, replacing § 105 of the Patents Act, 1883, penalties are now imposed on persons untruly representing that a trade mark is registered (*d*).

False pretences without words.

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

(*a*) On this principle, in New South Wales, a prosecution was directed against a person who had sold German cigars as Havannahs: *Heyde* v. *Wittkowski*, 5 N. S. W. Rep. (E.) 74.

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

(*c*) *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.

(*d*) See § 3 (1) of the Merchandise Marks Act; also *Wright, Crossley & Co.* v. *Dobbin & Co.*, 15 P. R. 21; *MacSymons' Stores, Ld.* v. *Shuttleworth*, 15 P. R. 748, in which the decision of the Irish Q. B. D. was approved; and *R.* v. *Morris*, Great Marlborough Street Police Court, December 16th, 1886.

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

CHAPTER VI.

THE CIVIL REMEDY. I.

Common Law. THE proper remedy at Common Law for a fraud committed by means of the infringement of a trade mark belonging to a rival trader is by an action on the case for deceit. The manner in which that form of action was made applicable to cases of trade mark and developed to meet the necessities of such cases, which in some respects differ from other cases of fraudulent misrepresentation, may be well stated in the language employed by Mellish, L. J., who says (*a*): "In my opinion, all actions of this nature must be founded upon false representations. Originally, I apprehend, the right to bring an action in respect of the improper use of a trade mark arose out of the Common Law right to bring an action for a false representation, which, of course, must be a false representation made fraudulently. It differed from an ordinary action for false representation in this respect, that an action for false representation is generally brought by the person to whom the false representation is made; but in the case of the improper use of a trade mark, the Common Law Courts noticed that the false representation which is made by putting another man's trade mark, or the trade name of another manufacturer, on the goods which the wrongdoer sells, is calculated to do an injury, not only to the person to whom the false or fraudulent representation is made, but to the manufacturer whose trade mark is imitated; and, therefore, the Common Law Courts held that such a manufacturer had a right of action for the improper use of his trade mark. Then the Common Law Courts extended that doctrine one step farther; first, if I recollect rightly, in the case of *Sykes* v. *Sykes* (*b*). There it was held that, although the representation was perfectly true as between the original vendor and the original purchaser,

(*a*) *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 453.
(*b*) 3 B. & Cr. 541. And see *per* Lord Blackburn, in *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15.

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." Common Law.

Action may be brought by manufacturer defrauded.

An action on the case for deceit at Common Law may then be brought, not only by the person who has been induced to purchase goods manufactured by one maker in the faith that they have been manufactured by another, but also by the maker of whose manufacture the goods in question have falsely been represented to be. It seems at least probable that this principle was recognized as early as the reign of Queen Elizabeth. In *Southern* v. *How* (*a*), a case was quoted by Doderidge, J., in which, in that reign, a clothier of Gloucester, who manufactured better cloth than any other person in the trade, had invented and applied to his cloth a special mark to denote his manufacture. Another clothier then pirated this mark and applied it to his own inferior cloth; and it was held in the Court of Common Pleas that an action on the case for deceit would lie against the fraudulent clothier. Whether the action was brought by the buyer of the cloth or by the rival clothier cannot be determined, since the reporters differ on this point; but this much is clear, that Chief Justice Popham (*b*) reported the case as establishing the right of the defrauded clothier to compensation for the injury done him.

(*a*) Cro. Jac. 471; Poph. 144: 2 Rolle, 28.

(*b*) The great weight to be given to any statement by Popham, C. J., appears from the terms applied to him in 6 Co. Rep. 75, where he is described as "the venerable and honourable Chief Justice of England, and Councillor of State to Queen Elizabeth and to our Lord the King that now is. . . . . Who was a most reverent judge, of a ready apprehension, profound judgment, most excellent understanding in the true reason of the law, and of universal and admirable experience and knowledge of all business which concerned the commonwealth; accompanied with a rare memory, with perpetual industry and labour for the maintenance of the tranquillity and public good of the realm, and in all things behaving with great constancy, integrity and patience." Eyre, C. J. (1 B. & P. 610), speaks of him as "a very able judge," and Lord Fitzgerald (14 App. Cas. 357) says "he had the reputation of being a consummate lawyer."

Common Law. Right to redress.

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

At Common Law, fraudulent intention must be proved.

According to the strict principles of the Common Law, for an action in respect of a trade mark to be successful, it must be proved that the defendant acted with fraudulent intention. "Proof of fraud on the part of the defendant," says Lord Westbury, C., "is of the essence of the action" (*b*). The general law on the subject of false representations is summed up by Parke, B., in *Taylor* v. *Ashton* (*c*), as being that, independently of any contract between the parties, no one can be made responsible for a representation of such a kind as there was in that case (*i.e.*, a false representation of the flourishing state of a bank, which had induced the plaintiff to take shares), unless it be fraudulently made. The law so enunciated was applied in a succession of trade mark cases at Common Law (*d*), the effect of which was stated by Lord Westbury as above. But it is not necessary that a person should sit down and say to himself: "I propose to defraud my neighbour," but if a man of common sense and intelligence, knowing his neighbour's rights, sets to work to do things which are necessarily calculated to injure him, he must be taken to be guilty of fraud—that

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

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

(*c*) 11 M. & W. 415. And see *Derry* v. *Peek*, 14 App. Cas. 337.

(*d*) See, among other cases, *Singleton* v. *Bolton*, 3 Doug. 293; *Crawshay* v. *Thompson*, 4 Man. & G. 357; *Rodgers* v. *Nowill*, 5 C. B. 109; *Myers* v. *Baker*, 3 H. & N. 802. In *Crawshay* v. *Thompson*, Coltman, J., expressed himself thus: "It appears to me that an intention to deceive is a necessary ingredient in this case. The intention is for the jury; and fraud must be made out by proof of an intention existing in the mind of the party that the iron should pass as the iron of the plaintiff." And in *Hargreaves* v. *Smith*, Dig. 338, Lush, J., told the jury that an intention to divert customers from the plaintiffs to the defendant must be proved. See *per* Lord Blackburn in *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15, in the House of Lords; *Lawrie* v. *Baker*, 2 P. R. 213; *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639, *per* Lopes, L. J.

is to say, of knowingly injuring his neighbour—knowingly violating his neighbour's rights by some false pretence (*a*). Common Law.

Defendant must have expected deception.

It has been held that intentional fraud cannot be inferred from the fact alone that the plaintiff has informed the defendant that in his opinion the defendant was using a trade mark calculated to deceive, nor even from the fact being that the trade mark so used is really calculated to deceive: there must be evidence that the defendant believed such deception to be probable (*b*); in other words, that the defendant has sold his goods "as and for" the plaintiff's goods (*c*). "But," said Lord Blackburn, in *Singer Manufacturing Co.* v. *Loog* (3) (*d*), "it is to my mind obvious that, though the defendants might have committed no actionable wrong whilst using the plaintiff's trade mark innocently, yet, if they persevered with the use of it after they had knowledge of the facts, they would do wrong, and there would be evidence to support a claim at law for damages for knowingly selling the defendants' goods as and for the plaintiff's." And in a Canadian case at law (*e*), it was held that the plaintiff was entitled to damages, though the defendant denied any fraudulent intention, since the mark had been registered for a year as the plaintiff's, and the defendant must be taken to have known it.

Deception of first purchaser not necessary.

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

(*a*) *Pinto* v. *Badman*, 8 P. R. 181, 184, *per* Day, J.

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

(*c*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; *Morison* v. *Salmon*, 2 Scott, N. R. 449; 2 Man. & G. 385; *Crawshay* v. *Thompson*, *ubi supra*. In equity, it is not necessary to prove fraudulent intention otherwise than by proving that the defendant has used a mark which is, in fact, calculated to deceive: and this was recognised by the Court of Queen's Bench in *Dixon* v. *Fawcus*, 3 Ell. & Ell. 537. Since, by the Judicature Act of 1873, § 25, the rules of Equity are to prevail where they conflict with those of the Common Law, it appears that at least nominal damages should now be recoverable in the King's Bench Division on proof of such facts as would be satisfactory to a Court of Equity. See *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639, *per* Lopes, L. J.

(*d*) 8 App. Cas. 15.

(*e*) *Bondier* v. *Depatie*, 3 Dorion, 233.

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

(*g*) *Per* Wood, V.-C., in *Farina* v. *Silverlock*, 1 K. & J. 509.

(*h*) Compare the language of the Court

Common Law. Questions for jury.

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

As to the questions to be left to the jury in a case of passing off, it was said by Lindley, L. J., on a motion for a new trial in the case of *Reddaway* v. *Bentham Hemp Spinning Co.* (*d*), in which the plaintiffs claimed an injunction to restrain the defendants from using the words "camel hair" in connection with the sale or manufacture of belting by them so as to induce the belief that such belting was of the plaintiffs' manufacture, that "two questions at least should be left to the jury, viz.: (1) What does camel hair belting mean? Does it mean belting made by the plaintiffs as distinguished from belting made by other manufacturers, or does it mean belting of a particular kind without reference to any particular maker? (2) If it has the first of these meanings, then the next question will be, Do the defendants so describe their belting as to be likely to mislead purchasers and to lead them to buy the defendants' belting as and for the belting of the plaintiffs? The second question, if answered in the affirmative, would entitle the plaintiffs to an injunction without proof of any intent to deceive." In the subsequent action of *Reddaway* v. *Banham* (*e*), brought by the same plaintiffs against different defendants for similar relief, Collins, J., left the following questions to the jury: (1) Does "camel hair belting" mean belting made by the plaintiffs as distinct from belting made by other manufacturers? Or (2) Does it mean belting of a particular kind without reference to any particular maker? (3) Do the defendants so describe their belting as to mislead

of King's Bench in *Polhill* v. *Walter*, 3 B. & Ad. 114. And see *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434—442, 451—453; and *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15.

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

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

(*c*) *Rodgers* v. *Nowill*, 5 C. B. 109. In *Hargreaves* v. *Smith*, Dig. 338, Lush, J., left it to the jury to say (1) whether the plaintiffs' mark was a good one; (2) whether it had been imitated; (3) whether, if there was imitation, it was with intent to deceive. And see *Gillespie & Co.* v. *Marshall*, Dig. 648.

(*d*) (1892) 2 Q. B. 639.

(*e*) (1895) 2 Q. B. 286; (1896) A. C. 199.

purchasers and to lead them to buy the defendants' belting as and for the belting of the plaintiffs? (4) Did the defendants endeavour to pass off their goods as and for the goods of the plaintiffs so as to be likely to deceive purchasers? The fourth question was added at the request of the plaintiffs' counsel, the learned judge considering the first three questions only to be necessary. The jury answered questions (1) (3) and (4) in the affirmative, and question (2) in the negative, and the judge thereupon gave judgment for the plaintiffs. The only material difference between the two cases was that in the latter it was admitted by the plaintiffs that the material of which the belting was made was substantially camel's hair, whereas the former case was decided on the footing that "camel hair" was a fancy name. The Court of Appeal, in reversing the judgment of Collins, J., attached great importance to this distinction, and held that none of the questions left by Collins, J., ought to have been left to the jury, inasmuch as a manufacturer could not be restrained from correctly describing his goods by reason of a rival manufacturer having sold similar goods under the same name, and there was no evidence that the defendants had attempted to pass off their goods as the plaintiffs' otherwise than by the use of the term "camel hair"; and Rigby, L. J., was of opinion that if there had been a case for the jury one of the questions which ought to have been left to them was whether upon the evidence the term "camel hair belting" was a description or a fancy name. The House of Lords, however, restored the judgment of Collins, J., and Lord Macnaghten expressly agreed with the learned judge that the fourth question which he left to the jury was unnecessary (*a*). Common Law.

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 Plaintiff must be injured.

(*a*) In *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893, Kekewich, J., adopted the same view. In *Magnolia Metal Co.* v. *Tandem Syndicate, Ld.*, 15 P. R. 701, the questions put to the jury were stated somewhat differently, and hardly in as suitable a form.

Common Law.

over carried on a banking business (*a*). 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 (*b*).

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. (*c*).

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 (*d*).

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 (*e*), 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 (*f*). And in *Taylor* v. *Carpenter* (*g*), when the defendant,

(*a*) *Lawson* v. *Bank of London*, 18 C. B. 84. And see *per* Lord Blackburn in *Singer Manufacturing Co.* v. *Loog* (3). 8 App. Cas. 15.

(*b*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307.

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

(*d*) *Rudderow* v. *Huntington*, 3 Saud. S. C. 252; R. Cox, 106.

(*e*) *Leather Cloth Co.* v. *Hirschfeld*, L. R. 1 Eq. 299. As to damages, see cap. 7, *infra*.

(*f*) *Graham* v. *Plate*, 40 Cal. 593: 6 Amer. Rep. 639. And see *Hostetter* v. *Vowinkle*, 1 Dill. 329.

(*g*) 2 Wood. & M. 1: 9 L. T. O. S. 514; R. Cox, 32, 42.

against whom a verdict had been 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." Common Law.

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*). Nominal damages where right infringed.

The first recorded case of trade mark brought before the judicial notice of the Court of Chancery was that of *Blanchard* v. *Hill* (*c*), in 1742, which, however, resulted in a statement by Lord Hardwicke, C., that he did not know "any instance of granting an Equity—*Blanchard* v. *Hill*.

(*a*) 4 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 *Rodgers* v. *Nowill*, 5 C. B. 109; *Chappell* v. *Davidson*, 2 K. & J. 123; *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 442, 451, 454; *Lawrie* v. *Baker*, 2 P. R. 213; *Monro* v. *Hunter*, 21 P. R. 296; and *Bondier* v. *Depatie*, 3 Dorion, 233; *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639; *Alexander & Co.* v. *Henry & Co.*, 12 P. R. 360, where damages were awarded under both heads. And see *Major Bros.* v. *Franklin & Son*, 25 P. R. 406. Contrast *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Hipkins* v. *Plant*, 15 P. R. 294; *Slazenger* v. *Spalding*, 27 P. R. 20.

(*c*) 2 Atk. 484.

Equity.

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 *Day* v. *Day* (1816) (*a*), *Henry* v. *Price* (1831) (*b*), and *Gout* v. *Aleploglu* (1833) (*c*), however, injunctions were granted to restrain the infringement of the plaintiffs' trade marks, and from this time the steadily increasing number of such cases coming before the Court of Chancery shows the growing favour with which that Court was regarded by suitors, the chief incentive no doubt being the more beneficial character of the remedy awarded, by injunction and account, as compared with the Common Law remedy of damages. By degrees the Court of Chancery absorbed the jurisdiction in trade-mark cases, until such cases were rarely, if ever, tried in the Common Law Courts, except when they were remitted by a Chancery judge for trial of the Common Law right. That practice was discontinued in consequence of Sir John Rolt's Act (*d*), and the effect was, notwithstanding the extended power given to the Common Law Courts by the Merchandise Marks Act of the same year (*e*), to confine the consideration of this class of cases more strictly, if possible, than before to the Court of Chancery.

Registration Acts administered by Chancery Division.

This fact was recognised by the Chancery Division being appointed to administer the Trade Marks Registration Acts (*f*), and although the High Court of Justice generally is now substituted for the Chancery Division (*g*), trade-mark cases are still usually brought before that Division.

Board of Trade.

The registrar appointed under the Trade Marks Act is, however, subject to the superintendence of the Board of Trade, which has power to refer all appeals to the Court (*h*).

Principles adopted in Equity with respect to trade marks.

The principles on which the Courts of Equity have long acted in cases where a valid trade mark has been affixed to the goods or

(*a*) Dig, 21.
(*b*) 1 Leg. Obs. 364.
(*c*) 5 *ib.* 495; and 6 Beav. 69. And see *Day* v. *Binning*, C. P. Cooper, 489; 1 Leg. Obs. 205.
(*d*) 25 & 26 Vict. c. 27.
(*e*) 25 & 26 Vict. c. 88, § 21.
(*f*) 38 & 39 Vict. c. 91; 39 & 40 Vict. c. 33; and 40 & 41 Vict. c. 37. See the old Rule 42, and *In re Orr-Ewing* (2), 28 W. R. 412.
(*g*) § 117 of Patents Act, 1883; § 3 of Trade Marks Act, 1905.
(*h*) T. M. Act, 1905, § 59. And see *In re Normal Co., Ld.*, 35 Ch. D. 231. As to the position of the late Commissioners of Patents, whose functions were transferred to the Board of Trade in 1883, see *In re Meikle*, 24 W. R. 1067; *In re Barrows*, 5 Ch. D. 353; *In re Rotherham*, 14 *ib.* 585.

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 (*a*)—are thus explained by Sir G. Jessel, M. R., in *Singer Manufacturing Co.* v. *Wilson* (*b*).

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

"Another element which is sometimes imported into these cases has also no material bearing: that is, that if the maker knows that they are not the goods of the person entitled to use the trade mark, and communicates that knowledge to the immediate purchaser, it makes, as I have said, no difference; and even if he does not know it, and tells the immediate purchaser that the goods are of his own manufacture, it will still not save him from an injunction, because, although the immediate purchaser from him is aware that the goods in question are not manufactured by any other person than the vendor, yet, as he passes them on, the representation does not necessarily pass on with them, and therefore the next purchaser, or the following or some other purchaser, or the public at large, who are the ultimate purchasers, would be as much deceived as if no such communication took place. Consequently, you have nothing more to do than to show that the trade mark has been taken" (*c*).

(*a*) See Judicature Act of 1873, § 25.
(*b*) 2 Ch. D. 434.
(*c*) And see *per* Lord Cairns, C., *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 391, and Lord O'Hagan, *ib.* 396; *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454; and *per* Bowen, L. J., in *Barlow & Jones, Ld.* v. *Johnson*,

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 purchasers would buy A.'s goods in the belief that they were B.'s, and B. would be deprived of the custom intended for him; so that A., whether by his own contrivance or not, would profit at the expense of B. and the public. In that case it was accordingly held by the Lord Chancellor that the plaintiffs were entitled to an injunction, although he stated in express terms that he saw no reason for thinking that there had been any fraudulent user by the defendant of the plaintiffs' mark (*c*).

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,

7 P. R. 395, 419; *Cochrane* v. *McNish*, 13 P. R. 100. So, in Scotland, "on an application for an interdict it is not only not necessary to prove any pecuniary damage, but it is not necessary to prove that any injury has been actually inflicted. A threat of injury is a sufficient ground for an application for an interdict; and in like manner a reasonable apprehension of injury from the proceedings of the parties complained against is also in many circumstances a very good ground for such an application." *Per* the Lord President, in *Singer Manufacturing Co.* v. *Kimball & Morton*, Ct. Sess. Cas. 3rd Ser. XI. 267. And in India, "it is not enough to say that there was no fraudulent intention. That is no reason why an injunction should not be granted." *Per* Phear, J., *Graham & Co.* v. *Kerr, Dods & Co.*, 3 Beng. L. R. App. 4.

(*a*) *Blanchard* v. *Hill*, 2 Atk. 484; *Canham* v. *Jones*, 2 V. & B. 218. Even now the fear of establishing a monopoly is sometimes expressed in connection with the protection of trade marks and trade names. But it is well to remember that, as was well said by Lord Craighill in *Dunnachie* v. *Young*, Ct. Sess. Cas. 4th Ser. X. 874: "Monopoly is not the thing for which the one party struggles and which the other resists. On the contrary, fair trading is all for the protection of which the law is invoked; and the public, as well as the manufacturer or merchant, are concerned that infringement of trade marks and trade designations should be prevented."

(*b*) 3 My. & Cr. 338. And see the earlier case of *Gout* v. *Aleploglu*, 5 Leg. Obs. 495.

(*c*) See *per* Lord Blackburn in *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15.

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 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 (*e*) finally put an end to it.

Principle of *Millington* v. *Fox* explained by V.-C. Wood.

The explanation given by Wood, V.-C., of the decision in *Millington* v. *Fox* (*f*) and other cases in which relief was given without proof of fraudulent user, was, that it was on the principle "that although a person had used another man's trade mark perfectly innocently, yet if he continued for one moment after he

(*a*) *Perry* v. *Truefitt*, 6 Beav. 66; *Croft* v. *Day*, 7 Beav. 84; *Foot* v. *Lea*, 13 Ir. Eq. 484; *Edelsten* v. *Vick*, 11 Hare, 78; *Collins Co.* v. *Brown*, 3 K. & J. 423; *Collins Co.* v. *Cowen*, 3 K. & J. 428, *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.

(*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*, 4 *ib.* 150; *McAndrew* v. *Bassett*, 4 *ib.* 380; *Leather Cloth Co.'s case*, 4 *ib.* 137; 11 H. L. C. 523; *Cartier* v. *Carlile*, 31 Beav. 292; *Moet* v. *Couston*, 33 *ib.* 578; *Barnett* v. *Leuchars*, 13 L. T. N. S. 495; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Collins Co.* v. *Reeves*, 28 L. J. Ch. 56; *Bradbury* v. *Beeton*, 39 *ib.* 57; *Radde* v. *Norman*, L. R. 14 Eq. 348; *Hirst* v. *Denham*, *ib.* 542; *Smith* v. *Mason*, W. N. 1875, p. 62; *Apollinaris Co.* v. *Norrish*, 33 L. T. N. S. 242; *Cheavin* v. *Walker*, 5 Ch. D. 850; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; *Same* v. *Loog* (3), 8 *ib.* 15; *Grillon* v. *Guénin*, W. N. 1877, p. 14; *Ransome* v. *Graham*, 51 L. J. Ch. 897; *Cowen* v. *Hulton*, 46 L. T. N. S. 897; *Hatchard* v. *Mège*, 18 Q. B. D. 771; *Oakey & Sons* v. *Dalton*, 35 Ch. D. 700; and see *Reddaway* v. *Banham*, (1896) A. C. 199; *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893. So in Scotland—*Singer Manufacturing Co.* v. *Kimball & Morton*, Ct. Sess. Cas. 3rd Ser. XI. 267; in Ireland—*Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; in India—*Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hydo, 185; in Canada—*Walker* v. *Alley*, 13 Grant, Up. Can. Clr. 366; in the United States—*Davis* v. *Kendall*, 2 R. I. 566; R. Cox, 112; *Clark* v. *Clark*, 25 Barb. 76; R. Cox, 206; *Gillott* v. *Esterbrook*, 47 Barb. 455; R. Cox, 340; 48 N. Y. 374; *McLean* v. *Fleming*, 96 U. S. 245; *Kidd* v. *Johnson*, 100 *ib.* 617; and many other cases.

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

(*d*) *Perry* v. *Truefitt*, 6 Beav. 66; *Rodgers* v. *Nowill*, 6 Hare, 325; *Foot* v. *Lea*, 13 Ir. Eq. 484; *Farina* v. *Silverlock*, 1 K. & J. 509; and others.

(*e*) 25 & 26 Vict. c. 27.

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

had been told of it to use another man's trade mark, he did so fraudulently, and if he sought to keep in his pocket profits which he had made by representing, however innocently, that his goods were another person's, after he had been told of the fact, it was fraud" (*a*).

By Lord Westbury.

From this view Lord Westbury, C., dissented (*b*), and the view which he took as to the principles which ought to govern the action of the Courts of Equity was thus stated by him in the *Leather Cloth Cos.' case* (*c*): "The representation which the defendant is supposed to make, that his goods are the goods of another person, is not actually made otherwise than by his appropriating and using the trade mark which such other person has an exclusive right to use in connection with the sale of some commodity; and if the plaintiff has an exclusive right to use any particular mark or symbol, it becomes his property for the purposes of such application, and the act of the defendant is a violation of such right of property, corresponding with the piracy of copyright or the infringement of a patent. I cannot therefore assent to the dictum that there is no property in a trade mark. It is correct to say that there is no exclusive ownership of the symbols which constitute a trade mark, apart from the use or application of them; but the word 'trade-mark' is the designation of marks or symbols when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called 'property.' The true principle, therefore, seems to be that the jurisdiction of the Court in the protection given to trade marks rests upon property; and that the Court interferes by injunction, because that is the only mode by which such property can be effectually protected. The same things are necessary to constitute a title to relief in Equity in the case of the infringement of the right to a trade mark as in the case of the violation of any other kind of property. First, the plaintiff must prove that he has an exclusive right to use some particular mark or symbol in connection with some manufacture or vendible com-

(*a*) *McAndrew* v. *Bassett*, 33 L. J. Ch. 561. See *per* Lord Cairns in *Singer Manufacturing Co* .v. *Wilson*, 3 App. Cas. 376, 391; and *per* Lord Blackburn in that case (*ib.* 400); and in *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15; also *McCaw, Stevenson & Orr, Ld.* v. *Nickols & Co.*, 21 P. R. 15.

(*b*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Leather Cloth Cos.' case*, 4 *ib.* 137; *Hall* v. *Barrows*, *ib.* 150; *McAndrew* v. *Bassett*, *ib.* 389.

(*c*) 4 De G. J. & S. 137.

modity; 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" (*a*).

Lord Herschell's view.

The view taken by Lord Westbury of the existence of property in a trade mark, independently of statute, has, however, not escaped criticism in later years, and the prevailing opinion in recent times is probably in accordance with that expressed by Lord Herschell in the leading case of *Reddaway* v. *Banham* (*b*): "The principle which is applicable to this class of cases was, in my judgment, well laid down by Lord Kingsdown in *Leather Cloth Co.* v. *American Leather Cloth Co.* (*c*). It had been previously enunciated in much the same way by Lord Langdale in the case of *Croft* v. *Day* (*d*). Lord Kingsdown's words were as follows: 'The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore (in the language of Lord Langdale in the case of *Perry* v. *Truefitt* (*e*)), be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.' It is, in my opinion, this fundamental rule which governs all cases, whatever be the particular mode adopted by any man for putting off his goods as those of a rival trader, whether it is done by the use of a mark which has become his trade mark, or in any other way. The word 'property' has been sometimes applied to what has been termed a trade mark at Common Law. I doubt myself whether it is accurate to speak of there being property in such a trade mark, though, no doubt, some of the rights which are incident to property may attach to it. Where the trade mark is a word or device never in use before, and meaningless, except as indicating by whom the goods in connection with which it is used were made, there could be no conceivable legitimate use of it by another person. His only object in employing it in connection with goods of his manufac-

(*a*) In *Walker* v. *Alley*, 13 Grant, Up. Can. Ch. 366, Van Koughuet, Chancellor of Upper Canada, said: "Some difficulty may be created by the use of the word 'property' in trade marks. It may be said, 'What is property, unless it be something tangible?' I take property, when used in this connection and sense, to be a means by which money or money's worth, in the shape of profit or otherwise, is created or obtained."

(*b*) (1896) App. Cas. 199, 209.

(*c*) 11 H. L. C. 538.

(*d*) 7 Beav. 84.

(*e*) 6 Beav. 66.

ture must be to deceive. In circumstances such as these the mere proof that the trade mark of one manufacturer had been thus appropriated by another would be enough to bring the case within the rule as laid down by Lord Kingsdown, and to entitle the person aggrieved to an injunction to restrain its use. In the case of a trade mark thus identified with a particular manufactory, the rights of the person whose trade mark it was would not, it may be, differ substantially from those which would exist if it were, strictly speaking, his property. But there are other cases which equally come within the rule that a man may not pass off his goods as those of his rival which are not of this simple character—cases where the mere use of the particular mark or device which had been employed by another manufacturer would not of itself necessarily indicate that the person who employed it was thereby inducing purchasers to believe that the goods he was selling were the goods of another manufacturer.

"The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves, without explanation or qualification, by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this, I think he would, on well-established principles, be entitled to an injunction."

In what sense fraud is required in Equity.

Still, whether it is or is not admitted that the Law of Trade Marks is based upon a right of property, fraud also is necessary to entitle the owner of the trade mark to redress (*a*). But the fraud need not necessarily consist in an intention to deceive on the part of the defendant, but may consist in an actual deception, or in the creation of a probability of deception (*b*), indepen-

(*a*) See *per* Mellish, L. J., in *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434, 453.

(*b*) Compare *per* Hall, V.-C., in *Cope* v. *Evans*, L. R. 18 Eq. 138. And see *Kinney* v. *Basch*, Dig. 542; *Bodega Co.*,

dently of any fraudulent intention. "Imposition on the public," says Lord Westbury (*a*), "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 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" (*b*), since the important and substantial point is completely established, that in cases of trade mark nothing more has to be done "than to show that the trade mark has been taken" (*c*).

Right of property in registered mark.

The right in a registered trade mark is strictly a right of property (*d*); the person entitled to it is the proprietor (*e*); he is entitled to the exclusive use of it (*f*); and though his rights in regard to it are in some respects less unlimited than those of owners of other kinds of property—*e.g.*, the inability to transfer it except in connection with the goodwill of the business (*g*) —still, subject to the statutory provisions, 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 (*h*), "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." The law is the same in the three kingdoms,

Ld. v. *Owens*, 6 P. R. 236; *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639.

(*a*) *Hall* v. *Barrows*, 4 De G. J. & S. 150. And see *per* Lord Cranworth, C., in *Farina* v. *Silverlock*, 6 De G. M. & G. 214; and *per* Jessel, M. R., in *Cheavin* v. *Walker*, 5 Ch. D. 850.

(*b*) *Per* Wood, V.-C., *McAndrew* v. *Bassett*, 33 L. J. Ch. 561.

(*c*) Jessel, M. R., in *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434. And see *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434; *Reddaway* v. *Banham*, (1896) A. C. 199; and the cases collected at note (*b*) on p. 183, *supra*.

(*d*) See *Eno* v. *Stephens*, Dig. 609.

(*e*) §§ 3, 4, 5 of the Act of 1875; §§ 62, 66, 71, 72, 76 of the Act of 1883; §§ 3, 4, 9, 12, &c. of the Act of 1905.

(*f*) § 3 of the Act of 1875; § 76 of the Act of 1883; § 39 of the Act of 1905.

(*g*) § 2 of the Act of 1875; § 79 of the Act of 1883; § 22 of the Act of 1905.

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

for, said Bacon, V.-C., in *Singer Manufacturing Co.* v. *Loog* (3) (*a*), "the law of Scotland does not in this respect (*i.e.*, with respect to trade marks) differ from the law of England." The principles which govern the one govern the other.

Proceedings in Equity.

In order to insure a full disclosure of the facts bearing upon these points, the Court will grant, if necessary, discovery and inspection, and upon the satisfactory establishment of the plaintiff's case will award its appropriate remedy of an injunction (*b*), framed in such terms as best to counteract the illicit designs of the infringer. And the injunction may be granted, even though the defendant has ceased to use a pirated trade mark (*c*), and has offered to undertake not to use any of the old labels in stock (*d*), or has actually retired from the business in which the pirated marks were used (*e*). But if a plaintiff continues the litigation after having received an offer of all he is entitled to get, he may fail to obtain his costs and may even have to pay the costs subsequent to the offer (*f*). The liability to account for profits is usually, as Romilly, M. R., said in *Carlier* v. *Carlile* (*g*), incident to the injunction (*h*), or the plaintiff may, at his option, have an inquiry as to damages in lieu of the account, but not both (*i*). The Court will further, where necessary, order the delivery up and destruction of the spurious labels, cards, or tickets (*k*), or the production of the goods wrongfully marked, for the purpose of the erasure and cancellation of the spurious marks (*l*). Destruction of the goods will not be ordered if it is possible without destruction to satisfactorily erase the spurious marks (*m*). In a

(*a*) 18 Ch. D. 395.

(*b*) The injunction may 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; *Gallice* v. *Levy*, Eady, J., May 15th, 1906.

(*c*) *Guinness* v. *Heap*, Dig. 617; *McLean* v. *Fleming*, 96 U. S. 245. And see *Reid* v. *Sibbald*, 18 Journ. of Jurisp. 392.

(*d*) *Guinness* v. *Heap*, Dig. 617; *American Tobacco Co.* v. *Guest*, (1892) 1 Ch. 630.

(*e*) *Weed* v. *Peterson*, 12 Abb. Pr. N. S. 178.

(*f*) See *infra*, p. 262, note (*b*).

(*g*) 31 Beav. 292. And see *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Lever* v. *Goodwin*, 36 Ch. D. 1; *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893.

(*h*) Unless the defendant can prove that he has bought and resold the improperly marked goods without being aware of the true ownership of the trade mark which he is shown to have infringed: *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578; *Hipkins* v. *Plant*, 15 P. R. 294; *Slazenger* v. *Spalding*, 27 P. R. 20.

(*i*) *Neilson* v. *Betts*, L. R. 5 H. L. 1; *Weingarten* v. *Bayer* (H. L.), 22 P. R. 341.

(*k*) *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, 6th ed. 636; *Graveley* v. *Winchester*, *ib.* 695.

(*l*) *Dent* v. *Turpin*, 2 J. & H. 139; *Upmann* v. *Elkan*, L. R. 12 Eq. 140: L. R. 7 Ch. 130.

(*m*) *Slazenger & Sons* v. *Feltham & Co.*, 6 P. R. 531.

case in the Supreme Court of Victoria (*a*) it was held that an agent, who had received from a foreign principal goods marked in imitation of the plaintiff's trade mark, could not be allowed to send back to his principal the goods as they were, since it was the plaintiff's right to have the fraudulent labels removed and destroyed.

Consideration shown for innocent infringer.

While, however, the Court will give protection where it is required, "it must not be forgotten that such protection by injunction when granted is, or may be, attended with loss to the defendant in rendering useless or depreciating in value articles to which the trade mark has already been affixed, and in compelling him otherwise to vary the mode in which he has been carrying on business" (*b*). And it has been thought that where it is proved that a defendant has adopted a trade mark in *bonâ fide* ignorance of its infringing the plaintiff's rights, the Court will be satisfied with the least amount of alteration of the defendant's mark which will effectually distinguish it from the plaintiff's (*c*).

But innocent infringement checked.

Sufficient distinction must, however, be made; and in the even harder case, where a man has not affixed the spurious mark to his own goods at all, but has bought goods already stamped with a mark which he did not know to belong to any one, he must submit to an injunction, though he may not have to account for profits if he does not delay his submission (*d*). 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 (*e*).

Infringement for purpose of foreign trade.

Where a manufacturer in this country places an imitation of another manufacturer's trade mark on his goods, or gets up his goods in such a way as to resemble the get-up of the other manufacturer's goods, not with any intention of selling the goods in this country, but with a view of exporting them to another country where the other manufacturer's goods are sold, there to create an unfair competition, relief will be granted in this country.

(*a*) *Siegert* v. *Lawrence*, 11 V. L. R. 47. And in New South Wales it was said that matches packed in boxes fraudulently labelled should be repacked before exposure for sale: *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72. See *Upmann* v. *Elkan*, L. R. 7 Ch. 130.

(*b*) *Cope* v. *Evans*, L. R. 18 Eq. 138. And see *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298; *Bass* v. *Dawber*, 19 *ib.* 626; *Ransome* v. *Graham*, 51 L. J. Ch. 897.

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

(*d*) *Moet* v. *Couston*, 33 Beav. 578; *Orr-Ewing* v. *Chooneeloll Mullick*, Cor. 150; *American Tobacco Co.* v. *Guest*, (1892) 1 Ch. 630; *Hipkins* v. *Plant*, 15 P. R. 294; *Slazenger* v. *Spalding*, 27 P. R. 20.

(*e*) *Ponsardin* v. *Peto*, 33 Beav. 642.

Examples of this have frequently occurred in the cotton trade with respect to goods intended for shipment to India and the East (*a*).

Foreign fraudulent samples.

Although there is no jurisdiction in the English Courts to try a case in which a foreign subject has sent direct to another foreign country, or to a British colony or dependency, goods bearing an infringement of a trade mark used by a British firm in their trade with such country, colony, or dependency, yet, if the spurious goods or samples of them have been sold or offered for sale in the United Kingdom, an action will lie (*b*).

Issue of writ for service in Scotland or Ireland.

In *Marshall* v. *Marshall* (*c*) there was an application by a person carrying on business in Scotland for leave to issue and serve out of the English jurisdiction (viz., in Scotland) a writ in an action intended to be brought by him against another person carrying on business in Scotland, for selling his goods in England under a trade mark calculated to deceive, the object being that the action might be heard together with an application for registration of the trade mark by the defendant, which was opposed by the plaintiff; but leave was refused, on the ground that it was expedient that proceedings should be taken in Scotland, where the order of the Court could be enforced against the defendant personally, rather than in England, where it could only be enforced against his servants and agents. And similarly in *Kinahan* v. *Kinahan* (*d*), where both parties were Irish and the application pending was an application by the plaintiffs in the action to strike off the register a mark which had been registered by the defendants. However, in *Burland & Co.* v. *Broxburn Oil Co., Ld.* (*e*), where a similar application was made by an English firm, who were desirous of taking proceedings against a Scotch company, who had their registered office in Glasgow, but had branch offices also in London, Manchester, and Hull, and whom the plaintiffs alleged to have been infringing their trade mark by sending out marked goods from their English branches, and the defendants were applying in England to rectify the plaintiffs' registration, it was held that it was possible to enforce in England against

(*a*) *E.g.*, *Orr-Ewing* v. *Johnston*, 13 Ch. D. 434; 7 App. Cas. 219.

(*b*) *Rodgers & Sons, Ld.* v. *Rottgen*, 5 Times L. R. 678.

(*c*) 38 Ch. D. 330.

(*d*) 45 Ch. D. 78.

(*e*) 41 Ch. D 542. Cf. *Morgan Crucible Co., Ld.* v. *Vulcan Crucible Co.*, 23 P. R. 229.

the property of the defendants any injunction that might be granted, and that, on the balance of convenience, leave should be given.

Motion to expunge mark registered by a foreigner.

In connection with the above, it seems relevant to refer to the cases relating to service out of the jurisdiction of a motion to rectify, to which defendants to an action for infringement so often resort. This point seems first to have arisen in *In re Compagnie Générale d'Eaux Minérales et de Bains de Mer* (*a*), where an application was made to expunge a mark registered in the name of a foreign company having no place of business in the United Kingdom, and it was held by Stirling, J., that there was no jurisdiction to serve notice of motion on the company, and that the proper course was to serve it on the Comptroller-General of Patents (now Registrar) only, and, after a day had been fixed for the hearing of the motion, to send a letter to the foreign company, with a copy of the notice of motion, stating that an application would be made on the day fixed affecting their interests. A similar practice has since been adopted upon an application to register a trade mark (*b*), and upon an opposition to registration (*c*). The course suggested by Stirling, J., was approved by the Court of Appeal in *In re King & Co.* (*d*), which was, again, a case of rectification, Lindley, L. J., however, doubting whether the notice of motion might not have been properly served on the foreigner, inasmuch as the Court had jurisdiction to rectify the register independently of the service, the only object of which was to give notice to the foreigner of the nature of the proceedings; and it would appear from the last-mentioned case that, provided sufficient notice of the proceedings is given to the proprietor, it is immaterial whether the notice of motion is addressed to him as well as to the Registrar or not, but the course now usually adopted is to address it to the Registrar only. In that case the application was by an English firm to expunge a mark registered in the name of an Irish company having a branch office in London, and, the applicants having sent to the company's office in Ireland a letter informing them of the nature of the application, together with a copy of the notice of motion in which the name of the company had been at first inserted

(*a*) (1891) 3 Ch. 451. This was followed in *In re Ashton*, 48 W. R. 389.

(*b*) *In re Stringer*, 8 P. R. 445.

(*c*) *In re Robertson, Sanderson & Co.*, 9 P. R. 213.

(*d*) (1892) 2 Ch. 462.

but afterwards struck out, the Court ordered the mark to be expunged although the company elected not to appear. So in *In re Stringer* (*a*), which was a motion to direct the Comptroller to proceed with an application to register an old mark notwithstanding the existence of a similar mark belonging to a Swedish company, where the company received notice by letter of the nature of the proceedings but sent no answer, the Court, upon proof of delivery of the letter to the company, directed the Comptroller to proceed in their absence, without prejudice to any opposition, the applicant undertaking to give due notice to the company of the advertisement. And a similar order was made in *In re Royal Baking Powder Co.* (*b*).

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 (*c*), and under the present practice the defendant would succeed on a motion to strike out such statements, under Order XIX., Rule 27.

Trial without a jury appropriate.

The appropriate mode of trial of cases in which, as in most trade-mark cases, law and fact are closely united, is by a judge without a jury; and therefore, where a defendant gave notice of trial of a trade-mark case before a judge and special jury, it was held that, notwithstanding the notice, the case must be heard without a jury (*d*). If the defendant allows the action to proceed to trial without applying for the questions at issue to be submitted to a jury, it will be too late for him to make such an application when the case comes on for trial (*e*). But where the defendants submitted to a perpetual injunction, leaving only the question of damages to be tried, the action was, on the plaintiffs' application, transferred to the Queen's Bench Division for trial with a jury (*f*). The more usual course is, however, for the damages to be ascertained by a master or official referee (*g*).

Interlocutory injunction.

It is usual for the plaintiff in trade-mark cases to apply for an interlocutory injunction at an early period. When such an application is to be made, it is the duty of the plaintiff to make it

(*a*) 8 P. R. 445.
(*b*) 14 P. R. 425.
(*c*) *Christie* v. *Christie*, L. R. 8 Ch. 499.
(*d*) *Spratt's Patent* v. *Ward & Co.*, 11 Ch. D. 240; *Singer Manufacturing Co.* v. *Loog* (2), *ib.* 656.
(*e*) *Thomas* v. *Williams*, 14 Ch. D. 864.
(*f*) *Fennessy* v. *Rabbits & Sons*, 56 L. T. N. S. 138.
(*g*) *E.g.*, *Alexander* v. *Henry*, 12 P. R. 360.

speedily (*a*), 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 (*b*). The plaintiff is, however, entitled to delay long enough to secure the necessary evidence to establish his case (*c*); and although no interlocutory injunction is asked for—as, for instance, where it is 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 (*d*), nor from his right to state, if true, that the defendant is acting without authority in what he is doing (*e*).

Letter before action.

It has sometimes been argued that in a case of infringement or unfair competition a letter ought to be written before action, cautioning the wrongdoer. The usual result of such a letter is to cause the wrongdoer to tone down his course of procedure, so as to make it more difficult for an action to succeed, while continuing to take advantage of the complainant's reputation, and the necessity for such a letter can hardly be urged now after the observations of Lord Macnaghten in the House of Lords in *Weingarten* v. *Bayer* (*f*):—"It was also urged that if the plaintiffs really objected to Mr. Charles Bayer taking their scroll, they ought to have written to complain, and told him what they complained of before taking legal proceedings. I cannot think that there is any substance in that objection. Why should a person, assailed and injured by unfair competition, teach his opponent how far he may safely go in undermining a rival business which he wishes to destroy? Why should he throw away the only chance of obtaining, by process of law, redress for injury already done?"

When granted.

In the older cases (*g*), the tendency of the Court was to refuse

(*a*) *E.g.*, *per* Romilly, M. R., in *Chubb* v. *Griffiths*, 35 Beav. 127.

(*b*) *Pickford* v. *Grand Junction Rail. Co.*, 3 Rail. Cas. 538; *Flavel* v. *Harrison*, 10 Hare, 467; *Isaacson* v. *Thompson*, 20 W. R. 196; *Mallan* v. *Davis*, 3 Times L. R. 221; *Evans* v. *Smith*, *ib.* 390.

(*c*) *Lee* v. *Haley*, L. R. 5 Ch. 155; *Cave* v. *Myers*, Dig. 304.

(*d*) *Collins Co.* v. *Walker*, 7 W. R. 222.

(*e*) *Anderson* v. *Liebig's Extract of Meat Co., Lt.*, 45 L. T. N. S. 757.

(*f*) 22 P. R. 341, at p. 350. See also pp 263-5, *infra*.

(*g*) *E.g.*, *Spottiswoode* v. *Clarke*, 2 Ph. 154; *Stevens* v. *Keating*, 2 Ph. 333; *Motley* v. *Downman*, 3 My. & Cr. 1; *Merrimack Manufacturing Co.* v. *Garner*, 2 Abb. Pr. 318.

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 (*a*), 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 (*b*); and it occasionally happens that after an interlocutory injunction has been granted, it is held at the hearing that the evidence is insufficient to justify any relief being given (*c*). The interlocutory injunction will, however, not be granted where the defendant has innocently infringed, and has withdrawn the offending articles from sale and offered an undertaking immediately on being served with the writ (*d*), nor where there is any considerable conflict (*e*), nor where the plaintiff has been guilty of delay (*f*); and if it is granted the plaintiff will be required to give an undertaking as to damages. When an

(*a*) Since Sir John Rolt's Act (25 & 26 Vict. c. 27).

(*b*) *Radde* v. *Norman*, L. R. 14 Eq. 348. And see *National Folding Box & Paper Co.* v. *National Folding Box Co.*, 43 W. R. 156. Also *Jarrett* v. *British North Borneo Cigar Co.*, 37 Sol. J. 116, where the infringement was innocent. If a defendant's defence and counter-claim contain any allegations of fact which the plaintiff does not desire to admit, he must deal specifically with them: *Benbow* v. *Low* (2), 13 Ch. D. 553.

(*c*) *E.g.*, in *Alaska Packers' Association* v. *Crooks*, 16 P. R. 503; 18 P. R. 129; *Parsons* v. *Gillespie*, (1898) A. C. 239; *Degraves* v. *Whiteman*, 5 V. L. R. Eq. 304.

(*d*) *Carmcho* v. *Highmoor*, 27 Sol. J. 199.

(*e*) *Green* v. *Rooke*, W. N. 1872, p. 49; L. J. N. of C. 1872, p. 54; *Farina* v. *Cathery*, L. J. N. of C. 1867, p. 134; *Hennessy* v. *Rohmann*, 36 L. T. N. S. 51; *Mitchell* v. *Henry*, 15 Ch. D. 181; *Coventry Machinists' Co.* v. *Helsby*, 13 Times L. R. 92; *ib.* 161; *Yost Typewriter Co., Ld.* v. *Typewriter Exchange Co.*, 19 P. R. 422; *Star Cycle Co.* v. *Frankenburgs*, 23 P. R. 337; *Moseley & Sons, Ld.* v. *Nathan*, 23 P. R. 345; *Fine Cotton Spinners & Doublers' Association, Ld.* v. *Harwood, Cash & Co.*, 24 P. R. 533; *C. A. Peters, Ld.* v. *Domestic Inventions Co.*, 25 P. R. 387; *Somervell Bros.* v. *Cuthbert & Co.*, 12 Cape Good Hope, 255; and other cases. If an interlocutory injunction is asked for on the ground that the defendant claims a right to use the plaintiff's trade mark, but there is evidence that he is not in fact using the mark or threatening an immediate exercise of his alleged right of user, the motion will be ordered to stand to the hearing, as in *Linoleum Manufacturing Co.* v. *Nairn*, Dig. 536, or refused, with costs, as in *Davis* v. *Tylor*, Jessel, M. R., July 27th, 1877 ("Ferndale" coal).

(*f*) *Isaacson* v. *Thompson*, 41 L. J. Ch. 101; *Chinn* v. *Thomas*, 5 V. L. R. Eq. 188; *Yost Typewriter Co., Ld.* v. *Typewriter Exchange Co.*, 19 P. R. 422. In the Irish case of *Grant* v. *Levitt*, 18 P. R. 361, where a motion for injunction was by consent treated as the trial, a delay of eighteen months was held no bar to an injunction, though the operation of it was suspended for six weeks. In the Scotch case of *Green* v. *Shepherd*, Ct. of Sess. Cas. 3rd Ser. IV. 1028, the plaintiff having by his summons asked for damages and an interdict, the Court refused a motion for an interim interdict, on the ground that the summons was framed on the footing that there was no case for an interim interdict, and that the plaintiff must first establish his right by recovering damages.

application for an interlocutory injunction is made, but not pressed, by reason of its becoming apparent that there is a serious question to try, leave is frequently given to expedite the trial.

Where application for registration pending.

Where, on the plaintiff moving for an injunction to restrain an alleged infringement of a trade mark registered in 1886, it appeared that the defendant had used the mark since 1884, and was himself then applying for registration thereof, the motion was ordered to stand over generally in order that the question of the defendant's right to registration might be first decided (*a*).

Liberty given to move to dissolve.

Where an injunction was granted on motion, but the defendant alleged that he had not had sufficient time to answer the affidavits on the other side, Lord Langdale, M. R., directed that the order should be prefaced by a statement to that effect, and giving the defendant leave to move to dissolve the injunction (*b*).

Submission not relieved against.

In *Elsas* v. *Williams* (*c*) the defendant having consented, on the hearing of a motion for injunction, to submit to a perpetual injunction to restrain him from infringing a trade mark for buttons, a subsequent application by him, before the order was drawn up, to be relieved from his consent, on the ground that his German manufacturers had sold buttons bearing the mark in England before the plaintiff had done so, was refused, on the ground that there had not been such a mistake as to entitle the defendant to be relieved.

Stay of proceedings after submission.

Where an action was brought to restrain the use of the word "Diamond" and a diamond-shaped device, and the defendant consented, on motion, to a perpetual injunction as to the word, and subsequently, after the plaintiff had delivered his statement of claim, to a perpetual injunction as to the device, and the plaintiff waived damages or an account, it was ordered, on the defendant's motion, that, the defendant submitting and paying costs, further proceedings should be stayed, except for the purpose of enforcing the order (*d*).

Right to submission in open Court.

A plaintiff whose right to his trade mark or get-up is challenged is entitled to have it admitted in open Court, and it seems that under ordinary circumstances a defendant cannot avoid sub-

(*a*) *Edwards* v. *Elkan*, 5 P. R. 70.

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

(*c*) 54 L. J. Ch. 336.

(*d*) *Curtis & Harvey* v. *Pape*, 5 P. R. 146. But stopping the infringement at the commencement of the action has been held in America no ground for withholding an injunction where the defendant put the plaintiff to proof: *Hutchinson* v. *Blumberg*, 51 Fed. Rep. 829.

mitting to an order in Court and paying the consequent costs, by offering to submit to judgment in chambers (*a*).

Infringer not entitled to make terms.

When one trader has infringed the rights of another by imitating his trade mark or get-up, he must submit to an injunction, and cannot make terms, as, *e.g.*, that there shall be no advertisement of this order (*b*).

Form of injunction.

The injunction may be granted in such a form as to restrain the imitation of the general style of the plaintiff's mark, while not interfering with the use of particular features (*c*), or, if granted so as to restrain the use of particular features, it may be limited so as not to interfere with the use of them absolutely and in all events (*d*); or, again, it may be granted in such terms as to restrain any imitation of a composite mark as a whole, or of any of the elements of which it is composed (*e*), or any other form of substitution or passing off (*f*). And it seems that in cases where the plaintiff's trade is confined to particular parts of the Empire, the injunction may be limited correspondingly (*g*).

(*a*) *Gandy* v. *Flem[illegible]*, 18 P. R. 276; *Gallice* v. *Levy*. Eady, J., May 15th, 1906; *Royal Warrant Holders' Association* v. *Kitson*, 26 P. R. 157. See, however, *Slazenger* v. *Pigott*, 12 P. R. 439, where the costs were not to exceed the costs of an application in chambers.

(*b*) *Hipkins* v. *Plant*, 15 P. R. 294; *Henry Clay & Bock & Co.* v. *Phillips*, 27 P. R. 508.

(*c*) *Compagnie Laferme* v. *Hendrickx*, Dig. 512; *Wolfe* v. *Hart*, 4 V. L. R. Eq. 125; *Wolfe* v. *Alsop*, 12 V. L. R. (E.) 421.

(*d*) *Ford* v. *Foster*, L. R. 7 Ch. 611; *Braham* v. *Beachim* (1), 7 Ch. D. 848; *Siegert* v. *Findlater*, 7 Ch. D. 801; *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Dence* v. *Mason* (1), Dig. 534; *Orr-Ewing* v. *Johnston*, 7 App. Cas. 219; *Montgomery* v. *Thompson*, (1891) A. C. 217; *Thompson* v. *Bent's Brewery Co.*, 8 P. R. 479; *Grezier* v. *Autran*, 13 P. R. 1; *In re Thompson*, 13 P. R. 35; *Brinsmead* v. *Brinsmead*, 12 Times L. R. 631; 13 *ib.* 3; *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 P. R. 194; *Reddaway* v. *Banham*, (1896) A. C. 199, 221, where Lord Macnaghten thought that in all cases where the defendant was to be restrained from using unfairly words or marks which he was at liberty to use provided he used them fairly, the form of injunction in *Orr-Ewing* v. *Johnston* (7 App. Cas. 219) ought to be adopted: *Bewlay & Co.* v. *Hughes*, 15 P. R. 290; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *Whitstable (Free Fishers and Dredgers of)* v. *Elliott*, W. N. 1888, p. 27; *J. & P. Cash, Ld.* v. *Cash*, 19 P. R. 181; *Holloway* v. *Clent*, 20 P. R. 525; *Daimler Motor Co.*, (1904) *Ld.* v. *London Daimler Co., Ld.*, 24 P. R. 379; *Iron Ox Remedy Co., Ld.* v. *Co-operative Wholesale Society, Ld.*, 24 P. R. 425: *Iron Ox Remedy Co., Ld.* v. *Leeds Industrial Co-operative Society, Ld.*, 24 P. R. 434; *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268. As to the difference in the form of the injunction to restrain the defendant from using the plaintiff's name where it is also the defendant's name and where it is not, see *Pinet* v. *Maison Pinet* (1), 14 P. R. 933; and *Pinet* v. *Maison Pinet* (2), (1898) 1 Ch. 179; 15 P. R. 65.

(*e*) See *India Rubber Comb Co.* v. *Rubber Comb and Jewelry Co.*, 45 N. Y. Super. Ct. 258.

(*f*) Speaking generally, it is not the practice of the Court in granting an injunction to insert any qualifying words which might leave it open to the defendant to say that the Court had in anticipation laid down a course of conduct which he might pursue: *Kerfoot* v. *R. A. Cooper, Ld.*, 25 P. R. 508.

(*g*) *Barber* v. *Manico*, 10 P. R. 93; *Carver* v. *Bowker*, Dig. 581; *Rodgers & Sons, Ld.* v. *Rottgen*, 5 Times L. R. 678;

Appeal.

In the case of an appeal delay is no less fatal than in the proceedings in the Court below (*a*); but no appeal ought to be brought from a refusal to grant an interlocutory injunction if the defendant, while refusing to submit to an injunction or to give an undertaking, removes the cause of complaint (*b*). Where the delay was slight and was caused by the mistaken advice of an official as to the date from which the time for appealing ran, the Court in its discretion, under Order LVIII., rule 5, of the Rules of the Supreme Court granted an extension of time (*c*). Where an injunction had been granted to restrain the sale by the defendant of "The Original Lazenby's Harvey's Sauce," an appeal against the decision was ordered to be advanced, on the ground of the irreparable damage the continuance of the injunction would occasion (*d*). It seems that when the Court of Appeal has overruled a demurrer or objection on a point of law, it will not stay the further hearing of the case with the evidence until after an appeal to the House of Lords from this decision on the point of law is decided (*e*). And where the Court of Appeal ordered a new trial in an action to restrain the defendants from passing off their goods as the plaintiffs', the Court declined to stay the new trial pending an appeal to the House of Lords (*f*).

Committal for contempt.

Where a defendant in a trade mark action continues to use the prohibited trade mark, or a mark insufficiently altered from it (*g*),

Orr-Ewing & Co. v. *Johnston & Co.*, 13 Ch. D. 434, 464; 7 App. Cas. 219, 227. And see *Lee* v. *Haley*, L. R. 5 Ch. 155; and *Cowie* v. *Herbert*, 14 P. R. 436; *In re Paine* (2), (1893) 2 Ch. 567; and *In re Société Anonyme des Verreries de l'Etoile* (2), (1894) 1 Ch. 61. It seems, however, that no distinction for this purpose will be drawn between different parts of the United Kingdom: *Cellular Clothing Co.* v. *Maxton & Murray*, (1899) A. C. 326, 342; *Royal Insurance Co., Ld.* v. *Midland Insurance Co., Ld.*, 26 P. R. 95. Cf. *Alaska Packers' Association* v. *Crooks*, 16 P. R. 503.

(*a*) See *per* Knight-Bruce, L. J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 896.

(*b*) *Dale* v. *Smith*, W. N. 1882, p. 145.

(*c*) *Reddaway* v. *Irwell and Eastern Rubber Co., Ld.*, 24 P. R. 93.

(*d*) *Lazenby* v. *White*, L. R. 6 Ch. 89.

(*e*) See *In re Palmer* (2), 22 Ch. D. 88. In that case the question was with reference to an application to strike a mark off the register. In *Fels* v. *Hodgson & Simpson*, 21 P. R. 95, it was held that the defendant could not agree that if the plaintiff consented to the dismissal of the action he should not be debarred from appealing after the hearing of an appeal in a similar case to the House of Lords, since the result might be to extend the time for appealing.

(*f*) *Edge* v. *Johnson*, 9 P. R. 134.

(*g*) *Devlin* v. *Devlin*, 69 N. Y. 212; *Daniel* v. *Whitehouse* (2), 16 P. R. 71, where North, J., thought that, though the Court had power to commit any person who assisted another in committing a breach of an injunction, a mere servant acting under his master's orders ought not to be joined as a respondent to a motion to commit.

after an injunction has been issued against him, he renders himself liable to committal (*a*). 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" (*b*), and if the plaintiff fails to prove his case strictly, the motion will fail (*c*). It was said by Lord Langdale, M. R., in *Croft* v. *Day* (*d*), 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 (*e*). Where the contempt committed has not been gross, it is usual not to make an actual order for committal, but only to order the

(*a*) *Rodgers* v. *Nowill*, 3 De G. M. & G. 614; *Gillis* v. *Hall*, R. Cox, 596. On August 8th, 1877, V.-C. Malins made an order to commit the defendant in *Dence* v. *Mason* (Dig. 570), who had, notwithstanding the injunction, continued to sell goods and issue labels using the name "Brand" thus—"Frank Mason & Co.'s ('Brand's') Essence of Beef," and so on. He was discharged on December 18th, on undertaking not to use the name "Brand" until the hearing of the action: Dig. 570. In *Devlin* v. *Devlin*, 69 N. Y. 212, the Supreme Court of New York imposed a fine. In *U. S.* v. *Roche*, 1 M'Crary, 385, it was held that the declaration that the U. S. Statute of 1870 was invalid did not affect the validity of an injunction granted independently of the Act, and that an attachment must issue against a defendant who had committed breaches of the injunction.

(*b*) *Swift* v. *Dey*, 27 N. Y. Super. Ct. 611; R. Cox, 319, 324; and see *per* Lord Langdale, M. R., in *Croft* v. *Day*, 28 Leg. Obs. 378. See also *London General Omnibus Co., Ld.* v. *Sullivan* (C. A.), Times, June 1, 1900. In *Braham* v. *Beachim* (1), 7 Ch. D. 848, an injunction was granted to restrain the defendants from calling themselves "The Radstock Colliery Proprietors," or saying that they were the proprietors of collieries at Radstock; and it was afterwards held (*Braham* v. *Beachim* (2), Dig. 633) that the defendants had committed no breach of the injunction by styling themselves "The Radstock Coal and Waggon Co., Colliery Proprietors, Radstock, Somerset." In *Dence* v. *Brand*, W. N. 1881, p. 31, it was held that the defendant had not committed a breach of an injunction restraining him from representing that he was the original inventor of essence of beef by stating that he was the original manufacturer of that article.

(*c*) *E.g.*, *Ripley* v. *John Arthur & Co.*, 19 P. R. 443, where the plaintiffs had obtained an injunction in general terms in default of pleading, and moved to commit without adducing evidence that what the defendants were doing was a breach of the injunction, and the Court was unable to arrive at that conclusion from a mere comparison of the goods themselves.

(*d*) 28 Leg. Obs. 378.

(*e*) *Rodgers* v. *Nowill*, 3 De G. M. & G. 614.

person in contempt to pay the costs of the motion for committal: *e.g.*, where an auctioneer, in contempt of an injunction, offered for sale "Vanity Fair" cigarettes, supposing the notice of motion served on him not to be properly authenticated, but did not actually effect any sale, V.-C. Malins made no order for committal, on his apologising, submitting to the injunction, and paying all the costs (*a*). But a defendant can only be ordered to pay the costs of a motion for committal, if his conduct has been such that a committal might have been ordered (*b*). Where an injunction had been granted to restrain the infringement of a mark on cotton, in which a conspicuous feature consisted of a cross, from which the cotton had become known as "Cross Cotton," and the defendant adopted an altered label, containing the words "Cross Cotton," and otherwise calculated to deceive, Wood, V.-C., refused to order a committal, on the ground that the defendant had ingeniously avoided committing a breach of the injunction, and that the plaintiff had delayed to enforce his right for fifteen months; but he enlarged the terms of the injunction so as effectually to put a stop to the new fraud, and ordered the defendant to pay all the costs (*c*). So where the sole breach of the injunction was by an agent of the defendant's without his knowledge, the Court refused a motion to commit the defendant, but deprived him of costs on the ground that he was civilly liable for the act of his agent (*d*). Sometimes an application is made to commit the editor or publisher of a newspaper on the ground that he has published something prejudicial to the fair trial of a pending action for infringement; but such a motion in *Singer Manufacturing Co.* v. *Loog* (*e*), based on a newspaper paragraph stating that further proceedings would be taken on the conclusion of the action, was refused, on the ground that the paragraph would have no influence on the trial of the action. Again in *Coats* v. *Chadwick* (*f*), it was laid down by Chitty, J., that the plaintiff, in an impending action for infringement of trade mark, is at liberty to warn the trade by circular against infringement; but if the warning contains matter which will prejudice the de-

(*a*) *Marcovitch* v. *Bramble, Wilkins & Co.*, Dig. 595; and see *Daniel* v. *Whitehouse* (?), 16 P. R. 71; *Palestine Wine and Trading Co., Ld.* v. *J. Cohen & Co.*, 23 P. R. 568; *Jefferson, Dodd, Ld.* v. *Dodd's Drug Stores, Ld.*, 25 P. R. 16.

(*b*) *Dence* v. *Brand*, W. N. 1881, p. 31.

(*c*) *Cartier* v. *May*, Dig. 200.

(*d*) *Parker Manufacturing Co., Ld.* v. *Cooper*, 18 P. R. 319.

(*e*) Dig. 635.

(*f*) (1891) 1 Ch. 347.

fence of the action, that is a contempt; and an injunction was granted, the defendants not asking for a committal.

Revivor.

An action to restrain the infringement of a trade mark is an action to protect property, and if the plaintiff dies, his representatives are entitled to continue it (*a*). On the other hand, when an injunction had been granted, without opposition by the defendant, the Superior Court of New York refused a motion by the defendant's administratrix to have the action continued against her, on the ground that it was not shown that the defendant had acquired any rights in the litigation, or that his estate would be prejudiced by the action not being continued (*b*).

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 (*c*). And so in *Wheeler* v. *Johnston* (*d*), the V.-C. of Ireland said that "a man may have two, or three, or more trade marks, which he may put on his goods as he likes." But where it was shown that the goods to which a certain mark was affixed were known by a distinct name, and not by the mark, and the mark was not commonly used by the plaintiff before bill filed, the injunction was refused (*e*).

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 (*f*). But where the name is the only distinctive part of the mark, and that is not taken, no injunction

(*a*) *Oakey & Sons* v. *Dalton*, 35 Ch. D. 700; *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268.

(*b*) *Republic of Peru* v. *Reeves*, 40 N. Y. Super. Ct. 516.

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

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

(*e*) *Wilson* v. *Maxfield*, L. J. N. of C. 1875, p. 51. This was before the Trade Marks Registration Act, 1875, was passed.

(*f*) *Ford* v. *Foster*, L. R. 7 Ch. 611. So in *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57; and *Hoby* v. *Grosvenor Library Co.*, 28 W. R. 386.

will be granted in respect of the use by the defendant of a non-distinctive part of the mark. There has, in fact, been no infringement (*a*).

Singer Manufacturing Co. v. Wilson.

Where, however, a manufacturing company affixed their special device to their machines, and also their name, the Master of the Rolls and Court of Appeal declined to restrain another company who manufactured similar goods bearing their own mark and name, but did not affix to them the plaintiffs' name, from using the plaintiffs' name as descriptive of the principle on which the machines were constructed (*b*); and this part of the decision was not disapproved by the House of Lords when they remitted to the Court below the question whether the name was in fact descriptive of the principle of the machines, which was afterwards decided against the plaintiffs in *Singer Manufacturing Co.* v *Loog* (*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 tenant of iron works.

In *Motley* v. *Downman* (*d*), Lord Cottenham, C., was of opinion that a trade mark habitually applied to the iron manufactured at certain works could not be sold with the business by the tenants of the works, so as to give the purchasers an exclusive right as against the landlord of the works, or as against tenants of the works who had leased them after the purchasers of the business and trade mark had removed from those works and gone elsewhere.

Successive lessees of brick works.

In another case (*e*), 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 suc-

(*a*) *E.g.*, it was held in Scotland that the fact that one firm called their goods "Wotherspoon's Victoria Lozenges," could not prevent another firm from styling theirs "Gray's Victoria Lozenges": *Wotherspoon* v. *Gray*, Ct. Sess. Cas. 3rd Ser. II. 38. And see *Cooper* v. *Maclachlan* (Sc.), 18 P. R. 380; 19 P. R. 27. See also the English case of *Hommel* v. *Bauer & Co.*, 22 P. R. 43, 47; and *Pirie* v. *Goodall*, (1892) 1 Ch. 35.

(*b*) *Singer Manufacturing Co.* v. *Wilson*, 2 Ch. D. 434. Cf. *Singer Manufacturing Co.* v. *Spence*, 10 P. R. 297; and *Singer Manufacturing Co.* v. *British Empire Manufacturing Co., Ld.*, 20 P. R. 313, where relief was granted.

(*c*) 8 App. Cas. 15.

(*d*) 3 My. & Cr. 1. See *Dickson* v. *McMaster & Co.*, 18 Ir. Jur. 202.

(*e*) *Harper* v. *Pearson*, 3 L. T. N. S. 547.

ceeded 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.

Owner and lessee of a spring.

If A. is the owner of a natural spring, and B. is the concessionnaire for a term of years, it seems that the name of the spring is the property of A., even though it was given to the spring by B., and that B. is not entitled to sell water from another spring under the same name (*a*), nor, if his concession is limited to sales in specified countries, to interfere with the sale in those countries, under the name of the spring, of genuine water from the spring, though not imported by him (*b*).

Manufacturer and printer of cotton goods.

Where manufacturers of cotton cloths, which were afterwards printed elsewhere, sought to restrain other manufacturers who made and printed similar cloths, and marked them similarly to the goods made by the plaintiffs, it was held that the marks on the plaintiffs' goods were indicative of the printer and not of the manufacturer (*c*). And in *Wamsutta Mills* v. *Allen* (*d*) it was held that muslin manufacturers were entitled to restrain the use of a colourable imitation of their mark on shirts made from inferior muslin, which might, from the mark, have been identified with their manufacture.

Principal and agent.

Where a London tradesman, who dealt in goods supplied to him by a foreign manufacturer, had invented a trade mark for those goods which stated the name of the foreign manufacturer, but made no reference to the London vendor, it was held by the Master of the Rolls that the latter could not restrain the use of the mark by a subsequent consignee of the same goods, though if the trade mark had referred to the goods having been of his selection, the case might have been different (*e*).

(*a*) *Hill* v. *Lockwood*, 32 Fed. Rep. 389.

(*b*) *Apollinaris Co., Ld.* v. *Scherer*, 23 Bl. C. C. 459; and see *In re Apollinaris Co., Ld.*, (1891) 2 Ch. 181.

(*c*) *Amoskeag Manufacturing Co.* v. *Garner*, 55 Barb. 151; R. Cox, 541; and see *In re Sykes*, 43 L. T. N. S. 626. But see *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298. And compare *Goodfellow* v. *Prince*, 35 Ch. D. 9, as to the difference between manufacturer and importer. An injunction has been obtained by one retail dealer against another in respect of the get-up of an article purchased in bulk by both parties from the same manufacturer: *Knott* v. *Marshall*, W. N. 1894, p. 214. See also *Ullmann & Co.* v. *Leuba*, 25 P. R. 673.

(*d*) 12 Phila. 535.

(*e*) *Hirsch* v. *Jonas*, 3 Ch. D. 584. See *Deuce* v. *Mason* (1), Dig. 534;

Manufacturer and importer.

In *In re Apollinaris Co.* (*a*) it was held by the Court of Appeal that an importer of foreign goods cannot register or claim as his own the trade mark of the foreign producer, whether the goods are produced by a course of manufacture or by a process of nature; nor whether the importer has or has not an exclusive contract for this country; nor whether the producer does or does not consent; and further, that whether an importer can or cannot register as his own the producer's trade marks after the importer has acquired the control of the producer's entire output (which was not distinctly decided), the registration by the importer in his own name, while only having a lesser right, of trade marks belonging to the producer, cannot be rendered valid by the subsequent acquisition by the importer of the right to the whole output. And as an importer cannot register the foreign producer's trade mark, so neither can he, without registration, sue for an infringement (*b*). It follows that where an importer registers as his own the mark of a foreign producer without his authority, the mark will be ordered to be struck off the register (*c*); but it has been held in America that an exclusive consignee from a foreign manufacturer may affix a trade mark of his own to the foreign goods, and after ceasing to import such goods may use his trade mark for other similar goods without infringing the rights of the foreign manufacturer, provided that he uses distinctive labels (*d*).

Manufacturer and exporter.

In another case (*e*), a combination mark, which was used on cotton goods manufactured by Ward, and consigned through Robinson, the exporting agent, to Galbraith, the merchant, at Rangoon, consisted of five separate stamps or labels, of which three had been used separately by Robinson, one (in a slightly different form) by Robinson and Galbraith, and the remaining one

J. Defries & Sons v. *Electric & Ordnance Accessories Co.*, 23 P. R. 341; *Swift* v. *Peters*, 11 U. S. Pat. Gaz. 1110; *McLean* v. *Fleming*, 96 U. S. 245; *Thomson & Co.* v. *Robertson*, Ct. Sess. Cas. 4th Ser. XV. 880.

(*a*) (1891) 2 Ch. 186, 226, 230. The name of the spring has since been registered on a special application under the present Act by the foreign company which owned the spring: *In re Apollinaris Co.*, (1907) 2 Ch. 178.

(*b*) *Richards* v. *Butcher* (1), 7 P. R. 288.

(*c*) *In re European Blair Camera Co.*, 13 P. R. 600.

(*d*) *Société des Huiles d'Olive* v. *Rorke*, 5 App. D. N. Y. 175; *Saxlehner* v. *Graef*, 81 Fed. Rep. 704.

(*e*) *Robinson* v. *Finlay*, 9 Ch. D. 487. In this case Bacon, V.-C., had held that the mark belonged to the exporter, and it seems that this may be so in a proper case. In *Godillot* v. *Hazard*, 81 N. Y. 263, the importer was recognised as the proprietor of the mark. Compare *In re "Tarantella" Trade Marks*, 27 P. R. 573, where the exporters from Italy were ordered to be registered jointly with the English importers.

was used for the first time by the three on the goods which passed through the course of dealing above stated; and it was held on appeal that neither Ward nor Robinson had such an exclusive right to the combination as to be entitled to restrain the other from using it. And there are other cases in which both parties have been held to be entitled by long user to use the same mark (*a*); but for this to be so the user must have been substantial (*b*).

Exporter and merchant.

A question of a somewhat similar character arose in *In re Jones* (*c*). In that case cotton goods were habitually exported by Jones of Manchester to Manilla, for sale there on commission, through Andrews & Co., of Manchester and Manilla, one of the partners in which firm, named Rotschke, was resident at Manilla; and two trade marks were designed and used for the goods which passed through this course of trade. Each of the marks contained a representation of Andrews & Co.'s house of business in Manilla, and, besides this, one of the marks had the name "Andrews & Co.," and the other had that name and also the name "Robert Jones of Manchester" and Rotschke's crest, with a statement that it was Rotschke's trade mark. It was held by Chitty, J., and the Court of Appeal that there was no contract that, after the joint adventure came to an end, either party was to be entitled, as against the other, to use or register the trade marks, and that if there had been such a contract it could not have been enforced, since, having regard to the composition of the marks, the result would be to deceive the public.

Manufacturer and merchant.

The construction of an agreement between two parties with respect to a mark on brandy had to be determined by the Court in *In re Rivière* (*d*), in which it was held by Pearson, J., and the Court of Appeal that the true purport of the arrangement was that the mark in question, which had been used and registered by Rivière & Co., the French manufacturers, in France, before it was adopted by McDowell & Co., wine and spirit merchants, in Madras, was to be used exclusively by McDowell & Co. so long

(*a*) *Day* v. *Neale*, Bacon, V.-C., May 24th, 1881: *Benbow* v. *Low* (4), 44 L. T. N. S. 875; and other cases cited at p. 125, note (*a*).

(*b*) *In re Hodson, Tessier & Co.*, 86 L. T. N. S. 188.

(*c*) 53 L. T. N. S. 1.

(*d*) 53 L. T. N. S. 237. See *In re Roger* (2), 12 P. R. 149; *Freeman Bros.* v. *Sharpe Bros. & Co., Ld.*, 16 P. R. 205; *R. Thorne & Sons, Ld.* v. *Pimms, Ld.*, 26 P. R. 221: *Lavergne* v. *Hooper*, Ind. L. R. 8 Mad. 149.

only as they took their brandy from Rivière & Co., and was only to be used by them on such brandy; and that on McDowell & Co. ceasing to take their brandy from Rivière & Co. the original right of the latter to the mark was to revive.

Shipper and shipowner.

In *Winsor* v. *Clyde* (*a*), it was held that a firm who had carried on business as shippers of merchandise by ships which they did not own, but of which they had the entire management while loading and unloading, &c., and who had denominated each line of vessels used by them and plying in a particular direction by the name of "The Keystone Line for ———," had acquired a right of property in the name, and were entitled to restrain the use of the name by another firm who owned the ships employed by the former firm for a certain period on one of their lines, after the termination of the connection, the latter firm having had at best a revocable licence to use the name.

Master and servant.

A different point occurred in another case (*b*), in which, after the plaintiff company had for some two years been selling cigars of their own manufacture marked with the name "Grand Master," and paying all the expenses of the manufacture and marking, a member of the company, who was also their superintendent, registered the mark as his own, and sought to justify himself by alleging that he had invented the name, selected the tobacco for the brand of cigars, devised the shape for them, made the first ones himself, and personally affixed the first labels to the boxes; but it was held that in all these matters he had been simply acting as the servant of the company, and that the mark belonged to them.

Rey v. *Lecouturier*. "Chartreuse."

In the "Chartreuse" case the monks of the Grande Chartreuse had been expropriated and expelled by the French Government, and their business establishment, goodwill, trade marks, &c., had been sold by the liquidator to a company which became the owner of the French business and continued to carry it on, using the same marks and names. The monks had, however, manufactured their liqueur under a secret process which had not been disclosed, though there was evidence to show that there was little, if any, difference between their liqueur and that of the new company. It was held by the Court of Appeal and the

(*a*) 9 Phila. 513.
(*b*) *Yale Cigar Manufacturing Co.* v. *Yale*, 30 U. S. Pat. Gaz. 1183. See *Hayward Bros., Ld.* v. *Peakall*, 26 P. R. 89.

House of Lords that in the United Kingdom the goodwill, trade marks, &c. had not been transferred to the new company, and an injunction was granted to restrain them from carrying on business in England in the same way as the monks had done, and in which the company alone was legally entitled to carry on business in France (*a*).

Secret recipe.

Again, in *Cotton* v. *Gillard* (*b*), it was decided by the Master of the Rolls that a man had no right to use a trade mark applied to a sauce with the composition of which he was unacquainted, even though he had, as he believed, bought that right from the person entitled to the same; it followed that he could not prevent its use by the person acquainted with the secret, of which he had in fact been the inventor. But it has been held in America (*c*) that a person who has been accustomed to manufacture for another, in accordance with the latter's instructions, may receive an assignment of the trade mark which has been habitually used on the goods so manufactured. And it seems that where an article known by a particular name or mark has been manufactured by partners, of whom one has been acquainted with the secret of the process and the other not, the former cannot, after the dissolution of the partnership, restrain the other from using the name or mark, for the right therein of the one partner is equal to that of the other (*d*).

Registered trade marks.

With respect to registered trade marks, such difficulties can seldom arise in the future, since it is the registered proprietor who has, *primâ facie*, the exclusive right to the mark (*e*), subject only to the possibility of a rectification of the register (*f*).

(*a*) *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268. And compare the observations of Lord Herschell and Lord Davey in the "Yorkshire Relish" case, *Powell* v. *Birmingham Vinegar Brewery Co.*, (1897) A. C. 710, at pp. 716, 717.

(*b*) 44 L. J. Ch. 90. Compare *Coffeen* v. *Brunton*, 5 McLean, 256; R. Cox, 132; *Taylor* v. *Bemis*, 4 Biss. 406.

(*c*) *Witthaus* v. *Braun*, 44 Md. 303. See *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453.

(*d*) *Weston* v. *Ketcham* (1) and (2), 39 N. Y. Super. Ct. 54; 51 How. Pr. 455. And see *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218.

(*e*) In the Scotch case of *Dunnachie* v. *Young & Sons*, Ct. Sess. Cas. 4th Ser. X. 874, the name "Glenboig" was used and registered by two companies trading as brickmakers on the Glenboig estate for the bricks made there, and a third firm carrying on the same business in the neighbourhood of the Glenboig estate began to use the name, alleging that it was descriptive of all bricks made of the seam of clay which ran through the Glenboig estate, and which they alleged that they were working. The Court of Session, however, decided against this contention, and granted an interdict at the suit of the two companies. See also *Montgomerie* v. *Donald & Co.*, Ct. Sess. Cas. 4th Ser. XI. 506; *Hayward Bros., Ld.* v. *Peakall*, 26 P. R. 89.

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

It is, therefore, of great importance that the registration should be effected in a form which will recognise all existing rights. Thus, in *Ex parte Hemming & Son* (*a*), in which recent occupiers of a needle mill were registering the name of the mill as their trade mark, a note was appended to the entry on the register, stating that the registered proprietors did not claim the exclusive right to the use of the name so as to prevent the owner or occupier for the time being from using the name for any legitimate purpose. If the name of the wrong person has been placed on the register, the rightful owner ought to apply for rectification (*b*).

More than one proprietor.

It occasionally happens that a trade mark becomes vested in more than one person. The question then arises whether either of these is entitled to succeed in a suit against an infringer, to which the other person entitled is not a party. In a case of this description, Shadwell, V.-C., gave it as his opinion, that whether the plaintiff had the right in himself, or jointly with some other persons, he still had sufficient right to bring forward the case (*c*). In *Dent* v. *Turpin* (*d*), 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 instead of one. In *Southorn* v. *Reynolds* (*e*), he decided in the same way, saying that his previous decision had not been interfered with (*f*). So, in the Scotch case of *Dunnachie* v. *Young & Sons* (*g*), the name "Glenboig" was used and registered as the trade mark of one company, and

(*a*) Jessel, M. R., April 27th, 1881.

(*b*) Thus, in *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268, the liquidator's name had been placed on the register, but this was removed on application by the monks, who were held not to have lost their rights.

(*c*) *Hine* v. *Lart*, 10 Jur. 106. See *Pratt's Appeal*, 117 Penn. St. 401.

(*d*) 2 J. & H. 139. Compare *In re Ehrmann*, (1897) 2 Ch. 495; *Whitstable Oyster Fishery Co.* v. *Hayling Fisheries*, *Ld.*, 17 P. R. 461; 18 P. R. 434, where concurrent rights were claimed in a trade name.

(*e*) 12 L. T. N. S. 75.

(*f*) And see *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; and *Newman* v. *Alvord*, 49 Barb. 588; R. Cox, 404; 51 N. Y. 189. And consider *Robinson* v. *Finlay*, 9 Ch. D. 487.

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

as part of the trade mark of another company, and an interdict was granted in an action in which the two companies were co-plaintiffs, to restrain the use of the name by a third company.

Partnership trade mark.

It seems that where the use of a trade mark is improperly secured for himself by one member of a partnership, he being bound to obtain it for the partnership, he will be held to be a trustee of it for the benefit of the partnership (*a*).

Delondre v. *Shaw*.

In *Delondre* v. *Shaw* (*b*) it was held that, inasmuch as one of the plaintiffs had no interest in the account (*c*), he was improperly joined as a co-plaintiff, the Court thus treating the injunction as ancillary to the account. In *Farina* v. *Silverlock* (*d*) the same question was raised, but without success, and no such objection would prevail at the present day (*e*).

Prize medallist.

In *Batty* v. *Hill* (*f*), 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 (*g*).

(*a*) *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54. And see *Ex parte Lawrence Bros.*, 44 L. T. N. S. 98; *In re Rust & Co.*, *ib.* 98; and *In re Farina* (4), *ib.* 99.

(*b*) 2 Sim. 237. And see *Page* v. *Townsend*, 5 Sim. 395.

(*c*) It should be observed that the reason given by Mr. Bickersteth (afterwards Lord Langdale and M. R.), who argued the case, for the joinder of Pelletier as a co-plaintiff, was that, though having no interest in the medicine, he yet was entitled to prevent his name being used. It is further to be observed, that the subsequent decision of Lord Langdale, in *Clark* v. *Freeman*, 11 Beav. 112, does not conflict with the position taken up by him in *Delondre* v. *Shaw*, since Pelletier not only manufactured the medicine, but supplied it to Delondre, so that he had a pecuniary interest in the maintenance of his reputation. *Clark* v. *Freeman* (as to which see p. 308, *infra*) was decided on the point that the plaintiff did not manufacture or sell pills.

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

(*e*) In *Millington* v. *Fox*, 3 My. & Cr. 338, the account was waived. And see *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Leather Cloth Co.* v. *American Leather Cloth Co.*, *ib.* 137; *Barnett* v. *Leuchars*, 13 L. T. N. S. 495; *Symonds* v. *Greene*, 28 Fed. Rep. 834; and many other cases. In fact, this is a common incident.

(*f*) 1 H. & M. 264.

(*g*) See Exhibition Medals Act, 1863 (26 & 27 Vict. c. 119); also *Taylor* v. *Gillies*, 59 N. Y. 331; and *Roper's, &c. Co.* v. *Copeman's, &c. Association, Ld.*, 28 Sol. J. 218. But representations of prize medals have been registered as parts of old combination marks, both in England (see *In re Brook*, 26 W. R. 791, and *In re Farina* (2), 27 W. R. 456) and in America (see *In re Bush & Co.*, 10 U. S. Pat. Gaz. 164).

Infringement by servants.

The person sought to be enjoined in a trade mark case is commonly a rival manufacturer, who is using the spurious mark to promote the sale of his own commodities. The fact that the fraud has been committed by a servant of the trader makes no difference, for principals "are bound to know what their agents do, and if they do not know, they are responsible exactly as if they did know." Hence, where a defendant's manager had affixed to his master's goods, without the knowledge of the latter, as he alleged, a ticket infringing the rights of the plaintiff, an injunction was granted against the master, with costs (*a*). And, similarly, where a clerk had sold goods in a spurious wrapper, with a verbal representation that the goods and wrapper were genuine (*b*). But if there has been only a single instance of passing off by a servant, who has since left his master's employment, the case is not one in which an injunction ought to be granted against the master (*c*). Nor does any liability of the employer relieve the servant or agent from his personal responsibility (*d*).

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 (*e*). And similarly in America with American agents of foreign manufacturers (*f*), and in the colonies (*g*). So, too, commission merchants, selling with the knowledge that the goods they sell are so marked as to deceive (*h*).

Engravers.

The remedy will, however, not only be awarded against such persons as are to profit directly by the perpetration of a fraud,

(*a*) *Tonge* v. *Ward*, 21 L. T. N. S. 480. And see *Twentsche Stoom Bleekery Goor* v. *Ellinger & Co.*, 26 W. R. 70; *Atkinson* v. *Atkinson*, 85 L. T. (Journal) 229.

(*b*) *Low* v. *Hart*, 90 N. Y. 457; *Havana Cigar and Tobacco Factories, Ld.* v. *Tiffin* (1905) *Ld.*, 26 P. R. 473. And see *Grierson, Oldham & Co., Ld.* v. *Birmingham Hotel & Restaurant Co., Ld.*, 18 P. R. 158, 159, and *Monro* v. *Hunter*, 21 P. R. 296, where injunctions were granted notwithstanding that the servant was acting (as was alleged) contrary to the instructions of his master.

(*c*) *Leahy* v. *Glover*, 10 P. R. 141. And see *Rutter & Co.* v. *Smith*, 18 P. R. 49; *Carr & Sons* v. *Crisp & Co., Ld.*, 19 P. R. 497; *John Knight & Sons, Ld.* v. *Crisp & Co., Ld.*, 21 P. R. 670; *Burberrys* v. *Watkinson*, 23 P. R. 141; *C. A. Peters, Ld.* v. *Domestic Inventions Co.*, 25 P. R. 387; *Kodak, Ld.* v. *Grenville*, 25 P. R. 416. So also in Scotland, *Montgomerie & Co., Ld.* v. *Young Bros.*, 21 P. R. 285.

(*d*) *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601; *Estes* v. *Worthington* (2), 30 Fed. Rep. 465.

(*e*) *Farina* v. *Cathery*, L. J. N. of C. 1867, p. 134; *Siegert* v. *Findlater*, 7 Ch. D. 801. And see *Siegert* v. *Ehlers*, Dig. 432; *Dadirrian* v. *Gullian*, 79 Fed. Rep. 784.

(*f*) *Roberts* v. *Sheldon*, 8 Biss. 398; *Carbolic Soap Co.* v. *Thompson*, 25 Fed. Rep. 625.

(*g*) *Siegert* v. *Lawrence*, 11 V. L. R. 47.

(*h*) *Coats* v. *Holbrook*, 2 Sandf. 586; R. Cox, 20.

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 (*a*).

Guinness v. *Ullmer.*

In *Guinness* v. *Ullmer* (*b*), where the defendants had supplied to one Taylor blocks engraved with the main part of the plaintiffs' trade mark, including their names, from which blocks Taylor had printed labels similar to the plaintiffs', the Vice-Chancellor of England, Sir L. Shadwell, was of opinion that, as the matter complained of could not have happened without the prints which had been made from the blocks, the defendants had made themselves ancillary to the piracy, and he accordingly granted the injunction. It had been contended for the defendants that it was with a part only of the plaintiffs' mark that they had been concerned; but the Vice-Chancellor thought that if a thing contained twenty-five parts, and only one was taken, such an imitation would be sufficient to contribute to a deception, and that the law would hold those responsible who had contributed to the fraud. In *Farina* v. *Shaw* (*c*), and *Farina* v. *Silverlock* (*d*), injunctions were granted to restrain the printing of labels similar to those used by the plaintiff. In the latter case, on appeal (*e*), Lord Cranworth, C., dissolved the injunction, and sent the right to be tried at law (*f*); but this can no longer be done (*g*).

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 purposes of transmission to the persons to whom they are consigned, yet an injunction will issue to restrain him from parting with the goods spuriously marked (*h*). "It is the

(*a*) *John Jameson & Son, Ld.* v. *R. S. Johnston & Co., Ld.*, 18 P. R. 259; *De Kuyper* v. *N. & G. Baird, Ld.*, 20 P. R. 581.

(*b*) 10 L. T. O. S. 127.

(*c*) Decided by V.-C. Parker, and referred to in *Farina* v. *Silverlock*, 1 K. & J. 509, 512. See 3 Eq. Rep. 886, 890.

(*d*) 1 K. & J. 509. And so as to box-makers who supplied cigar boxes got up and marked in imitation of the plaintiff's boxes to other cigar manufacturers: *Cuervo* v. *Jacob Henkel Co.*, 50 Fed. Rep. 471. And see *Hostetter Co.* v. *Brueggeman Reinert Distillery Co.*, 46 Fed. Rep. 188.

(*e*) 6 De G. M. & G. 214.

(*f*) Where the plaintiff obtained a verdict. See 4 K. & J. 650.

(*g*) 25 & 26 Vict. c. 27.

(*h*) *Upmann* v. *Elkan*, L. R. 12 Eq. 140; L. R. 7 Ch. 130. And see *Rivero*

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 (*a*). If, on the other hand, the carrier declines to give information required by the injured party for the purpose of an action against the author of the fraud, even after the marked goods have passed out of his control, it was formerly held that the person injured is entitled to succeed in an action brought against him to compel discovery (*b*). 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 (*c*). 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" (*d*).

Innocent mortgagee.

Where wines bearing a spurious trade mark were in the custody of a dock company, and an innocent third party had advanced money on the security of the wines, it was ordered by Romilly, M. R., that the wines should be delivered to the mortgagee, on the spurious brands being removed and destroyed (*e*).

Wharfinger's lien.

In *Moet* v. *Pickering* (*f*) wharfingers were in possession of wines spuriously branded, but they had no knowledge that the brand was spurious, and they offered to act with respect to the wine as the Court should direct, upon having their charges and

v. *Norris*, Seton, 6th ed. 625; *Del Valle* v. *Mayer*, *ib.*; *Moet* v. *Pickering*, 8 Ch. D. 372.

(*a*) *Per* Romilly, M. R., and Lord Hatherley, C., in *Upmann* v. *Elkan*, L. R. 12 Eq. 140; and L. R. 7 Ch. 130.

(*b*) *Orr* v. *Diaper*, 4 Ch. D. 92.

(*c*) *Upmann* v. *Elkan*, L. R. 12 Eq. 140. See *Moet* v. *Pickering*, 8 Ch. D. 372; *Upmann* v. *Forester*, 24 Ch. D. 231; *Upmann* v. *Currey*, 29 Sol. J. 735.

(*d*) *Per* Lord Hatherley, C., in *Upmann* v. *Elkan*, L. R. 7 Ch. 130. See, also, *Siegert* v. *Lawrence*, 11 V. L. R. 47, in Victoria: and *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72, in New South Wales.

(*e*) *Ponsardin* v. *Peto*, 33 Beav. 642.

(*f*) 6 Ch. D. 770: 8 *ib.* 372.

costs paid or provided for. The Court of Appeal held that they were entitled to a lien on the wine for their charges, and that, even if the plaintiffs in the action for infringement were entitled to any lien on the wine for their costs, which was doubted, that lien must, at all events, be postponed to that of the wharfingers; and the Court also held that the latter had not done anything to disentitle them to their costs, which must be paid in both Courts by the plaintiffs.

Warehousemen.

In *Hunt* v. *Maniere* (*a*), where warehousemen, at the request of the owners of a certain brand on wines, refused to deliver (*b*) to the indorsee of the dock warrants wines improperly marked with that brand, Romilly, M. R., restrained the indorsee from proceeding with an action at law against the warehousemen for their refusal. The jurisdiction of the old Court of Chancery to restrain actions at law is now gone, but the warehousemen would have a good defence in the Common Law Division to an action there commenced (*c*).

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 (*d*) otherwise than in accordance with a contract into which he had entered, or of an initial (*e*), or of the name of a business (*f*), or of a singer's voice (*g*), or of a publication (*h*).

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

(*a*) 34 Beav. 157.

(*b*) On the same day, but subsequently, an injunction was granted to restrain them from doing so.

(*c*) Judicature Act, 1873, § 24.

(*d*) *Ainsworth* v. *Bentley*, 14 W. R. 630; *Ward* v. *Breton*, L. R. 19 Eq. 207; *Gaye* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306.

(*e*) *Tudor* v. *Tudor*, W. N. 1873, p. 72: *Fullwood* v. *Fullwood* (2), 9 Ch. D. 176.

(*f*) *Hagg* v. *Darley*, 47 L. J. Ch. 567 ("Old Government Sanitary Company").

(*g*) *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.

(*h*) *Clowes* v. *Hogg*, W. N. 1870, p. 268.

been so used alone previously as a trade mark, and it was not then used as a motto, but as a trade mark (*a*).

Other cases.

Where, on a dissolution of partnership, it was agreed that neither partner should continue to use the firm's trade mark, which consisted of the letters "P. & O." within a scroll bearing an inscription, one of the members of the late firm was restrained from using a mark very similar to the old mark, the only practical difference being that the letters "P. S. & Co." were substituted for "P. & O." (*b*). And in a case of the same character, where, on a dissolution of partnership, one of the partners had assigned to the other his interest in the firm's stock of labels, which contained his name, and the other had covenanted not to print any more, except in a form expressive of the change in the firm, the latter was not allowed to register the old labels in Victoria, without alteration (*c*).

Name of cigarettes.

Where a tobacco manufacturer agreed to pay a royalty for the use of a patent for improvements in the manufacture, and he proposed and the patentee assented to his using as the name for the cigarettes to be made from the tobacco the words "Sweet Caporal," "Caporal" alone having been previously used by the manufacturer on other cigarettes, it was held that after the manufacturer had discontinued the use of the patent he was under no contract not to use the name "Sweet Caporal" on other cigarettes (*d*).

Barrows v. Pelsall Coal & Iron Co.

In *Barrows* v. *Pelsall Coal & Iron Co.* (*e*), the plaintiffs used a trade mark consisting of the letters "B. B. H." in Roman type, with a crown, and the defendants, who had compromised a suit commenced for the purpose of restraining them from using the letters "B. B. S." also in Roman type, with a crown, by undertaking to discontinue the use of the mark, were restrained by injunction from committing a breach of the contract by applying to register the letters "B. B. S." in italics, with a crown.

Fraudulent agreement.

The Court will not specifically enforce an agreement the object of which is to defraud the public by putting goods spuriously marked on the market (*f*), nor will it protect a person who has

(*a*) *Steinthal* v. *Samson*, Dig. 546.

(*b*) *Osborne, Garrett & Co.* v. *Parton, Son & Co.*, Bacon, V.-C., July 25th, 1884.

(*c*) *Ex parte Grist & Bowring*, 11 V. L. R. 630.

(*d*) *Hornbostel* v. *Kinney*, 52 N. Y. Super. Ct. 41.

(*e*) Dig. 530.

(*f*) *Oldham* v. *James*, 13 Ir. Ch. 393; 14 *ib.* 81.

used his trade mark on spurious as well as on genuine goods (*a*), or has intended to commit fraud by buying the right to stamp on his own goods the name of another person who has acquired a reputation in the trade (*b*). And where an action for damages was brought against a person who had filled with inferior seed seed-bags which he had bought from the plaintiffs, marked with their labels, it was held on demurrer that the plaintiffs, having knowingly been parties to a fraud upon the public, were not entitled to recover (*c*).

Contract with trade-mark owner for purchase of goods.

"Where the manufacture of a person or firm," said Cotton, L. J., in *Johnson* v. *Raylton* (*d*), "has acquired with the public a name or reputation, as Broadwood's or Erard's pianos, Purdey's or Lancaster's guns, a purchaser from them of articles of which they are the makers is entitled to refuse any not made by the firm with whom he contracts. In such a case the purchaser relies on reputation or public opinion that the maker to whom he goes supplies good articles. In other cases, where a man contracts with a particular firm of makers for goods such as they make, in the absence of evidence that in the particular trade, or as regards particular goods, there is a known practice that a maker of whom the goods are ordered is at liberty, in the absence of such a stipulation, to supply goods of the kind, though made by other firms. I should come to the conclusion that the purchaser is induced to go to the particular firm of manufacturers by his reliance, in part at least, on the opinion which he forms, either on his own experience or from information of others, as to the average or general excellence of the goods which are manufactured by them. He is trusting to his own experience, or to that of his friends, as a purchaser who goes to a firm which has acquired a public reputation trusts to the opinion of the public." So that where a manufacturer has contracted to sell goods of his own manufacture and bearing his trade mark, the purchaser is justified in refusing to accept other goods, though of the same quality. But it seems that if what is wanted is the particular manufacturer's trade mark on the goods as a guarantee of quality, the proprietor of the mark is justified in placing that mark on goods not of his own

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

(*b*) *Samuel* v. *Berger*, 24 Barb. 163; R. Cox, 178. See *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29; *In re Tolle*, 2 *ib.* 415.

(*c*) *Bloss* v. *Bloomer*, 23 Barb. 604: R. Cox, 200.

(*d*) 7 Q. B. D. 438.

make, since by so doing he makes himself responsible for the quality of them, just as if he had made them himself (*a*).

Contract for purchase of goods with a specified mark.

Where a contract has been entered into for the purchase of goods of a particular stamp, the question arises whether the stamp was specified as indicative of a particular quality, or as possessing some value in itself, so that the goods would be of less value if stamped differently. Thus, in *Hopkins* v. *Hitchcock* (*b*), where iron stamped with "S. & H." and a crown had been contracted for, and iron stamped with "H. & Co." and a crown was supplied, the firm having become differently constituted, and having consequently marked their iron of the quality originally denoted by the former brand with the latter stamp in substitution for the former, it was decided that the contract turned upon the quality of the iron, and not upon the brand (*c*); if, however, the brand had possessed a special value, and the object of the purchase had been to resell the iron at a price which would have had to be lowered in the absence of the special mark, or even if it had been clear that the defendant had contracted for the brand for its own sake, and not as indicative of quality, it seems that the decision would have been the other way. Such questions must, however, depend in each case upon the terms in which the intention of the contracting parties is expressed; and it seems that a contract to supply goods bearing a particular trade mark may be implied from that trade mark being printed at the head of the order form (*d*).

Painter's name on paintings.

In the case of paintings, described in a catalogue as being the work of Claude Lorraine and Teniers, it was held by Lord Kenyon, C. J., that the description was merely an expression of the vendor's opinion, and not a warranty of the authenticity of the paintings (*e*); 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 (*f*). The paintings being so much more modern,

(*a*) See *per* Brett, L. J., in S. C. But compare Merchandise Marks Act, 1887, § 3 (2).

(*b*) 14 C. B. N. S. 65.

(*c*) Compare *Nichol* v. *Godts*, 10 Ex. 191. Similarly, in *Gillespie & Co.* v. *Marshall*, Dig. 648, the question was discussed whether a contract to supply "Marshall's Canada Plates" was performed by the delivery of plates such as were usually supplied by Marshall, but which were not "Canada Plates" in the strict commercial sense.

(*d*) *Johnson* v. *Raylton*, 7 Q. B. D. 438.

(*e*) *Jendwine* v. *Slade*, 2 Esp. N. P. C. 572.

(*f*) *Power* v. *Barham*, 4 Ad. & E. 473.

it was more reasonable in this case to suppose that the vendor intended to make an assertion as to the fact of their authenticity, as within his own knowledge.

Merchandise Marks Act.

By the Merchandise Marks Act, 1887, any person selling or contracting to sell any goods bearing a trade mark, or trade description, is to be deemed to warrant the genuineness of the trade mark, or the correctness of the trade description, unless he expresses the contrary in signed writing, delivered to and accepted by the vendee (*a*).

By § 19 the punishment of an offender under that Act does not take away the civil remedy to which any person aggrieved by his conduct is entitled.

Risks incurred by infringement.

That under some circumstances an infringement of another person's trade mark may expose the infringer to liabilities even beyond those involved in an action brought to restrain the wrong, appears from the Victorian case of *In re Brebner* (*b*), in which an insolvent, who had wasted his means in litigation occasioned by his having infringed a trade mark, had his certificate suspended for a year.

(*a*) 50 & 51 Vict. c. 28, § 17.

(*b*) 2 W. & W. (I. E. & M.) 12.

CHAPTER VII.

THE CIVIL REMEDY. II.

DEFENCES—DISCOVERY AND INSPECTION—ACCOUNT—DAMAGES—COSTS.

Defences.

Defences. THE possible defences to an action to restrain an infringement of trade mark are numerous, some being of a somewhat special character. The following are some of the more important:—

1. *Non-Infringement.*

1. Non-infringement. The first and usual defence is that the conduct on the part of the defendant, of which the plaintiff complains, has not been, in fact, such as to have for its object or its result the appropriation by the defendant of what was the plaintiff's due, the fruits of his enterprise and reputation: shortly, that the defendant has not infringed (*a*).

2. *No Registration or Certificate of Non-Registration.*

2. No registration or certificate. The trade mark, so called, may present some one or more of the essential particulars required by the Act, and may not be objectionable in itself; but yet the fact of non-registration under the Act will, if it is a mark capable of registration, whether it was or was not used before the 13th August, 1875, effectually debar the person who has used it from obtaining the injunction, *quâ* trade mark, which would otherwise be awarded as a matter of

(*a*) *E.g.*, *Crawshay* v. *Thompson*, 4 Mau. & G. 357; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Blackwell* v. *Crabb*, 36 L. J. Ch. 504; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Blackwell* v. *Wright*, 73 N. Car. 310.

course (*a*). And this is so, even though the trade-mark owner has taken all steps in his power to protect his rights, and the Registry Office is responsible for the delay (*b*). If, being incapable of registration, it is an old mark, a certificate of refusal to register under the present Act will preserve the existing right to protection (*c*). If, being incapable of registration, it is a new mark, it cannot be sued on as a trade mark but only in an action for passing off (*d*), in which it may be referred to as corroborative evidence of fraud (*e*). 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 fraud, in which the imitation of marks was a more incident.

3. *The Plaintiff not the Registered Proprietor.*

3. Plaintiff not the registered proprietor.

By §§ 38, 39 of the Act of 1905, it is the registered proprietor who has the exclusive right to the registered mark (*g*), and has the power to deal with it. Any equities in respect of it may, however, be enforced, and in a case where a trade mark had been registered in the name of a firm, and a new firm took over the business and goodwill, and commenced an action for infringement before the trade mark had been transferred into their names, the action was allowed to proceed (*h*). If the trade mark has been

(*a*) See Trade Marks Act, 1905, § 42; also *Goodfellow* v. *Prince*, 35 Ch. D. 9; *Hart* v. *Colley*, 44 Ch. D. 193; and *Hargreave* v. *Freeman*, (1891) 3 Ch. 39. Registration is a "condition precedent to suing." *Per* Chitty, J., in *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398: and in *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 405.

(*b*) *Hazzopulo* v. *Kaufmann*, 23 Sol. J. 819.

(*c*) T. M. Act, 1905, § 42. See *per* Lord Blackburn in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 498. In *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434, a certificate of registration or of refusal to register does not appear to have been called for.

(*d*) Trade Marks Act, 1905, § 45.

(*e*) Jessel, M. R., has intimated from the bench that this view is correct. And see *per* Pearson, J., in *In re Riviere & Co.*, W. N. 1884, p. 75; and *per* Kay, J., in *In re Sanitas Co., Ld.*, 4 P. R. 533; and *per* Cotton, L. J., in *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 411; also *Hart* v. *Colley*, 44 Ch. D. 193; and the Canadian case of *Smith* v. *Fair*, 14 Ont. Rep. 729.

(*f*) *Woollam* v. *Ratcliff*, 1 H. & M. 259; *Edelsten* v. *Vick*, 11 Hare, 78; *Frese* v. *Bachof* (2), 14 Bl. C. C. 432; *Orr* v. *Diaper*, 4 Ch. D. 92; *Lever* v. *Goodwin*, 36 Ch. D. 1.

(*g*) See *Richards* v. *Butcher* (1), 7 P. R. 288, in which it was held that an importer of foreign goods could not sue in respect of an infringement of trade marks which belonged to and were registered in the name of the foreign producer, even though he had an exclusive contract in the United Kingdom.

(*h*) *Ihlee* v. *Henshaw*, 31 Ch. D. 323. And see *Reveliere* v. *Gateley*, 89 L. T. (Journal) 314.

registered by some person not entitled to it, the proper course is for the true owner to rectify the register before commencing an action for infringement or passing off.

The intention of the Act appears to be, that when a trade mark has been duly registered, the objection which formerly prevailed, by which a trade mark was excluded from protection when there were no vendible goods in the market stamped therewith (*a*), is no longer to be available to a defendant. But it would be dangerous to rely on this in view of such decisions as *Edwards* v. *Dennis* (*b*), and the mark might be removed from the register under §§ 35, 37 of the Act of 1905.

4. *Plaintiff's Trade Mark bad in itself.*

4. Plaintiff's trade mark bad.

This defence has hitherto had to be founded mainly on the definition of a trade mark in the Act under which the mark was registered. Thus, marks registered or tendered for registration between August 13th, 1875, and December 31st, 1883, had to comply with the definition in § 10 of the Trade Marks Registration Act, 1875; marks registered or tendered for registration between January 1st, 1884, and December 31st, 1888, had to comply with the definition in § 64 of the Patents Act, 1883; marks registered or tendered for registration between January 1st, 1889, and March 31st, 1906, had to comply with the last-mentioned definition as modified by § 10 of the Patents Act, 1888. It is now, however, provided by § 36 of the Act of 1905, in effect, that registrability under that Act is to be the test in all cases, as a mark which was registered wrongfully under an earlier Act will still stand if it could have been registered under the present Act (*c*). Then the question arises whether the contention, that the mark does not comply with the conditions imposed upon marks tendered for registration, can be set up by way of defence, or whether a motion to rectify the register is necessary. That such

(*a*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307.

(*b*) 30 Ch. D. 454; *Hargreave* v. *Freeman*, (1891) 3 Ch. 39. And see *In re Batt*, (1898) 2 Ch. 432; (1899) A. C. 428.

(*c*) *In re Compagnie Industrielle des Pétroles*, (1907) 2 Ch. 435. See *In re Gestetner*, (1907) 2 Ch. 478; (1908) 1 Ch. 513; *In re Philippart*, 25 P. R. 565; *In re Orlwoola, Ld.*, 27 P. R. 850, where marks wrongly registered under the prior Acts were held equally bad under the Act of 1905.

a contention may be set up by way of defence seems probable, having regard to the fact that by § 39 of the Act of 1905 an exclusive right is conferred by registration only if the registration is valid (*a*). The usual and more prudent course is to apply for rectification (*b*).

In *In re Palmer* (1) (*c*), Jessel, M. R., fully discussed the point, and Lindley, L. J., said that "after careful examination of §§ 3, 5, and 10 of the Trade Marks Registration Act, 1875, I am satisfied that a mark which is not a trade mark, and which therefore ought never to have been registered, does not become a trade mark by being on the register for five years." The Vice-Chancellor of Ireland has taken the same view (*d*), and the same principle has been followed in Victoria (*e*). In America also the same conclusion has been arrived at, under the United States Statute (*f*). In this country, however, it is essential to bear in mind the provisions of sect. 41 of the Act of 1905, by which the original registration of a trade mark is, after seven years, to be taken to be valid in all respects, unless it is open to certain specified objections.

5. *Trade Mark severed from Goodwill.*

5. Trade mark severed from goodwill.

It is a good defence to an action for infringement of trade mark to prove that the plaintiff is not the owner of the business and goodwill concerned in the particular goods or classes of goods in respect of which the trade mark is registered (*g*). But here also the safer course is to apply for rectification.

6. *Licence.*

6. Licence.

The defendant may plead a licence from the plaintiff, or from a co-proprietor of the mark (*h*), as a defence to an action, though

(*a*) See *Pinto* v. *Badman*, 8 P. R. 181, 189, 193; *Apollinaris Co., Ld.* v. *Herrfeldt*, 4 P. R. 478; *Leonard & Ellis* v. *Wells & Co.*, 26 Ch. D. 288.

(*b*) Even if a motion to rectify is not necessary, it seems that the question of validity will not be tried upon an interlocutory motion for injunction: *Hommel* v. *Gebrüder Bauer*, 20 P. R. 801.

(*c*) 21 Ch. D. 47. See also *In re Carter Medicine Co.*, (1892) 3 Ch. 472.

(*d*) *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236.

(*e*) *Lewis* v. *Klapproth*, 11 V. L. R. (E.) 214; *Wolfe* v. *Alsop* (2), 12 V. L. R. (E.) 421; *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752.

(*f*) *Moorman* v. *Hoge*, 2 Sawy. 78.

(*g*) See § 22 of Act of 1905. There can be no trade mark in gross: *Cotton* v. *Gillard*, 44 L. J. Ch. 90. See *In re Wellcome*, 32 Ch. D. 213; *Pinto* v. *Badman*, 8 P. R. 181.

(*h*) *Marshall* v. *Pinkham*, 52 Wisc. 572.

no rights can thus be given him as against third parties. In one American case (*a*) it was held that the plaintiffs, who had received an exclusive licence from the owner of a trade mark, were entitled to an injunction against the successors in business of persons who had been partners in business with the licensor, but had tacitly acquiesced in his retaining the sole right in the mark. However, the Court would not allow a licensee to defraud the public by the sale of goods under a mark which was similar to that on the licensor's own goods, while the goods themselves were not the goods or goods equivalent to the goods of the licensor (*b*).

It has been held in India (*c*) that plaintiffs, who had led the defendant to believe that they did not claim a certain trade mark, and that he was at liberty to use it, and had allowed him to build up a trade under it, were estopped by their own conduct from denying the defendant's right to use it.

7. *Delay and Acquiescence.*

7. Delay and acquiescence.

A man may by his own *laches* lose his right to that protection which he would have obtained at once, had he come to the Court with reasonable promptitude (*d*). 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 (*e*). That this must necessarily be so, the reasoning of the

(*a*) *Kidd* v. *Johnson*, 100 U. S. 617. See *Kidd & Co.* v. *Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337.

(*b*) *Oldham* v. *James*, 13 Ir. Ch. 393; 14 *ib.* 81; *Bloss* v. *Bloomer*, 23 Barb. 604; R. Cox, 200; *Samuel* v. *Berger*, 24 Barb. 163; R. Cox, 178.

(*c*) *Lavergne* v. *Hooper*, Ind. L. R. 8 Mad. 149.

(*d*) *Motley* v. *Downman*, 3 My. & Cr. 1; *Morison* v. *Moat*, 9 Hare, 241; *Flavel* v. *Harrison*, 10 Hare, 467; *Wason* v. *Waring*, 15 Beav. 151; *Attorney-General* v. *Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 327; *Burgess* v. *Burgess*, *ib.* 896; *Farina* v. *Gebhardt*, 3 Eq. Rep. 891; *Chappell* v. *Sheard*, 2 K. & J. 117; *Coles* v. *Sims*, 5 De G. M. & G. 1; *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Hovenden* v. *Lloyd*, 18 W. R. 1132; *Isaacson* v. *Thompson*, 41 L. J. Ch. 101; *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276: and other cases cited below.

(*e*) *Ford* v. *Foster*, L. R. 7 Ch. 611; *Wheeler & Wilson* v. *Shakespeare*, 39 L. J. Ch. 36; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *National Starch Manufacturing Co.* v. *Munn's Patent Maizena & Starch Co.*, (1894) A. C. 275.

Supreme Court of Victoria, in *Neva Stearine Co.* v. *Mowling* (*a*), appears convincing. "Great stress," said Holroyd, J., "has been laid on this: that a person who is entitled to a distinctive trade name or mark is said to have acquired property in it, and that the property once acquired cannot be lost. But what is the nature of the property, if that be the right designation to give it? It is that, when an article has become known to the public generally by a particular name or mark, no other person has a right to simulate that name or mark so as to induce the public to believe that his goods are the goods of the inventor. If that be the reason, then the right, if it be acquired in that way, must be lost when the reason for it ceases. If the use of the name by another person will no longer induce that belief, then the right to the property must be gone." Thus, in *In re Hyde & Co.* (*b*), it was held that the words "Bank of England" had long ceased to be a trade mark in respect of sealing-wax, by reason of the user for six years of those words on sealing-wax by persons other than those who had originally adopted it, without interference by the latter, and the registration of the lapsed trade mark was accordingly rescinded. There the mark had ceased to be private property before registration was effected, but even if the mark was distinctive when registered, it would appear that in the event of its subsequently losing its distinctive character, it would be "wrongly remaining on the register" under sect. 35 of the Act of 1905, and could be expunged.

Principle of this defence.

The principle on which the Court allows the plaintiff's delay to be pleaded by way of defence is thus stated by Wood, V.-C., in *Beard* v. *Turner* (*c*): "By not complaining at the time when you might complain (I do not say that it is your intention, we must judge of the intention by the necessary result), you are lying by, the man continuing to use your property, with the hope (and such is the prayer of your bill filed two or three years afterwards) of obtaining those profits which you stood by allowing him to make under this designation, without apprising him of your intention to make any such use of it. On that ground it falls within the principle enunciated by Lord St. Leonards in the Irish case referred to, in which it is stated that it is a fraud

(*a*) 9 V. L. R. (E.) 98.
(*b*) 7 Ch. D. 724.
(*c*) 13 L. T. N. S. 746. And see *Neva Stearine Co.* v. *Mowling*, 9 V. L. R. (E.) 98.

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.

Where, however, the case has arrived at the hearing, the degree of delay or acquiescence must be much greater; there must be such an acquiescence as to amount, not only to a positive licence, but to an implication of an actual grant, before the parties can be for ever deprived of their rights (*c*). In *Fullwood* v. *Fullwood* (2) (*d*), Fry, J., laid down that mere lapse of time, short of the statutory period fixed for the limitation of actions, would not deprive a plaintiff in an action for infringement of a trade mark, which is an action for the assertion of a legal right, of his right to the injunction. And in an American case (*e*), while it was held that a delay of twenty-five years effectually disentitled the plaintiffs to relief as against an innocent vendor of goods falsely marked, the question as to the rights of a trade mark owner,

(*a*) *Per* Lord Langdale, M. R., in *Gordon* v. *Cheltenham Rail. Co.*, 5 Beav. 233. And see *Isaacson* v. *Thompson*, 41 L. J. Ch. 101; *Flavel* v. *Harrison*, 10 Hare, 467; *Evans* v. *Smith*, 3 Times L. R. 390; *Mallan* v. *Davis*, 3 Times L. R. 221; *Van Oppen & Co., Ld.* v. *Van Oppen*, 20 P. R. 617; *Royal Warrant Holders' Association* v. *Slade & Co., Ld.*, 25 P. R. 245; *Chinn* v. *Thomas*, 5 V. L. R. Eq. 188. But compare *Heyde* v. *Wittkowski*, 5 N. S. W. Rep. (E.) 74.

(*b*) *Pickford* v. *The Grand Junction Rail. Co.*, 3 Rail. Cas. 538.

(*c*) *Patching* v. *Dubbins*, Kay. 11; *Gordon* v. *The Cheltenham Rail. Co.*, 5 Beav. 233; *Rodgers* v. *Rodgers*, 31 L. T. N. S. 285; *Grant* v. *Levitt*, 18 P. R. 361; *Reddaway* v. *Robert Stevenson Bros., Ld.*, 20 P. R. 276; *Leuba* v. *Ullmann & Co.*, 1 Hong Kong L. R. 131: 2 *ib.* 1: reversed 25 P. R. 673. And see *Loosley* v. *White*, 41 L. J. Ch. 351: *Weaver* v. *Sanitary, &c. Co.*, L. J. N. of C. 1887, p. 144 (where the defendants had used the word for eleven years, to the plaintiff's knowledge): *Weaver* v. *Stiff*, L. J. N. of C. 1887, p. 144 (where the defendants had so used the mark for ten years): *Gillott* v. *Esterbrook*, 47 Barb. 455: R. Cox, 340: 48 N. Y. 374; *Filley* v. *Fassett*, 44 Mo. 173: R. Cox, 530; *McLean* v. *Fleming*, 96 U. S. 245: *Holt* v. *Menendez*, 128 U. S. 182: *Saxlehner* v. *Eisner*, 179 U. S. 19. The same was formerly the case on demurrer.

(*d*) 9 Ch. D. 176.

(*e*) *Rodgers* v. *Philp*, 1 U. S. Pat. Gaz. 29.

after a similar delay, against a guilty manufacturer, was left open. In Victoria also it has been said that "in cases of fraud a much longer period of acquiescence would be necessary than where there was no fraud" (*a*). But a long delay may be regarded as rendering harmless that which might at an earlier period have been regarded as a misrepresentation (*b*).

Rights must be actively defended.

It is not a sufficient answer to a plea of delay on the part of the plaintiff for the plaintiff to allege continued assertions of his right. He must take some more decided measures. "What the plaintiffs mainly relied on was the continual claim on their part," says Turner, L. J. (*c*), "and no doubt they have not ceased to assert their claim; but I cannot agree to a doctrine so dangerous as that the mere assertion of a claim, unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded" (*d*).

No delay where no knowledge.

But where a trade mark has been infringed, and the owner has not been aware that this has been the case, he has been guilty of no delay in taking no steps to put an end to the fraud, and he will, therefore, not be deprived of his rights by reason of his having taken no proceedings while he was ignorant of the infringement (*e*). Hence, where a defence of delay is set up, the evidence must go to show, not merely that the plaintiff might have been aware of the infringement which was going on, but that he actually was so, and that it was with such knowledge that he remained quiescent (*f*).

Delay by retiring partner.

It has been held in America that if a member of a partnership retires therefrom without setting up any claim to an interest in the trade mark, and makes no objection to its being used by the

(*a*) *Nevo Stearine Co.* v. *Mowling*, 9 V. L. R. (E.) 98; compare *In re Heaton*, 27 Ch. D. 570.

(*b*) *Marquis of Londonderry* v. *Russell*, 3 Times L. R. 360; *McCue, Stevenson & Orr* v. *Lee*, 23 P. R. 1; *Cropper Minerva Machines Co.* v. *Cropper, Charlton & Co.*, 23 P. R. 388. And see *London General Omnibus Co.* v. *Lavell*, (1901) 1 Ch. 135.

(*c*) *Clegg* v. *Edmondson*, 8 De G. M. & G. 810.

(*d*) This dictum was approved and followed by Wood and Selwyn, L. JJ., in *Lehmann* v. *McArthur*, L. R. 3 Ch. 496. And see *Ripley* v. *Bundey*, 14 P. R. 591. But see *Attorney-General* v. *Sheffield Gas Consumers' Co.*, 3 De G. M. & G. 327; and *Kinahan* v. *Bolton*, 15 Ir. Ch. 75.

(*e*) *Weldon* v. *Dicks*, 10 Ch. D. 247; *In re Farina* (2), 27 W. R. 456; *Monson & Co.* v. *Rochm*, 26 Ch. D. 398; *Apollinaris Co.* v. *Herrfeldt*, 4 P. R. 478; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 419; *In re La Société Anonyme des Verreries de l'Etoile* (2), (1894) 2 Ch. 26; *Rowland* v. *Michell*, (1897) 1 Ch. 71; *Saxlehner* v. *Eisner*, 179 U. S. 19. Compare *In re Heaton*, 27 Ch. D. 570.

(*f*) *Siegert* v. *Findlater*, 26 W. R. 462.

continuing partner, he must be taken to acquiesce in its being appropriated by the latter (*a*); but that if, on the other hand, a partner submits to the appropriation of the firm trade mark by his partner, at a time when he is, in a measure, in the latter's power, by reason of the latter being in sole possession of an important secret used in the business, he will be held not to have lost his right (*b*); and that a continued user of the mark by the retiring partner, even on a spurious article, is evidence that he does not intend to give up his rights therein (*c*).

Delay for purpose of securing evidence.

Inasmuch as in a case where no proof of actual deception is produced, the Court has to try a hypothetical case, turning on the probabilities of deception, it has been held that a person who believes others to be infringing his trade mark is entitled to wait until he can collect a sufficient number of cases to prove to the Court that the proceedings of which he complains do actually deceive the public; and that his right to protection is not gone by reason of such delay (*d*). It seems that in *Rodgers* v. *Rodgers* (*e*), and *Estcourt* v. *Estcourt Hop Essence Co.* (*f*), the delay would have been condoned had it resulted in the production of satisfactory evidence of deception. On the other hand, where a plaintiff delayed his motion until December, having been in possession of sufficient evidence in May, the delay was fatal to the motion (*g*).

Delay in regard to motion to commit.

Where an injunction has been granted by the Court, there must, in order to deprive the party who has obtained the injunction of his right to move for committal upon the breach of it, be a case made out almost amounting to such a licence to the party enjoined to do the act enjoined against as would entitle him to maintain an action against others for doing that act (*h*).

Indulgence to defendant, plaintiff having delayed.

Even if the delay has not been such as to disentitle the plaintiff to his injunction, it may yet obtain some indulgence for the defendant; as, for instance, the permission to dispose of the wares

(*a*) *Kidd & Co.* v. *Mills, Johnson & Co.*, 5 U. S. Pat. Gaz. 337; *Simpson* v. *Wright* (1), 15 *ib.* 248; *Holt* v. *Menendez*, 128 U. S. 182.

(*b*) *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54.

(*c*) *Wright* v. *Simpson*, 15 U. S. Pat. Gaz. 968.

(*d*) *Lee* v. *Haley*, L. R. 5 Ch. 155; *Cave* v. *Myers*, Dig. 304.

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

(*f*) L. R. 10 Ch. 276.

(*g*) *Isaacson* v. *Thompson*, 41 L. J. Ch. 101.

(*h*) *Per* Turner, L. J., in *Rodgers* v. *Nowill*, 3 De G. M. & G. 614. In *Cartier* v. *May*, Dig. 200, a delay of eighteen months was one of the grounds on which the motion to commit was refused.

on which he expended money in consequence of the plaintiff's delay (*a*).

Account or damages withheld.

Or, the injunction may be granted and the account of profits or damages, by which it is usually accompanied, withheld (*b*).

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 (*c*). On the other hand, a defendant who has only defeated the plaintiff's claim by pleading the latter's delay, may fail to obtain thereby the costs of the proceedings occasioned by his own fraud (*d*).

8. *Plaintiff's Misrepresentation.*

8. Plaintiff's misrepresentation.

"The administration of Equity is founded on perfect truth" (*e*). and "when the owner of a trade mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade mark, or in the business connected with it, be himself guilty of any false or misleading representation; for if the plaintiff makes any material false statement in connection with the property which he seeks to protect, he loses, and very justly, his right to claim the assistance of a Court of Equity. He must come there with clean hands" (*f*).

(*a*) *Clowes* v. *Hogg*, W. N. 1870, p. 268; S. C. on appeal, W. N. 1871, p. 40: *Anglo-Swiss Condensed Milk Co.* v. *Swiss Condensed Milk Co.*, W. N. 1871, p. 163. And see *County Chemical Co., Ld.* v. *Frankenburg*, 21 P. R. 722, where delivery up was refused.

(*b*) *Harrison* v. *Taylor*, 11 Jur. N. S. 408; *Reddaway* v. *Robert Stevenson & Bros., Ld.*, 20 P. R. 276; *McLean* v. *Fleming*, 96 U. S. 215: *Carver* v. *Bowker*, Dig. 581; *Holt* v. *Menendez*, 128 U. S. 182. And see *Beard* v. *Turner*, 13 L. T. N. S. 746: *Leuba* v. *Ullmann*, 1 Hong Kong L. R. 131: 2 *ib.* 1: reversed 25 P. R. 673.

(*c*) See *Millington* v. *Fox*, 3 My. & Cr. 338; *Beard* v. *Turner*, 13 L. T. N. S. 746; *Day* v. *Neale*, Bacon, V.-C., May 24th, 1881; *Perks* v *Hall & Co.*, W. N. 1881, p. 111; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298.

(*d*) *Rodgers* v. *Rodgers*, 31 L. T. N. S. 285.

(*e*) *Per* Lord Romilly, M. R., in *Cocks* v. *Chandler*, L. R. 11 Eq. 446.

(*f*) *Per* Lord Westbury, C., in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137. And see *Edelsten* v. *Vick*, 11 Hare, 78; *Post* v. *Marsh*, 16 Ch. D. 395: *Talbot* v. *Judges*, 3 Times L. R. 398; *Lewis's* v. *Goodbody*, 67 L. T. N. S. 191: *In re Hill*, 10 P. R. 113: *Bile Bean Manufacturing Co.* v. *Davidson*, 22 P. R. 553; *Cropper Minerva Machine Co.* v. *Cropper, Charlton & Co.*, 23 P. R. 388; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218: *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752. As to whether the plaintiff's misrepresentation will afford an answer to his Common Law claim for damages, see *per* Willia s. L. J., in *Jamieson* v. *Jamieson*, 15 P. R. 169, 191, or to an injunction in a passing off case, see *Wolff* v. *Nopitsch*, 18 P. R. 27, 32; compare *R. Warsop & Sons, Ld.* v. *Warsop*, 21 P. R. 481; *Bile Bean Manufacturing Co.* v. *Davidson*, 22 P. R. 553: *Worden* v. *California Fig Syrup Co.*, 187 U. S. 516. Words which would be disentitled to protection in a Court of

It is impossible to define what misrepresentation will disentitle the plaintiff to relief; all that can be said is, that "he that hath committed iniquity shall not have equity" (*a*).

Misstatements in plaintiff's marks.

The trade marks, labels, &c., of the plaintiff, who is complaining of fraud on the part of another, may themselves contain statements calculated to mislead and defraud the public, who are induced by such statements to buy goods which otherwise they would not buy. Thus, in *Pidding* v. *How* (*b*), the plaintiff sold tea which he termed "Howqua's Mixture," and which he put up in packets labelled with extravagant and false statements as to its origin and quality. Shadwell, V.-C. of England, declined to protect the plaintiff until he had established his title in a Court of law, saying that it was a clear rule laid down by Courts of Equity not to extend their protection to persons whose case was not founded in truth.

Perry v. *Truefitt*.

In *Perry* v. *Truefitt* (*c*), 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 *Pidding* v. *How* (*d*), did not think it a favourable case for the interposition of the Court, and ordered the matter to stand over, with liberty to bring an action.

Leather Cloth Cos.' case.

In *Leather Cloth Co.* v. *American Leather Cloth Co.* (*e*), the House of Lords sustained the judgment of Lord Westbury, C. (*f*), 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. (*f*), 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.

justice by reason of their being calculated to deceive, are not to be registered under the Trade Marks Act, 1905, § 11.

(*a*) *Palmer* v. *Harris*, 60 Penn. St. 156; R. Cox, 523. See *Blackwell* v. *Armistead*, 5 Am. L. T. 85.

(*b*) 8 Sim. 477.

(*c*) 6 Beav. 66.

(*d*) 8 Sim. 477.

(*e*) 11 H. L. C. 523.

(*f*) 4 De G. J. & S. 137.

If there was a wilfully false statement he would not stop to inquire whether it was too gross to mislead."

Cases in tobacco trade.

The tobacco trade has been fruitful in cases of this description. Thus in *Wood* v. *Lambert* (*a*), John Wood & Son of London sold their English-made cigarettes sometimes in boxes labelled "cigarettes of the finest selected Turkish tobacco, manufactured by Jancal Tachta, Constantinople," sometimes in boxes labelled "St. Petersburg—P. Mavrogordato & Co.—cigarettes"; and it was held that the word "Eton," which had been used upon the boxes so labelled was disentitled alike to registration and protection. So in *Newman* v. *Pinto* (*b*), where the plaintiff sold cigars in boxes branded with the Spanish words "La Pureza —Habana—Ramon Romnedo," and bearing labels on which appeared the words "La Pureza," the written signature of Ramon Romnedo (who was in fact a non-existent personage), and the arms of Spain and Havannah, and it was proved that the cigars, though made of Havannah tobacco, were imported from Bremen, and no evidence was given by the plaintiff as to the actual place of manufacture, it was held that the get-up of the goods was such as to represent that the cigars were manufactured in Havannah by Ramon Romnedo, and that the plaintiff, having failed to prove that this representation was true, he was disentitled to sue in respect of his label, which was only used as part of the fraudulent get-up, which Bowen, L. J., described as "an elaborate concatenation of pictorial lies." It is, however, to be noticed that in *In re Wills* (*c*), where Messrs. W. D. and H. O. Wills had used their registered trade mark as part of a label containing the name of an imaginary Spanish firm and the word "Habana" upon boxes of cigars manufactured for them by an English firm, Wright, J., held that Messrs. Wills, by their mark, simply represented that the cigars were sold by them, and that the misrepresentation as to the manufacture of the cigars did not deprive the mark of its distinctive character

(*a*) 32 Ch. D. 247. The same principle applies in the United States: *Palmer* v. *Harris*, 60 Penn. St. 156; *Schumacher & Ettlinger* v. *Schuenke* (2), 36 U. S. Pat. Gaz. 457; *Solis Cigar Co.* v. *Pozo*, 16 Col. 388; 25 Am. St. Rep. 279; *Hilson & Co.* v. *Foster*, 80 Fed. Rep. 896; in Canada: *Labbatt* v. *Trester*, 2 St. Dig. 726: and in New South Wales: *Heyde* v. *Wittkowski*, 5 N. S. W. Rep. (E.) 74. See *Kirker, Green & Co., Ld.* v. *Mayman*, N. S. W. 1 S. R. Eq. 73.

(*b*) 4 P. R. 508. Cf. *In re Fuente*, (1891) 2 Ch. 166.

(*c*) (1893) 2 Ch. 262.

so as to disentitle them to protection, and *Wood* v. *Lambert* (*a*) was further distinguished on the ground that the user by Messrs. Wills of their trade mark for cigars was not general or extensive and had ceased for several years.

Puffing.

In short, the Court will not protect a trade mark, label, &c., which contains, or has attached to it, a serious misstatement calculated to deceive (*b*). 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*). Thus, in *Holloway* v. *Holloway* (*d*), the assumption of the title of "Professor" was disregarded. In *Metzler* v. *Wood* (*e*) it was held that the plaintiffs were not disentitled either by a representation that the publication was the 600th edition of the work, it being shown to be a trade custom to call 250 copies an edition; or by a statement that the work was specially revised by the author, the fact being that a previous edition which the present one followed had been so revised. In *Hogg* v. *Kirby* (*f*), the defendant, who had brought out what he intended to be taken for a continuation of the 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 (*g*).

Melachrino v *Melachrino.*

Again, in *M. Melachrino & Co.* v. *R. Melachrino & Co.* (*h*), it was held that the plaintiffs were not disentitled, either because they placed the word "registered" on their trade mark as used, though it differed from the registered trade mark in having what were blank spaces in the latter filled in with coats-of-arms, nor because they sold their cigarettes as "Egyptian cigarettes," whereas on one occasion they had re-made in England with Egyptian tobacco a small quantity of cigarettes which had been damaged on the voyage from Egypt to England. And it has

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

(*b*) In *Raggett* v. *Findlater*, L. R. 17 Eq. 29, costs were given against the plaintiff mainly on account of a misstatement by him; *Worden* v. *California Fig Syrup Co.*, 187 U. S. 516.

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

(*d*) 13 Beav. 209.

(*e*) 8 Ch. D. 606.

(*f*) 8 Ves. 215.

(*g*) And see *Dale* v. *Smithson*, 12 Abb. Pr. 237; R. Cox, 282; *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450; 12 Amer. Rep. 401.

(*h*) Chitty, J., May 29th, 1888. And see *In re Lyle & Kinahan, Ld.*, 24 P. R. 37, 249.

been held in America that the use of the word "imported" in connection with goods of home-manufacture does not disentitle the plaintiff, if the word is used without intention to deceive and does not produce that effect (*a*).

False statement in foreign language.

If the misrepresentation is in other respects such as to disentitle, the fact of its being made in a foreign language does not necessarily save the plaintiff from losing the rights which he would have had if no such statements had been made (*b*).

Use of predecessor's name.

The use of the name of his predecessor by one who has succeeded him in business, when such use will not lead to any other supposition than that the business is the same (*c*), or the use of his own name, without more, by one whose name happens to be the same as that of another manufacturer (*d*), is not such a misrepresentation as to disentitle such a person to relief against fraud. But where a trader has been in the habit of labelling his goods (*e.g.*, a particular medicine) with statements which refer to himself personally, and his successor in business continues to use the same statements, "a Court of Equity will extend no aid to sustain a claim to a trade mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured both of which particulars were originally circumstances to guide the purchaser of the medicine" (*e*). When a person has bought the business of a company in liquidation from the liquidator, he is entitled to describe himself as the successor to the business, and to use the trade names for the goods sold therein; but he is not entitled to trade in the name of the company *simpliciter*, nor to describe himself as the "original firm," and, if he does so, the misrepresentation will debar him of his right to relief against imitators (*f*).

Collateral misrepresentations.

Collateral misrepresentations made by the plaintiff, as, for

(*a*) *Funke* v. *Dreyfus*, 34 La. Ann. 80.

(*b*) *Palmer* v. *Harris*, 60 Penn. St. 156; R. Cox, 523.

(*c*) *Leather Cloth Co.'s case*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. C. 523; *Churton* v. *Douglas*, Johns. 174; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748.

(*d*) *Holloway* v. *Holloway*, 13 Beav. 209; *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Turton* v. *Turton*, 42 Ch. D. 128; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Saunders* v. *Sun Life Assurance Co. of Canada*, (1894) 1 Ch. 537; *Crawford* v. *Bernard*, 11 P. R. 580; *Jamieson* v. *Jamieson*, 15 P. R. 169; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

(*e*) *Per* U. S. Supreme Court in *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218.

(*f*) *Cropper Minerva Machines Co.* v. *Cropper, Charlton & Co.*, 23 P. R. 388.

instance, in an advertisement in the newspapers, do not necessarily disentitle him to protection (*a*). Nor do misstatements of so trifling a character as not to mislead purchasers (*b*), or statements not made till after the institution of the action (*b*). And it seems that the effect of a misrepresentation, though material, may be cured by discontinuance for a long period before action brought (*c*).

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 plaintiff's delay, to grant the injunction they prayed, it declined to give costs to the defendant, who was *in pari delicto* (*d*). And on similar grounds relief will be refused to a plaintiff who has used his trade mark on goods of inferior quality to those with which the mark has become associated (*e*), or who has used the mark beyond the limits to which he was confined on the assignment of it to him (*f*), or who adopted it in infringement of the rights of another (*g*).

Hogg v. *Maxwell*.

In *Hogg* v. *Maxwell* (*h*) the plaintiff registered, under the Copyright Acts, the title of an intended magazine in 1863, but did not bring out the work. In June, 1866, the defendant registered the same name. The plaintiff discovered this in August. He then hastened on his own publication, which was first announced on September 24th, and published next day. In the meantime the plaintiff had, on the 19th, undertaken to advertise the defendant's intended magazine, but retracted the undertaking, and gave the defendant notice of his claim to the title on the 25th. Proceedings were taken by both parties with a view to an injunction, which was refused in both cases, the Court being of

(*a*) *Curtis* v. *Bryan*, 2 Daly, 212; R. Cox, 434. And see *Ford* v. *Foster*, L. R. 7 Ch. 611; *Davis* v. *Rogers*, 89 L. T. (Journal) 292; *Plotzker* v. *Lucas*, 24 P. R. 551.

(*b*) *Siegert* v. *Findlater*, 7 Ch. D. 801.

(*c*) *In re Wills*, (1893) 2 Ch. 262; *Benedictus* v. *Sullivan, Powell & Co.*, 12 P. R. 25.

(*d*) *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276. And see *In re Saunion & Co.*, Dig. 625; *Newman* v. *Pinto*, 4 P. R. 508.

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

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

(*g*) *O'Rourke* v. *Central City Soap Co.*, 26 Fed. Rep. 576; *Parlett* v. *Guggenheimer*, 67 Md. 542; *Lawrence Manufacturing Co.* v. *Tennessee Manufacturing Co.*, 31 Fed. Rep. 776; 138 U. S. 537. And see *In re Heaton*, 27 Ch. D. 570.

(*h*) L. R. 2 Ch. 316.

opinion, in *Hogg* v. *Maxwell*, that the plaintiff had got beforehand by improper means, which disentitled him to relief.

Short weight.

The Court will not protect persons in carrying on a trade in which short measure is given systematically and knowingly (*a*). And in *Hennessy* v. *Wheeler* (*b*), the New York Court of Common Pleas refused relief to brandy merchants who sold their brandy in bottles containing quarts and pints of nominal measure, but really considerably less. But this decision was reversed on appeal, on the ground that the bottles were not bought on the faith of their containing any particular quantity of brandy, and that no one was proved to have been deceived or was likely to be so. Similarly, where the plaintiff stated that his medical preparation was "sold only in quart bottles," and the bottles, though such as were commonly known in the trade as quart bottles, really contained substantially less, it was held in America that the misstatement was not such as to deprive the plaintiff of his right to protection (*c*).

9. *Word "Patent" improperly used by Plaintiff.*

9. Improper use of word "patent."

"It is impossible not to see," says Mellish, L. J., "that persons do try to use their right in trade marks for the purpose of getting a monopoly in particular articles, just as if they had a patent for the goods which they manufacture" (*d*). A special form of misrepresentation consists in the use by persons in their trade marks of words inducing the belief that they have a patent for the articles to which those trade marks are affixed; and the tendency which the use of such words has to procure for the persons using them an unfair monopoly, or to prolong a monopoly granted only for a limited time, causes it to be regarded with special disfavour. The importance of the point is forcibly pointed out by Wood, V.-C., in *Morgan* v. *McAdam* (*e*). 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

(*a*) See *per* Giffard, L. J., in *Lee* v. *Haley*, L. R. 5 Ch. 155.
(*b*) 51 How. Pr. 457; 69 N. Y. 271.
(*c*) *Alexander* v. *Morse*, 14 R. I. 153.
(*d*) *Singer Manufacturing Co.* v. *Wilson*. 2 Ch. D. 434, 456.
(*e*) 36 L. J. Ch. 228.

be induced to purchase it from the plaintiffs, under the belief that there is a patent, and that the plaintiffs, or at least some limited number of persons, are the only persons authorised 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, and it has been held in America that marks containing a reference to a patent declared to be invalid could not be protected by injunction (*g*).

Retention of word after expiration of patent.

There has been some apparent difference of opinion in regard to the case in which the word "patent" has been inserted in the trade mark while the article was still patented, and has been retained there after the patent has run out. In such a case (*h*), Wood, V.-C., held that the plaintiffs were entitled to recover, the blocks for the labels having been made during the existence of the

(*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 re Adams*, 9 P. R. 174 (where the Court refused to alter a mark by striking out the word "patent"); *Meaby & Co.* v. *Tritieine, Ld.*, 15 P. R. 1.

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

(*f*) 3 B. & Cr. 541; cf. *per* Vaughan Williams, L. J., in *Jamieson* v. *Jamieson*, 15 P. R. 169, 191.

(*g*) *Consolidated Fruit Jar Co.* v. *Dorflinger*, 6 Am. L. T. N. S. 511.

(*h*) *Edelsten* v. *Vick*, 11 Hare, 78 And see *Leather Cloth Co.* v. *Hirschfeld* (1), 1 N. R. 551.

patent, when the representation was perfectly true. Lord Kingsdown, in discussing this judgment (*a*), 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 (*b*), 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 (*c*), upon the articles which they designate as patented." In a later case (*d*), it was clearly established by the Court of Appeal that the principle enunciated by Lord Kingsdown is the rule of the Court, and that the use of the word "patent," so as to indicate an existing patent, is equally fatal, whether there has never been a patent for the article in question, or the patent which did exist has expired. But the Court will not entertain this question unless it is raised in the pleadings (*e*).

Word so used as not to deceive.

As has been seen, Lord Hatherley, when V.-C. (*f*), and Lord Kingsdown (*g*), were of opinion that when the word "patent" formed part of the name of an article, and did not operate so as to induce a belief in the existence of a patent, the trade mark in which the word appeared might be protected. A distinct decision to this effect was pronounced by James, V.-C., in *Marshall* v. *Ross* (*h*), where "patent thread" was compared by the learned

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

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

(*c*) Note the provisions of the Patents and Designs Act, 1907, § 33.

(*d*) *Chearin* v. *Walker*, 5 Ch. D. 850; *Thomas Hubbuck & Son, Ld.* v. *Brown*, 17 P. R. 638. And see *A. Boake, Roberts & Co., Ld.* v. *Wayland*, 26 P. R. 251; *In re Gestetner*, (1907) 2 Ch. 478; (1908) 1 Ch. 513.

(*e*) *Lever* v. *Goodwin*, W. N. p. 1887, p. 107; *A. Boake, Roberts & Co., Ld.* v. *Wayland*, 26 P. R. 251.

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

(*g*) *Leather Cloth Cos.' case*, 1 H. L. C. 523.

(*h*) L. R. 8 Eq. 651.

judge to "patent leather boots" (*a*). And where the plaintiffs had described themselves as "patentees" of an article of which they had secured the exclusive manufacture by registration, though not by letters patent, it was held that they were not disentitled (*b*). In the American case of *Lauferty* v. *Wheeler* (*c*), it was held that the plaintiff was not disentitled by reason of having described his goods as "Patent, Sept.," after being officially informed that his application for a patent had been allowed, but before the actual issue of letters patent.

When validity of patent doubtful.

A patentee is not bound to decide a doubt as to the validity of his patent adversely to himself, and consequently the plaintiff, in an action for infringement of a trade mark for boot-tips, was held not to be disentitled to relief by the fact that the word "patentee" appeared in his trade mark, he being the owner of an existing patent, notwithstanding that it had been shown that questions might be raised as to the validity of the patent, and the plaintiff had himself admitted that he had some doubt as to the validity (*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*). And in *Consolidated Fruit Jar Co.* v. *Dorflinger* (*g*), it was held that certain trade marks consisting of the words "Mason's Patent, November 30th, 1858," "Mason's Improved," and "The Mason Jar of 1858," were bad, the patent of 1858 being invalid by judicial decision.

Lamplough v. *Balmer.*

When a plaintiff used on his stopper labels with the words "Royal Letters Patent," the explanation that he had for twenty-five years paid the stamp duty on "patent medicines," and that he was only continuing to use the labels he had had on hand when he discovered his medicines did not belong to that class, was not

(*a*) See the observations on this case in *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345. And see, too, *Ransome* v. *Graham*, 51 L. J. Ch. 897.

(*b*) *Cave* v. *Myers*, Dig. 304.

(*c*) 63 How. Pr. 488; 11 Daly. 194.

(*d*) *Blakey* v. *Latham*, 85 L. T. (Journal) 47.

(*e*) *Leather Cloth Cos.' case*, 4 De G. J. & S. 137; 11 H. L. C. 523.

(*f*) *Nixey* v. *Roffey*, W. N. 1870, p. 227.

(*g*) 6 Am. L. T. N. S. 511.

accepted as satisfactory, and his motion for an injunction to restrain an imitator was refused (*a*).

Collateral use of word.

If, however, the plaintiff's trade is a perfectly honest trade, and the trade mark is a perfectly honest trade mark, the fact that the plaintiff has committed a purely collateral misrepresentation, by describing himself, though not in the trade mark itself, as "patentee," will not disentitle him to his remedy (*b*). And where a registered label for soda water contained the words "manufactured by Royal Letters Patent," which were explained by the plaintiff to mean "manufactured by means of patented machinery," the Privy Council, being of opinion that the plaintiff's trade was an honest trade, held that he was not disentitled to relief "by reason of some words not designed to mislead, and at most equivocal" (*c*).

Must be pleaded.

And in any case this defence is one which must be pleaded, and which cannot be raised unless it is pleaded (*d*).

10. *Words "Registered" or "Trade Mark" improperly used by Plaintiff.*

On the same principles on which the deceptive use of the word "patent" has been held to disentitle a plaintiff to relief, so a misrepresentation as to a trade mark being registered which is not so, or a misrepresentation as to what it is that is the trade mark, may similarly disentitle to relief.

Statutory provisions.

By § 105 of the Patents Act, 1883 (*e*), it was provided that

(*a*) *Lamplough* v. *Balmer*, W. N. 1867, p. 293.

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

(*c*) *Cochrane* v. *McNish*, (1896) A. C. 225. And see *National Starch Manufacturing Co.* v. *Munn's Patent Maizena & Starch Co.*, (1894) A. C. 275; *Ingram* v. *India Rubber, Gutta Percha & Telegraph Co., Ld.*, 29 V. L. R. 172.

(*d*) *Lever* v. *Goodwin*, W. N. 1887, p. 107; *Bouke, Roberts & Co., Ld.* v. *Wayland & Co.*, 26 P. R. 251.

(*e*) This replaced § 7 of 5 & 6 Will. IV. c. 83. See *Myers* v. *Baker*, 3 H. & N. 802. In America a penalty is similarly assigned for the use of the word "Patented" on an unpatented article: U. S. Rev. St. § 4901. See *Wilson* v. *Singer Manufacturing Co.*, 16 U. S. Pat. Gaz. 1091: *Stimpson* v. *Pond*, 2 Curtis, 502. And an article which, together with patented elements, contains new and valuable unpatented elements, ought not, as a rule, to be termed "patented": *Deverall* v. *Banker*, 45 U. S. Pat. Gaz. 591. But the penalty is only incurred if there is an attempt to defraud (*Tompkins* v. *Butterfield*, 25 Fed. Rep. 556), and that question is for the jury (*Walker* v. *Hawkshurst*, 5 Bl. C. C. 494; *Deverall* v. *Banker*, 45 U. S. Pat. Gaz. 591); who are justified in convicting if they are reasonably satisfied upon the evidence as to the material facts, and proof beyond a reasonable doubt is not required (*Hauchetz* v. *Kass*, 25 Fed. Rep. 765); a corporation is responsible for the act of its superintendent in wrongfully

"any person who represents that any article sold by him is a patented article, when no patent has been granted for the same, or describes any design or trade mark applied to any article sold by him as registered, which is not so, shall be liable for every offence on summary conviction to a fine not exceeding £5." And it was also provided that "a person shall be deemed, for the purposes of this enactment, to represent that an article is patented, or a design or a trade mark is registered, if he sells the article with the word 'patent,' 'patented,' 'registered,' or any word or words expressing or implying that a patent or registration has been obtained for the article, stamped, engraved, or impressed on, or otherwise applied to the article." This section has now been replaced, as to trade marks, by § 67 of the Trade Marks Act, 1905, and as to patents and designs, by § 89 of the Patents and Designs Act, 1907, but in substance the law remains the same. Under the Act of 1883 it was held that a person was subject to a penalty who represented an article to be patented, after he had applied for a patent and obtained provisional protection, but before the actual grant (*a*); and, similarly, where a person represented a trade mark to be registered, after he had applied for registration, and the application had been advertised in the "Trade Marks Journal," but before the actual registration (*b*). So, too, where a trade mark had been registered but had been expunged before the date of the representation (*c*); and where goods of foreign manufacture were sold in the United Kingdom under a label containing the word "registered," the use of that word was held to amount to a representation that the label was registered as a trade mark in the United Kingdom notwithstanding that the name of the foreign place where, in point of fact, the goods were manufactured appeared in small type on a different part of the label (*d*). It seems, however, that a statement that a trade mark is

describing an unpatented article as "patented," and will be liable to a penalty if he knew or should have known that the article was not patented, but not if he *bonâ fide* believed it was so: *Tompkins* v. *Butterfield*, 25 Fed. Rep. 556. In *U. S.* v. *Morris*, 2 Bond, 23, Leavitt, J., held that the statute did not apply unless the goods were patentable: but in *Oliphant* v. *Salem Flouring Mills*, 5 Sawy. 128, Deady, J., held that it applied whether the goods were patentable or not.

(*a*) *R.* v. *Wallis*, 3 P. R. 1; *R.* v. *Crampton*, *ib.* 367.

(*b*) *R.* v. *Morris*, Great Marlborough St. Police Court, Dec. 16, 1886.

(*c*) *Wright, Crossley & Co.* v. *William Dobbin & Co.*, 15 P. R. 21.

(*d*) *Wright, Crossley & Co.* v. *William Dobbin & Co.*, 15 P. R. 21; *McSymons' Stores, Ld.* v. *Shuttleworth*, *ib.* 748. And see *Pneumatic Rubber Stamp Co.* v. *Lindner*, *ib.* 525.

registered before it in fact is so, does not disentitle the proprietor to sue, after registration has been effected (*a*), though it exposes him to a penalty (*b*), and may affect the costs of the action (*c*). Nor is the proprietor of a registered trade mark disentitled by the fact that he places the word "registered" on his trade mark when in use, though spaces left blank in the mark as registered are filled in when it is in use (*d*).

Use of word "trade mark" without registration.

The question whether the use by a trader upon his goods of the word "trade mark," without the word "registered," in connection with a word or device which has not been registered, amounts to a representation that the word or device has been registered, so as to expose the trade to the penalties of sect. 67, or to disentitle him to relief in an action brought by him to restrain passing off, is a question which must depend upon the facts of the particular case. The use of the word "trade mark" does not necessarily imply registration, for a trade mark can exist perfectly well without registration, though it cannot in most cases be protected without it, and in *Sen-Sen Co.* v. *Britten* (*e*), Stirling, J., considered that the word was not there used so as to convey any misrepresentation, and granted relief. In *Thomas Hubbuck & Son, Ld.* v. *Brown* (*f*), Kekewich, J., adopted the same view, and modified the opinion he had previously expressed in *Lewis's* v. *Goodbody* (*g*), and it may generally be taken that the words "trade mark" *per se* do not imply registration (*h*).

Use of word "trade mark" in wrong place on label.

The word "trade mark" may be misused in another way: by being placed on a label or other composite mark in such a position as to indicate that a particular part of a registered mark is alone claimed, and not the mark as a whole, so as to lead persons to suppose that the remainder of the mark is open to the public. In such a case the person so using the word may be disentitled to bring an action, and his mark may be expunged (*i*). But here,

(*a*) See *per* Brett, L. J., in *Read* v. *Richardson*, 45 L. T. N. S. 54.

(*b*) See Trade Marks Act, 1905, § 67, replacing Patents Act, 1883, § 105; *R.* v. *Morris*, Great Marlborough St. Police Court, Dec. 16th, 1886; *Wright, Crossley & Co.* v. *Dobbin*, 15 P. R. 21; *McSymons' Stores, Ld.* v. *Shuttleworth*, *ib.* 748.

(*c*) *Harris* v. *Ogg*, 5 N. S. W. Rep. 114.

(*d*) *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888.

(*e*) (1899) 1 Ch. 692.

(*f*) 17 P. R. 148; affirmed *ib.* 638.

(*g*) 67 L. T. N. S. 194.

(*h*) This was in fact the view taken in the House of Lords in *Royal Baking Powder Co* v. *Wright, Crossley & Co.*, 18 P. R. 95, though not expressly so stated in the judgments.

(*i*) *In re Apollinaris Co.*, (1891) 2 Ch. 186, 233—235; *In re Wills*, (1893) 2 Ch. 262.

again, it must not be assumed that whenever the word "trade mark" is placed upon a label it must be intended to denote only that particular part of the label upon which it is placed (*a*); it is a question of fact in each case whether the word is used to mislead (*b*). On the same principle, the wrongful use of the word "registered" has been held to be a ground for depriving a successful defendant of his costs (*c*).

Merchandise Marks Act, 1887.

By the Merchandise Marks Act, 1887, § 3 (1), a statement "as to any goods being the subject of an existing patent, privilege, or copyright," is, if untrue, a "false trade description" punishable under the Act. Under § 18, however, the provisions of the Act with respect to false trade descriptions are not to apply to the use of a trade description which was at the passing of that Act "lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods." This will protect such combinations as "patent thread," in *Marshall* v. *Ross* (*d*), or "patent leather" boots.

Inoperative Defences.

Among the defences which have occasionally been set up in actions for infringement of trade mark, but without success, are the following:

Ignorance.

Ignorance of the plaintiff's rights. This will not suffice to prevent the issue of the injunction (*e*): although it may have the effect of relieving the defendant from the necessity of accounting (*f*).

(*a*) *In re Bass, Ratcliff & Gretton, Ld.*, (1902) 2 Ch. 579. Since this decision the point can hardly be taken successfully except under very special circumstances.

(*b*) *Hammond* v. *Malcolm, Brunker & Co.*, 9 P. R. 301. And see *Benedictus* v. *Sullivan, Powell & Co.*, 12 P. R. 25.

(*c*) *In re Bradley*, 9 P. R. 205; *In re Paine* (2), 10 *ib.* 71. And see the observations of the L. JJ. in the same case, (1893) 2 Ch. 567. See also *Winser & Co., Ld.* v. *Armstrong & Co.*, 16 P. R. 167; *R. Warsop & Sons, Ld.* v. *Warsop*, 21 P. R. 481. Cf. *Read* v. *Richardson*, 45 L. T. N. S. 54.

(*d*) L. R. 8 Eq. 651.

(*e*) *Burgess* v. *Hills*, 26 Beav. 244; *Geary* v. *Norton*, 1 De G. & S. 9; *Carlier* v. *Carlile*, 31 Beav. 292; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578; *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hyde, 185; *Blogg* v. *Anderson*, N. S. W. 21 L. R. Eq. 238; *Upmann* v. *Forester*, 24 Ch. D. 231, and other cases.

(*f*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578; *Rose* v. *Loftus*, 47 L. J. Ch. 576; *Hipkins* v. *Plant*, 15 P. R. 291; *Slazenger* v. *Spalding*, 27 P. R. 20.

No intention to sell.

Absence of intention to sell the goods bearing the spurious mark is no defence (*a*).

No actual deception or fraud.

Absence of proof of actual deception or fraudulent intention is no defence, if in the opinion of the Court or jury there is such imitation as to be calculated to deceive (*b*).

Immediate purchasers not deceived.

It is no defence to prove that all the persons who bought from the defendant goods bearing the plaintiff's mark were well aware that they were not of the plaintiff's manufacture (*c*).

Indication of quality as well as manufacturer.

Nor to say that the marks used indicate quality or pattern, if they also indicate a particular manufacturer or merchant (*d*).

Words ambiguous.

Nor to show that the words, of the use of which the plaintiff complains, are ambiguous and capable of being understood by different persons in different ways (*e*).

Only part of mark taken.

Nor to say that the plaintiff's entire mark has not been copied (*f*).

Name used is defendant's own.

Nor to say that the name, to the use of which by the defendant the plaintiff objects, is the defendant's own, if he has used it so as to deceive (*g*).

Name inaccurate in

Nor to say that the words, to the use of which by the defendant

(*a*) *Upmann* v. *Forester*, 24 Ch. D. 231. See *Upmann* v. *Carey*, 29 Sol. J. 735.

(*b*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Cope* v. *Evans*, L. R. 18 Eq. 138; *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236; *Carr & Sons* v. *Crisp & Co., Ld.*, 19 P. R. 497; *Orr-Ewing & Co.* v. *Grant, Smith & Co.*, 2 Hyde, 185; *Coats* v. *Holbrook*, 2 Sandf. Ch. 586; R. Cox, 20; *Taylor* v. *Carpenter*, 11 Paige, 292; 2 Sandf. Ch. 603; R. Cox, 45; *Coffeen* v. *Brunton*, 4 McLean, 516; 5 *ib* 256; R. Cox, 82, 132; *Davis* v. *Kendall*, 2 R. I. 566; R. Cox, 112; *McLean* v. *Fleming*, 96 U. S. 245. And see Ch. IV. on Infringement.

(*c*) *Sykes* v. *Sykes*, 3 B. & Cr. 541; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Rose* v. *Loftus*, 47 L. J. Ch. 576; *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15; *Balfour & Co.* v. *Kilburn & Co.*, 1 Hyde, 270; *Anglo-Swiss Condensed Milk Co.* v. *Metcalf*, 31 Ch. D. 454; *Reddaway* v. *Frictionless Engine Packing Co.*, 19 P. R. 505. And cases at p. 148, *supra*.

(*d*) See cases at pp. 79–80, *supra*.

(*e*) *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15, *per* Lord Selborne, C.; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888.

(*f*) *Ford* v. *Foster*, L. R. 7 Ch. 611; *Witherspoon* v. *Currie*, L. R. 5 H. L. 508. And see cases at pp. 152, 153, *supra*. Cf. *Rugby Portland Cement Co.* v. *Rugby & Newbold Portland Cement Co.*, 8 P. R. 241; *Barber* v. *Manico*, 10 P. R. 93.

(*g*) *Clarton* v. *Douglas*, Johns. 174; *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Pullar* v. *Pullar*, Fry J., April 9th, 1883; *Nicholls* v. *Kimpton*, 3 Times L. R. 674; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888; *Warner* v. *Warner*, 5 Times L. R. 359; *Army & Navy Co-operative Soc., Ld.* v. *Army & Navy & Civil Service Co-operative Soc. of India, Ld.*, 8 P. R. 426, 472; *Otard, Dupuy & Co.* v. *Otard de Monte Bello Cognac Co.*, 9 Times L. R. 295; 10 *ib.* 67; *Brinsmead* v. *Brinsmead*, 12 *ib.* 631; 13 *ib.* 3; *J. & J. Cash, Ld.* v. *Cash*, 19 P. R. 181; *Joseph Rodgers & Sons* v. *Simpson*, 23 P. R. 348; *Joseph Rodgers & Sons* v. *Hearnshaw*, 23 P. R. 349; *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306. And see *Bayer* v. *Baird*, 15 P. R. 651 (a case of initials). See also cases at p. 141.

the plaintiff objects, form an accurate description of the goods which the defendant is selling, if the use is calculated to deceive (*a*). secondary meaning only.

Nor to produce a colourable authority to use the name of a person having the same name as that used by the plaintiff in his business (*b*). Colourable authority.

Nor to say that the goods which the defendant is selling under the mark in question are goods manufactured by the plaintiff, if they are of a different quality from that of which the defendant represents them to be (*c*). Goods plaintiff's own of different quality.

Nor to say that the spurious goods are equal in quality to the genuine ones, for the plaintiff's right is equally invaded (*d*). Equality in quality.

The defendant will not escape by showing that he has used his own name in conjunction with the mark or word which is alleged to be used in infringement of the plaintiff's rights (*e*). Addition of defendant's name.

(*a*) *Reddaway* v. *Banham*, (1896) A. C. 199; *Rockingham Rail. Co.* v. *Allen*, 12 Times L. R. 345.

(*b*) *Perry* v. *Truefitt*, 6 Beav. 66; *Croft* v. *Day*, 7 Beav. 84; *Moet* v. *Clyborne*, Dig. 533; *Dence* v. *Mason* (1), Dig. 534; 41 L. T. N. S. 573; *Melachrino & Co.* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215; *Birmingham Vinegar Brewery Co., Ld.* v. *Liverpool Vinegar Co., Ld.*, W. N. 1888, p. 139; *Rendle* v. *Rendle & Co.*, 63 L. T. N. S. 94; *Edge* v. *Harrison*, 8 P. R. 74. But see *Beard* v. *Turner*, 13 L. T. N. S. 746; *Dence* v. *Brand*, W. N. 1881, p. 31.

(*c*) *Hennessy* v. *Kennett*, Dig. 556; *Hennessy* v. *White*, 6 W. W. & A'B. Eq. 216; *Hennessy* v. *Hogan*, *ib.* 225; *Gillott* v. *Kettle*, 3 Duer, 624; *Teacher* v. *Levy*, 23 P. R. 117; *Kirker, Greer & Co., Ld.* v. *Mayman*, N. S. W. 1 S. R. 73.

(*d*) *Blofield* v. *Payne*, 4 B. & Ad. 410; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185 (*per* Lord Westbury, C., "It is not necessary, for the injunction, to prove . . . . that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to the plaintiff in his trade by loss of custom is sufficient to support his title to relief"); *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15, *per* Lord Blackburn; *Coats* v. *Holbrook*, 2 Sandf. Ch. 586; R. Cox, 20; *Taylor* v. *Carpenter*, 11 Paige, 292; 2 Sandf. Ch. 603; R. Cox, 45; *Partridge* v. *Menck*, 2 Barb. Ch. 101; 1 How. App. Cas. 558; R. Cox, 72.

(*e*) *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; *Siegert* v. *Findater*, 7 Ch. D. 801; *Braham* v. *Bustard*, 1 H. & M. 447; *Ford* v. *Foster*, L. R. 7 Ch. 611; *Kinahan* v. *Bolton*, 15 Ir. Ch. 75; *Eno* v. *Stephens*, Dig. 609; *Rose* v. *Loftus*, 47 L. J. Ch. 576; *Field* v. *Lewis*, Dig. 280; *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57; *Berliner Brauerei Gesellschaft Tiroli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70; *Eno* v. *Dunn*, 10 P. R. 261; *Grezier* v. *Autran*, 13 P. R. 1; *Birmingham Vinegar Brewery Co., Ld.* v. *Powell*, (1897) A. C. 710; *Daniel* v. *Whitehouse* (2), 16 P. R. 71; *Burberrys* v. *Raper & Pulleyn*, 23 P. R. 170; *Gt. North of Scotland Rail. Co.* v. *Mann*, Ct. Sess. Cas. 4th Ser. XIX. 1035; *Nami Chand* v. *Wallace*, 34 Calc. 495. And see *Reddaway* v. *Ahlers*, 19 P. R. 12; *Reddaway* v. *Frictionless Packing Co.*, 19 P. R. 505; *Reddaway* v. *Robert Stevenson & Bros., Ld.*, 20 P. R. 313; *Singer Manufacturing Co.* v. *British Empire Manufacturing Co., Ld.*, 20 P. R. 313; *Siegert* v. *Ehlers*, Dig. 432; *Davis* v. *Kennedy*, 13 Grant, Up. Can. Ch. 523. And see *Pillsbury* v. *Pillsbury-Washburn Flour Mills Co.*, 64 Fed. Rep. 841, where a statement that the defendant's goods were not the same as the plaintiff's was held not a good defence. But compare *Chearin* v. *Walker*, 5 Ch. D. 850; *Barrett* v. *Gomm*, 74 L. T. (Journal) 388; *Barrett* v. *White*, North, J., May 12th, 1883; *Somerville* v. *Schembri*, 12 App.

Addition of address.

Nor by showing that he has always placed his own address on the goods (*a*).

Addition of word "Improved."

Nor by showing that he has used the word "Improved" in connection with his goods (*b*).

User by others.

Nor by showing that the same mark has been used by other persons on goods of another class (*c*), or by fewer than three firms besides the plaintiff on goods of the same class (*d*), or by different firms abroad, if not in England (*e*).

Fraudulent anticipation.

Nor by showing that another trader used the mark before the plaintiff, if that other trader's right to the mark has been adjudged to be gone by reason of misrepresentations contained in it (*f*).

Infringement by others.

Nor by showing that the plaintiff's trade mark has been infringed by others without his knowledge or acquiescence (*g*).

A plurality of marks or names.

It is no defence to say that the plaintiff uses more than one trade mark on the same goods (*h*), nor that his goods have been known by a variety of names (*i*).

Additions in practice to marks as registered.

Nor that the plaintiff in practice uses devices, &c., on his trade marks which are not registered as part of them—*e.g.*, filling in blank spaces with coats-of-arms (*k*).

Infringement in district of a licensee.

Nor that the infringement has been committed in a district in which the plaintiff has appointed a licensee (*l*).

Cas. 453; *McCall* v. *Theal*, 28 Grant, Up. Can. Ch. 48; *Pratt's Appeal*, 117 Penn. St. 401; *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72: *Saxlehner* v. *Eisner*, 179 U. S. 19.

(*a*) *Gray* v. *Taper Sleeve Pulley Works*, 16 Fed. Rep. 436. Cf. *Croft* v. *Day*, 7 Beav. 84.

(*b*) *Russia Cement Co.* v. *Le Page*, 147 Mass. 206; *Alexander* v. *Morse*, 14 R. I. 153; *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306; *Californian Fig Syrup Co.* v. *Improved Fig Syrup Co.*, 51 Fed. Rep. 296; 54 *ib.* 175.

(*c*) *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Somerville* v. *Schembri*, 12 App. Cas. 453; *Colman* v. *Crump*, 70 N. Y. 573.

(*d*) *Dent* v. *Turpin*, 2 J. & H. 139; *Worcester Royal Porcelain Co.* v. *Locke & Co.*, 19 P. R. 479; *Dunnachie* v. *Young & Sons*, Ct. Sess. Cas., 4th Ser. X. 874; and cases at pp. 124, 125.

(*e*) *Berliner Brauerei Gesellschaft Tivoli* v. *Knight, Stocks & Co.*, W. N. 1883, p. 70; *Jackson* v. *Napper*, 35 Ch. D. 162; *Newman* v. *Pinto*, 4 P. R. 508 (*per* Kekewich, J.); *Board & Son* v. *Huddart*, 21 P. R. 149; *Board & Son* v. *Thom & Cameron*, 24 P. R. 697. So in Canada: *Smith* v. *Fair*, 14 Ont. Rep. 729.

(*f*) *Parlett* v. *Guggenheimer*, 67 Md. 542.

(*g*) *Ford* v. *Foster*, L. R. 7 Ch. 611; *Board & Son* v. *Huddart*, 21 P. R. 149; *Board & Son* v. *Thom & Cameron*, 24 P. R. 697; *Taylor* v. *Carpenter*, 3 Story, 458; R. Cox, 14; *Filley* v. *Fassett*, 44 Mo. 173; R. Cox, 530.

(*h*) *Braham* v. *Bustard*, 1 H. & M. 447; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284.

(*i*) *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434.

(*k*) *Newman* v. *Pinto*, 57 L. T. N. S. 31 (*per* Kekewich, J.); *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888; *Hammond* v. *Malcolm, Brunker & Co.*, 9 P. R. 301.

(*l*) *Moxie Nerve Food Co.* v. *Baumbach*, 32 Fed. Rep. 205.

Puffing.

Mere exaggerated statements of the merits of medical or other compounds on the part of the plaintiff, which do not amount to fraud, will not exonerate the defendant from the consequences of his own fraud (*a*). Nor will other statements by the plaintiff, which, though not absolutely correct, cannot mislead in any important respect (*b*)—*e.g.*, an allegation that the plaintiff's mark was registered before registration had actually been effected (*c*); or the putting the word "registered" on the mark as used, though spaces left blank in the mark as registered are filled in (*d*).

Slight delay.

The defendant will not escape by alleging laches on the part of the plaintiff in prosecuting his action, if no greater delay has taken place than was requisite to enable necessary evidence to be obtained (*e*).

Infancy.

Infancy is no defence, for "if an infant practises a fraud, he is liable for the consequences" (*f*), and he will be in the same position as an adult with respect to the payment of costs (*g*). And so with a married woman having separate estate (*h*).

Defendant's mark registered.

Registration of the defendant's mark at Stationers' Hall, or in the trade marks register (*i*), is no defence (*i*).

Interference with defendant's business.

Nor is it any defence to say that an injunction, if granted, would interfere with the defendant's business, or with that of other manufacturers, since they will be able to trade as they please, with the sole exception of using the plaintiff's trade mark (*k*).

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

(*a*) *Holloway* v. *Holloway*, 13 Beav. 209; *Metzler* v. *Wood*, 8 Ch. D. 606; *Rowland* v. *Michell*, (1897) 1 Ch. 71; *Comstock* v. *White*, 18 How. Pr. 421. See cases at p. 229.

(*b*) *Siegert* v. *Findlater*, 7 Ch. D. 801. See cases at p. 231.

(*c*) *Read* v. *Richardson*, 45 L. T. N. S. 54; *Upper Assam Tea Co.* v. *Herbert & Co.*, 7 P. R. 183; *Goodwin* v. *Fenning*, 24 Sol. J. 690.

(*d*) *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888.

(*e*) *Lee* v. *Haley*, L. R. 5 Ch. 155; *Care* v. *Myers*, Dig. 304. See *McLean* v. *Fleming*, 96 U. S. 245.

(*f*) *Per* Plumer, V.-C., in *Cory* v. *Gertcken*, 2 Madd. 49.

(*g*) *Chubb* v. *Griffiths*, 35 Beav. 127; *Woolf* v. *Woolf*, 43 Sol. J. 127.

(*h*) *Nicholls* v. *Kempton*, 3 Times L. R. 674.

(*i*) *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57. And see cases at p. 158.

(*k*) *Ransome* v. *Graham*, 51 L. J. Ch. 897. See *Cope* v. *Evans*, L. R. 18 Eq. 138: *Bass* v. *Dawber*, 19 L. T. N. S. 626.

the names of customers to whom the goods alleged to be marked with the plaintiff's trade mark have been sold, or on whose account such goods have been conveyed.

Principles on which given.

The principles on which this advantage is given or withheld are thus stated by Lord Hatherley, C. (*a*): "The Court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the question of materiality or immateriality; but where the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the Court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery which can be of use to him, on the other it is bound to protect the defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the case made by the plaintiff's pleadings, and to what will be in issue at the hearing."

Not given where oppressive.

"The more strict the Court is in compelling a full answer, the more necessary it is that the Court should be vigilant in seeing that the process of the Court is not made use of in an oppressive manner" (*b*). Where, therefore, the L.J.J. were of opinion that the discovery asked was such as the plaintiff, even if he failed at the hearing, might yet afterwards use in a manner prejudicial to the defendant, and were not satisfied that there was any real prospect of its being of material service to the plaintiff at the hearing, they reversed the order of the Vice-Chancellor of Lancaster, by whom such discovery had been granted (*c*).

Benbow v. *Low*.

So in *Benbow* v. *Low* (*d*) the defendants, who were also plaintiffs by counterclaim, exhibited interrogatories requiring the plaintiffs to state (*inter alia*) what quantities of soap had been sold by them bearing the name in dispute, between the dissolution of the original partnership and the date of the action, distinguishing between the quantities sold in each year, and between the quantities sold in England and in the United States and in the continent of Europe; and Bacon, V.-C., and the Court

(*a*) *Moore* v. *Craven*, L. R. 7 Ch. 94.

(*b*) *Per* Selwyn, L. J., in *Lockett* v. *Lockett*, L. R. 4 Ch. 341. And see *Piggott* v. *Anglo-American Telegraph Co.*, 19 L. T. N. S. 46.

(*c*) *Carver* v. *Pinto Leite*, L. R. 7 Ch. 90. "If the Court sees that all fair and legitimate purposes will be answered by a restricted discovery, it will so restrict it": *per* Hall, V.-C., in *Orr* v. *Diaper*, 4 Ch. D. 92, commenting on this case. The present Rules of Court favour such restrictions.

(*d*) 16 Ch. D. 93.

of Appeal held that the plaintiffs were justified in refusing to answer, as the question was framed, not for the ordinary purposes of discovery, but in order to get at the details of a part of the plaintiffs' evidence.

In re Wills.

In *In re Wills* (*a*), which was an application to remove a trade mark from the register, Kekewich, J., ordered the respondents to give discovery of documents after the evidence was all but completed, but restricted the order to documents relating to certain specified questions framed with a view to show that the respondents' mark was common to the trade and not distinctive; but the Court of Appeal regarded even this restricted form of order as oppressive, and discharged it upon the terms of the respondents undertaking to deliver a statement of the labels on which they intended to rely, and to produce all relevant documents in Court.

Given when necessary.

On the other hand, "the Court, while it takes care that no oppressive use is made of its forms of procedure, must take care that parties are not allowed to refuse discovery which they ought to make" (*b*). Where, therefore, a defendant who, having been the agent in London of the plaintiff, an American sewing-machine maker, continued, after dismissal, to advertise himself as the plaintiff's agent, and to sell as "the Howe Sewing Machine" machines not made by the plaintiff, and refused to give discovery of all the machines sold by him, with the prices, profits, names of purchasers, and other particulars, on the ground that he would thereby disclose the names of his customers and the secrets of his trade, Romilly, M. R., held that the discovery might be extremely material to the plaintiff, and ordered it to be given (*c*). Again, where the plaintiff obtained an injunction against the defendants, and the defendants offered to submit to an injunction and pay costs, and then moved to stay proceedings, the answer to the plaintiff's interrogatories not having yet been given, Wood, V.-C., said that the plaintiff had a right to ascertain the facts in his own way, by the answer of the defendants to his interrogatories, and that until the defendants had

(*a*) (1892) 3 Ch. 201.

(*b*) *Per* Giffard, L. J., in *Thompson* v. *Dunn*, L. R. 5 Ch. 576. And see *Renard* v. *Levinstein*, 10 L. T. N. S. 94; *Russell* v. *Crichton*, Ct. Sess. Cas. 1st Ser. XV. 1270; *Union Paper Collar Co.* v. *Metropolitan Collar Co., Ld.*, 3 Daly, 171: *Byass* v. *Sullivan*, 21 How. Pr. 50.

(*c*) *Howe* v. *McKernan*, 30 Beav. 547.

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 refused, with costs (*a*).

Leather Cloth Co. v. *Hirschfeld.*

In *Leather Cloth Co.* v. *Hirschfeld* (*b*), a decree having been made directing the defendant to account for all goods sold by him with a particular stamp, it was decided by the same learned judge that the defendant was compellable to disclose the names of all persons to whom he had sold any such goods, and that if he could not say to which of his customers the stamped goods were sold, he was then (but not otherwise) compellable to disclose the names of all customers to whom he had sold goods which he would not swear positively were unstamped.

Fennessy v. *Clark.*

In *Fennessy* v. *Clark* (*c*), an action for an injunction to restrain an infringement of trade mark, and for damages or an account, after an order had been made for the trial of issues of fact before a judge and jury, and before the plaintiff had elected between damages and an account, the plaintiff took out a summons for a fuller statement by the defendant of the number of his sales and for inspection of his books; but the application was refused as being premature.

Orr v. *Diaper.*

In *Orr* v. *Diaper* (*d*) discovery was granted, though no other relief was sought in the action, but it is questionable whether this decision can now be relied on.

In *Poisson* v. *Robertson* (*e*), the question was raised, but not decided, whether the assignee of a partial interest in a secret remedy was as such entitled to a knowledge of the secret, but the Court refused an application for inspection of the recipe on the ground that at the date of the application the action was at an end.

Discovery under Merchandise Marks Act, 1887.

By § 2 (2) (b) of the Merchandise Marks Act, 1887, a person who sells or exposes for sale goods having a forged trade mark or false trade description applied thereto is guilty of an offence against the Act, unless he proves, among other things, "that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom

(*a*) *Stephens* v. *Brett*, 10 L. T. N. S. 231.

(*b*) 1 H. & M. 295. And see *Powell* v. *Birmingham Vinegar Brewery Co.*, 14 P. R. 1.

(*c*) 37 Ch. D. 184.

(*d*) 4 Ch. D. 92.

(*e*) 86 L. T. N. S. 302.

he obtained" the goods; and § 12 authorises the issue of a search-warrant (*a*).

Inspection under Judicature Acts.

In *Hennessy* v. *Rohmann* (*b*), Malins, V.-C., granted inspection of cases and bottles used by the defendants. In *Smith* v. *Harris* (*c*), the plaintiff in a trade-mark case alleged by his statement of claim that he had for many years used the word "Glenlivet" on his invoices, letters, billheads, and whiskey casks, and, on the defendant's application, he was ordered to produce for inspection the invoices, letters and billheads in his possession so marked, but not the casks.

Particulars.

In the last-mentioned case the defendant alleged by his statement of defence that the plaintiff had for many years been well aware of the word "Glenlivet" being widely used in the trade in connection with other makes of whiskey; and the Court of Appeal ordered (*d*) the defendant within an appointed time to deliver particulars of the names of the persons alleged to have used the word with the plaintiff's knowledge, and the times when and the places where they had done so, and ordered that, if the defendant should not do so, the paragraph in the defence should be struck out. Again, in *Humphries* v. *Taylor Drug Co.* (1) (*e*) the plaintiff in a trade-mark action having alleged by his statement of claim that persons had been deceived, he was ordered to deliver particulars of the names and addresses of the persons alleged to have been deceived. But in *Duke* v. *Wisden* (*f*), which was a passing off action, the Court of Appeal held that it was sufficient for the plaintiffs to give information of the times and places of the sales complained of without giving the names and addresses of the purchasers. If a defendant alleges that the trade mark is invalid, he must, if re-

(*a*) By sect. 6 of the Merchandise Marks Act, 1862, full information had to be given within forty-eight hours.

(*b*) 36 L. T. N. S. 51. This was under Order LII. r. 3, of the Rules of Court then in force, now Order L. r. 3.

(*c*) 48 L. T. N. S. 869.

(*d*) Feb. 6th, 1884.

(*e*) 39 Ch. D. 693. And see *Aquascutum, Ld.* v. *Moore & Scantlebury*, 20 P. R. 640; *Imperial Tobacco Co., Ld.* v. *Parnell & Co.*, 20 P. R. 718.

(*f*) 77 L. T. N. S. 67. So *per* C.A., *Blackburn* v. *Lodge*, Ann. Pr. 1911, 446, 454. This was followed by Eady, J., in chambers in *Banana Food Co., Ld.* v. *Jones* (Feb. 15th, 1901). It has also been followed in Victoria (*National Starch Co.* v. *Robert Harper & Co. Proprietary, Ld.* (1906), V. L. R. 8), where the Court expressly declined to follow *Aquascutum, Ld.* v. *Moore & Scantlebury* (20 P. R. 640) and *Imperial Tobacco Co.* v. *Parnell*, 20 P. R. 718. And see *A. Boake, Roberts & Co., Ld.* v. *Wayland*, 26 P. R. 249.

quired, give particulars of the alleged invalidity (*a*), and where a defendant has alleged that the mark has been used by traders other than the plaintiffs, particulars of such user have frequently been directed (*b*). But in some cases in which the defendant has alleged common user and has given particulars of persons alleged to have used the name, he has been permitted to give evidence of user by persons not named in the particulars (*c*).

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 (*d*), or the publication of a newspaper (*e*).

Incident to injunction. "The liability to account for the profits is incident to the injunction" (*f*), and "on authority and principle it is clear that if a man manufactures goods and knowingly marks them with the trade mark of another person, he is accountable for the profits so made" (*g*), and that, whether he manufactures on his own account, or only puts up goods for others (*h*).

Wherever another's mark is placed on the goods by the defendant. So long as the defendant is aware that he is using a trade mark, which is not his, the fact that he does not know to whom the trade mark belongs which is on the goods he is selling does not in the slightest degree affect the right of the owner to an injunc-

(*a*) *Rowland* v. *Michell*, 13 P. R. 457 (see p. 460); *Grosvenor Chemical Co.* v. *Greenfield*, (1909) 1 Ir. R. 32.

(*b*) *E.g.*, *Brooke, Bond & Co.* v. *City Tea Co.*, Chitty, J., Feb. 27th, 1893; *Same* v. *Shaw*, North, J., Feb. 27th, 1893, in *Anglo-Swiss Condensed Milk Co.* v. *Parks*, 20 P. R. 509; *Aquascutum, Ld.* v. *Moore*, 20 P. R. 640; *Schweppes, Ld.* v. *Gibbons*, 22 P. R. 116; *Star Cycle Co.* v. *Frankenburgs*, 24 P. R. 46, 405.

(*c*) *Star Cycle Co., Ld.* v. *Frankenburgs*, 24 P. R. 46, 405; and in Scotland, *Parozone Co., Ld.* v. *Johnston Gibson*, 21 P. R. 317. Such permission, however, obviously reduces the value of the particulars to very little indeed.

(*d*) *Green* v. *Folgham*, 1 S. & S. 398.

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

(*f*) *Per* Romilly, M. R., in *Cartier* v. *Carlile*, 31 Beav. 292. And see *Lever* v. *Goodwin*, 36 Ch. D. 1; and *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893.

(*g*) *Per* Romilly, M. R., in *Moet* v. *Couston*, 33 Beav. 578. See *Carver* v. *Bowker*, Dig. 581. The account only extends to goods actually sold under the spurious mark, not to goods manufactured but not sold. See *Stonebraker* v. *Stonebraker*, 33 Md. 252.

(*h*) *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601.

tion and an account of profits. And since the defendant cannot himself have placed on the goods another's trade mark, without being aware that he was infringing someone's trade-mark rights, though he may not have known exactly whose it was, he will be accountable in all cases in which he has himself placed the mark on the goods (*a*).

Not always so, where defendant used innocently.

But where the defendant has used the mark innocently, although the plaintiff will be entitled to his injunction, he will not necessarily be entitled to an account, except in respect of any user by the defendant after he became aware of the prior ownership (*b*). On this principle, in *Ellin* v. *Slack* (*c*), a defendant who had bought and resold goods bearing a mark which infringed the plaintiff's trade mark, but without knowledge of the infringement, and who, on hearing of the infringement, had at once desisted from any further sales and offered to submit to a perpetual injunction with costs, was relieved from accounting.

Account sometimes useless.

In many cases the main object of the action is to obtain the injunction, the account being of very secondary importance (*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 to his injunction by reason of his own laches, so he may be disentitled by the same reason to the account of profits. If he permits the defendant to continue his infringement for a prolonged period, he will not then be allowed to treat him as his salesman, and claim an account (*f*). But if the plaintiff has not been aware of the fact of the defendant's user, the length of that user will not deprive him of his right to an account (*g*).

(*a*) *Cartier* v. *Carlile*, 31 Beav. 292; *Moet* v. *Couston*, 33 Beav. 578. And see S. C. 10 L. T. N. S. 395.

(*b*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Moet* v. *Couston*, 33 Beav. 578; *Hipkins* v. *Plant*, 15 P. R. 294; *Slazenger* v. *Spalding*, 27 P. R. 20.

(*c*) 24 Sol. J. 290.

(*d*) *Perce* v. *Franks*, 15 L. J. Ch. 122; *Burgess* v. *Hately*, 26 Beav. 249; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G. J. & S. 137; *McAndrew* v. *Bassett*, *ib.* 380; *Barnett* v. *Leuchars*, 13 L. T. N. S. 495; *Shipcright* v. *Clements*, 19 W. R. 599, &c.

(*e*) *Belondre* v. *Shaw*, 2 Sim. 237.

(*f*) *Beard* v. *Turner*, 13 L. T. N. S. 746; *Harrison* v. *Taylor*, 11 Jur. N. S. 408; *McLean* v. *Fleming*, 96 U. S. 245; *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298; *Holt* v. *Menendez*, 128 U. S. 182; *Low* v. *Fells*, 35 Fed. Rep. 361.

(*g*) *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601.

Offer of submission.

Where a defendant offered, among other things, to account for profits, but the plaintiff, declining the offer of submission, insisted upon his own terms, including an account, the Court granted the account, but only upon the plaintiff's request, and at his peril in respect of costs, in case it should turn out that the account furnished by the defendant of his own accord was accurate (*a*).

Sub-divided account.

In *Dent* v. *Turpin* (*b*), where a defendant had infringed a trade mark, which had become by bequest the property of two different persons, and those persons brought distinct actions against the defendant, the prayer in each case including an account and payment of such share of the profits as should be shown to be attributable to the individual plaintiff's share, it was held that such an account and payment could be granted.

Extent of account.

As to the extent of the account, the general rule is (though it seems possible that there may be exceptions to it), that where goods are sent into the market under a spurious mark or name or get-up which is calculated to deceive, the account must extend to the whole of the goods so sent into the market, and will not be limited to such part of the goods as can be proved to have caused deception, nor yet so as to exclude such part of the goods as can be proved to have been sold without deception, seeing that the goods carry with them the means of deception, and ultimate or intermediate purchasers may well be deceived, even though the immediate purchaser, who is usually a wholesale or retail trader, may not be. The manufacturers of the spurious goods cannot retain the profits which they have made by putting into the hands of the retailers the means of deceiving the public, whether they have made such use of those means as to produce deception or not (*c*). The account will not be given for a period of more than six years before the commencement of the action, and it will not include every species of profit made by the defendant during that

(*a*) *Nunn* v. *D'Albuquerque*, 34 Beav. 595.

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

(*c*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Lever* v. *Goodwin*, 36 Ch. D. 1; *Saxlehner* v. *Apollinaris Co., Ld.*, (1897) 1 Ch. 893. According to the American decisions, the defendant must account for the whole of the profits made by the sales under the wrongful mark (*Benkert* v. *Feder*, 34 Fed. Rep. 534), even though he may have sustained a loss on his business as a whole: *Atlantic Milling Co.* v. *Rowland*, 27 Fed. Rep. 24. In computing profits no deduction can be made for expenses not exclusively attributable to the wrongful venture: *Société Anonyme* v. *Western Distilling Co.*, 46 Fed. Rep. 921. And when the plaintiff elects to take an account of the profits made by the defendant, the profits which he would himself have made are immaterial: *Atlantic Milling Co.* v. *Rowland*, 27 Fed. Rep. 24.

period, but only so much as is properly attributable to the use of the plaintiff's trade mark (*a*). The account must extend, at all events in case of fraud, to sales prior to the plaintiff's registration, as well as to sales since then (*b*). If the defendant was at first ignorant that he was using a trade mark, the account may be made to commence from the date when he became aware of that fact (*c*); and where the plaintiff had himself been guilty of misrepresentation, and the defendant's business was carried on upon so much larger a scale than the plaintiff's as to render it impossible to suppose that the use of the plaintiff's mark had alone brought the defendant his customers, the account was only given from the date of filing the bill, and not earlier (*d*).

Account directed at plaintiff's risk.

An account of profits is usually directed at the plaintiff's risk (*e*). Where an account had been directed of the sale and profits of a book published in infringement of the plaintiff's rights notwithstanding an affidavit by the defendant that about half of 11,000 copies printed had been sold, and the account showed that 9,000 copies had been sold, but that instead of a profit there had been a small loss, it was held that the affidavit had been shown to be untrustworthy, and that the plaintiff was justified in requiring the account to be taken, and was entitled to the costs thereby occasioned (*f*).

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 insist on both (*g*), though he may at the outset claim both in the alternative, reserving his election till a later stage (*h*).

Right to elect between account and damages.

It has sometimes been considered that the Court has a discretion to refuse to direct an account and to compel a successful plaintiff to accept an inquiry as to damages (*i*), but after the decision of the House of Lords in *Weingarten* v. *Bayer* (*k*), adopting the

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

(*b*) *Smith* v. *Fair*, 14 Ont. Rep. 729.

(*c*) *Moet* v. *Couston*, 33 Beav. 578; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185. But in America the state of knowledge of the infringer appears to be immaterial, and a defendant may be made to account for an inadvertent infringement: *Oakes* v. *Tonsmierre*, 49 Fed. Rep. 447.

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

(*e*) As an inquiry as to damages may be. See *Tonge* v. *Ward*, 21 L. T. N. S. 480.

(*f*) *Dicks* v. *Jackson*, Chitty, J., March 31st, 1884.

(*g*) *Neilson* v. *Betts*, L. R. 5 H. L. 1.

(*h*) This is the usual course in England; and see *Leidersdorf* v. *Flint* (2), 50 Wisc. 401.

(*i*) *E.g.*, *Weingarten* v. *Bayer* (Joyce, J., and C. A.), 20 P. R. 289, 649; *Van Zeller* v. *Mason, Cattley & Co.*, 25 P. R. 37.

(*k*) 22 P. R. 341, at p. 351.

view taken by Lord Westbury in *Edelsten* v. *Edelsten* (*a*), it can hardly be questioned that the plaintiff is entitled to make his own election between them.

Damages.

Damages. It is in the option of a successful plaintiff in a trade mark action to elect between an account of profits and an inquiry as to damages, although, as before stated, he cannot have both (*b*). Damages being the appropriate remedy at Common Law, while the account of profits was peculiar to Equity, the result, and probably the cause of the great majority of trade mark cases being brought into Equity, has been that an account has been frequently awarded, and not damages. This has been the case notwithstanding that the Courts of Equity have had the power of giving relief in the shape of damages (*c*), since in many cases the account forms the most convenient remedy.

When given. Some of the remarks made in reference to the account apply in respect of damages: thus, the defendant is liable in damages for the user of what he has reason to know, or suppose to be, a forged trade mark, though he may be ignorant of the owner; but not necessarily for user of a mark which he did not at all know to be wrongly used (*d*): while, on the other hand, the plaintiff may be held to be disentitled to damages by reason of his own delay (*e*). Damages may be awarded in respect of infringements prior to the plaintiff's registration, since registration is only a condition precedent to suing (*f*).

(*a*) 1 De G. J. & S. 185; and see *Lever* v. *Goodwin*, 4 P. R. 492; *Saxlehner* v. *Apollinaris Co.*, 14 P. R. 645.

(*b*) *Neilson* v. *Betts*, L. R. 5 H. L. 1: *Weingarten* v. *Bayer*, 22 P. R. 341; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Lever* v. *Goodwin*, 4 P. R. 492: 36 Ch. D. 1; *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893; and *Leidersdorf* v. *Flint* (2), 50 Wisc. 401. *Van Zeller* v. *Mason Cattley & Co.*, 25 P. R. 37, seems to have been based on a misapprehension as to the decision of the House of Lords in *Weingarten* v. *Bayer*, 22 P. R. 341.

(*c*) Thus, inquiries as to damages were given in *Chearin* v. *Walker*, 5 Ch. D. 850, 861; and *Graveley* v. *Winchester*, Seton, 6th ed. 695.

(*d*) *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *Cartier* v. *Carlile*, 31 Beav. 292; *Hurt* v. *Cowston*, 33 *ib.* 578: 10 L. T. N. S. 395; *Hipkins* v. *Plant*, 15 P. R. 291; *Slazenger* v. *Spalding*, 27 P. R. 20. Thus, in *Weed* v. *Peterson*, 12 Abb. Pr. N. S. 178, it was held that, though an injunction must be granted with costs, yet, as the defendants had acted perfectly *bonâ fide*, no damages could be given. But, however innocent the defendant may have been, there has still been an invasion of the plaintiff's rights, and it would appear that at Common Law the plaintiff is entitled to at least nominal damages. See p. 179.

(*e*) *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298; *Holt* v. *Menendez*, 128 U. S. 182.

(*f*) *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 411.

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 usually be given (*a*). Even if the wrongful act has been done by a servant, contrary to his employer's directions, it appears that the employer will still be liable, at all events in nominal damages, if the servant was acting within the scope of his employment (*b*). And it has been held in Scotland (*c*), in New Zealand (*d*), and New South Wales (*e*), that more than nominal damages may be awarded for a fraudulent imitation, even without proof of special damage.

Measure of damages.

The measure of damages which can be recovered when special damage is proved is not yet clearly settled by authority; but in *Leather Cloth Co.* v. *Hirschfeld* (*f*), it was held by Wood, V.-C., that it would not be assumed in the absence of evidence that the amount of goods sold by the defendant under the fraudulent trade mark would have been sold by the plaintiff but for the defendant's unlawful use of the plaintiff's trade mark: for the Court could not assume that the persons who bought what the plaintiff averred were inferior articles, at an inferior price, would necessarily, if they had not done so, have bought the superior articles at the higher prices. Again, in *Magnolia Metal Co.* v. *Atlas Metal Co.* (*g*), notwithstanding that the defendants had sold a large quantity of the spurious goods, Collins, J., refused to award any damages in the absence of evidence that the plaintiffs had been thereby deprived of the sale of any goods, or that the reputation of their goods had suffered, and this view was affirmed by the Court of Appeal. In America it has been said that "every consideration of reason, justice, and sound policy demands that one who fraudulently uses the trade mark of another should not be allowed to shield himself from liability for the profit he has made

(*a*) *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; *Monro* v. *Hunter*, 21 P. R. 296; and cases at p. 179, n. (*b*). But in a case where the defendant was not the substantial infringer and the sales by him were small the Court refused an inquiry as to damages: *Board & Son* v. *Huddart*, 21 P. R. 149.

(*b*) *Monro* v. *Hunter*, 21 P. R. 296.

(*c*) *Thomson & Co.* v. *Daily*, Ct. Sess. Cas. 4th Ser. XXIV. 1173.

(*d*) *Littlejohn & Son* v. *Mulligan*, 3 N. Z. L. R. (Sup. Ct.) 446.

(*e*) *Wilson* v. *Smith*, N. S. W. 2 S. R. 174.

(*f*) L. R. 1 Eq. 299. See *Davenport* v. *Rylands*, *ib.* 302; *Alexander & Co.* v. *Henry & Co.*, 12 P. R. 360.

(*g*) 14 P. R. 389. Cf. *Pinto* v. *Trott*, 8 P. R. 173, 179; and *Thomson & Co.* v. *Daily*, Ct. Sess. Cas. 4th Ser. XXIV. 1173.

by the use of the trade mark on the plea that it is impossible to determine how much of the profit is due to the trade mark and how much to the intrinsic value of the commodity. The fact that it is impossible to apportion the profit renders it just that he should lose the whole" (*a*); and the usual practice in America appears to be to assess damages at the amount of the profits which the plaintiffs would have made if they had sold the same quantity of the genuine goods as the defendants had sold of the spurious ones (*b*), or, at all events, at the amount of the actual profits reaped by the defendants from the infringement (*c*). The observation, however, seems just, that the measure of damages is really the injury done to the plaintiffs, and not the profits made by the defendants (who in *Leather Cloth Co.* v. *Hirschfeld* (*d*) were selling at lower prices than the plaintiffs) (*e*); and in an Indian case (*f*), where it was shown that the price of the plaintiff's goods had been necessarily lowered in consequence of the defendants' fraudulent competition, it was held that the amount of the reduction in price gave the measure of damages. So it was said in *Atlantic Milling Co.* v. *Robinson* (*g*) that the extent to which the defendants' infringement had interfered with the plaintiff's sales was the measure of damages. All the above elements were present in *Alexander & Co.* v. *Henry & Co.* (*h*), in which the plaintiffs recovered over 8,000*l.* by way of damages in respect of their thread having been practically driven out of the Mexican market by repeated fraudulent imitations of their trade marks, the damages being made up of (1) profits which the plaintiffs would have made if they had sold thread of their own equal in quantity to the thread sold under certain spurious tickets, they having previously had a substantial monopoly of the market; (2) damage incurred by enforced reduction of the plaintiffs' prices; (3) damage occasioned by the competition of the defendants under other tickets, which had only been rendered possible by the injury to the plaintiffs' reputation caused by the sale of inferior thread under the fraudulent tickets.

(*a*) See *per* Crockett, J., in *Graham* v. *Plate*, 40 Cal. 593; 6 Amer. Rep. 639.

(*b*) *Hostetter* v. *Vowinkle*, 1 Dill. 329: *Faber* v. *Hovey*, Dig. 481.

(*c*) *Graham* v. *Plate*, 40 Cal. 593; *Peltz* v. *Eichele*, 62 Mo. 171.

(*d*) L. R. 1 Eq. 299.

(*e*) *Vulcan Match Co.* v. *Jebsen & Co.*, 1 Kyshe, 650. See *Addington* v. *Cullinane*, 28 Mo. App. 238.

(*f*) *Manockji Petit Manufacturing Co.* v. *Mahalaxmi Spinning & Weaving Co., Ld.*, Ind. L. R. 10 Bomb. 617.

(*g*) 20 Fed. Rep. 217.

(*h*) 12 P. R. 360.

Where a defendant offers submission in terms which are rejected by the plaintiff, the latter will be allowed an inquiry as to damages at his own risk (*a*), but if the plaintiff does not recover more than the defendant offered, the plaintiff will have to pay the costs (*b*). Offer of submission.

Costs.

(i.) *In Actions.*

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 (*c*); where he is unsuccessful, he will have to pay costs (*d*). 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 (*e*). And where a plaintiff had registered a label containing common words, without a disclaimer, it was held that this was not such a wrongful act as to disentitle him to costs as against the defendants, who had used an identically similar label (*f*). So when a plaintiff succeeded substantially on his whole claim, but failed in one item which involved no additional expense, he was allowed the full costs of the action (*g*). General rule as to costs—follow event.

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 (*h*), or where the successful plaintiff has been Relief sometimes granted without costs.

(*a*) *Tonge* v. *Ward*, 21 L. T. N. S. 480. See *Dicks* v. *Jackson*, Chitty, J., March 31st, 1884: *Thomson & Co.* v. *Daily*, Ct. Sess. Cas. 4th Ser. XXIV. 1173.

(*b*) *E.g.*, *Feltes* v. *Williams*, 25 P. R. 511.

(*c*) *Chappell* v. *Davidson*, 2 K. & J. 123; *Farina* v. *Silverlock*, 1 K. & J. 509; 6 De G. M. & G. 214; 4 K. & J. 650; *Collins Co.* v. *Walker*, 7 W. R. 222; *Edelsten* v. *Edelsten*, 1 De G. J. & S. 185; *McAndrew* v. *Bassett*, 4 *ib.* 380.

(*d*) *Woollam* v. *Ratcliff*, 1 H. & M. 259; *Williams* v. *Osborne*, 13 L. T. N. S. 493; *Morgan* v. *McAdam*, 36 L. J. Ch. 228; *Bass* v. *Dancer*, 19 L. T. N. S. 626; *Locke* v. *Webster*, Jessel, M. R., April 4th, 1879; *Watt* v. *O'Hanlon*, 4 P. R. 1.

(*e*) *Morison* v. *Salmon*, 2 Scott, N. R. 449; 2 Man. & G. 385. But in a similar case the Canadian Court gave no costs: *Boudier* v. *Depatie*, 3 Dorion, 233.

(*f*) *Per* Kekewich, J., in *Newman* v. *Pinto*, 4 P. R. 508.

(*g*) *Kodak, Ld.* v. *London Stereoscopic and Photographic Co., Ld.*, 20 P. R. 337.

(*h*) *Mellington* v. *Fox*, 3 My. & Cr. 338; *Moet* v. *Couston*, 33 Beav. 578; *Hudson* v. *Bennett*, 12 Jur. N. S. 519.

guilty of delay (*a*), or brings unfounded charges of fraud (*b*), or has made false statements to the public in relation to his trade mark (*c*). So, again, where forwarding agents, who had been made the medium for importing spuriously-marked cigars, had not participated in the fraud, had offered to give what information they could, and had submitted to act as the Court should direct (*d*).

Relief granted, plaintiff to pay costs.

Under some circumstances the plaintiff may obtain his injunction and yet have to pay the costs of some defendants, as where a dock company was innocently in possession of spuriously-marked goods (*e*). And again, where wine bearing a spurious brand was in the possession of wharfingers, it was held by the Court of Appeal that they were entitled to their costs of being made defendants to an action for infringement, notwithstanding that they had submitted to act as the Court should direct only upon having their charges and costs paid or provided for (*f*).

Relief refused, no costs.

On the other hand, while the relief claimed by the plaintiff is refused, the defendant may still be left to pay his own costs, as where the plaintiff has lost his remedy by lapse of time (*g*), or improper use of the word "patentee" (*h*), or other similar reasons (*i*), 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 (*k*). Thus, where the Vice-Chancellor considered

(*a*) *Millington* v. *Fox*, 3 My. & Cr. 338; *Beard* v. *Turner*, 13 L. T. N. S. 746; *Perks* v. *Hall & Co.*, W. N. 1881, p. 111; *Amoskeag Manufacturing Co.* v. *Garner* (2), 54 How. Pr. 298.

(*b*) *Montgomerie & Co.* v. *Young Bros.*, 20 P. R. 781.

(*c*) *Ingram* v. *India Rubber, Gutta Percha and Telegraph Co., Ld.*, 29 W. R. 172.

(*d*) *Upmann* v. *Elkan*, L. R. 7 Ch. 130. See *Moet* v. *Pickering*, 8 Ch. D. 372.

(*e*) *Upmann* v. *Elkan*, L. R. 7 Ch. 130.

(*f*) *Moet* v. *Pickering*, 8 Ch. D. 372.

(*g*) *Rodgers* v. *Rodgers*, 31 L. T. N. S. 285; *Ripley* v. *Bawley*, 14 P. R. 591.

(*h*) *Nixey* v. *Roffey*, W. N. 1870, p. 227. And where a plaintiff company was held to be disentitled to an injunction by reason of the wrongful use of the word "patent," and the defendant, as having been the company's manager, was in some sense responsible for this, he was deprived of the costs which would otherwise have been given him: *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345.

(*i*) *E.g.*, *Fetridge* v. *Wells*, 13 How. Pr. 385; R. Cox, 180.

(*k*) *Edgington* v. *Edgington*, 11 L. T. N. S. 299; *Bass* v. *Dauber*, 19 *ib.* 626; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Wylam* v. *Clarke*, W. N. 1876, p. 68; *Robineau* v. *Charbonnel*, *ib.* p. 160; *Borthwick* v. *Evening Post, Ld.*, 37 Ch. D. 449; *Thornelor* v. *Hill*, (1894) 1 Ch. 569; *Lambert & Butler* v. *Goodbody*, 19 P. R. 377. And see *Newman* v. *Pinto*, 4 P. R. 508, and *Leeer* v. *Bedingfield*, 16 P. R. 3, where defendants who succeeded in the Appeal Court were left to pay their own costs of the action though allowed the costs of the appeal. See *Humphries* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820;

that the defendant had acted fraudulently, but thought himself bound by a decision of the Court of Appeal on the motion to dismiss the bill, he did so without costs (*a*). Where the defendant had filled with his own lime-juice bottles brought to him for the purpose, though they were stamped with the plaintiff's name, and the plaintiff brought an action, making charges which amounted to fraud, but which the Court did not consider to be justified, though the defendant had done that which he was not entitled to do, and the defendant gave an undertaking not to repeat the offence, no order was made, and each party was left to pay his own costs (*b*). The costs of interlocutory proceedings are usually made costs in the cause (*c*), but where an application to the Court is contested and fought out, it is usual for this to be done only with respect to the costs of the successful party, leaving the unsuccessful party to bear his own in any event.

Apportionment of costs.

In some cases a portion only of the relief asked for has been granted, and the costs have either been apportioned in a manner corresponding to the amount of success achieved, or each party has been left to pay his own costs. Thus, where a plaintiff company succeeded on the question of imitation of labels and wrappers, but failed as to trade mark, the plaintiffs were given their costs up to the motion for injunction, each party having to bear his own after that (*d*). In *Day* v. *Neale* (*e*) no costs were given on either side, the plaintiffs having asked for an injunction in respect of several trade marks, in only two of which they had an exclusive right, and having delayed to take proceedings for more than two years, while the defendants were in the wrong as to the two marks. In *Metzler* v. *Wood* (*f*), the plaintiffs, who succeeded

also *Talbott* v. *Moore*, 13 N. Y. Sup. Ct. 106; *Ingraves* v. *Whiteman*, 3 V. L. R. Eq. 301; *Hop Bitters Manufacturing Co.* v. *Lake*, 10 V. L. R. (E.) 231. Compare *King & Co., Ld.* v. *Gillard & Co., Ld.*, 21 P. R. 589; 22 P. R. 327, where the Court of Appeal held that a misrepresentation by the successful defendant as to medals and awards was not a ground for depriving him of his costs.

(*a*) *Witherspoon* v. *Carrie*. See L. R. 5 H. L. 510.

(*b*) *Rose* v. *Loftus*, 47 L. J. Ch. 576. And see *Perks* v. *Hall & Co.*, W. N. 1881, p. 111. So in N. S. W., where the successful party had untruly marked his goods as if the mark were registered: *Harris* v. *Ogg*, 5 N. S. W. Rep. (E.) 114. As to costs where fraud is charged but not made out, see *Baker* v. *Rawson*, 45 Ch. D. 519, 536; and *Hargreave* v. *Freeman*, (1891) 3 Ch. 39.

(*c*) For example, see *Isaacson* v. *Thompson*, 41 L. J. Ch. 101; *Brook* v. *Evans*, 2 L. T. N. S. 740; *Wallis* v. *Wallis*, 4 Dr. 458.

(*d*) *Compagnie Lafrance* v. *Hendricks*, Dig. 512. And see *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; and *Baker* v. *Rawson*, 45 *ib.* 519, 536.

(*e*) Bacon, V.-C., May 21th, 1881.

(*f*) 8 Ch. D. 606.

on the main question of imitation of the title of their publication, were deprived of half their costs, on the ground of their having made claims as to copyright which failed. Where a plaintiff succeeded in establishing a limited right in a word, and also that the defendant had acted fraudulently, but failed to show a general right in the word, and that certain labels used by the defendant were deceptive, the defendant was ordered by the Irish Court to pay the general costs of the suit, but the plaintiff was ordered to pay and set off against his own costs the costs of all the affidavits of the defendant's witnesses (except that of the defendant himself), since they had been addressed to the part of the case on which the plaintiff failed (*a*). On the other hand, where an action was brought for infringement of trade mark and for passing off, and fraud was proved on the part of the defendant, but infringement of trade mark was not proved, the defendant was ordered to pay the whole of the costs (*b*); but in another similar case the plaintiff was allowed his costs of the action except so far as they had been increased by the claim in respect of the trade mark (*c*). In a Bombay case (*d*), in which six marks were in question, and the defendants succeeded as to all but one, which they had offered to give up within six days after the commencement of the suit, it was held that the defendants must only pay their own costs with regard to that mark, and one-sixth of the plaintiff's costs up to and including the day on which the offer was made, and that all the remaining costs of both parties must be paid by the plaintiffs. Where a defendant had unruly alleged that he was the first to use a word in dispute, and that the plaintiff had copied from him, no costs were given, though the action was dismissed (*e*).

Sometimes the costs of one issue are given to the plaintiff, and those of another to the defendant, with a set off, or occasionally a rule of thumb mode of division between the parties is adopted. Thus, in a case where the plaintiff succeeded on one issue and failed on another, and the defendant had acted fraudulently, the Court

(*a*) *Wheeler* v. *Johnston*, 3 L. R. Ir. 284.

(*b*) *Rowland* v. *Michell*, 13 P. R. 457: *Hodgson* v. *Kynoch, Ld.*, 15 *ib.* 465.

(*c*) *Lever* v. *Bedingfield*, 15 P. R. 453. This case was, however, reversed on the facts, and judgment was entered for the defendants without costs. 16 P. R. 3.

(*d*) *Wallace & Co.* v. *King & Co.*, Bombay High Ct., April 30th, 1879.

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

ordered the defendant to pay one-third of the plaintiff's costs and made no order as to the defendant's costs (*a*). So where an action for infringement of trade mark and a motion for rectification were heard together, and neither party was wholly successful, the costs were lumped together and the plaintiff was ordered to pay two-fifths of the total costs (*b*). Where a case was overloaded with useless evidence, the successful plaintiff was allowed the general costs of the action less half the cost of the evidence (*c*).

Costs of unfounded charges, &c.

If a plaintiff makes a charge which he is unable to substantiate, he may obtain an injunction with costs, and not have to pay all costs occasioned by the making of that charge (*d*). 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 (*e*). So if he unsuccessfully persists in his claim for damages after the defendant has submitted to an injunction, he must pay the costs of such claim (*f*).

Where increased costs only set off.

There is a wide distinction between cases in which the costs of issues are given separately and cases in which the costs of the action are given to one party except so far as they have been increased by special issues, as in the first class the general costs are apportioned (*g*), while in the second class they are given to the successful party, and it is of much importance to see that the order is drawn up so as to give effect to the intentions of the Court (*h*).

(*a*) *Findlater, Mackie, Todd & Co.* v. *Norman*, 19 P. R. 235.

(*b*) *Bourne* v. *Swan & Edgar*, (1903) 1 Ch. 211.

(*c*) *Daimler Motor Co.* (1904), *Ld.* v. *London Daimler Co., Ld.*, 24 P. R. 379.

(*d*) *Pierce* v. *Franks*, 15 L. J. Ch. 122 *Standish* v. *Whitwell*, 14 W. R. 512; *Wyborn* v. *Clarke*, W. N. 1876, p. 68; *Saichnar* v. *Apollinaris Co.*, (1897) 1 Ch. 893; *Pneumatic Rubber Stamp Co.* v. *Lindner*, 15 P. R. 525; *Society of Accountants and Auditors* v. *Goodway*, 24 P. R. 159. And see *Apollinaris Co.* v. *Duckworth*, 23 P. R. 540, where a successful defendant was made to pay the costs of an unfounded charge of fraud against the plaintiffs. See also *ante*, p. 257, note (*b*).

(*e*) *Nunn* v. *D'Albuquerque*, 34 Beav. 595.

(*f*) *Magnolia Metal Co* v. *Atlas Metal Co.*, 14 P. R. 389; *Hipkins* v. *Plant*, 15 *ib.* 294.

(*g*) *Jenkins* v. *Jackson*, (1891) 1 Ch. 89.

(*h*) Thus in *Thomas, Ld.* v. *Tiffin*, 26 P. R. 473, the Court of Appeal had expressed its intention of giving the plaintiffs, who succeeded on appeal, the costs of the action except so far as they had been increased by a claim for infringement of trade mark, and the order having been drawn up in a form corresponding to that in *Jenkins* v. *Jackson*, (1891) 1 Ch. 89, it became necessary to obtain an order from the C. A. correcting the slip which had been made: 27 P. R. 602. See also the award of costs in *Hopton Wood Stone Firms, Ld.* v. *Gething*, 27 P. R. 605.

Scale of costs when defendant submits.

When a defendant in a trade mark action submits to a perpetual injunction with costs, the mere fact of his having submitted constitutes no special ground, under R. S. C., 1883, Order LXV. r. 9, for directing the costs to be taxed on the higher scale, but in such a case the Court will refuse to punish him for submitting at once, and will leave the costs to be taxed on the lower scale (*a*). But there may be cases in which costs will be given on the higher scale *e.g.*, where the action has been fought out at great length (*b*).

Costs of motion to commit.

A motion to commit for breach of an injunction is not unfrequently made without any expectation of obtaining an order for actual committal, but the defendant can only be ordered to pay the costs of such a motion if the facts would have warranted a committal (*c*). But where an order for committal was rescinded by the Court of Appeal, no costs were given the defendant, on account of the equivocal conduct of some of his agents (*c*). Where a motion to commit was dismissed on the ground of delay, as well as that the actual terms of the injunction had not been disobeyed, though its spirit had been. Wood, V.-C., while refusing the motion, enlarged the injunction and made the defendant pay the costs (*d*). Where there was a difference of opinion between the members of the Court of Appeal whether upon the evidence a breach had been committed, no order was made as to the costs of the appeal (*e*). In a case in which the Supreme Court of New York had fined a defendant for contempt, the Court of Appeals, while considering itself bound by the decision of the Supreme Court as to the fact of the breach, yet thought the decision so doubtful that it gave no costs of the appeal (*f*).

Costs of appeals.

The costs of appeals are usually governed by the same principle as those in the Courts of First Instance, and follow the event. Thus, in *McLean* v. *Fleming* (*g*), in which the U. S. Circuit Court considered the plaintiff to be entitled to an injunction and an account, but the Supreme Court reversed the decision with re-

(*a*) *Hudson* v. *Osgerby*, 50 L. T. N. S. 236.

(*b*) *Great Tower Street Tea Co.* v. *Smith*, 6 P. R. 165; *In re Crosfield*, 27 P. R. 133, where the costs of three counsel were also allowed. But see *In re Apollinaris Co.*, (1891) 2 Ch. 186.

(*c*) *Hudson* v. *Osgerby*, 50 L. T. N. S. 323. But see *Grezier* v. *Ziemer*, 89 L. T. (Journal) 117.

(*d*) *Carter* v. *May*, Dig. 200.

(*e*) *Eg.*, *Dover* v. *Brand*, W. N. 1881. p. 31.

(*e*) *Ripley* v. *John Arthur & Co.*, 19 P. R. 443.

(*f*) *Berlin* v. *Declin*, 69 N. Y. 212.

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

spect to the account, on the ground of the plaintiff's own laches, it was held that the plaintiff must have his costs in the Court below, but the defendant (appellant) his costs of the appeal. The costs of an unnecessary appeal must be paid by the appellant. Thus, where a respondent appeared at the hearing of an appeal, after having received notice from the appellant that no alteration would be asked in the order in the Court below with respect to his costs, which the appellant had been ordered to pay, that respondent was left to pay the costs of such appearance (*a*). And where, in an action for imitation of the name of the plaintiffs' journal, the plaintiffs brought on an appeal from the decision of the judge directing the motion for an injunction to stand to the hearing, after the defendants had changed the name of their publication, the plaintiffs were ordered to pay the costs of the appeal, notwithstanding that the defendants had refused to submit to an injunction, or to give an undertaking as to their original title (*b*). In *Newman* v. *Pinto* (*c*) the plaintiff, who had succeeded in the Court of First Instance, was held by the Court of Appeal to be disentitled to relief on the ground of misrepresentations contained in his trade mark; but the defendants, who had used the same trade mark, containing the same misrepresentations, were not allowed the general costs of the action, but only the costs of the appeal. Where the Court of Appeal makes an order for repayment to the appellant of the costs paid by him in the Court below, interest on the costs between the date of payment and the date of the order of the Court of Appeal is not chargeable (*d*). As a general rule the costs of the shorthand notes of the evidence in the Court below will not be included in the costs of the appeal, but they may be allowed under special circumstances (*e*).

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" (*f*).

(*a*) *Upmann* v. *Elkan*, L. R. 7 Ch. 130.

(*b*) *Dale* v. *Smith*, W. N. 1882, p. 145.

(*c*) 4 P. R. 508. Cf. *Lever* v. *Bedingfield*, 16 P. R. 3.

(*d*) *Edge & Sons* v. *Gallon*, 16 P. R. 509.

(*e*) See *Edge & Sons* v. *Gallon*, 16 P. R. 509.

(*f*) *Per* Lord Cottenham, C., in *Millington* v. *Fox*, 3 My. & Cr. 338. See the order made in *Pinto* v. *Badman*, 8 P. R. 181, 192.

Although, therefore, a plaintiff whose rights have been attacked is not bound to rely on the assurance of his assailant that the act will not be repeated, but is entitled to the protection of an injunction (*a*), yet if he, immediately after the suit is commenced, is offered and may obtain all he seeks, and still thinks proper to go on with the suit, the Court may give him his decree, but will not give him the costs of the suit so unnecessarily prosecuted (*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*). Thus, where in a patent case an injunction was granted, the defendants having previously promised to commit no further infringement and to pay the costs of preparing the bill, Knight Bruce, V.-C., gave the plaintiffs their costs at the hearing, since the defendants ought to have offered, on the injunction being obtained, to pay all costs up to that time (*d*). 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 (*e*).

But if an innocent infringer withdraws all marked articles from sale, and offers an undertaking immediately upon being served with

(*a*) *Geary* v. *Norton*, 1 De G. & S. 9; *Routh* v. *Webster*, 10 Beav. 561; *Tonge* v. *Ward*, 21 L. T. N. S. 480; *Coats* v. *Holbrook*, 2 Sandf. Ch. 586; R. Cox, 20; *Radway* v. *Coleman*, 15 Grant, Up. Can. Ch. 50; *Guardian Fire and Life Assurance Co.* v. *Guardian and General Insurance Co., Ld.*, 50 L. J. Ch. 252.

(*b*) *Per* Wigram, V.-C., in *Colburn* v. *Simms*, 2 Hare, 560, commenting on *Millington* v. *Fox*. And see *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Hudson* v. *Bennett*, 12 Jur. N. S. 519; *Upmann* v. *Elkan*, L. R. 12 Eq. 140; 7 Ch. 130; *Williams* v. *Osborne*, 13 L. T. N. S. 498; *Slazenger* v. *Pigott*, 12 P. R. 439; *Grand Hotel Co. of Caledonia Springs, Ld.* v. *Wilson*, 21 P. R. 117, 128; and see *Vernon* v. *Buchanan's Flour Mills, Ld.*, 23 P. R. 17.

(*c*) *Fradella* v. *Weller*, 2 R. & M. 247: *Kelly* v. *Hooper*, 1 Y. & C. Ch. 197; *Geary* v. *Norton*, 1 De G. & S. 9; *Burgess* v. *Hills*, 26 Beav. 244; *Burgess* v. *Hately*, *ib.* 249; *Wallis* v. *Wallis*, 4 Dr. 458: *Collins Co.* v. *Walker*, 7 W. R. 222: *Moet* v. *Couston*, 33 Beav. 578; *Nunn* v. *D'Albuquerque*, 34 *ib.* 595: *Hipkins* v. *Plant*, 15 P. R. 294; *Maréchal* v. *McColgan*, 18 P. R. 262; *Hat Manufacturers Supply Co.* v. *Tomlin*, 23 P. R. 413; *Nitedals Taendstikfabrik* v. *R. Lehmann & Co., Ld.*, 25 P. R. 793.

(*d*) *Geary* v. *Norton*, 1 De G. & S. 9. See *Lochgelly Co., Ld.* v. *Lumphinnans Iron Co.*, Ct. Sess. Cas. 4th Ser. VI. 482.

(*e*) *Kelly* v. *Hooper*, 1 Y. & C. Ch. 197.

the writ, and the plaintiff afterwards moves for an injunction, the motion may be refused with all costs, less the costs of the writ, which will have been incurred before the defendant's offer (*a*). On the other hand, where the infringement is not innocent the plaintiff is not bound to be satisfied with an undertaking (*b*); but where the defendant consents to an order in the terms of the writ to be obtained in chambers, the plaintiff will not be entitled as a matter of course to any additional costs incurred by his bringing the matter into Court (*c*). If, however, the Court considers that the nature of the case was such as to justify the plaintiff in desiring that the order should be made public, the defendant will not obtain any reduction in the costs by offering to submit in chambers (*d*). In short, if the defendant wishes to escape further costs he must make a clean offer of the whole of the relief to which the plaintiff is entitled, and must not seek to impose terms as to non-advertisement or otherwise on which he is not entitled to insist (*e*). If, however, he offers the plaintiff all to which he is entitled, and the plaintiff nevertheless continues the litigation, the latter will have to pay the costs subsequent to the offer (*f*).

Notice to infringer.

It has been suggested 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 (*g*); and if he does so, and a fair offer is made, he should not hasten to incur needless expense (*h*), or he may be punished in respect of costs. Lord Romilly, M. R., was, however, of opinion (*i*) that, the defendant having been the

(*a*) *Caruncho* v. *Highmoor*, 27 Sol. J. 199. And see *Clarke* v. *Hudson's Executors*, 18 P. R. 310; *Burgoyne & Co., Ld.* v. *Godfree*, 22 P. R. 169.

(*b*) *Smith* v. *Carron Co.*, 13 P. R. 108; *Slazenger* v. *Pigott*, 12 *ib.* 439; *Jameson* v. *R. S. Johnston & Co., Ld.*, 18 P. R. 259. See *Dover* v. *New Townend Cycle Co., Ld.*, 21 P. R. 135.

(*c*) *Slazenger* v. *Pigott*, 12 P. R. 439.

(*d*) *Gandy Belt Co., Ld.* v. *Fleming, Ld.*, 18 P. R. 276; *Gallice* v. *Levy*, Eady, J., May 15, 1906; *Royal Warrant Holders' Association* v. *Kitson*, 26 P. R. 157. And the same has been held in Ireland: *Jameson* v. *R. S. Johnston & Co.*, 18 P. R. 259.

(*e*) See *Hipkins* v. *Plant*, 15 P. R. 294; *Henry Clay & Bock, Ld.* v. *Phillips*, 27 P. R. 508.

(*f*) *E.g.*, *Fettes* v. *Williams*, 25 P. R. 511.

(*g*) *Chappell* v. *Davidson*, 2 K. & J. 123; *Wallis* v. *Wallis*, 4 Dr. 458; *Twentsche Stoom Bleekery Goor* v. *Ellinger & Co.*, 26 W. R. 70.

(*h*) *Williams* v. *Osborne*, 13 L. T. N. S. 498. And see the opinion of Jessel, M. R., cited in *Upmann* v. *Forester*, 24 Ch. D. 231; and *In re Kuhn & Co.*, 53 L. J. Ch. 238.

(*i*) In *Burgess* v. *Hately*, 26 Beav. 249. In *Field* v. *Lewis*, Dig. 280, Wood, V.-C., granted an injunction with costs, though no notice had been given before bill filed. And see *Coats* v. *Holbrook*,

aggressor, the plaintiff would be justified in filing his bill without making any application to the defendant; and in *Upmann* v. *Elkan* (*a*) he indicated his adherence to the same view, saying that he did not mean to lay down that the person whose trade mark had been imitated might not file a bill without making any inquiry at all. In the later case of *Upmann* v. *Forester* (*b*), Chitty, J., decided in accordance with this opinion, giving costs to a plaintiff who had moved for an injunction without giving any previous notice, though the defendant had acted perfectly innocently, and would have submitted if notice had been given him. And he stated that this was also the opinion of Jessel, M. R. (*c*). But in *Upmann* v. *Currey* (*d*), a case very similar to *Upmann* v. *Forester* (*e*), the innocent defendant offered in Court to empty and deliver up or destroy the boxes in which the cigars had been sold to him, and which were labelled (but without his knowledge) in imitation of the plaintiff's boxes, and Smith, J., refused an injunction, and gave no costs on either side. So in *American Tobacco Co.* v. *Guest* (*f*), where an action was brought without any previous notice against a retail dealer who had innocently sold a small quantity of infringing goods, and the defendant submitted to an injunction, Stirling, J., made no order as to costs, and expressed his opinion that proceedings ought in the first instance to be taken against those who placed the spurious goods upon the market. In an Irish case (*g*) where the infringement was not innocent, but the defendants asked for particulars of the acts complained of, and offered to insert any reasonable notices in the newspapers to show that they had no connection with the plaintiffs' firm and to pay the costs, and the plaintiffs took no notice of the offer, it was held by the Master of the Rolls that the plaintiffs by declining to consider the defendants' suggestions, had lost their right to relief, the defendants having in the meantime inserted advertisements in the newspaper disclaiming all connection with the plaintiffs, and the action was dismissed without

2 Sandf. Ch. 586; R. Cox, 20; and *Sawyer* v. *Kellogg*, 7 Fed. Rep. 721; 9 *ib.* 601.

(*a*) L. R. 12 Eq. 140; L. R. 7 Ch. 130.

(*b*) 24 Ch. D. 231.

(*c*) See *per* Jessel, M. R., in *In re Kuhn & Co.*, 53 L. J. Ch. 238; and *Barrett* v. *Gomm*, 74 L. T. (Journal) 388. Also *Fennessy* v. *Day*, 55 L. T. N. S. 161. So *Siegert* v. *Lawrence*, 11 V. L. R. 47, in Victoria.

(*d*) 29 Sol. J. 735.

(*e*) 24 Ch. D. 231.

(*f*) (1892) 1 Ch. 630.

(*g*) *Valentine* v. *Valentine*, 31 L. R. Ir. 488.

costs. That there is, however, no right to require a preliminary letter seems to follow from the decision of the House of Lords in *Weingarten* v. *Bayer* (*a*), in which Lord Macnaghten pointed out that a person whose rights had been invaded might lose his opportunity of obtaining proper relief if he were required to write such a letter. In fact, the usual consequence of such a letter is that the offender does something which makes it more difficult for relief to be obtained, but without making the full amends to which the person injured is fairly entitled.

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 (*b*). And so with a married woman having separate estate (*c*).

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 the instrument of his fraud the costs of legal proceedings brought about by the infringement, including any sum which that person may have reasonably paid to compromise the matter (*d*).

(ii.) *In Registration Cases.*

Costs in registration *cases.*

When an application for the registration of a trade mark is opposed and brought before the Court, the costs are usually ordered to be paid by the unsuccessful party, as having been occasioned by his wrongful claim or opposition. Thus, where a claim was made to register and use a trade mark, which would have been an infringement of an existing mark, the persons who wrongly claimed the mark were ordered to pay the costs of cross-adjourned summonses, as well as of an action for an injunction which had been rendered necessary by the claim (*e*). And in *In re Rosing* (*f*), the Cutlers' Co. of Sheffield, who had opposed an

(*a*) 22 P. R. 341. See p. 350.

(*b*) *Cory* v. *Gerteken*, 2 Madd. 49; *Chubb* v. *Griffiths*, 35 Beav. 127; *Woolf* v. *Woolf*, 43 Sol. J. 127.

(*c*) *Nicholls* v. *Kimpton*, 3 Times L. R. 674.

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

(*e*) *Davis* v. *Tylor*, Jessel, M. R., April 24th, 1879. See *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *In re Grossmith*, 6 P. R. 180; *In re Burgoyne*, *ib.* 227, and many other cases.

(*f*) 54 L. J. Ch. 975.

application in what they believed to be the interest of the public (and whose opposition succeeded in the Court of Appeal), were ordered by V.-C. Bacon to pay the costs of their opposition, which failed before him.

No costs.

If, on the other hand, each party is partially successful, no costs will be given on either side (*a*). And where application was made for the registration of a label containing descriptive words, and the applicants disclaimed some of the descriptive words, but not all, and conducted their case on the footing that registration would give them an exclusive right to such words, the Court of Appeal held that though the registration must be granted, and would not have the effect of giving any such right, the litigation had nevertheless been caused by the applicants, and no costs could be given them (*b*). And in *In re Dunn* (*c*), in which the Court of Appeal reversed the refusal of the Court below to allow registration, they only gave costs of the appeal, and none of the hearing below. If an applicant for registration proposes to ask that the respondent may be ordered to pay the costs of the application, it is desirable (*d*), though not essential (*e*), that this should be mentioned in the notice of motion.

Costs paid by successful applicant.

Where an applicant took advantage of the precise wording of the Act of 1875 to obtain registration as a part of his trade mark of words to the exclusive use of which he was not entitled, and the application was unsuccessfully opposed, Jessel, M. R., held that, notwithstanding the success of the applicant, he must still pay the costs of the application, as he was taking advantage of the Act to do that which the Act did not intend him to do (*f*).

Costs of registrar.

Where the registrar is served with notice of an application to the Court, and he appears, his costs are in the discretion of the Court, though he cannot be ordered to pay costs (*g*). But it has been held that under the Act of 1905, as under the previous Acts, he is entitled to appear on the hearing of the application, and to receive his costs of so doing, since it is proper that he should

(*a*) *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Rosing*, 54 L. J. Ch. 975; *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398.

(*b*) *In re Hudson*, 32 Ch. D. 311. And see *In re Swift Specific Co.*, 6 P. R. 352.

(*c*) 41 Ch. D. 444.

(*d*) *In re North Shore Mill Co., Ld.*, 22 P. R. 599.

(*e*) *In re Davis*, 14 P. R. 903.

(*f*) *In re Maignen*, 28 W. R. 759.

(*g*) T. M. Act, 1905, § 48.

know what order is made (*a*). But when the application raises purely a question *inter partes*, *e.g.*, whether two marks do or do not conflict, it is usual for him not to appear, whether the application be for registration or for rectification, on receiving an assurance that no exceptional order will be asked for.

When he opposes.

Where the registrar opposes an application, and his opposition fails, he cannot now be required to pay the costs of the successful applicant (*b*); and the rule has in fact been established that the comptroller will generally receive his costs, whether successful or unsuccessful (*c*), but where the case is a test case, each party may be left to pay his own costs (*d*). In the case of a successful appeal by a trade mark owner against a refusal to register, the appellant will still be left to pay the registrar's costs in the Court of First Instance, but it is not usual to make him pay also the costs of the appeal (*d*). If the comptroller refuses to register on the ground of similarity to an earlier mark, and upon an appeal by the applicant to the Court, the proprietor of the earlier mark appears and objects to the application, no costs may be given (*e*), or costs may be given against him if his objection is unsuccessful (*f*), while he obtains them if successful (*g*).

Costs in registry.

Costs of opposed applications in the Registry Office are now in the discretion of the registrar, or, on appeal to the Board of Trade, of the Board (*h*).

Extent of costs.

Since, by the terms of the old Rule 16 (*i*), an opposed application did not stand for the determination of the Court until the comptroller informed the applicant that the opponent had given security, no costs incurred before that point in the proceedings, but only those incurred after it, could formerly be given by the Court or be included in an order to pay costs (*k*); and it has been held that the Court could not give a successful

(*a*) This was repeatedly so laid down under the earlier Acts: *e.g.*, *In re Orr-Ewing* (2), 28 W. R. 412.

(*b*) Notwithstanding *In re Rotherham*, 14 Ch. D. 585; *In re Patent Flambago Crucible Co.*, Jessel, M. R., August 1st, 1879; *In re Jones Bros.*, Hall, V.-C., July 10th, 1880.

(*c*) *In re Van Duzer*, 34 Ch. D. 623; *In re Leaf, Sons & Co.*, 34 Ch. D. 632; *In re Farbenfabriken vormals Fried. Bayer & Co.*, (1894) 1 Ch. 645.

(*d*) See *Eastman Co., Ld.* v. *Comptroller-General*, (1898) A. C. 571, 585; *In re California Fig Syrup Co.*, 26 P. R. 846, 864.

(*e*) *In re Holbrooks, Ld.*, 26 P. R. 791.

(*f*) *In re Simpson*, L. J. N. of C. 1890, p. 143.

(*g*) *In re Royal Worcester Corset Co.*, 26 P. R. 175.

(*h*) T. M. Act, 1905, § 14 (10).

(*i*) Repeated in § 69 of the Patents Act, 1883, as amended, now repealed.

(*k*) *In re Brandreth*, 9 Ch. D. 618.

opponent the costs of the proceedings in the Registry Office, under either § 69 or § 90 of the Patents Act, 1883 (*a*). The same will no doubt be the rule under the Act of 1905, by which the registrar can, and does, give costs himself. In *In re Apollinaris Co.* (*b*), the Court of Appeal refused to give costs on the higher scale, though the case was one of unusual complexity and difficulty. But in *In re Crosfield* (*c*), Eady, J., considered that the case was one in which costs on the higher scale should be allowed, and, further, allowed the costs of three counsel, as was also done in *In re Burroughs, Wellcome & Co.* (*d*), a rectification case.

Costs of application to remove.

If a person registers as his property a trade mark to which he is not entitled, he will, as a rule, have to pay the costs of the necessary application to remove it from the register (*e*), though there may be exceptional cases in which this rule will not be followed: as if the mark was originally his property, but has become common through the common piracy of the trade, and they have delayed to apply for removal for some time after his registration, and have then done so without notice to him, he being a foreigner (*f*); or if the mark is removed from the register on the application of a person who has copied it, and who has only applied for rectification under stress of an action for infringement (*g*). Again, where a mark was removed from the register by the Court of Appeal on a ground which had not been raised in the Court below, and the applicant had acted in a fraudulent manner, no costs were given in either Court (*h*). So, also, a successful applicant has been deprived of costs on the ground of delay (*i*), and on the ground of the unsatisfactory state of the

(*a*) *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278.

(*b*) (1891) 2 Ch. 186, 236.

(*c*) 27 P. R. 433.

(*d*) 22 P. R. 164.

(*e*) *In re Hyde & Co.*, 7 Ch. D. 724; *In re Palmer* (3), 24 *ib.* 504; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274; *In re Vignier*, 6 P. R. 490; *In re Edge*, 8 *ib.* 207; *In re Hare*, 24 P. R. 263. Where the registered proprietor had given up business, and the benefit of his trade mark was claimed by his mortgagees, and an order was made in the absence both of the registered proprietor and of the mortgagees for removal of the mark and payment of costs by the mortgagees, the registered proprietor was afterwards added at the instance of the mortgagees as one of the parties to pay costs: *In re Davis*, 14 P. R. 903.

(*f*) *In re Kuhn & Co.*, 53 L. J. Ch. 238.

(*g*) *In re Perry Davis & Son*, 5 P. R. 333; *Humphries* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820. See *In re Gianaclis*, 6 P. R. 467; and *Richards* v. *Butcher* (2), 8 *ib.* 37, 49.

(*h*) *Thompson* v. *Montgomery*, 41 Ch. D. 35. And see *In re Bradley*, 5 P. R. 205.

(*i*) *In re Talbot*, 11 P. R. 77; 63 L. J. Ch. 264.

evidence (*a*). Where an application to remove a trade mark from the register was refused in the Court of First Instance (though subsequently granted on appeal) on the ground that the party applying was not aggrieved at the time of the hearing, though he had been so at the time when the application was made, and until very shortly before the hearing, when a concession was made by the registered proprietor, Kekewich, J., while declining to remove the mark from the register, gave the applicant the costs up to the hearing (*b*). As a rule, a person who fails in an application to rectify will have to pay the costs of the application (*c*). It seems doubtful whether a respondent to an application to rectify, who is served with a notice of discontinuance, can treat such notice as entitling him to get his costs taxed, and therefore the notice should be accompanied by a statement that he shall have his costs (*d*).

Security for costs.

Where a firm of shipowners had been restrained, as carriers, from parting with cases of mineral waters containing bottles alleged to bear infringements of the plaintiffs' labels, and an American resident claimed to be the owner of the goods, and applied for leave to re-ship them to Hamburg, it was held that he must give security for the costs of his application (*e*). And where an application for the registration of a trade mark was made by a foreign resident and opposed, it was held that he must give security for costs, and that, unless he did so within seven days, his application must be refused without further order (*f*). A foreign company will not be required to give security for the costs of proceedings in England with reference to the registration of trade marks, or of an appeal, if it has substantial assets in England available to answer the costs (*g*). Where a foreign company made a special application to the Board of Trade for registration of a trade mark under sect. 9 (5) of

(*a*) *In re European Blair Camera Co.*, 13 P. R. 603. And see *In re Thompson*, *ib.* 35.

(*b*) *In re Apollinaris Co.*, (1891) 2 Ch. 186, 199. See 63 L. T. N. S. 162, 168.

(*c*) *In re Atkins Filter and Engineering Co., Ld.*, 3 P. R. 164, and many other cases, *e.g.*, in *In re Burroughs, Wellcome & Co.*, 22 P. R. 164.

(*d*) *In re Dyson*, 65 L. T. N. S. 488.

(*e*) *Apollinaris Co.* v. *Wilson*, 31 Ch. D. 632.

(*f*) *In re Hurter*, W. N. 1887, p. 71. But a registered proprietor residing abroad who desires to oppose a motion for rectification will not as a general rule be required to give security for costs: *In re La Société Anonyme des Verreries de l'Etoile* (1), 10 P. R. 290; cf. *In re La Compagnie Générale d'Eaux Minérales, &c.*, (1891) 3 Ch. 451.

(*g*) *In re Apollinaris Co.*, (1891) 1 Ch. 1.

the Act of 1905, and the application was referred by the Board to the Court, with a direction to the applicants to serve a third party with notice, it was held, on application by the third party, that the applicants must give security for costs, notwithstanding a contention that if the case had been heard by the Board of Trade no security could have been ordered, and that the application having been referred to the Court contrary to the wish of the applicants, they were unwilling litigants (*a*).

(*a*) *In re Royal Worcester Corset Co.*, Warrington, J., Nov. 26th, 1908.

CHAPTER VIII.

PASSING OFF AND ANALOGOUS CASES.

A CONVENIENT, though not exhaustive, summary of the law on the subject of what has now come to be known as the law of "passing off," and which is expressly excepted by the Trade Marks Act, 1905 (*a*), from the operation of that statute, was given by Kay, L. J., in *Powell* v. *Birmingham Vinegar Brewery Co.* (*b*). Passing off: *per* Kay, L. J.

"The law relating to this subject may be stated in a few propositions:—

(1) It is unlawful for a trader to pass off his goods as the goods of another.

(2) Even if this is done innocently it will be restrained: *Millington* v. *Fox* (*c*).

(3) *A fortiori* if done designedly, for that is a fraud.

(4) Although the first purchaser is not deceived, nevertheless if the article is so delivered to him as to be calculated to deceive a purchaser from him, that is illegal: *Sykes* v. *Sykes* (*d*).

(5) One apparent exception is, that where a man has been describing his goods by his own name, another man having the same name cannot be prevented from using it, though this may have the effect of deceiving purchasers: *Burgess* v. *Burgess* (*e*); *Turton* v. *Turton* (*f*).

(6) But this exception does not go far. A man may so use his own name as to infringe the rule of the law: 'It is a question of evidence in each case whether there is false representation or not:' *per* Turner, L. J., in *Burgess* v. *Burgess* (*e*). So he may be restrained if he associates another man with him so that under their joint names

(*a*) § 45.
(*b*) (1896) 2 Ch. 54, at p. 79.
(*c*) 3 My. & Cr. 338.
(*d*) 3 B. & C. 541.
(*e*) 3 De G. M. & G. 896.
(*f*) 42 Ch. D. 128.

he may pass off goods as the goods of another person: *Croft* v. *Day* (*a*); *Clayton* v. *Day* (*b*); *Melachrino* v. *Melachrino Egyptian Cigarette Co.* (*c*).

(7) Another apparent exception is where a man has under a patent had a monopoly for fourteen years, and has given the article a descriptive name, he cannot, when the patent has expired, prevent another from selling it under that name: *Young* v. *Macrae* (*d*); *Linoleum Manufacturing Co.* v. *Nairn* (*e*).

(8) I am not sure this would be so if the name so used were the name of the patentee, or even a purely fanciful name not descriptive.

(9) Certainly where there has not been a patent, and an article has been made and sold under a fanciful name not descriptive, so that the article as made by one person has acquired reputation under that name, another trader will not be permitted to use the name for a similar article made by him: *Braham* v. *Bustard* (*f*); *Cochrane* v. *Macnish & Son* (*g*).

(10) To this last proposition there is again a limitation. If the first maker has slept upon his rights, and allowed the name to be used by others until it has become *publici juris*, the Court will not interfere."

Per Lord Herschell.

It is important also to remember that, so long as the public know that the name employed indicates the manufacture of some particular manufacturer, it is immaterial whether they know who that manufacturer is or not. Thus, in the same case, Lord Herschell said in the House of Lords (*h*): "I think that the fallacy of the appellants' argument rests on this: that it is assumed that one trader cannot be passing off his goods as the manufacture of another unless it be shown that the persons purchasing the goods know of the manufacturer by name, and have in their mind when they purchase the goods that they are made by a particular individual. It seems to me that one man may quite well pass off his goods as the goods of another if he passes them off to people who will accept them as the manufacture of another,

(*a*) 7 Beav. 84.
(*b*) 26 Sol. J. 43.
(*c*) 4 P. R. 215.
(*d*) 9 Jur. N. S. 322.
(*e*) 7 Ch. D. 834.
(*f*) 1 H. & M. 447.
(*g*) (1896) A. C. 225.
(*h*) (1897) A. C. 710, 715.

though they do not know that other by name at all. In the present case it seems to me that 'Yorkshire Relish' meant the manufacture of a particular person. I do not mean that in the minds of the public the name of the manufacturer was identified, but that it meant a particular manufacture, and that when a person sold 'Yorkshire Relish,' as the defendants did, by selling it as 'Yorkshire Relish,' and calling it 'Yorkshire Relish,' they represented to the public that it was that manufacture which was known as and by the name of 'Yorkshire Relish.'" As Smith, L. J., said in the same case (*a*): "What the purchasers in truth asked for was either the old 'Yorkshire Relish' made by the plaintiff which they had been accustomed to buy, or, if they did not know the plaintiff made it, then for 'Yorkshire Relish' made by the same maker, whosoever he might be."

Per Parker, J.

Another valuable statement may be found in the judgment of Parker, J., in *Burberrys* v. *Cording* (*b*): "The principles of law applicable to a case of this sort are well known. On the one hand, apart from the law as to trade marks, no one can claim monopoly rights in the use of a word or name. On the other hand, no one is entitled by the use of any word or name, or indeed in any other way, to represent his goods as being the goods of another to that other's injury. If an injunction be granted restraining the use of a word or name, it is no doubt granted to protect property, but the property, to protect which it is granted is not property in the word or name, but property in the trade or goodwill which will be injured by its use. If the use of a word or name be restrained, it can only be on the ground that such use involves a misrepresentation, and that such misrepresentation has injured, or is calculated to injure another in his trade or business. If no case of deception by means of such misrepresentation can be proved, it is sufficient to prove the probability of such deception, and the Court will readily infer such probability if it be shown that the word or name has been adopted with any intention to deceive. In the absence of such intention, the degree of readiness with which the Court will infer the probability of deception must depend on the circumstances of each particular case, including the nature of the word

(*a*) (1896) 2 Ch. at p. 89. And see *per* Lindley, L. J., at p. 68.
(*b*) 26 P. R. 693, at p. 701.

or name, the use of which is sought to be restrained. It is important for this purpose to consider whether the word or name is *primâ facie* in the nature of a fancy word or name, or whether it is *primâ facie* descriptive of the article in respect of which it is used. It is also important for the same purpose to consider its history, the nature of its use by the person who seeks the injunction, and the extent to which it is or has been used by others. If the word or name is *primâ facie* descriptive or be in general use, the difficulty of establishing the probability of deception is greatly increased. Again, if the person who seeks the injunction has not used the word or name simply for the purpose of distinguishing his own goods from the goods of others, but primarily for the purpose of denoting or describing the particular kind of article to which he has applied it, and only secondarily, if at all, for the purpose of distinguishing his own goods, it will be more difficult for him to establish the probability of deception. But whatever be the nature or history of the word or name, in whatever way it has been used, either by the person seeking the injunction or by others, it is necessary, where there has been no actual deception, to establish at least a reasonable probability of deception. In such cases the action is, in effect, a *quia timet* action, and unless some reasonable probability is established, the proper course is, in my opinion, to refuse an injunction, leaving the plaintiff to his remedy if cases of actual deception afterwards occur."

Cases of true trade mark.

A trade mark is a technical matter, and for there to be an infringement of trade mark there must be a valid trade mark in existence—that is to say, there must not only be such a device in existence as is capable of forming a trade mark, but it must be actually attached to vendible articles in the market (*a*), or, if first used since the Trade Marks Act of 1875, must be properly registered under the Trade Marks Act, 1905, or, if an old mark, must be the subject of a certificate of refusal (*b*).

Cases not of true trade mark.

Where, however, there has been a representation that an article made by A. is made by B., by means of which one person has secured custom intended for another, so that both the purchaser

(*a*) *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307. See also *In re Leonard & Ellis*, 26 Ch. D. 288.

(*b*) See the Trade Marks Act, 1905, § 42. Also *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Batt & Co.*, (1898) 2 Ch. 432; (1899) A. C. 428.

and the genuine trader have been defrauded, there the injury is the same, and 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.

Methods of passing off.

As stated by Kay, L. J. (*a*), and also by Turner, L. J., in *Burgess* v. *Burgess* (*b*), "no man can have any right to represent his goods as the goods of another person." "The most obvious way," said Lord Halsbury, C. (*c*), "in which a man would be infringing the rule laid down by Turner, L. J., is if he were to say in terms, 'these are the goods manufactured by' a rival tradesman; and it seems to be assumed that unless he says something equivalent to that, no action will lie. It appears to me that that is an entire delusion. By the course of trade, by the existence and technology of trade, and by the mode in which things are sold, a man may utter that same proposition, but in different words and without using the name of the rival tradesman at all. A familiar example, of course, is when, without using any name, by the identity of the form of the bottle, or the form of the label, or the nature of the thing sold in the package, he is making the statement, not in the express words, but in one of those different forms in which the statement can be made by something that he knows will be so understood by the public" (*d*).

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 (*e*), 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.

(*a*) See *ante*, p. 271.

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

(*c*) *Birmingham Vinegar Brewery Co.* v. *Powell*, (1897) A. C. 710. And see *Reddaway* v. *Banham*, (1896) A. C. 199. 204.

(*d*) And see *Coats* v. *Merrick Thread Co.*, 149 U. S. 562; *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893, where this principle was applied to a case in which the reputation acquired for the plaintiff's goods was due to the exertions of the defendant.

(*e*) *Per* Wood, V.-C., in *Churton* v. *Douglas*, Johns. 174. And see *Pomeroy, Ld.* v. *Scale*, 24 P. R. 177.

No exclusive right in name apart from business.

"In this country," said Lord Chelmsford (*a*), "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 connection with a trade or business is familiar to our law; and any person using that name, after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or at least of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction." But a man who has never carried on business under a particular name cannot, even though he has some kind of right to use that name, interfere with its being used by another. Thus, where the plaintiff was the mortgagee of the goodwill of a business, including the right to use the name under which the business was carried on, but had never exercised his right so to do (*b*).

Name by which goods identified.

There is another kind of trade name besides the trade name which is synonymous with firm name—viz., the trade name which is applied, not to the firm by whom the goods are manufactured and sold, but to the goods themselves; and it was with immediate reference to a trade name of this description (*c*), though the principles laid down by him are equally applicable to both classes of trade names, that Lord Blackburn (*d*), after referring to frauds committed by the infringement of trade marks, went on to say: "There is another way in which goods not the plaintiff's may be sold as and for the plaintiff's. A name may be so appropriated by user as to come to mean the goods of the plaintiff, though it is not, and never was, impressed on the goods or on the packages in which they are contained, so as to be a trade mark, properly so called, or within the recent statutes. Where it is established that such a trade name bears that meaning, I think the use of that

(*a*) *Du Boulay* v. *Du Boulay*, L. R. 2 P. C. 441. And see *Dockrell* v. *Dougall*, 80 L. T. N. S. 556; *Lore* v. *Latimer*, 32 Ont. R. 231.

(*b*) *Beazley* v. *Soares*, 22 Ch. D. 660. And see *Lore* v. *Latimer*, 32 Ont. R. 231.

(*c*) "Singer" sewing machines.

(*d*) In *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15. And see *Reddaway* v. *Banham*, (1896) A. C. 199; *Grezier* v. *Autran*, 13 P. R. 1; *Rockingham Rail. Co.* v. *Allen*, 12 Times L. R. 345; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710; *Coventry Machinists' Co.* v. *Helsby*, 13 Times L. R. 92; *ib.* 161; *Rickerby* v. *Reay*, 20 P. R. 380; *Rey* v. *Leconturier*, 25 P. R. 265; 27 *ib.* 268; *R. Thorne & Sons, Ld.* v. *Pimms, Ld.*, 26 P. R. 221; *Nova Stearine Co.* v. *Mowling*, 9 V. L. R. (E.) 98; *Noera* v. *Williams' Manufacturing Co.*, 158 Mass. 110; *Cady* v. *Schultz*, 19 R. I. 193; 61 Am. St. Rep. 763.

name, or one so nearly resembling it as to be likely to deceive, as applicable to goods not the plaintiff's, may be the means of passing off those goods as and for the plaintiff's, just as much as the use of a trade mark; and I think the law (so far as not altered by legislation) is the same. And I think it settled by a series of cases that both trade marks and trade names are in a certain sense property, and that the right to use them passes with the goodwill of the business to the successors of the firm which originally established them, even though the name of that firm be changed so that they are no longer strictly correct."

Property in trade name questioned.

It cannot be said to be generally admitted that a right of property can be acquired in a trade name. The Vice-Chancellor of Ireland said (*a*), "it has been repeatedly held that there is no property in the name of a firm, or of an individual, or of a place of business; and that the only right of an individual or firm to the sole use of a trade name, as distinguished from a trade mark, is this, that when a name has become identified, by adoption and user, with a particular trade or manufacture or business, the person who has so used or adopted it can obtain the aid of this Court to restrain the use of it by others in such a way as to lead customers or the public to think that the trade or business of the person so using it is his trade or business." And he went on to say that in a registered trade mark there is a larger right. The distinction, however, does not appear to be of much practical importance, as it is now admitted on all hands that if a trade name is so imitated as to render deception probable, relief will be granted, and the test of infringement of a trade mark, in which the right of property is undoubted, is the production of such a probability of deception (*b*).

Unregistered trade name protected.

The non-registration of trade names of the kind primarily referred to by Lord Blackburn is no bar to an action for the wrongful imitation of them (*c*); and where a trade mark consist-

(*a*) *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236. And see *Reddaway* v. *Banham*, (1896) A. C. 199, 209, 210, *per* Lord Herschell.

(*b*) *Per* Lord Westbury, in *Hall* v. *Barrows*, 4 De G. J. & S. 150. And see *Curtiss* v. *Messler*, 13 A. L. T. 127; *Crawford* v. *Bernard*, 11 P. R. 580; *Cady* v. *Schultz*, 19 R. I. 193; 61 Am. St. Rep. 763.

(*c*) *In re Sanitas Co., Ld.*, 4 P. R. 533; *Reddaway* v. *Bentham Hemp Spinning Co.*, (1892) 2 Q. B. 639; *Eno* v. *Dunn*, 10 P. R. 261; *Huntley & Palmer* v. *Reading Biscuit Co.*, *ib.* 277; *Reddaway* v. *Banham*, (1896) A. C. 199; *Rockingham Rail. Co.* v. *Allen*, 12 Times L. R. 345; *Daniel* v. *Whitehouse*, (1898) 1 Ch. 685; *Beuclay & Co.* v. *Hughes*, 15 P. R. 290; *Worcester Royal Porcelain Co., Ld.* v. *Locke & Co.*, 19 P. R. 479; *Muralo Co.* v. *Taylor*, 27 P. R. 261.

ing of the words "Stone Ale" alone had been expunged from the register as not being registrable, an injunction to restrain the use of those words was nevertheless granted (*a*), and the same thing happened with respect to the words "Yorkshire Relish" (*b*), and "Silver Pan" (*c*).

Form of injunction.

In cases in which unregistered trade names, and not registered trade marks, have been imitated, the usual form of injunction is to prohibit the use of the word "without clearly distinguishing" (*d*) the defendant's goods from the plaintiff's. But if the defendant cannot find an effective method of distinguishing, as may often be the case, he must not use the name at all (*e*).

Descriptive words become distinctive. *Reddaway* v. *Banham*.

The case of *Reddaway* v. *Banham* (*f*), has established (*g*) that a name which in its primary sense is a correct description of the goods to which it is applied, may possibly acquire in the trade a technical signification identifying it with the goods of a particular manufacturer, so as to be entitled to protection upon the principles above stated. In that case the plaintiff had for many years manufactured a belting from yarn consisting mainly of camel's hair and sold it under the name of "Camel hair belting." The defendant, who was formerly in the employment

(*a*) *Thompson* v. *Montgomery*, 41 Ch. D. 35; (1891) A. C. 217; *Thompson* v. *Bent's Brewery Co.*, 8 P. R. 479; *In re Thompson*, 13 *ib.* 35. And see *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 *ib.* 389; and *In re Magnolia Metal Co.*, (1897) 2 Ch. 371; *Godillot* v. *American Grocery Co.*, 71 Fed. Rep. 873; and *Sparks* v. *Harper*, 3 Queens. L. J. 158, 201. See also *Bayer* v. *Baird*, 15 P. R. 615, where a disclaimer of the exclusive right to certain initials as part of a trade mark was held in Scotland to be no bar to an action to restrain a rival trader from using those initials in such a way as to pass off his goods as the goods of the plaintiff; and *Birmingham Small Arms Co., Ld.* v. *Webb & Co.*, 24 P. R. 27, where certain initials, which being printed in the usual manner were under the Acts then in force incapable of registration, had come to denote the plaintiffs' goods, and an injunction was granted to restrain the use of the same initials in a different order. The initials in question are now registered under the wider provisions of the Act of 1905. See *In re Birmingham Small Arms Co., Ld.*, 24 P. R. 563. In *Aerated Bread Co., Ld.* v. *Aerated Bakeries (Manchester), Ld.*, Eady, J., Oct. 22, 1909, an injunction was granted to restrain the defendants from passing off by using the letters "A B C," and the injunction was made perpetual at the hearing (Neville, J., Nov. 20, 1909). In *Reynier* v. *Bide*, Neville, J., Nov. 20, 1909, the name protected was "Jössefors, Ld." for gloves.

(*b*) In *In re Powell*, (1893) 2 Ch. 388; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710.

(*c*) *In re Faulder & Co., Ld.*, 18 P. R. 37, 535; *Faulder & Co., Ld.* v. *O. & G. Rushton, Ld.*, 20 P. R. 477, 491.

(*d*) See *Thompson* v. *Montgomery*, (1891) A. C. 217; *Magnolia Metal Co.* v. *Atlas Metal Co.*, 14 P. R. 389; *Kinnell* v. *Ballantine*, 27 P. R. 185, and many other cases.

(*e*) *Powell* v. *Birmingham Vinegar Brewery Co.*, (1893) 2 Ch. 54; (1897) A. C. 710.

(*f*) (1896) A. C. 199.

(*g*) This is quite in accordance with the cases relating to geographical words, *e.g.*, "Glenfield Starch" (*Wotherspoon* v. *Currie*, L. R. 5 H. L. 508); "Stone Ale" (*Thompson* v. *Montgomery*, (1891) A. C. 217).

of the plaintiff, afterwards manufactured a similar belting on his own account, and sold it under the same name, and the correspondence showed that he did this *malâ fide*. The jury found that the phrase "Camel hair belting" meant camel hair belting made by the plaintiff as distinguished from belting made by other manufacturers, and did not mean belting of a particular kind without reference to the maker, and that the defendant so described his belting as to be likely to mislead purchasers into buying his belting for the plaintiff's. Upon these findings, Collins, J., granted an injunction. This judgment was reversed by the Court of Appeal on the ground that a manufacturer could not be restrained from calling his goods by a name which correctly described them, but when the case came before the House of Lords the original judgment was restored. Lord Halsbury, C., after referring to the principle of law laid down by Turner, L.J., in *Burgess* v. *Burgess* (*a*), said: "How far the use of particular words, signs, or pictures, does or does not come up to the proposition which I have enunciated in each particular case must always be a question of evidence, and the more simple the phraseology, the more like it is to be a mere description of the article sold, the greater becomes the difficulty of proof (*b*); but if the proof establishes the fact the legal consequences appear to follow." Lord Herschell dealing with the same point said: "The name of a person or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer, would deceive a purchaser into the belief that he was getting the goods of A., when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this, I think he would, on well established principles, be entitled to an injunction (*c*).

(*a*) 3 De G. M. & G. 896. See *ante*, p. 275.

(*b*) See *Cellular Clothing Co.* v. *Maxton & Murray*, (1899) A. C. 326; *Winser & Co.*, *Ld.* v. *Armstrong*, 16 P. R. 167; *A. W. Gamage, Ld.* v. *H. E. Randall, Ld.*, *ib.* 185.

(*c*) Some recent examples of cases in which injunctions were granted on this

In my opinion, the doctrine on which the judgment of the Court of Appeal was based, that where a manufacturer has used as his trade mark a descriptive word, he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are getting the goods of the manufacturer who has theretofore employed it as his trade mark, is not supported by authority, and cannot be defended on principle." Lord Herschell then dealt with the view taken by the Court of Appeal, that the defendants could not be liable to an action because in using the words "camel hair" in connection with their belting they were simply telling the truth. As to that he said: "I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it, and be known and intended to understand it in its secondary sense, it will none the less be a falsehood that in its primary sense it may be true."

Difficulty of descriptive words becoming distinctive. *Cellular Clothing Co.'s case.*

But the extreme difficulty of proving that a word which is merely descriptive or expressive of the quality of the goods has acquired a secondary meaning was emphasized in the subsequent case of *Cellular Clothing Co.* v. *Maxton and Murray* (*a*), in which Lord Davey said: "There are two observations which must be made: one is that a man who takes upon himself to prove that words, which are merely descriptive or expressive of the

principle are the following: *Reddaway* v. *Ahlers*, 19 P. R. 12; *Reddaway* v. *Frictionless Engine Packing Co.*, 19 P. R. 505; *Reddaway* v. *Robert Stevenson & Bros., Ld.*, 20 P. R. 276; *Smidt* v. *Reddaway*, 32 Calo. 401 ("Camel Hair" or "Karmal Hair" in connection with belting); *Faulder & Co.* v. *O. & G. Rushton, Ld.*, 20 P. R. 477 ("Silver Pan" jam); *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, 32 Can. Sup Ct. 315, where the injunction was granted as to the name of the company, the ground of the injunction being that the plaintiffs' shoes had become known as "Bostons," which name had been fraudulently appropriated by the defendants. See and compare *H. E. Randall, Ld.* v. *British and American Shoe Company*, (1902) 2 Ch. 354, and *H. E. Randall, Ld.* v. *E. Bradley & Son*, 24 P. R. 657, 773.

(*a*) (1899) A. C. 326. Accordingly injunctions were refused in respect of the following words: "Flaked oatmeal" (*Parsons* v. *Gillespie*, (1898) A. C. 239); "Oval Blue" (*Ripley* v. *Griffiths*, 19 P. R. 590); "Naphtha" soap (*Fels* v. *Hedley & Co.*, 20 P. R. 437; 21 P. R. 91; *Fels* v. *Stephenson Bros.*, 20 P. R. 443; 21 P. R. 89; *Fels* v. *Christopher Thomas & Bros., Ld.*, 20 P. R. 447; 21 P. R. 85); "Erect Form" corsets (in common type) (*Weingarten* v. *Bayer*, 20 P. R. 649; 22 P. R. 341; *Weingarten* v. *Rosenthal*, 21 P. R. 212); "Slip-on" garments (*Burberrys* v. *Cording*, 26 P. R. 693. And see *Aerators, Ld.* v. *Tollitt*, (1902) 2 Ch. 319; *S. Chivers & Sons* v. *S. Chivers & Co., Ld.*, 17 P. R. 420; *Warwick Trading Co.* v. *Urban*, 21 P. R. 240; *Hommel* v. *Gebrüder Bauer*, 22 P. R. 43; *Plotzker* v. *Lucas*, 24 P. R. 551; *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.*, 24 P. R. 641; *Electromobile Co., Ld.* v. *British Electromobile Co., Ld.*, 25 P. R. 149; *Wilson* v. *Lyman*, 25 Ont. App. R. 303; *Gillett* v. *Lumsden*, 8 Ont. L. R. 168; *Standard Co.* v. *Standard Co.*, P. C., Nov. 3rd, 1910.

quality of the goods, have acquired the secondary sense to which I have referred, assumes a much greater burden—and, indeed, a burden which it is not impossible, but at the same time extremely difficult, to discharge—a much greater burden than that of a man who undertakes to prove the same thing of a word not significant and not descriptive, but what has been compendiously called a 'fancy' word.

The other observation which occurs to me is this: that where a man produces or invents, if you please, a new article and attaches a descriptive name to it—a name which, as the article has not been produced before, has, of course, not been used in connection with the article—and secures for himself either the legal monopoly or a monopoly in fact of the sale of that article for a certain time, the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the plaintiff's goods alone is of a very slender character, for the simple reason that the plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it, and anybody who wanted the goods had no shop to go to, or no merchant or manufacturer to resort to, except the plaintiff. And on this point I adopt what was said in felicitous language by Fry, L.J., in *Siegert* v. *Findlater* (*a*). That is, my Lords, a matter of express decision in the case of a patent. If a man invents a new article and protects it by a patent, then during the term of the patent he has, of course, a legal monopoly; but when the patent expires all the world may make the article, and if they may make the article they may say that they are making the article, and for that purpose use the name which the patentee has attached to it during the time when he had the legal monopoly of the manufacture. But the same thing in principle must apply where a man has not taken out a patent, as in the present case, but has a virtual monopoly because other manufacturers, although they are entitled to do so, have not in fact commenced to make the article. He brings the article before the world, he gives it a name descriptive of the article; all the world may make the article, and all the world may tell the public what article it is they make, and for that purpose they may *primâ facie* use the name by which the article is known on the market."

(*a*) 7 Ch. D. 801, at p. 813.

Double user.

It seems that under ordinary circumstances a geographical word which has been so used that it may mean the goods of either A. or B. will not be protected at the instance of either or both of them (*a*).

Fraud not necessary to be proved.

It was formerly sometimes supposed, and was held by Sir G. Jessel, M. R., and the Court of Appeal, in *Singer Manufacturing Co.* v. *Wilson* (*b*), that for an action to restrain the use of a trade name to be successful fraud must be proved, on the ground that, when a trade mark was once affixed to the goods, it passed with the goods from hand to hand, thus silently repeating to each successive purchaser the original misrepresentation of the original infringer, while the improper use of a name not affixed to the goods was not the necessary consequence of being in possession of marked goods, but was the individual act of each person who used it in respect of the goods; so that there might be held to be an infringement of a trade mark when, in analogous circumstances, there would be no infringement of a trade name. And when the case of *Singer Manufacturing Co.* v. *Wilson* was remitted by the House of Lords to the Court of First Instance (*c*), on the ground of insufficiency of evidence, some of the law peers seem to have thought that different principles of law might possibly be applicable to trade marks and trade names. But Lord Cairns, C. (*d*), said: "It may well be that if an imitated trade mark is attached to the article manufactured, there will from that circumstance be the certainty that it will pass into every hand into which the article passes, and be thus a continuing and ever present representation with regard to it; but a representation made by advertisements that the articles sold at a particular shop are articles manufactured by A. B. (if that is the legitimate effect of the advertisements, which is

(*a*) *Whitstable Oyster Fishery Co.* v. *Hayling Fisheries, Ld.*, 17 P. R. 461; 18 P. R. 434; *Grand Hotel of Caledonia Springs* v. *Wilson*, (1904) A. C. 103, 110; *Hopton Wood Stone Firms, Ld.* v. *Gething*, 27 P. R. 605. In *Worcester Royal Porcelain Co., Ld.* v. *Locke*, 19 P. R. 479, the separate businesses had been united for a substantial time before action brought.

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

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

(*d*) *Ib.* 389. And see *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236; 7 *ib.* 31; *Reddaway* v. *Bentham Spinning Co.*, (1892) 2 Q. B. 639; *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710. Though proof of fraudulent intent is not necessary it may have a great influence in convincing the Court that the name claimed to be distinctive is so in fact: *Cellular Clothing Co.* v. *Maxton & Murray*, (1899) A. C. 326, 334, 341. See also *S. Chivers & Sons* v. *S. Chivers & Co.*, 17 P. R. 420; *Ripley* v. *Griffiths*, 19 P. R. 590; *Plotzker* v. *Lucas*, 24 P. R. 551, 560; *H. F. Randall, Ld.* v. *E. Bradley & Son*, 24 P. R. 773, 781. In many cases in which an injunction has been granted on the principle of *Reddaway* v. *Banham*, (1896) A. C. 199, a fraudulent intent has in fact been proved.

a separate question) must, in my opinion, be as injurious in principle, and may possibly be quite as injurious in operation, as the same representation made upon the articles themselves." And in *Singer Manufacturing Co.* v. *Loog* (*a*), Lord Blackburn took the view that the law of trade marks and trade names when not affected by legislation was the same.

False representation sufficient.

Whether there is or is not property in a trade name, as Lord Blackburn suggested (*b*), 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 (*c*). The question is not whether the defendant's business is represented as being similar to the plaintiff's, but whether it is represented as being that very identical business (*d*). If such a false representation has been made, whatever may have been the motive of the persons making it, when proceedings are taken in consequence of it, "all the Court requires is to be satisfied that the names are so similar as to be calculated to produce confusion between the two—so calculated to do it that, when it is drawn to the attention of those adopting the name complained of that that would be the result, it is not honest for them to persevere in their intention, though originally the intention might not have been otherwise than honest" (*e*).

Act originally innocent may become fraudulent.

"The question is this," said Cotton, L. J., in the Court of Appeal (*f*),—"whether the defendant has represented that the goods manufactured by him were manufactured by the plaintiffs, or whether he has done anything calculated so to represent. I quite agree that it is unnecessary that a fraudulent intention in issuing the circulars complained of should be established. If the

(*a*) 8 App. Cas. 15.

(*b*) And see *per* the Court of Session in *Singer Manufacturing Co.* v. *Kimball & Morton*, Ct. of Sess. Cas. 3rd Ser. XI. 267; also *Boulnois* v. *Peake*, 13 Ch. D. 513.

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

(*d*) *Cruttwell* v. *Lye*, 17 Ves. 335; *Churton* v. *Douglas*, Johns. 174; *Civil Service Supply Association* v. *Dean*, 13 Ch. D. 512; *Hirsch* v. *Hirsch & Co.*, 80 L. T. (Journal) 283; *Magnolia Metal Co.* v. *Tandem Smelting Co.*, 17 P. R. 477. See *Manchester Brewery Co.* v. *North Cheshire & Manchester Brewery Co.*, (1898) 1 Ch. 539; (1899) A. C. 83, where an injunction was granted restraining the defendant company from using a name which suggested that the plaintiff company had been amalgamated with them. And see *Army & Navy Co-operative Society, Ld.* v. *Army, Navy & Civil Service Co-operative Society of South Africa, Ld.*, 19 P. R. 574.

(*e*) *Per* James, L. J., in *Hendriks* v. *Montagu*, 17 Ch. D. 638. And see *Manchester Brewery Co.* v. *North Cheshire & Manchester Brewery Co.*, (1898) 1 Ch. 539; *Bayer* v. *Baird*, 15 P. R. 615.

(*f*) In *Singer Manufacturing Co.* v. *Loog* (3), 18 Ch. D. 417; and see *Carr & Sons* v. *Crisp & Co., Ld.*, 19 P. R. 497.

natural consequence of those things, even in circumstances not known to him, is that they will represent the goods to be those of another person, it is wrongful, and, as this Court says, a fraud in him, to continue the user after those circumstances are brought to his knowledge. We must consider whether he has represented, or done that which is reasonably calculated to give that misrepresentation." In the same spirit, Wood, V.-C., had laid down long previously (*a*) that if the plaintiffs had represented to the defendants that the course which the latter had been taking was calculated to deceive the public, and, "after such representation, the defendants persisted in continuing the use of the name in the same manner, then, on the plaintiffs' bringing the case before the Court, the Court would be justified in saying that that which was not fraudulent at first became so by the defendants' persisting in the same course, and that therefore the plaintiffs would be entitled to the relief they claimed."

But deception must be probable.

The circumstances must, however, be such as to satisfy the Court that deception is probable, and where that is not adequately made out, relief will be refused. Thus, in *Goodfellow* v. *Prince* (*b*), a London wine merchant agreed with a firm of French wine growers to import from them a particular growth of champagne under a label bearing the assumed name "Le Court et Cie, Reims," and sold considerable quantities of wine in England under the label, and another London wine merchant began to import champagne from a different French grower and to sell it in England under a label also bearing the assumed name of "Le Court et Cie"; and it was held by the Court of Appeal that, whether the use of the name by the defendant might or might

(*a*) In *Williams* v. *Osborne*, 13 L. T. N. S. 498. And see *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236; *Huntley & Palmer* v. *Reading Biscuit Co.*, 10 P. R. 277; *In re Paine* (2), (1893) 2 Ch. 567; *Pinet* v. *Maison Pinet* (2), (1898) 1 Ch. 179; *Bayer* v. *Baird*, 15 P. R. 615; *Birmingham Small Arms Co., Ld.* v. *Webb & Co.*, 24 P. R. 27; *Magee Furnace Co.* v. *Le Barron*, 127 Mass. 115; and *Holt* v. *Menendez*, 128 U. S. 182.

(*b*) 35 Ch. D. 9. And see *California Fig Syrup Co.* v. *Taylor Drug Stores*, 14 P. R. 564; *Attenborough* v. *Jay*, 14 Times L. R. 439; *London General Omnibus Co.* v. *Lavell*, (1901) 1 Ch. 135; *Wolff* v. *Nopitsch*, 18 P. R. 27; *Cooper & McLeod* v. *Maclachlan*, 18 P. R. 380; 19 P. R. 27; *Goodwin* v. *Ivory Soap Co.*, 18 P. R. 387; *Findlater, Mackie, Todd & Co.* v. *Newman*, 19 P. R. 235; *Macmillan* v. *Ehrmann Bros., Ld.*, 21 P. R. 357, 647; *Warwick Trading Co.* v. *Urban*, 21 P. R. 240; *Imperial Tobacco Co. of Great Britain and Ireland, Ld.* v. *Purnell & Co.*, 21 P. R. 368, 598; *Neostyle Mfg. Co., Ld.* v. *Ellam's Duplicator Company*, 21 P. R. 569; *Silicate Paint Co*, v. *Smith*, 23 P. R. 143; *Gawthorp* v. *Mason*, 23 P. R. 401; *Reddaway* v. *Irvell and Eastern Rubber Co., Ld.*, 24 P. R. 203; *National Cash Register Co., Ld.* v. *Theeman*, 24 P. R. 211; *Star Cycle Co., Ld.* v. *Frankenburgs*, 24 P. R. 46, 405; *Burberrys* v. *Cording*, 26 P. R. 693; *Hunt, Roope & Co.* v. *Ehrmann*, 27 P. R. 512; *Griffiths* v. *Frankenburg*, 27 P. R. 733. Cf. *Richards* v. *Butcher* (1), 7 P. R. 288.

not represent that his wine was manufactured by the same French grower who manufactured the plaintiff's wine, there was nothing to show that it represented that the wine was imported by the same importer. And in *Bodega Co., Ld.* v. *Owens* (*a*), the V.-C. of Ireland held on motion that, there being in Ireland only one establishment of the plaintiff company known as a Bodega, which was in Dublin, there was no such probability of deception, if the defendant were allowed to open a "Bodega" in Belfast, as to call for an injunction to prevent the latter from so doing. But at the hearing of the action, on further evidence, an injunction was granted. A defendant is not responsible for improper conduct on the part of his predecessors in title which he has not himself repeated (*b*).

This may be affected by lapse of time.

Lapse of time may be material in considering whether deception is probable. Thus, where the Marquis of Londonderry and his predecessors in title, owners of the Londonderry collieries in the county of Durham, had for many years been in the habit of selling their coal in London, wholesale but not retail, and the defendant, a coal merchant, had, with the knowledge of the Marquis and his predecessors in title, been in the habit, since 1861, of selling retail a particular quality of coal, not obtained from the Londonderry collieries, under the name of "Londonderry Wallsend," or "Londonderry W. E.," and the Marquis had begun in February, 1885, to sell retail in London coal got from a particular seam under the name of "Londonderry Wallsend," an injunction to restrain the defendant from selling his coal by the names which he had been accustomed to use was refused, on the ground that, having regard to the lapse of time, there was no misrepresentation, notwithstanding that the plaintiff's title formed part of the names, and that he was the owner of the Londonderry collieries (*c*).

Evidence of intention to deceive, when superfluous.

If in an action to restrain the use of a trade name the defendant's goods, on the face of them, and having regard to the surrounding circumstances, are calculated to deceive, "no evidence is required to prove the intention to deceive, nor ought time and money to be expended on any such defence. The sound rule is that a man must be taken to have intended the reasonable and natural consequences of his acts, and no more is wanted. If,

(*a*) 6 P. R. 236; 7 *ib.* 31.

(*b*) *Paterson* v. *Kit Coffee Co.*, 27 P. R. 594.

(*c*) *Marquis of Londonderry* v. *Russell*, 3 Times L. R. 360. And see *Ford* v. *Foster*, L. R. 7 Ch. 611, 628, *per* Mellish, L. J.; *Cropper Minerva Machines Co.* v. *Cropper, Charlton & Co.*, 23 P. R. 388; *London General Omnibus Co.* v. *Lavell*, (1901) 1 Ch. 135.

on the other hand, a mere comparison of the goods, having regard to the surrounding circumstances, is not sufficient, then it is allowable to prove from other sources that what is or may be apparent innocence is really intended to deceive" (*a*). In such cases it is important to examine the motive, because, as was said by Farwell, J., "it does not lie in the mouth of a rogue, when he is found to be a rogue in fact, to say that his roguery was so clumsy that it could not possibly succeed" (*b*). As has often been said, if a man is shown to be fraudulent, the Court may well adopt his own view that the steps which he himself thought sufficient to accomplish his object would be likely to do so.

What evidence admissible.

The question as to what evidence is admissible to satisfy the Court that the defendant's conduct is calculated to cause deception, has been much considered. Formerly it was usual for persons in the trade to be regarded as experts, and to be allowed to state their opinion as to what would be likely to happen. At the present time the prevailing view is that such persons cannot be treated as experts, and that mere statements of opinion are not admissible, as the question whether deception is likely to occur or not is for the Court. Evidence of persons in the trade is, however, admitted to prove the manner in which the trade is carried on, the class of customers, the points to which these are accustomed to look, and, in short, any matters of fact which may assist the Court in coming to its own conclusion (*c*). The language of the Merchandise Marks Act, 1887, s. 2 (2), is to prohibit the use of anything which is "reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they

(*a*) *Saxlehner* v. *Apollinaris Co.*, (1897) 1 Ch. 893, *per* Kekewich, J. And see *Martell & Co.* v. *Paarl Wine & Spirit Co.*, 12 Cape Good Hope, 326.

(*b*) *S. Chivers & Sons* v. *S. Chivers & Co., Ld.*, 17 P. R. 420, 427. And see *Payton & Co., Ld.* v. *Snelling, Lampard & Co.*, 17 P. R. 48: (1901) A. C. 308; *Iron-Ox Remedy Co., Ld.* v. *Co-operative Wholesale Soc., Ld.*, 24 P. R. 425: *Hennessy & Co.* v. *Keating*, 25 P. R. 125, 136; *Royal Insurance Co., Ld.* v. *Midland Insurance Co., Ld.*, 26 P. R. 95. See and compare *H. E. Randall, Ld.* v. *British & American Shoe Co.*, (1902) 2 Ch. 354; and *H. E. Randall, Ld.* v. *E. Bradley & Son*, 24 P. R. 771.

(*c*) See *North Cheshire & Manchester Brewery Co.* v. *Manchester Brewery Co.*, (1899) A. C. 83; *London General Omnibus Co.* v. *Lavell*, (1901) 1 Ch 135; *Payton & Co., Ld.* v. *Snelling, Lampard & Co.*, (1901) A. C. 308: *Alaska Packers' Association* v. *Crooks & Co.*, 18 P. R. 129; *Bourne* v. *Swan & Edgar*, (1903) 1 Ch. 211: *Cropper Minerva Machines Co.* v. *Cropper, Charlton & Co.*, 23 P. R. 388: *Hennessy & Co.* v. *Keating*, 25 P. R. 125, 361; *Royal Insurance Co., Ld.* v. *Midland Insurance Co., Ld.*, 25 P. R. 728; 26 P. R. 95; *St. Mungo Co.* v. *Piper Co.*, 27 P. R. 420; and many other cases. See also T. M. A. 1905, s. 43.

really are," and trade experience would usually assist the Court in deciding what is "reasonably calculated" to deceive.

Name of company.

When the name which is alleged to have been imitated is that of a company, and is composed of such words as are in ordinary use in the language, very clear evidence indeed of probability of deception will be required for an action for infringement to be successful. Thus, where a bill was filed by the London and Provincial Law Assurance Society against the London and Provincial Joint Stock Life Assurance Company (*a*), 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 (*b*), and by the London Assurance Company against The London and Westminster Assurance Corporation, Limited (*c*), the injunction was simply refused. In *Lee* v. *Haley* (*d*), 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 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 (*e*).

(*a*) *London & Provincial Law Assurance Society* v. *London & Provincial Joint Stock Life Assurance Co.*, 17 L. J. Ch. 37. In *Purser* v. *Brain*, 17 L. J. Ch. 141, it was held that the circulars of "The London Patent Manure Co." were clearly fraudulent imitations of those of "The London Manure Co.," but the case was sent to a jury for the purpose of deciding whether the plaintiffs' user of their title had been sufficiently long. And in *Lawson* v. *Bank of London*, 18 C. B. 84, a case at Common Law, the plaintiff was defeated on the ground of a want of averment in the declaration that he was a banker or had ever carried on that business; but Willes, J., remarked that "he was not prepared to say that the defendant would not be liable if the cause of complaint were properly alleged."

(*b*) *Colonial Life Assurance Co.* v. *Home & Colonial Assurance Co.*, 33 Beav. 548.

(*c*) *London Assurance Co.* v. *London & Westminster Assurance Corporation*, 32 L. J. Ch. 664.

(*d*) L. R. 5 Ch 155

Injunctions granted.

(*e*) See *Churton* v. *Douglas*, Johns. 174. In *Hendriks* v. *Montagu*, 17 Ch. D. 638, an injunction was granted at the instance of "The Universal Life Assurance Society" to restrain the use of the name "The Universe Life Assurance Association, Ld.," on the ground of similarity: in *Simpson* v. *Anglo-Indian Tea Co., Ld.*, Bacon, V.-C., May 4th, 1883, the defendant company was not allowed to trade under the name which it had taken, which was the same as that under which the plaintiff was trading; in *Guardian Fire & Life Assurance Co.* v. *Guardian & General Insurance Co., Ld.*, 50 L. J. Ch. 252, it was

Descriptive name of company.

In *Australian Mortgage, Land & Finance Co.* v. *Australian & New Zealand Mortgage Co.* (*a*), the Court of Appeal pointed

held that the defendant company's name was likely to deceive, but that the name of "The Guardian Horse, Vehicle and General Insurance Co." might fairly be taken; in *Capital & Counties Bank, Ld.* v. *Capital & County Deposit Bank*, Chitty, J., Feb. 9th, 1884, an injunction was granted to restrain the use of the latter name; in *Accident Insurance Co., Ld.* v. *Accident, Disease & General Insurance Corporation, Ld.*, W. N. 1884, p. 191, Pearson, J., granted an injunction, and on appeal an order was taken by consent, the defendants agreeing to place some other word than "Accident" at the head of their title: in *Thompson* v. *Improved French Dye-Cleaning & Dyeing Co., Ld.*, 30 Sol. J. 753, the plaintiff was carrying on business at Brixton as "The French Dyeing & Cleaning Co.," and the defendants were carrying on business in Great Portland Street under the name above, and using the address "Brixton" on their trade papers, and an injunction was granted. So, also, in *Sanitas Co., Ld.* v. *Condy*, 4 P. R. 195, 533, in which the plaintiffs were "The Sanitas Co., Ld.," and the defendant began to trade as "The Condisanitas Co."

Injunctions were also granted in *Rendle* v. *Rendle & Co., Ld.*, 63 L. T. N. S. 94; *Army & Navy Co-operative Society, Ld.* v. *Army & Navy Civil Service Co-operative Society of India, Ld.*, 8 P. R. 426, 472; *Premier Cycle Co., Ld.* v. *Premier Tube Co., Ld.*, 12 Times L. R. 481; *Brinsmead* v. *Brinsmead, ib.* 631; 13 *ib.* 3; *Dunlop Pneumatic Tyre Co., Ld.* v. *Dunlop-Truffault Cycle & Tube Manufacturing Co.*, 40 Sol. J. 544; *Same* v. *Dunlop Lubricant Co.*, 16 P. R. 12; *Eastman Photographic Materials Co.* v. *Griffiths' Cycle Co.*, 15 P. R. 165, where the Kodak Cycle Co. were restrained from using "Kodak," which had become identified with the plaintiff company; *National Folding Box & Paper Co.* v. *National Folding Box Co.*, 43 W. R. 156, where the fact that the word "National" was intended to refer to different nations in the two cases was held immaterial, inasmuch as both companies sold their goods in this country; *Manchester Brewery Co.* v. *North Cheshire & Manchester Brewery Co.*, (1898) 1 Ch. 539; (1899) A. C. 83, where the defendant company succeeded to the business of the North Cheshire Brewery Company, and the ground of the decision was that the name of the defendant company would induce the belief that it had been formed by an amalgamation of the plaintiff company with the North Cheshire Company, and that the plaintiff company had ceased to have any separate existence; *Valentine Meat Juice Co.* v. *Valentine Extract Co., Ld.*, 17 P. R. 673; *La Société Anonyme des Anciens Etablissements Panhard Levassor* v. *Panhard Levassor Motor Co., Ld.*, (1901) 2 Ch. 513; *Grant* v. *Levitt*, 18 P. R. 361; *H. E. Randall, Ld.* v. *British & American Shoe Co., Ld.*, (1902) 2 Ch. 354; *Army & Navy Co-operative Society, Ld.* v. *Army, Navy & Civil Service Co-operative Society of South Africa, Ld.*, 19 P. R. 574; *International Plasmon, Ld.* v. *Plasmonade, Ld.*, 22 P. R. 543; *Daimler Motor Co.* (1904) *Ld.* v. *London Daimler Co., Ld.*, 24 P. R. 379; *Fine Cotton Spinners & Doublers' Association, Ld.* v. *Harwood, Cash & Co., Ld.*, 24 P. R. 533; *Toms* v. *Merchant Service Guild, Ld.*, 25 P. R. 474; *Resartus Co.* v. *Sartor Resartus Co.*, 25 P. R. 808; *Standard Bank of South Africa* v. *Standard Bank, Ld.*, 26 P. R. 310; *Ouvah Ceylon Estates, Ld.* v. *Uva Ceylon Rubber Estates, Ld.*, 27 P. R. 645, affirmed C. A. Oct. 21, 1910; *Hopton Wood Stone Firms, Ld.* v. *Gething*, 27 P. R. 605 (in which Parker, J., thought that prefixing the word "New" to the defendant's title would afford a sufficient distinction); *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, 32 Can. Sup. Ct. 315; *Mount Balfour Copper Mines no Liability* v. *Mount Balfour Mines no Liability* (1909), V. L. R. 542. And see *Braham* v. *Beachim*, 7 Ch. D. 848 ("Radstock Colliery Proprietors"): *Campbell* v. *Hollins*, Dig. 548 ("Minton & Co.").

(*a*) W. N. 1880, p. 6. So, also, *per* the Supreme Court of the U. S. in *Goodyear Rubber Co.* v. *Goodyear India-rubber Glove Manufacturing Co.*, 128 U. S. 598. And see *Aerators, Ld.* v. *Tollitt*, (1902) 2 Ch. 319, which shews that, speaking generally, the principles of *Reddaway* v. *Banham*, (1896) A. C. 199, as explained in *Cellular Clothing Co.* v. *Maxton & Murray*, (1899) A. C. 326, apply as much to a name of a company as to a name given to a particular class of goods; *Plotzker* v. *Lucas*, 24 P. R. 551; *British Vacuum Cleaner Co., Ld.* v. *New Vacuum Cleaner Co., Ld.*, 24 P. R. 641; *H. E. Randall, Ld.* v. *E. Bradley & Son*, 24 P. R. 773; *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, 32 Can. Sup. Ct. 315.

out the difficulty of monopolising the exclusive use of a name which correctly described the nature of a company's business, or the locality of its operations. And in *India & China Tea Co.* v. *Teede* (*a*), it was held that a firm of tea merchants were entitled to assume the name of "The India & China Packet Tea Co." notwithstanding that the name of the plaintiff company was as above, the name assumed by the defendants being simply descriptive, and there being no evidence of deception (*b*).

The Companies (Consolidation) Act, 1908.

By § 8 of the Companies (Consolidation) Act, 1908, replacing § 20 of the Companies Act, 1862, it is enacted that "a company may not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved, and signifies its consent in such manner as the registrar requires: if any company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with

(*a*) W. N. 1871, p. 241.

Injunctions refused.

(*b*) In the following cases injunctions were refused:—*London & County Banking Co.* v. *Hampshire & North Wilts Bank*, Dig. 618, in which the defendant company was proposing to take the name of "The Capital & Counties Bank"; *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank, Ld.*, 9 Ch. D. 560; *Army & Navy Co-operative Society, Ld.* v. *Junior Army & Navy Stores, Ld.*, Dig. 640; *Australian Mortgage, Land & Finance Co.* v. *Australian & New Zealand Mortgage Co.*, W. N. 1880, p. 6; *Midland Electric Light & Power Co.* v. *Brush Midland Electric Light & Power Co.*, 26 Sol. J. 465; *Provident Association of London, Ld.* v. *London & Provincial Provident Association, Ld.*, 30 Sol. J. 753; *Bumsted* v. *General Reversionary Co., Ld.*, 4 Times L. R. 621, where the plaintiff sued on behalf of "The General Reversionary & Investment Co.," who carried on an extensive business in London, with country agents, and the defendants were setting up a small business at Liverpool; *California Fig Syrup Co.* v. *Taylor's Drug Co.*, 14 P. R. 564; *Montreal Lithographing Co.* v. *Sabiston*, (1899) A. C. 610; *Daimler Motor Car Co., Ld.* v. *British Motor Traction Co., Ld.*, 18 P. R. 465; *Aerators, Ld.* v. *Tollitt*, (1902) 2 Ch. 319; *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co., Ld.*, 23 P. R. 761; *National Cash Register Co., Ld.* v. *Theeman*, 24 P. R. 211; *Plotzker* v. *Lucas*, 24 P. R. 551; *H. E. Randall, Ld.* v. *E. Bradley & Son*, 24 P. R. 657, 773; *British Vacuum Cleaner Co., Ld.* v. *New Vacuum Cleaner Co., Ld.*, 24 P. R. 641; *Electromobile Co., Ld.* v. *British Electromobile Co., Ld.*, 24 P. R. 688; 25 P. R. 258; *Scottish Union & National Insurance Co.* v. *Scottish National Insurance Co.*, 25 P. R. 560; 26 P. R. 105; *Royal Insurance Co., Ld.* v. *Midland Royal Insurance Co., Ld.*, 25 P. R. 728; 26 P. R. 95; *Meikle* v. *Williamson*, 26 P. R. 775; *Elliott* v. *Expansion of Trade, Ld.*, 27 P. R. 54; *Bendigo & Country District Trustees & Executors Co., Ld.* v. *Sandhurst & Northern District Trustees, Executors & Agency Co., Ld.*, 9 C. L. R. 474; *Goodyear Rubber Co.* v. *Goodyear Indiarubber Glove Manufacturing Co.*, 128 U. S. 598. And see *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766 ("Condy's Fluid Co."); *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748 ("Thorley's Cattle Food Co."); *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Saunders* v. *Sun Life Assurance Co. of Canada*, (1894) 1 Ch. 537, where the Sun Life Assurance Society failed to restrain the defendants from using their full name, but succeeded in restraining them from using any abbreviated form of it.

that by which a company in existence is previously registered, or so nearly resembling it as to be calculated to deceive, the first-mentioned company may, with the sanction of the registrar, change its name" (*a*). This section does not authorise a company to use or register a name so nearly resembling one previously used by another company as to be calculated to deceive, even though the name of the earlier company has not itself been registered (*b*); and, on the other hand, since the section only affects the registration of the name of a company, the rights of a company to a name which has been registered cannot be attacked *under the section*, whatever may be the rights outside the section of another company which has previously used the name (*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*). But in *Olin* v. *Bate* (*e*), the plaintiff Olin failed to succeed in restraining the defendant Bate from carrying on the same profession (the medical) in the same town as himself under the name of Olin, the defendant having so done before the plaintiff came to the town in question. And where "Liebig's Extract of Meat" had come to be the proper designation of an article first invented by Baron Von Liebig, Field, J., affirmed by the Court of Appeal and the House of Lords, declined to restrain a manufacturer of the article from styling his preparation "Baron Liebig's Extract of Meat," and placing on the pots a photograph of the Baron (*f*).

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

(*a*) See *Manchester Brewery Co.* v. *North Cheshire & Manchester Brewery Co.*, (1898) 1 Ch. 539; *Daimler Motor Car Co., Ld.* v. *British Motor Traction Co., Ld.*, 18 P. R. 465; *Daimler Motor Co.* (1904), *Ld.* v. *London Daimler Co., Ld.*, 24 P. R. 379.

(*b*) *Hendriks* v. *Montagu*, 17 Ch. D. 638. See *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Société Anonyme des Anciens Etablissements Panhard et Levassor* v. *Panhard Levassor Motor Co., Ld.*, (1901) 2 Ch. 513; *Toms* v. *Merchant Service Guild*, 25 P. R. 474.

(*c*) *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank, Ld.*, 9 Ch. D. 560.

(*d*) *Per* Turner, L. J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 896. See *Barber* v. *Manico*, 10 P. R. 93; *Pinet* v. *Maison Pinet*, (1898) 1 Ch. 179.

(*e*) 98 Ill. 55; 38 Amer. Rep. 78.

(*f*) *Liebig's Extract of Meat Co.* v. *Anderson*, W. N. 1882, p. 147; *ib.* 1883, p. 185; H. L., July 16th, 1885. Cf. *Richmond Nervine Co.* v. *Richmond*, 159 U. S. 293.

restrained (*a*); and that of the name "The Oldfield Lane Doctor" (*b*); and in *Isaacson* v. *Thompson* (*c*) the plaintiff kept a millinery establishment, as "Madame Elise," which name being imitated by the defendant, an injunction would have been awarded, had not the plaintiff's own delay disentitled her to relief.

Man's own name. Use not restrained unless fraudulent.

In some cases the use of a man's own name may be such as to deceive, and where this is so the person aggrieved is entitled to obtain an injunction against such use of the name (*d*); but "it is a question of evidence in each case whether there is false representation or not" (*e*). It is not sufficient in such cases to show that the use of the name, though honest, may cause confusion. Thus, in *Turton & Sons, Ld.* v. *Turton* (*f*) the plaintiffs carried on an old-established business in Sheffield

(*a*) *Christy* v. *Murphy*, 12 How. Pr. 77; R. Cox. 164; *Montague* v. *Moore*, Seton, 6th ed. 629.

(*b*) *Milner* v. *Reed*, Dig. 328.

(*c*) 41 L. J. Ch. 101. And see *Davis* v. *Rogers*, 89 L. T. (Journal) 292.

(*d*) *Churton* v. *Douglas*, Johns. 174: *Burgess* v. *Burgess*, 3 De G. M. & G. 896: *Fullwood* v. *Fullwood*, W. N. 1873, pp. 93, 185: *Fullwood* v. *Fullwood* (2), 9 Ch. D. 176; *Holloway* v. *Holloway*, 13 Beav. 209; *Pullar* v. *Pullar*, Fry, J., April 9th, 1883; *Melachrino & Co.* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215: *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888; *Nicholls* v *Kimpton*, 3 Times L. R. 674; *Birmingham Vinegar Brewery Co., Ld.* v. *Liverpool Vinegar Co., Ld.*, 4 Times L. R. 613; *Atkinson* v. *Atkinson*, 85 L. T. (Journal) 229; *Warner* v. *Warner*, 5 Times L. R. 359; *Tussaud* v. *Tussaud*, 44 Ch. D. 678: *Rendle* v. *Rendle & Co.*, 63 L. T. N. S. 94; *Edge* v. *Harrison*, 8 P. R. 74; *Otard, Dupuy & Co.* v. *Otard de Montebello Cognac Co*, 9 Times L. R. 295: 10 *ib.* 67; *Brinsmead* v. *Brinsmead*, 12 Times L. R. 631: 13 *ib.* 3; *Pinet* v. *Maison Pinet* (1), 14 P. R. 933; *Dunlop Pneumatic Tyre Co.* v. *Dunlop-Truffault Cycle and Tube Manufacturing Co.*, 40 Sol. J. 544; *Bayer* v. *Baird*, 15 P. R. 615, 627; *J. H. Brooks & Co., Ld.* v. *Norfolk Cycle Co.*, 16 P. R. 523; *Valentine Meat Juice Co.* v. *Valentine Extract Co.*, 17 P. R. 393; *J. & J. Cash, Ld.* v. *Cash*, 19 P. R. 181; *Van Oppen & Co., Ld.* v. *Van Oppen*, 20 P. R. 617; *Rigden* v. *Jones*, 22 P. R. 417; *Joseph Rodgers & Sons* v. *Simpson*, 23 P. R. 297; *Joseph Rodgers & Sons* v. *Hearnshaw*, 23 P. R. 349; *Jameson* v. *Dublin Distillers' Co.*, (1900) I. R. 43; *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306. See *Christie* v. *Christie*, L. R. 8 Ch. 499.

(*e*) *Per* Turner, L. J., in *Burgess* v. *Burgess*, 3 De G. M. & G. 896. And see *Turton & Sons, Ld.* v. *Turton*, 42 Ch. D. 128; *Reddaway* v. *Banham*, (1896) A. C. 199, 211; *Birmingham Vinegar Brewery Co.* v. *Powell*, (1897) A. C. 710; *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, 23 P. R. 761. See *per* Kay, L. J., in *Powell* v. *Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; and other cases.

(*f*) 42 Ch. D. 128. And see *Saunders* v *Sun Life Assurance Co. of Canada*, (1894) 1 Ch. 537; *Crawford* v. *Bernard*, 11 P. R. 580; *Valentine* v. *Valentine*, 32 L. R. Ir. 488; *Jamieson & Co.* v. *Jamieson*, 15 P. R. 169; *Attenborough* v. *Jay*, 14 Times L. R. 365; *ib.* 439; *Montreal Lithographing Co.* v. *Sabiston*, (1899) A. C. 610; *Chivers & Sons* v. *S. Chivers & Co., Ld.*, 17 P. R. 420; *John Dewar & Sons, Ld.* v. *Dewar*, 17 P. R. 341; *Marshall* v. *Sidebotham*, 18 P. R. 43; *H. P. Truefitt, Ld.* v. *Edney*, 20 P. R. 321; *B. Warsop & Sons, Ld.* v. *Warsop*, 21 P. R. 481; *Joseph Lucas, Ld.* v. *Fabry Automobile Co., Ld.*, 23 P. R. 261; *Cropper Minerva Machines Co.* v. *Cropper, Charlton & Co.*, 23 P. R. 388; *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, 23 P. R. 761; *J. B. Williams Co.* v. *H. Bronnley & Co., Ld.*, 26 P. R. 481, 765; *Rosher* v. *Young*, 17 Times L. R. 347; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540.

as Thomas Turton & Sons, Ld., and the defendant John Turton, who had for some years carried on a similar business in the same town as John Turton & Co., took his two sons into partnership, and changed his trade name to John Turton & Sons; and although some confusion was proved, the Court of Appeal held that, the name adopted being a true statement of the composition of the firm, and there being no proof or even allegation of fraud, no injunction could be granted. Lord Esher, M. R., said: "If all that a man does is to carry on the same business (as another trader), and to state how he is carrying it on, that statement being the simple truth, and he does nothing more with regard to the respective names (*a*), he is doing no wrong. He is doing what he has an absolute right by the law of England to do; and you cannot restrain a man from doing that which he has an absolute right by the law of England to do." And Cotton, L. J., added: "The Court cannot stop a man from carrying on his own business in his own name, although it may be the name of a better known manufacturer, when he does nothing at all in any way to try and represent that he is that better known and successful manufacturer." Even if an injunction is granted, it will not absolutely restrain him from trading in his own name, but only from doing so in some particular way (*b*). Further, "if he has established a business in his own name, no element or suspicion of fraud attaches to him if he turns the business into a limited company, and applies to that limited company his own name with the word 'limited,' because the reason for so doing is obvious, that he desires to retain the goodwill which he has gained for that name" (*c*). But where a person has allowed another to use his name, and acquire a reputation under it, he will not afterwards be allowed himself to use his name so as to deceive, nor to empower others to use it so as to produce that result, nor will such others be permitted so to use it. Thus, where one Holbrook, an employé of the Birmingham Vinegar Brewery Co., Ld., had allowed the company to use his name for twelve years as part of the title of their goods—*e.g.*, "Holbrook's

(*a*) See *Lewis's* v. *Lewis*, 45 Ch. D. 281, 284; and *Jamieson & Co.* v. *Jamieson*, 15 P. R. 169. Compare, however, *Reddaway* v. *Banham*, (1896) A. C. 199.

(*b*) *J. & J. Cash, Ld.* v. *Cash*, 19 P. R. 181.

(*c*) *Per* Farwell, J., in *S. Chivers & Sons* v. *S. Chivers & Co.*, 17 P. R. 420. And see *J. & J. Cash, Ld.* v. *Cash*, 19 P. R. 181; *Dunlop Pneumatic Tyre Co. Ld.* v. *Dunlop Motor Co., Ld.*, 24 P. R. 572.

Worcestershire Sauce," "Holbrook's London Relish," "Holbrook's Pure Pickles"—he was not allowed, on leaving their service and entering that of the Liverpool Vinegar Co., Ld., to give the latter a right to use his name as part of the same titles, nor were they allowed so to use it (*a*). And a man may not add to his own name, *e.g.*, "and Sons," so as to create an unfair competition with another firm (*b*).

Lending name to third person.

"There is no instance," said Kay, J., in *Rendle* v. *Rendle & Co.* (*c*), "in which it has been held that a man can lend his name to a third person, and can induce that third person to start business in opposition to someone else who is using that name, and has an established business under that name. Take a well-known name—that of 'Christie' for instance—can a man whose name is Christie, who has never carried on business as an auctioneer on a large scale, say to another man, not having the name of Christie, 'I will lend you my name, and then you can say the business is Christie's, and the justification for your doing so is that I have sold you my name'? As the law of England stands, that will not be allowed. And what is the difference between that—namely, lending your name to an individual—and lending your name to a joint stock company? The fraud is transparent" (*d*).

Evidence of fraud.

Evidence of fraudulent intention was supplied in one case (*e*) by a removal by the defendant into the neighbourhood in which

(*a*) *Birmingham Vinegar Brewery Co., Ld.* v. *Liverpool Vinegar Co., Ld.*, 4 Times L. R. 613. And see *Pratten* v. *Peacock*, N. S. W. 20 L. R. Eq. 147; *Richmond Nervine Co.* v. *Richmond*, 159 U. S. 293.

(*b*) *Dickson* v. *Dickson*, (1909) 1 Ir. R. 185.

(*c*) 63 L. T. N. S. 94.

(*d*) And see *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215; *Otard, Dupuy & Co.* v. *Otard de Montebello Cognac Co.*, 9 Times L. R. 295; 10 *ib.* 67; *Dunlop Pneumatic Tyre Co.* v. *Dunlop-Truffault Cycle & Tube Manufacturing Co.*, 10 Sol. J. 544; *Brinsmead* v. *Brinsmead*, 12 Times L. R. 631; 13 *ib.* 3; *Dunlop Pneumatic Tyre Co., Ld.* v. *Dunlop Lubricant Co.*, 16 P. R. 12; *Valentine Meat Juice Co.* v. *Valentine Extract Co.*, 17 P. R. 673; *Pearks, Gunston & Tee, Ld.* v. *Thompson, Talmey & Co.*, 18 P. R. 185; *Abel Morrall, Ld.* v. *Hessin*, 19 P. R 557; 20 P. R. 429; *Mappin & Webb* v. *Leapman*, 22 P. R. 398; *Fine Cotton Spinners and Doublers' Association, Ld.* v. *Harwood, Cash & Co., Ld.*, 24 P. R. 533. Cf. *Attenborough* v. *Jay*, 14 Times L. R. 365: *ib.* 439.

(*e*) *Fullwood* v. *Fullwood*, W. N. 1873, pp. 93, 185. So where the plaintiff carried on business as "Newman & Co." and the defendant bought a similar business carried on as "H. Newman," and changed the name to "Newman & Co.": *Holt* v. *Smith*, 4 Times L. R. 329. And where the plaintiff dealt in "Warner's Safe Cures," and the defendant, who was also named Warner, bought the goodwill of "Ashton's Gout and Rheumatic Cure," and changed the name to "Warner's Gout and Rheumatic Cure": *Warner* v. *Warner*, 5 Times L. R. 359. And see *Valentine* v. *Valentine*, 31 L. R. Ir. 488, where the defendant set up a rival business in premises recently vacated by the plaintiffs. See, also, *Smith* v. *McBride*, Ct. Sess. Cas. 4th Ser. XVI. 36.

the plaintiff was carrying on his business, and the addition of "and Co." to the name "H. Fullwood," the plaintiff's trade name being "R. J. Fullwood & Co."; and in another case (*a*), in which the same person was plaintiff, by a representation that the business of M. Fullwood and E. Fullwood, trading as "E. Fullwood & Co.," had been established in 1785, and was carried on at Hoxton, those facts being true of the business of R. J. Fullwood & Co., but not of that carried on by the defendants. In a third case (*b*), 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 business was so well known that it was unnecessary to say anything about it; thus, in fact, "representing himself to be the owner of that which he had sold." So, too, it was held to be a 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 (*c*). But where the plaintiff had been for eight years in the habit of engaging Dr. Richter to conduct concerts in London, which the plaintiff advertised and made popular by the name of "Richter Concerts," and in 1887 Dr. Richter declined to continue to act with the plaintiff, and agreed to conduct concerts in London for the defendant, who began to advertise them as "Richter Concerts," it was held that the name "Richter Concerts" meant concerts conducted by Dr. Richter, and was properly applied to the proposed concerts, and that no injunction could be granted (*d*).

Change of name copied.

Where the plaintiff had changed his name to Frank Leslie, and his son had, by his orders, assumed the same name, and the

(*a*) *Fullwood* v. *Fullwood* (2), 9 Ch. D. 176. And see *Van Oppen & Co., Ld.* v. *Van Oppen*, 20 P. R. 617; *Rigden* v. *Jones*, 22 P. R. 417; *Joseph Rodgers & Sons, Ld.* v. *Simpson*, 23 P. R. 297; *Joseph Rodgers & Sons* v. *Hearnshaw*, 23 P. R. 349. Where Robert Minton Taylor, formerly a member of the firm of Minton, Hollins & Co., set up for himself as Robert Minton Taylor & Co., and, on being threatened with legal proceedings, undertook to trade only as Robert Minton Taylor, it was held that a purchaser of R. M. Taylor's business could not carry it on under the style of "The Minton Brick & Tile Co.": *Campbell* v. *Hollins*, Dig. 548.

(*b*) *Churton* v. *Douglas*, Johns. 174.

(*c*) *Boulnois* v. *Peake*, 13 Ch. D. 513. And see *Care* v. *Myers*, Dig. 304; *Atkinson* v. *Atkinson*, 85 L. T. (Journal) 229; *Davis* v. *Rogers*, 89 *ib.* 292.

(*d*) *Franke* v. *Chappell*, 57 L. T. N. S. 141.

plaintiff had afterwards brought out "Frank Leslie's Illustrated News," and other publications of the titles of which his new name formed part, it was held, in America, that there was no ground for restraining the publication by the son of "Frank Leslie Junior's Sporting and Dramatic Times" (*a*). On the other hand, where Dr. Trust had changed his name to Gouraud, but his sons had not changed their name, the latter were restrained from selling a preparation with a statement that it was prepared by Dr. Gouraud's sons, there being a representation which, though not strictly false, was yet calculated to mislead (*b*).

Deceptive circulars.

Again, a fraudulent intention may be shown to exist by the production of deceptive circulars so framed by the defendant as to represent his business to be identical with or a continuation of that carried on by the plaintiff; and such a fraud will be restrained (*c*). Thus, in *Mogford* v. *Courtenay* (*d*), the defendant issued a circular of which the effect was to represent that he was carrying on the business which he had previously carried on in partnership with the plaintiff, although under the partnership articles the entire goodwill vested in the plaintiff on dissolution.

Opening letters.

So, too, one person will not be allowed to defraud another by opening letters addressed to him, and executing orders intended for him (*e*). 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 (*f*).

Fraudulent partnership.

Nor will fraud be permitted to be perpetrated under cover of a

(*a*) *England* v. *New York Publishing Co.*, 8 Daly, 375.

(*b*) *Gouraud* v. *Trust*, 10 N. Y. Sup. Ct. 627.

(*c*) *Churton* v. *Douglas*, Johns. 174; *Stevens* v. *Paine*, 18 L. T. N. S. 600; *Purser* v. *Brain*, 17 L. J. Ch. 141; *Christie* v. *Christie*, L. R. 8 Ch. 499; *Burrows* v. *Foster*, 1 N. R. 156; *Graveley* v. *Winchester*, Seton, 6th ed. 695; *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191: *Rendle* v. *Rendle & Co.*, 63 L. T. N. S. 94; *Rickerby* v. *Reay*, 20 P. R. 380; *Rigden* v. *Jones*, 22 P. R. 417.

(*d*) 45 L. T. N. S. 303.

(*e*) *Scheile* v. *Brakell*, 11 W. R. 796; Seton, 6th ed. 686, 687; *Witt* v. *Corcoran*, *ib.* 686; *England* v. *Curling*, 8 Beav. 129; *Vernon* v. *Hallam*, 34 Ch. D. 748.

(*f*) *Edgington* v. *Edgington*, 11 L. T. N. S. 299.

partnership got up for the purpose of fraud (*a*). Thus, in *Clayton* v. *Day* (*b*), an ironmonger's assistant named Day, and a general shopkeeper named Martin, were not allowed to carry on the business of blacking manufacturers under the name of "Day and Martin," though they were left free to trade as "Martin and Day." Similarly, in *Melachrino* v. *Melachrino Egyptian Cigarette Co.* (*c*), the plaintiff's cigarettes being well known as "Melachrino Cigarettes," a person named Poulides took a brother of the plaintiff into his service, under an agreement by which Poulides was to have the right to use his name, and Poulides then opened a business close to the plaintiffs under the name of "The Melachrino Egyptian Cigarette Co.," and used the name "Melachrino" in various ways calculated to deceive, and an injunction was granted. Again, in *M. Melachrino & Co.* v. *R. Melachrino & Co.* (*d*), Poulides, the defendant in the previous action, went to Egypt as soon as an interlocutory injunction had been granted in that action, and induced a person named Melachrino, who was not connected with the plaintiffs, but was a tobacconist in a small way of business in Alexandria, to enter into partnership with him and come to England to establish a business under the name of "R. Melachrino & Co.," the plaintiffs being "M. Melachrino & Co.," and they used various fraudulent devices. An injunction was again granted. Again, in *Edge* v. *Harrison* (*e*), where the plaintiff had taken out a patent for an invention for wrapping up soluble blue, and the defendants, R. & S. Harrison and Mrs. Edge, the mother-in-law of the latter, conspired together to take out a patent in the name of Mrs. Edge for a similar invention, and used other devices to enable them to pass off their blue as the plaintiff's, damages were awarded and an injunction granted, and an order was made for revocation of the defendants' patent.

Sale over counter: Substitution. Trap-orders.

Where a retail dealer is in the habit of supplying over the counter, in response to orders for articles described by the use of words which indicate the goods of a particular manufacturer,

(*a*) *Croft* v. *Day*, 7 Beav. 84; *Moet* v. *Clybourn*, Dig. 533; *Schweitzer* v. *Atkins*, 37 L. J. Ch. 847; *Dence* v. *Mason*, Dig. 534; 41 L. T. N. S. 573; *Dence* v. *Brand*, W. N. 1881, p. 31; *Edge* v. *Harrison*, 8 P. R. 74; *Dunlop Pneumatic Tyre Co.*, *Ld.* v. *Dunlop Lubricant Co.*, 16 P. R. 12; *Smith* v. *McBride*, Ct. Sess. Cas. 4th Ser. XVI. 36.

(*b*) 26 Sol. J. 43; 76 L. T. (Journal) 79.

(*c*) 4 P. R. 215.

(*d*) Chitty, J., May 29th. 1888.

(*e*) 8 P. R. 74.

goods not made by him, the case is one of substitution, and the continuance of the practice will be restrained by injunction (*a*). Isolated instances of mistakes are, however, not sufficient to establish a wrongful practice (*b*), and in Scotland relief has been refused even where a number of such occurrences have taken place, but where the Court has not been satisfied of a fraudulent intention (*c*). Where a dealer is suspected of such practices it is legitimate to test his course of procedure by giving trap-orders, but when this is done it must be done fairly, and the Court must be satisfied that the dealer understood what was ordered. Written orders are preferable, and if the dealer describes the goods by the proprietary name in his invoices it will have a considerable influence on the result of the proceedings (*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*).

Dissolution of partnership.

On the dissolution of a partnership, if the whole concern and the goodwill are sold, the trade name is sold with them (*f*). But

(*a*) *Kodak, Ld.* v. *London Stereoscopic Co., Ld.* 20 P. R. 337; *Burroughs, Wellcome & Co.* v. *Thompson & Capper*, 21 P. R. 69; *Parozone Co.* v. *Gibson*, 21 P. R. 317; *Havana Cigar and Tobacco Factories, Ld.* v. *Tiffin*, (1905) *Ld.*, 26 P. R. 473. As to form of injunction, see *Kerfoot* v. *R. A. Cooper, Ld.*, 25 P. R. 508. In *Godfrey Phillips, Ld.* v. *Russell*, 26 P. R. 834, such a case was held to fail on the evidence.

(*b*) *Leahy* v. *Glover*, 10 P. R. 141; *Rutler* v. *Smith*, 18 P. R. 49; *Carr* v. *Crisp*, 19 P. R. 497; *Mosciey* v. *Nathan*, 23 P. R. 345; *C. A. Peters, Ld.* v. *Domestic Inventions Co.*, 25 P. R. 387; *Kodak, Ld.* v. *Grenville*, 25 P. R. 416; *Armstrong Oiler Co., Ld.* v. *Patent Axlebox Co., Ld.*, 27 P. R. 362.

(*c*) *Bass* v. *Laidlaw*, Ct. Sess. Cas. 4th Ser. XIII. 898; *Thomson* v. *Robertson*, Ct. Sess. Cas. 4th Ser. XV. 880; *Edye & Sons* v. *Gallon*, 15 P. R. 689; *Montgomerie* v. *Young*, 21 P. R. 285; *Bass* v. *Laidlaw* (No. 2), 26 P. R. 211.

(*d*) *Carr* v. *Crisp*, 19 P. R. 497; *Ripley* v. *Griffiths*, 19 P. R. 590; *Truefitt* v. *Edney*, 20 P. R. 321; *Montgomerie* v. *Young*, 21 P. R. 285.

(*e*) *Cruttwell* v. *Lye*, 17 Ves. 335; *Churton* v. *Douglas*, Johns. 174; *Johnson* v. *Helleley*, 34 Beav. 63; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Rickerby* v. *Reay*, 20 P. R. 380. *Tudor* v. *Tudor*, W. N. 1873, p. 72, depended on an express stipulation in the deed under which the plaintiff retired from the business.

(*f*) *Banks* v. *Gibson*, 34 Beav. 566. See *Hoffman* v. *Duncan*, Seton, 6th ed. 693, 787; *Witt* v. *Corcoran*, *ib.* 686.

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 whole name just as the partnership did before (*a*); at all events, if no injury will be thereby caused to a partner whose name the firm have used (*b*). Where there are express stipulations in a deed, the parties are of course bound. Thus, in *Day* v. *Finch* (*c*) a member of the dissolved firm of "Benjamin Finch & Co.," who had agreed to carry on business after the dissolution in his own name only, was restrained from continuing to use the words "and Co." after the name "Benjamin Finch." But where, on a dissolution of partnership, it was agreed that neither partner was to use the firm name, but that each was to be at liberty to manufacture the same articles as had been manufactured by the firm, and one of the partners set up in business on his own account and put up over his shop the name "Hodgson, late of Matthews & Hodgson," the words "late of" being in small type, it was held that no breach of the agreement had been committed (*d*); and where a business carried on as "Madame Élise" was purchased under an agreement which recited (inaccurately) that the business had been carried on as "Madame Élise & Co.," and gave the purchaser the right to use that name, it was held that the purchaser was not entitled to trade as "Madame Élise" simply (*e*).

Rights of retiring partner.

If, again, on the dissolution of partnership, one partner takes over the whole concern by arrangement, he must compensate the other partner for his interest in the trade name (*f*), and the retiring partner is at liberty to set up a similar business in his own name, even on adjoining premises (*g*).

Scott v. *Scott*.

In *Scott* v. *Scott* (*h*), R. & W. Scott carried on business in partnership in Nithsdale, and in Glasshouse Street, Regent Street,

(*a*) *Ib.* See *Clark* v. *Leach*, 32 Beav. 14; *Dence* v. *Mason*, Dig. 534; *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Levy* v. *Walker*, 10 Ch. D. 436.

(*b*) *Scott* v. *Rowland*, 20 W. R. 508; *Levy* v. *Walker*, 10 Ch. D. 436; *Fenton* v. *Levy*, 29 Sol. J. 735; *Chappell* v. *Griffith*, 53 L. T. N. S. 459; *Gray* v. *Smith*, 43 Ch. D. 208; *Burchell* v. *Wilde*, (1900) 1 Ch. 551. See *Chatteris* v. *Isaacson*, 57 L. T. N. S 177.

(*c*) 25 Sol. J. 354. And see *Tudor* v. *Tudor*, W. N. 1873, p. 72; *Vernon* v. *Hallam*, 34 Ch. D. 748.

(*d*) *Matthews* v. *Hodgson*, 2 Times L. R. 899.

(*e*) *Chatteris* v. *Isaacson*, 57 L. T. N. S. 177. Compare *Rosher* v. *Young*, 17 Times L. R. 347.

(*f*) *Banks* v. *Gibson*, 34 Beav. 566.

(*g*) *Bond* v. *Milbourn*, 20 W. R. 197; *Mayford* v. *Courtenay*, 45 L. T. N. S. 303.

(*h*) 16 L. T. N. S. 143.

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 London premises of the late firm, and made them over with his business to the defendants Scott & Nixon. The inscription used by the late firm over their house at Glasshouse Street having been "R. & W. Scott of Nithsdale," the defendants replaced this by "Scott and Nixon, late R. & W. Scott of Nithsdale." Upon this W. Scott filed a bill against them, and on motion for injunction, the injunction was granted to restrain the defendants from permitting that inscription to remain, and from representing their business to be in continuance of that carried on by the late partnership of R. & W. Scott (*a*).

Representations that plaintiff has retired.

The injury caused by the defendants to the plaintiffs is even greater than in an ordinary case of misappropriation of a trade name, when the representations made by the defendants go to show that the plaintiffs have retired from business, and that the defendants have succeeded to the business formerly carried on by them. Thus, where the defendants had acquired a lease of works at which the plaintiffs had formerly manufactured bricks, but not of the mines from which the brick-clay used by the plaintiffs had been obtained, and then issued cards and circulars styling themselves "E. J. & J. Pearson (late Harpers & Moore)," and otherwise representing themselves to have succeeded to the business of the plaintiffs, who were, as a matter of fact, carrying on their business on other works, the defendants were restrained by injunction from these misrepresentations (*b*); and Wood, V.-C., expressed an opinion that, on application by the owner of the mines of fire-clay used by the plaintiffs, but not by the defendants, the issue of an injunction would have been almost a matter of course.

(*a*) See *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

(*b*) *Harper* v. *Pearson*, 3 L. T. N. S. 547; also *Scott* v. *Scott*, 16 L. T. N. S. 143; *Stevens* v. *Paine*, 18 L. T. N. S. 600. And as to a representation of one business being a continuation of another, see *Churton* v. *Douglas*, Johns. 174; *Burrows* v. *Foster*, 1 N. R. 156; *Witt* v. *Corcoran*, Seton, 6th ed. 686; *Graveley* v. *Winchester*, *ib.* 695; *Montague* v. *Moore*, *ib.* 629; *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191; *England* v. *Curling*, 8 Beav. 129; *Vernon* v. *Hallam*, 34 Ch. D. 748.

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, unless he has contracted not to do so (*a*), to derive what benefit he may from a fair statement of the fact of his former employment (*b*), which is usually expressed by the addition after his own name of the name of his former firm or employer, with the words "late of," or "late with." But such statement must be made in an unambiguous way, and not in such a manner as to induce the belief that the tradesman in question is selling the goods of his former firm or employer (*c*). 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" (*d*), the plaintiff is entitled to protection just as much as if there were intentional fraud.

Glenny v. *Smith*.

In *Glenny* v. *Smith* (*e*), the defendant, who had been in the plaintiff's service, opened a shop in Oxford Street, where he placed his own name over the door, but on the brass plates and on the awning the words "from Thresher & Glenny," "from" being in much smaller letters than the plaintiff's name. It further appeared that the defendant's own name over the door was quite hidden when the awning was let down. Kindersley, V.-C., granted an injunction (*f*).

Hookham v. *Pottage*.

In *Hookham* v. *Pottage* (*g*), 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

(*a*) *Wolmershausen* v. *O'Connor*, 36 L. T. N. S. 921.

(*b*) See *per* Wood, V.-C., in *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; also *Clark* v. *Leach*, 32 Beav. 14; *Goodman* v. *Way*, 36 Sol. J. 830; *Cundy* v. *Lerwill*, 99 L. T. N. S. 273; *Boswell* v. *Mathie*, Ct. Sess. Cas. 4th Ser. XI. 1072; *Wolfe* v. *Alsop* (1), 10 V. L. R. (E.) 41; and cases *infra*. But see *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

(*c*) See *Worcester Royal Porcelain Co., Ld.* v. *Locke & Co.*, 19 P. R. 479, 490; *Rickerby* v. *Reay*, 20 P. R. 380; *Rickett, Cockerell & Co., Ld.* v. *Nevill*, 21 P. R. 394; *Jefferson Dodd & Co.* v. *Dodd's Drug Stores*, 25 P. R. 16.

(*d*) V.-C. Kindersley, in *Glenny* v. *Smith*, 2 Dr. & Sm. 476. And see *Curtiss* v. *Messler*, 13 A. L. T. 127.

(*e*) 2 Dr. & Sm. 476.

(*f*) See, too, *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Dence* v. *Mason* (1), Dig. 534; *Boswell* v. *Mathie*, Ct. Sess. Cas. 4th Ser. XI. 1072; *Wolfe* v. *Alsop*, 12 Vict. L. R. (E.) 421; *Garde* v. *Mitchell*, 17 V. L. R. 209.

(*g*) L. R. 8 Ch. 91. And see *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

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." There was some evidence of deception, and Malins, V.-C., granted an injunction, which decision was uphold by the Court of Appeal.

Other cases.

In *Foot* v. *Lea* (*a*), an older case, the Master of the Rolls in Ireland was of opinion that there was no attempt to deceive on the part of the defendant, who had used show-boards and labels on which his own name was followed by "late of Lundy, Foot & Co.," the latter name being of equal size with the defendant's, and he accordingly refused the injunction, with leave to bring an action at law. In *Williams* v. *Osborne* (*b*), Wood, V.-C., was of a similar opinion, and dismissed the bill, and, on account of the extreme haste with which it had been filed, with costs. In a more recent case (*c*), the defendants, who had been forewomen in the plaintiff's shop in Paris, used on their window blinds in Bond Street, the words "Ex 1ères de la," in small letters, followed by "Maison Boissier de Paris," in large letters, to signify their former employment; and although V.-C. Malins declined to restrain the use of those words, notwithstanding that they were not generally understood in London as equivalent to "from," he left the defendants to pay their own costs.

Name of establishment.

Deception of the same kind will be restrained when what is imitated is not a name of an individual or firm, but a designation of the place at which the business of an individual or firm is carried on, and by which it is known and recognised. Thus, "Osborne House" (*d*), "The Carriage Bazaar" (*e*), "The Bodega" (*f*), "The New York Dental Rooms" (*g*). But in such cases the plaintiff must prove that there is something distinctive in the appellation which he has given to his establishment, since no relief can be given him if that appellation is merely descriptive, as "The Antiquarian Book Store" (*h*), "The Mammoth Ward-

(*a*) 13 Ir. Eq. 490. And see *Matthews* v. *Hodgson*, 2 Times L. R. 899.

(*b*) 13 L. T. N. S. 498.

(*c*) *Robineau* v. *Charbonnel*, W. N. 1876, p. 160.

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

(*e*) *Boulnois* v. *Peake*, 13 Ch. D. 513.

(*f*) *Bodega Co., Ld.* v. *Owens*, 7 P. R. 31.

(*g*) *Sanders* v. *Utt*, 16 Mo. App. 322 (the rooms were in St. Louis, Mo.). See *Sanders* v. *Jacob*, 20 Mo. App. 96; *Cady* v. *Schultz*, 19 R. I. 193; 61 Am. St. Rep. 763.

(*h*) *Choynski* v. *Cohen*, 39 Cal. 501: R. Cox, 593. See, however, *Weinstock, Lubin & Co.* v. *Marks*, 109 Cal. 529, where the name "Mechanics' Store" was protected.

robe" (*a*), "The Tower Palace" (*b*), "Misfits Parlours" (*c*); and he must also prove that the result of the defendant's acts is to represent that his business is identical with that carried on by the plaintiff (*d*), as in *Cave* v. *Myers* (*e*), where the defendant, whose shop was in a corner house close to the establishment of the plaintiffs, Messrs. Cave, adopted for his shop the name of "Cavendish House," and had it so painted up that "Cave" appeared on the side of the street in which was the plaintiff's shop, and the remainder round the corner, and *Genin* v. *Chadsey* (*f*), where the plaintiff was the proprietor of "The Captain's Live-and-Let-Live Oyster and Dining Saloon," and the defendant set up "G. W. Chadsey & Co.'s Great Eastern Live-and-Let-Live Dining Saloon." On the other hand, it was held (*g*) that "Great I X L Auction Company" was not likely to be mistaken for "I X L General Merchandise Auction Store," and where the defendant had put up a sign with the words "Depôt of the Cherry Pectoral Company," and inside his premises a notice, "Ayer's Cherry Pectoral, One Dollar; Rushton's Cherry Pectoral, Fifty Cents. Which will you have?" it was held that the defendant had done no more than trade in fair competition with the plaintiff, as he was entitled to do (*h*); but when fraud is proved or admitted, it will be restrained (*i*).

Name of premises after sale.

Where the proprietor of a shop had his name carved in stone over the door it was held, upon the sale of the shop without the goodwill of the business, that the purchaser could not be compelled to remove the carving though he might be prohibited from using the name as a means of trading (*k*).

So, where the freehold of premises known as the "Black Swan Distillery," of which the sign was the figure of a black swan, was conveyed to B., and the goodwill of the business which had

(*a*) *Gray* v. *Koch*, 2 Mich. N. P. 119.
(*b*) *Armstrong* v. *Kleinhaus*, 1 Ky. L. Rep. 112; 82 Ky. 303.
(*c*) *Cohn* v. *Kahn*, 26 Alb. L. J. 342.
(*d*) See *Lyric Theatre, Ld.* v. *Cordingley*, 90 L. T. (Journal) 122 ("Lyric Theatre" and "Lyric Opera House"); *Cooper & M'Leod* v. *Maclachlan*, 18 P. R. 380; 19 P. R. 27 ("Castle Brewery," used in conjunction with the plaintiffs' and defendants' names respectively).
(*e*) Dig. 301.
(*f*) Cited in *Dixon Crucible Co.* v. *Guggenheim*, R. Cox, 367. And see *Hoby* v. *Grosvenor Library Co.*, 28 W. R. 386 ("Grosvenor Library"); *Wheeler* v. *Johnston*, 3 L. R. Ir. 284 ("Cromac Springs"); and *Glen & Hall Manufacturing Co.* v. *Hall*, 61 N. Y. 226; 19 Amer. Rep. 278 ("No. 10, South Water Street, Rochester, New York").
(*g*) *Lichtenstein* v. *Mellis*, 8 Oreg. 464.
(*h*) *Ayer* v. *Rushton*, 7 Daly, 9.
(*i*) *Cohn* v. *Kahn*, 26 Alb. L. J. 342.
(*k*) *Townsend* v. *Jarman*, (1900) 2 Ch. 698.

been carried on there was subsequently assigned to N., it was held that N. could not restrain B. from continuing to describe the premises as the "Black Swan Distillery," and keeping the sign up (*a*).

Again, where a firm of picture dealers owned a gallery known as the Goupil gallery, and sold it to their former manager, but without the goodwill of the business, and appointed him their agent, in England, for five years, and agreed not to carry on business themselves in England during that period, it was held that upon the termination of the agreement the purchaser, who had in the meantime acquired a reputation as a picture dealer at the gallery on his own account, was entitled to use the name of the gallery in connection with his business, and to restrain the original proprietors from using the name without clearly distinguishing their business from his (*b*).

Signboard.

In *Walker* v. *Alley* (*c*) it was decided that the name and sign of "The Golden Lion" was so connected with the plaintiff's dry goods business that it could not be taken by another trader; and the Chancellor of Upper Canada said that "where it is clear to the Court that the defendant himself intended an advantage by the use of a particular sign or mark in use by another, and believes he has obtained it, or, in other words, that the defendant himself thought the use of it was calculated to advertise him at the expense of the plaintiff, and this was his object in using it, and where such has been the effect of the user, I think the Court should say to him, 'Remove that sign; its use by you may, as you intend, damage the plaintiff. It cannot be necessary or valuable to you for any other purpose. You have your choice of many signs which, as a mere attraction, or to give your store a marked designation, must answer a fair business purpose equally well.'"

No right in name of private house or telegraphic address.

Apart from a business of some kind, no exclusive right can be acquired in the name of a house, any more than in the name of a person, and no right of action arises from the annoyance occasioned by a person re-naming his residence after a neighbouring residence of another householder (*d*). And where an abbreviated telegraphic address ("Street, London") had been used for many years by a business firm, and another firm of a different character

(*a*) *Nicholson* v. *Buchanan*, 19 P. R. 321.
(*b*) *Boussod Valadon & Co.* v. *Marchant*, 24 P. R. 665.
(*c*) 13 Grant, Up. Can. Ch. 366.
(*d*) *Day* v. *Brownrigg*, 10 Ch. D. 294.

afterwards adopted the same telegraphic address, it was held that the confusion which ensued was *damnum absque injuriâ*, and that no injunction could be granted (*a*).

Hotel.

The same principle which governs the names of business establishments has been extended to hotels, and a proprietor of one already established has been held entitled to protection against the setting up of hotels in the same neighbourhood under a similar title. Thus, "The Irving House" (*b*), "The What Cheer House" (*c*), "The McCardel House" (*d*), "The Palace Hotel" (*e*), and "The Columbia Hotel" (*f*), have been protected. In the last case the objection that the name was geographical was raised but was overruled.

Must be distinctive.

On the other hand, the Scotch Court of Session has held that the proprietor of "The Station Hotel" was not entitled to interfere with the use of the name "The Royal Station Hotel" for another hotel in the same neighbourhood, the plaintiff's name not being distinctive, and the defendant's name being sufficiently distinguished by the insertion of the word "Royal" (*g*).

Name goes with building.

But it seems that where a name has been attached to a building it passes with it, and cannot be retained or dealt with by the former owner apart from the building. Thus, in *Booth* v. *Jarrett* (*h*), the founder of "Booth's Theatre," who had gained a reputation for it by his skill in acting, and had named it after himself, attempted, without success, to prevent the continued use of the name by a person into whose possession the theatre had subsequently come, the name having passed to the defendant with the building and goodwill. Again, in *Mason* v. *Queen* (*i*), the proprietor of the "Waverley Hotel," Glasgow, sold his premises to a railway company, who compensated him for the removal. He afterwards assigned the goodwill of his business and trade

(*a*) *Street* v. *Union Bank of Spain & England*, 30 Ch. D. 156.

(*b*) *Howard* v. *Henriques*, 3 Sand. S. C. 725; R. Cox, 129.

(*c*) *Woodward* v. *Lazar*, 21 Cal. 448; R. Cox, 300; *Gamble* v. *Stephenson*, 10 Mo. App. 581.

(*d*) *McCardel* v. *Peck*, 28 How. Pr. 120; R. Cox, 312.

(*e*) *Great North of Scotland Rail. Co.* v. *Mann*, Ct. Sess. Cas. 4th Ser. XIX. 1035.

(*f*) *Whitfield* v. *Loveless*, 64 U. S. Pat. Gaz. 442.

(*g*) *Charleson* v. *Campbell*, Ct. of Sess. Cas. 4th Ser. IV. 149. See *Great North of Scotland Rail. Co.* v. *Mann*, *ib.* XIX. 1035; *Crauford's Trustees* v. *Lennox Co.*, *ib.* XXIII. 747; *Cooper & M'Leod* v. *Maclachlan*, 18 P. R. 380; 19 P. R. 27.

(*h*) 52 How. Pr. 169. And see *Nicholson* v. *Buchanan*, 19 P. R. 321; *Rickerby* v. *Reay*, 20 P. R. 380; *Boussod Valadon & Co.* v. *Marchant*, 24 P. R. 665.

(*i*) 23 Scot. L. R. 641. And see *Cowan* v. *Miller*, Ct. Sess. Cas. 4th Ser. XXII. 833.

name to the plaintiff, who was carrying on another hotel in a different part of Glasgow, the name of which was thereupon changed to the "Waverley." The railway company did not require the actual site of the old hotel for their purposes, and subsequently let it to the defendant, who re-opened the hotel under the name of the "Old Waverley Hotel," and it was held that the plaintiff was not entitled to restrain the defendant from so doing. In *Woods* v. *Sands* (*a*), it was held that the founder of "Woods' Hotel," who had sold and afterwards repurchased his interest in it, had recovered by the re-assignment his exclusive right in the name, and the use of it by another person was prohibited. So, in *Armstrong* v. *Kleinhaus* (*b*), the tenant of a business house which he had called "The Tower Palace," was held to have no right in the name capable of being transferred to a different building elsewhere. And in *Pepper* v. *Labrot* (*c*) it was held that the name "Oscar Pepper's Old Crow Distillery" had become attached to the distillery, and that Oscar Pepper's son and successor in business, on whose bankruptcy the distillery was sold, was not entitled to interfere with the use by the purchaser of the name "Oscar Pepper" as part of the name of the distillery. But in one Canadian case (*d*) the purchasers of "The Western or Mason's Hotel" were protected in their exclusive right to the name, as against the vendor, who had re-occupied his former premises after the purchaser had been driven out by a fire.

Name of hotel on conveyances.

In the same way, the proprietor of the "Prescott House" Hotel was held entitled to restrain the use of the name by a coach proprietor upon his coaches, an agreement between the latter and a former owner of the hotel being treated as having been in the nature of a revocable licence, which had been revoked upon the sale of the hotel to the plaintiff (*e*). 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

(*a*) Dig. 467.
(*b*) 1 Ky. L. Rep. 112: 82 Ky. 303.
(*c*) 8 Fed. Rep. 29.
(*d*) *Mossop* v. *Mason*, 18 Grant. Up. Can. Ch. 453.
(*e*) *Deiz* v. *Lamb*, 29 N. Y. Super. Ct. 537.

and servants' clothing of the name of the establishment with which they were connected (*a*).

Similar cases.

So, again, the name of a line of steamships (*b*), of collieries (*c*), and of particular waggons (*d*), has been protected.

Name not used in ordinary business.

Closely connected with the cases which concern the rights of an individual or firm in the trade name under which his or their business is carried on, are the cases in which it has been sought by one person to restrain the unauthorized use of his name by another, though he does not himself use that name over a shop, or, in fact, as a trade name usually so called.

Where articles are produced under a certain name.

Where a person produces certain articles, and a representation is made by another that articles not the production of that person are in fact produced by him, there is an injury to the right of property in the name, which has in fact, though not used as a trade mark, yet come to be the producer's means of selling the articles produced.

Author.

Thus, an author is entitled to protection for the name which sells his works for him. In *Lord Byron* v. *Johnston* (*e*), the defendant, who had advertised for sale poems which he represented to be by the plaintiff, but as to which he declined to swear to his belief in their genuineness, was restrained by injunction. And in *Besant* v. *Moffatt & Paige* (*f*), a well-known writer was protected against the use of his name in connection with a book for which he was not responsible.

Humourist.

In *Clemens* v. *Such* (*g*), a humorous writer, whose works were published under the *nom de plume* of "Mark Twain," was held to be entitled to restrain the unauthorized use of that designation by another person. And in *Clemens* v. *Belford* (*h*), it was held that the name might not be connected with matter not written by the plaintiff, though it might be attached to a reprint of matter written by him and not copyrighted. In *Picture Press, Ld.* v. *Ross* (*i*) the plaintiffs were the proprietors of certain publi-

(*a*) *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.

(*b*) *Winsor* v. *Clyde*, 9 Phila. 513 ("Keystone Line").

(*c*) *Braham* v. *Beachim*, 7 Ch. D. 848 ("Radstock Collieries").

(*d*) *Shaver* v. *Shaver*, 54 Iowa, 208 ("Shaver Waggons").

(*e*) 2 Mer. 29.

(*f*) 84 L. T. (Journal) 152.

(*g*) Dig. 429.

(*h*) 11 Biss. 459.

(*i*) Joyce, J., Feb. 21, 1909. In *New York Herald Co.* v. *Ottawa Citizen Co.*, Can. S. C. R. 229, the Supreme Court of Canada refused to restrain the proprietors of a newspaper from using the heading "Buster Brown and Tige"

cations which had since 1884 been issued under the name of "Ally Sloper's" publications; and they succeeded in obtaining an injunction to restrain the defendant, who was the son and executor and universal legatee of one C. H. Ross, from issuing another publication as "Ally Sloper's Comic Calendar," notwithstanding that C. H. Ross had published a paper under that name from 1876 to 1888, when it came to an end, and that it was stated that C. H. Ross had originated the name "Ally Sloper."

Legal writer.

So, again, a legal writer is entitled to prevent the issue as his of works or editions not of his production. In *Archbold* v. *Sweet* (*a*) the plaintiff was the author of a book on a legal subject, of which he had sold the copyright to the defendant. The plaintiff refusing to re-edit the book, the defendant had it edited by another, and the plaintiff thereupon came forward to complain of the inaccuracies which he alleged to be contained in the new edition. Lord Tenterden, C. J., after remarking on the close analogy between that case and those in which an inferior article was sold in the name of a well-known manufacturer, the injury being in the latter case to the sale of the goods, in the former to the character of the author, laid down to the jury that if the new edition, in the form in which it was put forth, would be understood by purchasers who paid reasonable attention to its contents to be by the plaintiff, their verdict must be in his favour.

Painter. Medical man.

So, again, a painter will be protected from having exhibited as his a picture which he has not painted (*b*), and a medical man who compounds medicines from having spurious medicines sold as his (*c*).

Deception must be probable.

In all such cases the plaintiff must of course show that deception is probable, or he cannot succeed in obtaining the relief he seeks. Thus, where an artist painted a picture, and another person exhibited a diorama imitated from it, it was held that there could be no deception or injury, though if the plaintiff's picture had been a diorama the case would have been different (*d*). So where a person who wrote songs under the name of Claribel sought to

for an illustrated comic section, in an action by the proprietors of another paper which contained an illustrated comic section headed "Buster Brown."

(*a*) 1 M. & Rob. 162. Cf. *Lee* v. *Gibbings*, 67 L. T. N. S. 263.
(*b*) *Martin* v. *Wright*, 6 Sim. 297.
(*c*) *Clark* v. *Freeman*, 11 Beav. 112.
(*d*) *Martin* v. *Wright*, 6 Sim. 297.

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 (*a*).

Clark v. *Freeman.*

The decision in *Clark* v. *Freeman* (*b*) has been much discussed with respect to the right a man has in his name. In that case the plaintiff, Sir James Clark, was an eminent physician, who filed a bill to restrain the advertisement and sale by the defendant of certain pills termed by him "Sir J. Clarke's Consumption Pills," the advertisements being so framed as to be calculated to induce the public to buy the pills as being of the plaintiff's invention. Lord Langdale, M. R., refused to grant the injunction, on the ground that there was no injury to property; but apparently not without some doubt, since he gave leave for the case to be mentioned again to him if cases in support of the bill could be produced. He did not, however, think the cases mentioned to him (*c*) sufficient to warrant him in granting the injunction, but at the same time he remarked that if "Sir James Clark had been in the habit of manufacturing and selling pills, it would have been very like the other cases in which the Court had interfered for the protection of property." The principle on which Lord Langdale's decision was based was that the Court would not interfere where the name pirated by the defendant had not become known to the public in connection with a manufactured article, but was merely a name under which an individual had acquired a certain reputation (*d*). 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" (*e*). It would appear, however,

(*a*) *Barnard* v. *Pillow*, W. N. 1868, p. 94. And see *Seeley* v. *Fisher*, 11 Sim. 581; and *Archbold* v. *Sweet*, 1 M. & Rob. 162.

(*b*) 11 Beav. 112.

(*c*) *Lord Byron* v. *Johnston*, 2 Mer. 29; and *Routh* v. *Webster*, 10 Beav. 561.

(*d*) See *Delondre* v. *Shaw*, 2 Sim. 237.

(*e*) *Per* Cairns, L. J., in *Maxwell* v. *Hogg*, L. R. 2 Ch. 307. In *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 561, Malins, V.-C., went even farther. And

that an action will not lie to restrain an unauthorised use of a man's name unless such use is calculated to injure him in his property, business, or profession (*a*).

Contracts in respect of names.

Whatever rights a man may, irrespective of contract, have in his own name, so as to be able to prevent the unauthorised use of it by another, it is always open to him to modify those rights by contract, whether by way of permitting others to use his name in a certain manner (*b*), or by way of restraining his own use of it to a certain extent (*c*). Thus, where a publisher had sold to the defendants the copyright of an annual, entitled "Beeton's Christmas Annual," he himself entering into their service, it was held that the defendants were entitled to continue the annual publication under that same name, even after the plaintiff had ceased to remain in their employ, and had become unwilling for his name to be used by them in connection with a work not of his production (*d*). But it seems that, although a contract by which a man binds himself to limit in some way his use of his own name can be enforced, a contract so binding him cannot be made by the representative of his estate in bankruptcy, and if such a contract has been entered into, the bankrupt will be entitled to disregard it (*e*).

Name of editor.

The name of the editor of a publication, appearing upon the title page, forms no part of the title. Romilly, M. R., refused, therefore, to restrain the proprietors of a paper, who had agreed

in *In re Riviere*, 26 Ch. D. 48, 53, Lord Selborne, C., observed, "that case has seldom been cited but to be disapproved; could not a professional man be injured in his profession by having his name associated with a quack medicine?" In *Williams* v. *Hodge & Co.*, 84 L. T. (Journal) 134, a very similar case, Kay, J., said that the decision in *Clark* v. *Freeman* "was rather a surprising one, and one which he had always thought was not sufficiently considered"; but he did not feel himself at liberty to disregard it on an interlocutory application, in the absence of authority to the contrary. The expressions of opinion of Lord Cairns, Lord Selborne and Malins, V.-C., had apparently not been brought to his notice. Lord Westbury, C., however, spoke of the decision at all events without disapprobation: *Leather Cloth Co.'s case*, 4 De G. J. & S. 137. *Clark* v. *Freeman* has been again observed upon by Kekewich, J., in *Lee* v. *Gibbings*, 67 L. T. N. S. 263, in which he said, "I do not think that after the observations of Malins, V.-C., Lord Cairns, and Lord Selborne, I ought to hold or regard it as otherwise than erroneously decided." And see *per* Byrne, J., in *Walter* v. *Ashton*, (1902) 2 Ch. 282.

(*a*) *Walter* v. *Ashton*, (1902) 2 Ch. 282; *Dockrell* v. *Dougall*, 80 L. T. N. S. 556.

(*b*) *Ward* v. *Beeton*, L. R. 19 Eq. 207. See *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766.

(*c*) *Ainsworth* v. *Bentley*, 14 W. R. 630; *Ward* v. *Beeton*, L. R. 19 Eq. 207.

(*d*) *Ward* v. *Beeton*, L. R. 19 Eq. 207. See *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 305.

(*e*) *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453. And see *Walker* v. *Mottram*, 19 Ch. D. 354.

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 (*a*).

Where name is used so as to injure.

It is clear that a man has a right to prevent the unauthorised use of his name by another person, apart from any special manufacture, where such use of it might involve him in legal or other difficulties. Thus, in *Routh* v. *Webster* (*b*), a bill was filed to restrain the provisional directors of a joint-stock company, called "The Economic Conveyance Company," from using the plaintiff's name in their prospectuses as a trustee of their company without his authority. The defendants setting up by way of defence that what had been done had been done inadvertently, and stating their intention of discontinuing their misrepresentations, the Master of the Rolls granted the injunction, holding that the defendants were not entitled "to use the name of any person they pleased, representing him as responsible in their speculations, and to involve him in all sorts of liabilities, and then to be allowed to escape the consequences by saying they had done it by inadvertence," and also that the plaintiff was in nowise bound to surrender his right to the injunction, trusting to the assurances of the defendants as to their intentions for the future. This decision has been generally approved as an "authority for preventing the improper use of a man's name against his will; not for the restraint of a libel, for no libel was involved" (*c*). On this principle, the proprietors of "The Times" succeeded in obtaining an injunction against a person who was offering cycles for sale in such a manner as to create the impression that the plaintiffs were the vendors (*d*).

Trade libel.

Where, however, a man's name has been used against his will in such a manner as to be libellous, or where statements have been made disparaging the goods sold under his name or trade mark, or threatening persons dealing in his goods, a more difficult question is raised, and one which has not always been answered in the same

(*a*) *Crookes* v. *Petter*, 6 Jur. N. S. 1131.

(*b*) 10 Beav. 561.

(*c*) *Per* Lord Cairns, C., in *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142. In *Webster* v. *Webster*, 3 Swanst. 490, n., the injunction was refused because there was no injury to be apprehended. In *Tudor* v. *Tudor*, W. N. 1873, p. 72, there was an express contract. See *Bullock* v. *Chapman*, 2 De G. & Sm. 211; *Dixon* v. *Holden*, L. R. 7 Eq. 488; *Hodges* v. *London Trams Co.*, 12 Q. B. D. 105; *Dockrell* v. *Dougall*, 80 L. T. N. S. 556; *Townsend* v. *Jarman*, (1900) 2 Ch. 698; *Walter* v. *Ashton*, (1902) 2 Ch. 282; *Reid* v. *Sibbald*, 18 Journ. of Juris. 392, and cases *infra*.

(*d*) *Walter* v. *Ashton*, (1902) 2 Ch. 282.

way. With respect to libels, Lord Cottenham, C., said (*a*), that the Libel Act "appointed a jury as the proper tribunal for trial of injuries to the person by libel or defamation; and that the liberty of the press consisted in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels, public or private." The principle that the publication of a libel was a crime, and that the Court of Chancery had no jurisdiction to prevent the commission of crimes, except in such cases as those relating to the protection of infants, was laid down by Lord Eldon in 1818 (*b*), and after that time the Equity judges frequently stated that it was not within the proper scope of their authority to restrain the publication of libels (*c*). There were, indeed, cases in which it was thought that where an injury was occasioned or threatened to a right of property by a libellous statement, the Court had jurisdiction to interfere to protect that right of property (*d*), but, practically speaking, cases which involved the consideration of libellous statements were left to the Courts of Common Law (*e*).

Effect of the Judicature Act, 1873.

The Judicature Act, 1873, however, introduced a new element into the discussion by enacting (§ 25, sub-s. 8) that "an injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made"; and in *Thorley's Cattle Food Co.* v. *Massam* (*f*), Vice-Chancellor Malins suggested that this enactment had conferred upon the Court more extensive powers than those which it previously possessed, and that an injunction might

(*a*) *Fleming* v. *Newton*, 1 H. L. C. 376. This case was a Scotch one, and the Lord Chancellor was speaking with reference to the Scotch Libel Act, but his remarks are equally applicable to cases arising in England, and under Order XXXVI. rule 2, of the Rules of 1883, a defendant in a libel case can still insist upon a jury.

(*b*) *Gee* v. *Pritchard*, 2 Swanst. 413.

(*c*) *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* Turner, L. J.); *Mulkern* v. *Ward*, L. R. 13 Eq. 619; *Browne* v. *Freeman*, W. N. 1873, p. 178; *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. 142; *Fisher* v. *Apollinaris Co.*, *ib.* 297. The same view has been taken in India: *Shepherd* v. *Trustees of the Port of Bombay*, Ind. L. R. 1 Bomb. 132; and in America: *Manger* v. *Dick*, 55 How. Pr. 132.

(*d*) This was especially the view of Malins, V.-C. See *Dixon* v. *Holden*, L. R. 7 Eq. 488; *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 561; *Rollins* v. *Hinks*, L. R. 13 Eq. 355; *Axmann* v. *Lund*, L. R. 18 Eq. 330. And see also *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *James* v. *James*, L. R. 13 Eq. 421.

(*e*) For the principles by which the Courts of Common Law were guided, see *Wren* v. *Weild*, L. R. 4 Q. B. 730; *Western Counties Manure Co.* v. *Lawes' Chemical Manure Co.*, L. R. 9 Ex. 218; *Mellin* v. *White*, (1895) A. C. 154.

(*f*) 6 Ch. D. 582.

have been granted by virtue of those powers to restrain an injurious and unjust statement. Numerous cases have since been decided with respect to the effect of the section, in some of which expressions were employed which were calculated to lead to the belief that the power to grant injunctions where it was thought to be "just or convenient" conferred a power to grant injunctions in cases in which no legal remedy previously existed (*a*). It is now, however, settled—and this is not opposed to the observations before referred to—that the right view is that the section has enlarged the powers of the Court, not by enabling the Court to grant relief in cases where none was obtainable before in any of the Superior Courts, but by way of giving each branch of the High Court power to grant relief in cases which could previously be brought only in the same or a different form before some other branch of the Court (*b*); so that, as Cotton, L. J., said in the case of *North London Railway Co.* v. *Great Northern Railway Co.* (*c*), "where there is a legal right which was, independently of the Act, capable of being enforced either at law or in equity, there, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right."

Conditions necessary for injunction.

The injunction may be granted to restrain the continued publication of a libel which has been found to be so by the verdict of a jury (*d*), or it may be granted to restrain the publication of statements which have not been submitted to a jury (*e*). But where the Court is asked to grant an injunction, especially on an interlocutory application, without the assistance of a jury, the jurisdiction which it possesses so to do is one which must be exercised very carefully (*f*), and it ought not to be exercised unless

(*a*) See *Beddoe* v. *Beddoe*, 9 Ch. D. 89; *Quartz Hill Consolidated Gold Mining Co.* v. *Beall*, 20 Ch. D. 501.

(*b*) *Day* v. *Brownrigg*, 10 Ch. D. 294; *Ward* v. *Drat*, L. J. N. of C. 1878, p. 67; *Gaskin* v. *Balls*, 13 Ch. D. 324; *Dicks* v. *Brooks*, 15 Ch. D. 22 (*per* Bacon, V.-C.); *Mellin* v. *White*, (1895) A. C. 154, 163.

(*c*) 11 Q. B. D. 30.

(*d*) *Saxby* v. *Easterbrook*, 3 C. P. D. 339; *Hinrichs* v. *Berndes*, W. N. 1878, p. 11.

(*e*) As in *Thomas* v. *Williams*, 14 Ch. D. 864; *Collard* v. *Marshall*, (1892) 1 Ch. 571; *Pink* v. *Federation of Trades & Labour Union*, 67 L. T. N. S. 258; *Dunlop Pneumatic Tyre Co., Ld.* v. *Maison Talbot*, 52 W. R. 254. And see *Jarradale Timber Co.* v. *Temperley*, 11 Times L. R. 119; *ib.* 305. Cf. *Lee* v. *Gibbings*, 67 L. T. N. S. 263, and *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*, 15 P. R. 677; 16 P. R. 217; 18 P. R. 95.

(*f*) *Quartz Hill Consolidated Gold Mining Co.* v. *Beall*, 20 Ch. D. 501; *Armstrong* v. *Armit*, 2 Times L. R. 887; *Coulson & Sons* v. *Coulson & Co.*, 3 *ib.* 846; *Liverpool Household Stores Association* v. *Smith*, 37 Ch. D. 170. See *Marks* v. *Conservative Newspaper Co., Ld.*, 3 Times L. R. 244; *Collard* v. *Marshall*, (1892) 1 Ch. 571; *Lipton, Ld.* v. *Duncans*, Times, Nov. 26th, 1898.

the statements of which complaint is made are proved to be untrue (*a*), unless they are injurious to the plaintiff (*b*), with reference to his trade or property (*c*), and are so clearly libellous that a contrary verdict of a jury would be set aside as unreasonable (*d*), unless it is proved that the defendant intends to continue to make them (*e*), and that the injury will be irreparable, *i.e.*, incapable of compensation by damages (*f*), and unless (in cases of privilege) express malice is also established (*g*). Thus, in *Halsey* v. *Brotherhood* (*h*) the defendant had threatened intending purchasers from the plaintiff, alleging that the plaintiff was manufacturing in infringement of his, the defendant's, patent rights; and Jessel, M. R., and the Court of Appeal held that an injunction could not be granted unless the defendant persisted in making the statements after they had been proved to be false. In *Colley* v. *Hart* (*i*), it was held by North, J., that there was

(*a*) *Halsey* v. *Brotherhood*, 15 Ch. D. 514; 19 *ib.* 386; *Burnett* v. *Tate*, 45 L. T. N. S. 743; *Anderson* v. *Liebig's Extract of Meat Co., Ld.*, *ib.* 757; *Quartz Hill, &c. Co.* v. *Beall*, 20 Ch. D. 501; *Benbow* v. *Low* (1), 23 Sol. J. 819: *Roper's, &c. Co.* v. *Copeman's, &c. Association, Ld.*, 28 *ib.* 218; *Armstrong* v. *Armit*, 2 Times L. R. 887; *Coulson & Sons* v. *Coulson & Co.*, 3 *ib.* 846; *Liverpool Household Stores Association* v. *Smith*, 37 Ch. D. 170; *Poulett* v. *Chatto & Windus*, 32 Sol. J. 24; *Nähmaschinen Fabrik vormals Frister & Rossmann Aktiengesellschaft* v. *Singer Manufacturing Co.*, 10 P. R. 310; *Incandescent Gas Light Co.* v. *New Incandescent Gas Lighting Co.*, 76 L. T. N. S. 47, which shows that it is a good defence that the statements are substantially true; *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*, 15 P. R. 677; 16 P. R. 217; 18 P. R. 95. And see *Clover* v. *Royden*, L. R. 17 Eq. 190.

(*b*) *Dicks* v. *Brooks*, 15 Ch. D. 22. And see *Brook* v. *Evans*, 2 L. T. N. S. 740; *Bullock* v. *Chapman*, 2 De G. & Sm. 211.

(*c*) See *per* Lindley, L. J., in *Coulson & Sons* v. *Coulson & Co.*, 3 Times L. R. 846, with which compare the statement by North, J., in *Pollard* v. *Photographic Co.*, 40 Ch. D. 345. And see *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*, 18 P. R. 95.

(*d*) *Coulson & Sons* v. *Coulson & Co.*, 3 Times L. R. 846; *Liverpool Household Stores Association* v. *Smith*, 37 Ch. D. 170; *London & Northern Bank, Ld.* v. *Newnes, Ld.*, 16 Times L. R. 96; *Lloyds Bank, Ld.* v. *Royal British Bank, Ld.*, 19 Times L. R. 518, 604.

(*e*) *Quartz Hill, &c. Co.* v. *Beall*, 20 Ch. D. 501.

(*f*) *Armstrong* v. *Armit*, 2 Times L. R. 887.

(*g*) *Quartz Hill, &c. Co.* v. *Beall*, 20 Ch. D. 501; *Burnett* v. *Tate*, 45 L. T. N. S. 473; *Armstrong* v. *Armit*, 2 Times L. R. 887; *Coulson & Sons* v. *Coulson & Co.*, 3 *ib.* 846; *Liverpool Household Stores Association* v. *Smith*, 37 Ch. D. 170; *Incandescent Gas Light Co.* v. *New Incandescent Gas Lighting Co.*, 76 L. T. N. S. 47; *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*, 18 P. R. 95; *Ripley* v. *Arthur & Co.*, 18 P. R. 82.

(*h*) 15 Ch. D. 514; 19 *ib.* 386. See the New York case of *Wolfe* v. *Burke*, 56 N. Y. 115. The precise question raised in *Halsey* v. *Brotherhood* was settled by § 32 of the Patents Act, 1883, under which numerous cases have been decided, but the general question of injunctions to restrain trade libels remains. See *Incandescent Gas Light Co.* v. *New Incandescent Gas Lighting Co.*, 76 L. T. N. S. 47; *Ripley* v. *Arthur & Co.*, 18 P. R. 82. The Patents Act, 1883, s. 32, is now repealed, but its provisions have been re-enacted and extended to designs by Patents and Designs Act, 1907, ss. 36, 61.

(*i*) 6 P. R. 17.

no jurisdiction to restrain the defendant from issuing a circular to the plaintiff's customers, alleging that the plaintiff was infringing his trade marks, and threatening proceedings, but at the trial of the action he appears to have been disposed to hold that such an action might properly lie if malice were proved (*a*). And in *Anderson* v. *Liebig's Extract of Meat Co., Ld.* (*b*), Chitty, J., refused to restrain the company (who were taking proceedings to stop the plaintiff from selling his goods as "Baron Liebig's Extract of Meat" and using on the pots a photograph of the Baron) from circulating letters among the plaintiff's customers, stating that he was using the name and photograph without authority, on the ground that the company was not shown to be acting otherwise than *bonâ fide*, or to be stating that which was untrue (*c*). In a similar case of *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (*d*), an injunction was ultimately refused on the ground that no special damage was proved. On the other hand in *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot* (*e*), an injunction was granted where, though no actual damage had accrued, it was proved that damage was imminent and was the natural and direct result of the trade libel.

Trade libel.

In *Lee* v. *Gibbings* (*f*), it was held by Kekewich, J., that an author of a book who had sold the copyright to a publisher, could not restrain him from publishing the book in a mutilated form except on the ground of injury to reputation, the remedy for which was an action for libel, and that the Court ought not, except in the case of a trade libel, to grant an interlocutory injunction to restrain a libel. In *Mellin* v. *White* (*g*), it was held by the House of Lords, that in order to maintain an action for a false statement disparaging the goods of a rival trader, proof of special damage (*h*) was necessary, and that for this purpose it was immaterial whether the remedy sought was injunction

(*a*) *Colley* v. *Hart* (2), 7 P. R. 101.
(*b*) 45 L. T. N. S. 757.
(*c*) And see *Nähmaschinen Fabrik vormals Frister & Rossmann Aktiengesellschaft* v. *Singer Manufacturing Co.*, 10 P. R. 310; *Sanders* v. *United Horse Shoe and Globe Nail Co*, N. S. W. 12 L. R. Eq. 224. Cf. *Coats* v. *Chadwick*, (1894) 1 Ch. 347.
(*d*) 18 P. R. 95. And see *Concaris* v. *Duncan*, (1909) W. N. 51.
(*e*) 52 W. R. 254.
(*f*) 67 L. T. N. S. 263.
(*g*) (1895) A. C. 154. So in *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*, 18 P. R. 95, another case in the H. L.
(*h*) As to the meaning of special damage, see *Ratcliffe* v. *Evans*, (1892) 2 Q. B. 524; *Alcott* v. *Millar's Karri and Jarrah Forests, Ld.*, 21 Times L. R. 30. And see *Empire Typesetting Machine Co. of New York* v. *Linotype Co.*, 79 L. T. N. S. 8.

or damages; and it was doubted by Lord Herschell whether such an action could be maintained where the only disparagement consisted in vaunting the superiority of the defendant's goods either generally or in some particular respect. "In order to constitute disparagement," said Lord Watson, "which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they have occasioned special damage to the plaintiff"; though, where the statement complained of is not merely a disparagement of the plaintiff's goods but is capable of being read as a disparagement of the plaintiff in the way of his trade, it may be a trade libel (*a*), in which case proof of special damage is unnecessary (*b*). In accordance with the view above expressed by Lord Herschell, the Court of Appeal in another case in which the sole cause of action disclosed by the statement of claim was that the defendants, who were rivals in trade of the plaintiffs, had falsely and maliciously published a statement that their goods were superior to the plaintiffs', ordered the statement of claim to be struck out as disclosing no reasonable cause of action and dismissed the action on the ground that the statement complained of, coming from rival traders, did not constitute a cause of action, whether special damage were alleged or not (*c*).

When granted.

On the other hand, where the necessary facts are present, an injunction will be granted, as in *Thorley's Cattle Food Co.* v. *Massam* (2) (*d*), where it was established that the plaintiffs and defendants were both in possession of and entitled to use the same secret recipe in their respective businesses, and Malins, V.-C., and the Court of Appeal granted an injunction to restrain the defendants from publicly advertising that they alone were acquainted with the secret.

Survival of cause of action.

Where the plaintiff in an action for slander of title to a trade mark and his property therein dies, the cause of action survives to

(*a*) *Linotype Co.* v. *British Empire Typesetting Machine Co.*, 81 L. T. N. S. 331.

(*b*) *South Hetton Colliery Co.* v. *North Eastern News Association*, (1894) 1 Q. B. 133.

(*c*) *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark*, (1899) 1 Q. B. 86. This case is explained and distinguished in *Alcott* v. *Millar's Karri and Jarrah Forests, Ld.*, 21 Times L. R. 30.

(*d*) 14 Ch. D. 763. And see *Hill* v. *Hart-Davies*, 21 Ch. D. 798; *Hermann Loog, Ld.* v. *Bean*, 26 Ch. D. 306; *Haywards & Co.* v. *Hayward & Sons*, 34 Ch. D. 198; *Punch* v. *Boyd*, 16 L. R. Ir. 476; *Dunlop Pneumatic Tyre Co.* v. *Maison Talbot*, 52 W. R. 254.

his legal personal representative (*a*). Where a trader represented to the public that work executed by a rival trader was his work, Kekewich, J., thought that an action for an injunction might lie as between rival traders without proof of special damage, but held that such an action did not pass by an assignment of the goodwill (*b*).

Misrepresentations by subsequent manufacturer.

The same principle on which misrepresentations by an original manufacturer with respect to the goods and business of a subsequent manufacturer are restrained, applies with even greater force to similar misrepresentations by the latter, and while it is open to any one to manufacture an unpatented article with the process of manufacture of which he has become acquainted, and also to describe it by the name applied to it by the original inventor so soon as that name shall have become *publici juris*—that is to say, descriptive of a specific article, but not of a specific maker—yet at the same time such subsequent manufacturer is not entitled to carry on an unfair competition in trade with the original maker or his successors in business, by means of assertions or representations that his own article is the only genuine one, or that the article of the original maker or his successors is spurious (*c*).

"Original."

And where such an assertion or representation is embodied in the title of the later manufacturer's article by its being styled the "original" an appellation which would naturally suggest the idea of the article in question being the make of the original manufacturer—such fraudulent representation will usually be restrained (*d*). But in the entire absence of evidence as to deception, Wood, V.-C., refused to grant an injunction in a similar case (*e*), and from the result of later litigation between the same parties (*f*), it is clear that the presumption against a person who

(*a*) *Hatchard* v. *Mège*, 18 Q. B. D. 771.

(*b*) *Bullivant* v. *Wright*, 13 Times L. R. 201.

(*c*) *James* v. *James*, L. R. 13 Eq. 421; *Thomas* v. *Williams*, 14 Ch. D. 864; *Liebig's Extract of Meat Co., Ld.* v. *Anderson* (2), 55 L. T. N. S. 206; *Hirsch* v. *Hirsch & Co.*, 80 L. T. (Journal) 283: *Briton Life Association, Ld.* v. *Roberts*, 2 Times L. R. 319; *George* v. *Blow*, N. S. W. 20 L. R. Eq. 395. And see *Gillette Safety Razor, Ld.* v. *Pellett, Ld.*, 26 P. R. 538, where the issue of an unfair circular was restrained.

(*d*) *Cocks* v. *Chandler*, L. R. 11 Eq. 446; *Lazenby* v. *White*, 41 L. J. Ch. 354. So in *M. Melachrino* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888, where the defendants had placed on their labels the words "R. Melachrino & Co. Original Egyptian cigarettes." And see *Hagg* v. *Darley*, 47 L. J. Ch. 567.

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

(*f*) *Browne* v. *Freeman*, W. N. 1873. p. 178. This was, however, before the cases under the Judicature Act, 1873, which see, *supra*.

styles an article of his own manufacture, but not of his invention, "the original," may be rebutted. In *Dence* v. *Mason* (1) (*a*), the defendant was restrained from styling himself the original maker of the "essence of beef," Malins, V.-C., holding that even if he had been the first to actually compound the article, which was not satisfactorily proved, he was not entitled to make such statements as those complained of, since he was in the employ of the plaintiff's predecessor in business at the time when he said he made it for the first time. In *Fullwood* v. *Fullwood* (2) (*b*), the defendants attempted to represent their business to be the original one, by assuming for it the date of establishment of the business which was really the first.

False representation of agency.

A dealer may not represent, contrary to the fact, that he is agent for a manufacturer (*c*); neither may a manufacturer represent, contrary to the fact, that a dealer is acting as agent for him (*d*). A trader who manufactures according to a particular process cannot obtain an injunction to restrain another trader from stating untruly that he manufactures according to that process, so long as the latter does not represent that his goods are the goods of the plaintiff. In civil proceedings traders can only sue in protection of their own interests and not to prevent the public from being cheated (*e*).

Deceptive labels and notices.

In other cases the attempt to deceive has been made in different forms: thus, in an early case (*f*), the defendant attempted to attract to himself the custom intended for the plaintiffs by an ingenious variation of their labels, his own labels being facsimiles of those of the plaintiffs, with only the difference that, whereas theirs contained the sentence "Manufactured by Day and Martin," his bore the words "Equal to Day and Martin's," the "Equal to" being in very small type. So, in an American case (*g*), a dentist formerly employed by the Colton Dental Asso-

(*a*) Dig. 534; 41 L. T. N. S. 573.

(*b*) 9 Ch. D. 176. And see *Green* v. *Rooke*, W. N. 1872, p. 49; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *Whitney* v. *Hickling*, 5 Grant, Up. Can. Ch. 605; *Mossop* v. *Mason*, 18 *ib.* 453.

(*c*) *Howe* v. *McKernan*, 30 Beav. 547: *Wheeler & Wilson* v. *Shakespear*, 39 L. J. Ch. 36. And see *Cyclists Touring Club* v. *Hawley*, Times, July 9, 1900.

(*d*) *Coleman* v. *Flavel*, 12 Sawy. 220.

(*e*) *Native Guano Co., Ld.* v. *Sewage Manure Co.*, 8 P. R. 125. And see *Freeman* v. *Sharp Brothers & Co., Ld.*, 16 P. R. 205.

(*f*) *Day* v. *Binning*, C. P. Cooper, 489; 1 Leg. Obs. 205. See *Wolfe* v. *Alsop* (1) & (2), 10 V. L. R. (E.) 41; 12 *ib.* 421.

(*g*) *Colton* v. *Thomas*, 2 Brews. 308; R. Cox, 507. And see *Klotz* v. *Hecht*, 73 Fed. Rep. 822; *Garde* v. *Mitchell*, 17 V. L. R. 209. And see cases collected at pp. 150, 151.

ciation, 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. And in another American case (*a*) a former partner in a firm of dentists trading as "Morgan and Schuyler," continued to carry on business at the old premises as "B. F. Schuyler, successor to Morgan and Schuyler," the words preceding the old firm name being in such small letters as to be almost invisible. In *Mallan* v. *Davis* (*b*), a dentist who had practised for several years in Praed St. with the words "Old-established dentist" over the door, left that address; and the defendant, who practised as a dentist at another house in Praed St., put up a notice stating that the old-established dentist could be consulted there; and it was held that he had acted in a way calculated to deceive, but no injunction was granted, there having been a delay of three months, and the defendant giving an undertaking to combine his own name in a conspicuous way with the description.

Franks v. *Weaver.*

Again, in *Franks* v. *Weaver* (*c*), the plaintiff sold a medicine which he had invented, and which he termed "Franks' Specific Solution of Copaiba," in bottles enclosed in wrappers, on which were printed directions for use, and testimonials. The defendant, an agent of the plaintiff, sold a preparation of his own, labelled "Chemical Solution of Copaiba." The label went on to state that the plaintiff had invented the "Specific Solution," and then gave the testimonials printed by the plaintiff as commendatory of the plaintiff's medicine, and also the same directions for use as those given by the plaintiff. In *Sedon* v. *Senate* (*d*), a person who had sold a medicine to another, set up a new medicine under a similar description, and in his advertisement adopted verses which had been attached to the original medicine. In all these cases, except *Mallan* v. *Davis* (*e*), injunctions were granted. It appears from the decision of Stirling, J., in *Tallerman* v. *Dowsing* (*f*), that the right to restrain a misappropriation of testimonials is merely ancillary to the right to prevent one person passing off his goods as the goods of another. In that case the plaintiff, who

(*a*) *Morgan* v. *Schuyler*, 79 N. Y. 490.
(*b*) 3 Times L. R. 221.
(*c*) 10 Beav. 297. And see *Siegert* v. *Findlater*, 7 Ch. D. 801; *Siegert* v. *Ehlers*, Dig. 432: *Dunbar* v. *Glenn*, 42 Wisc. 118.
(*d*) 2 V. & B. 220. And see *Wotherspoon* v. *Gray*, Ct. Sess. Cas. 3rd Ser. II. 38, where the interdict was refused.
(*e*) 3 Times L. R. 221.
(*f*) (1900) 1 Ch. 1.

was the inventor of a system of treating diseases by hot air, moved to restrain the defendant, who was the inventor of a rival system of hot air treatment, from appropriating a press notice relating to the plaintiff's system and applying it to his, the defendant's, system. Stirling, J., declined to grant an interlocutory injunction in the absence of any attempt by the defendant to pass off his system as the plaintiff's, and distinguished *Franks* v. *Weaver* (*a*) on that ground; but the case was compromised on appeal.

Directions for use.

With respect to directions for the use of the article, it seems that, as Malins, V.-C., said in *Massam* v. *Thorley's Cattle Food Co.* (1) (*b*), if the article produced by one person is the same as that produced by another, and the former is quite at liberty to produce the same article, then the directions used by the latter are the correct directions for the use of the former's article, and he can only repeat them. In fact, if he could not give the appropriate directions for using the article which he is entitled to make, his liberty to manufacture would be unduly interfered with. The decision in the above case was, however, reversed by the Court of Appeal (*c*) on the general question of representation, the imitation of the directions being referred to as an indication of fraudulent intention, and any trader who uses the same directions as another ought to take great care to prevent the possibility of deception.

Name of patentee.

To describe articles formerly patented by the name of the former patentee is not necessarily fraudulent, since the name may be used as indicative of a principle of construction (*d*); but in an American case (*e*) an injunction was granted to restrain the defendant from marking goods of his own make as being made under the plaintiff's subsisting patent, notwithstanding an allegation by the defendant that the patent was invalid.

Mode of packing.

The imitation of a peculiar manner of making up and packing goods may, in combination with other circumstances, be held to prove a fraudulent intention; and it seems that, even in the

(*a*) 10 Beav. 297.

(*b*) 6 Ch. D. 574, 581. And see *per* Cotton, L. J., in *In re Leonard & Ellis*, 53 L. J. Ch. 611.

(*c*) 14 Ch. D. 748. And see *Simmons Medicine Co.* v. *Simmons*, 81 Fed. Rep. 163.

(*d*) *Wheeler & Wilson Manufacturing Co.* v. *Shakespear*, 39 L. J. Ch. 36; *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15; and other cases in Ch. 4.

(*e*) *Washburn & Moen Manufacturing Co.* v. *Haish*, 9 Biss. 141.

absence of other circumstances of fraud, if the imitation is very significant, and the evidence very conclusive, an injunction will be awarded (*a*). But for this the imitation must be in respect of matters which are not common to the trade, but special to the plaintiffs (*b*), and the defendant must not have effectively distinguished his goods (*c*).

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 (*d*). 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 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*) See *Edelsten* v. *Vick*, 11 Hare, 78; *Woollam* v. *Ratcliff*, 1 H. & M. 259; *Anglo-Swiss Condensed Milk Co.* v. *Swiss Condensed Milk Co.*, W. N. 1871, p. 163; *Lever* v. *Goodwin*, 36 Ch. D. 1; *Edge* v. *Johnson*, 9 P. R. 134; *Havana, Ld.* v. *Tyffin*, 26 P. R. 473; *Adolph Frankau & Co., Ld.* v. *Effucaer*, 26 P. R. 741; *S. C.* (2), Joyce, J., Dec. 13th, 1910; *Edge* v. *Nicolls*, 27 P. R. 671 (reversed, C. A., Nov. 22nd, 1910); *McLean* v. *Fleming*, 96 U. S. 245 See also *Orr* v. *Diaper*, L. R. 4 Ch. D. 92; and cases collected at p. 155.

(*b*) *Jamieson* v. *Jamieson*, 15 P. R. 169; *King* v. *Gillard*, 22 P. R. 327; *Williams* v. *Bromley*, 26 P. R. 481, 765; *Williams* v. *Newbery*, 26 P. R. 489.

(*c*) *Burford, Ld.* v. *Mowling*, 8 C. L. R. 460.

(*d*) *Knott* v. *Morgan*, 2 Keen, 213. See also *London General Omnibus Co.* v. *Felton*, 12 Times L. R. 213; *London Road Car Co.* v. *Era Omnibus Association*, Times, June 23rd, 1898, where the defendants were restrained on motion by the Court of Appeal from running omnibuses with a flag affixed thereto and otherwise got up like the plaintiffs' omnibuses without more clearly distinguishing their omnibuses from the plaintiffs', and at the trial the injunction was made perpetual by Cozens-Hardy, J., Times, April 28th, 1899. Injunctions were also granted by Farwell, J., in *London General Omnibus Co.* v. *Haydon*, Times, Feb. 17th, 1900, and *London General Omnibus Co.* v. *Lavell*, (1901) 1 Ch. 135, after a personal inspection of the rival omnibuses; but in the latter case the injunction was discharged by the Court of Appeal for want of any evidence of actual or probable deception. In *London General Omnibus Co.* v. *Gillings*, C. A., June 27th, 1900, the refusal of Cozens-Hardy, J., to grant an injunction was affirmed by the Court of Appeal. See also *London General Omnibus Co.* v. *Sullivan*, Times, June 1st, 1900.

a right to call upon that Court to restrain the defendant from fraudulently using precisely the same words and devices which they had taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages, really the defendant's, belonged to and were under the management of the plaintiffs." This case was not at all a case of trade mark, though reference has been made to it as such; the Master of the Rolls expressly denied any exclusive right in the words painted on the vehicles, and personally altered the terms of the injunction so as to avoid creating such a right. In the language of Wood, V.-C. (*a*), "the defendant might have had those words painted on a yellow omnibus without objection, and so of the other resemblances; the wrong lay in their accumulation, not in any one of them alone." The value of the case really consists in the example it affords of the way in which the aggregation of a number of circumstances, individually comparatively harmless, may produce a result injurious to an individual and obnoxious to the law; and also of the manner in which the law will interfere to protect the interests of honest trade.

Etchings.

Where A. had surreptitiously obtained possession of some etchings by B., and had advertised them for exhibition, and a catalogue of them, Lord Cottenham, C., held that there was a title to relief alike on the ground of injury to property and on that of breach of trust (*b*).

Trade secrets.

As to the cases which have been decided in respect of trade secrets, the general rule may be stated as being that any person who has, without the use of unfair means, become acquainted with the mode of compounding a secret unpatented preparation, may make and sell the compound, provided he does not lead the public to suppose that his preparation is the manufacture of the original discoverer or of his successors in business; and he may even call the compound made by himself by the same name as that given by the original discoverer to his, so long as he does not sell his own goods as and for those of another (*c*). On the other hand, where

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

(*b*) *Prince Albert* v. *Strange*, 1 Mac. & G. 25. See *Pollard* v. *Photographic Co.*, 40 Ch. D. 345. Also *Lamb* v. *Evans*, (1893) 1 Ch. 218, 229, *per* Bowen, L. J.

(*c*) *James* v. *James*, L. R. 13 Eq. 421; *Liebig's Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298; *Condy* v. *Mitchell*, 37 *ib.* 268, 766; *Carter* v. *Goetze*, 2 Keen,

the knowledge of the secret process has been acquired by means of a breach of trust, neither the person who has committed the breach of trust, nor any one to whom he has imparted his discovery, will be allowed to make use of the information so surreptitiously acquired (*a*).

Duty not to use or divulge another's secret.

Again, "there is no doubt whatever that where a party who has a secret in a trade employs persons under contract express or implied, or under duty express or implied, those persons cannot gain the knowledge of that secret and then set it up against their employer" (*b*); and, stating it generally, where 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 an injunction from so divulging or using the secret in question (*d*); and so will a person who is acting in collusion with him (*e*); and a contract by which, on the sale of a trade secret, the vendor has bound himself not to use that secret, is not invalid as being in restraint of trade (*f*). Where the defendant, who had become acquainted with a trade secret, stood by and allowed the plaintiff to purchase it, without disclosing that he was acquainted with it,

581; *Singleton* v. *Bolton*, 3 Doug. 293; *Williams* v. *Williams*, 3 Mer. 157; *Canham* v. *Jones*, 2 V. & B. 218: *Heyl-Dia* v. *Edmunds*, 81 L. T. N. S. 579. And see the comments on *Canham* v. *Jones* in *Morison* v. *Moat*, 9 Hare, 241. But, of course, when the name has become a trade mark, no one but the proprietor can use it. The question is whether the name is descriptive of the article or distinctive of the manufactory. See *Massam* v. *Thorley's Cattle Food Co.* (2), 14 Ch. D. 748.

(*a*) *Williams* v. *Williams*, 3 Mer. 157; *Youatt* v. *Winyard*, 1 Jac. & W. 394: *Tipping* v. *Clarke*, 2 Hare, 383; *Morison* v. *Moat*, 9 *ib.* 241; 21 L. J. Ch. 248; *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276; *Portal* v. *Hine*, 4 Times L. R. 330.

(*b*) *Per* Lord Cranworth, L. J., in *Morison* v. *Moat*, 21 L. J. Ch. 248. And see *Merryweather* v. *Moore*, (1892) 2 Ch. 518; *Lamb* v. *Evans*, (1892) 3 Ch. 462: (1893) 1 Ch. 218.

(*c*) See *Tipping* v. *Clarke*, 2 Hare, 383; *Robb* v. *Green*, (1895) 2 Q. B. 1, 315; *General Accident Corporation* v. *Noel*, (1902) 1 K. B. 377: *Weston* v. *Hemmons*, 2 V. L. R. Eq. 121.

(*d*) *Solon* v. *Senate*, 2 V. & B. 220: *Bryson* v. *Whitehead*, 1 S. & S. 74: *Green* v. *Folgham*, *ib.* 398; *Tipping* v. *Clarke*, 2 Hare, 383; *Morison* v. *Moat*, 9 *ib.* 241; 21 L. J. Ch. 248; *Hagg* v. *Darley*, 47 *ib.* 567; *Portal* v. *Hine*, 4 Times L. R. 330; *Merryweather* v. *Moore*, (1892) 2 Ch. 518; *Whitney* v. *Hickling*, 5 Grant, Up. Can. Ch. 605; *Weston* v. *Hemmons*, 2 V. L. R. Eq. 121; *Peabody* v. *Norfolk*, 98 Mass. 452; *Salomon* v. *Hertz*, 40 N. J. Eq. 400, where, however, it was held that the defendant ought not to be restrained from divulging where or from whom the plaintiff bought his materials, or to whom he sold his goods, or the prices at which he bought and sold. In *Newbery* v. *James*, 2 Mer. 446, Lord Eldon declined to issue an injunction, on the ground that the Court could have no means of judging as to its infringement.

(*e*) *Portal* v. *Hine*, 4 Times L. R. 330: *Peabody* v. *Norfolk*, 98 Mass. 452; *Salomon* v. *Hertz*, 40 N. J. Eq. 400.

(*f*) *Bryson* v. *Whitehead*, 1 S. & S. 74; *Hagg* v. *Darley*, 47 L. J. Ch. 567; *Jarvis* v. *Peck*, 10 Paige, 118. And see *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 352; *Allsopp* v. *Wheatcroft*, L. R. 15 Eq. 59.

it was held that he was estopped from setting up his previous knowledge against the plaintiff, and an injunction was granted to restrain him from using it (*a*). In a passing off action by the owner of a trade secret, where the identity of the processes of manufacture is put in issue, the plaintiff is not usually required to disclose his secret process (*b*).

Name of secret manufacture.

Where the defendant is availing himself of a breach of faith or of contract by means of the use of a certain designation for his goods, in such a case the defendant will be restrained from the use of such designation, although the plaintiff may have no exclusive right in the same, apart from such special circumstances (*c*).

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 (*d*); nor is it a good defence to say that the purchasers of the article did not know the name of the original manufacturer, for "one man may quite well pass off his goods as the goods of another if he passes them off to people who will accept them as the manufacture of another, although they do not know that other by name at all" (*e*); but it seems that if a person has an equal right to the use of the name with the person who is acquainted with the secret in accordance with which the goods are manufactured, the latter, at all events, cannot restrain him from the use of the mark, whatever remedy may be open to the public (*f*). If the person of whom complaint is made is acquainted with the secret process, the objection to his use of the name does

(*a*) *Champlin* v. *Stoddart*, 37 N. Y. Sup. Ct. 300.

(*b*) *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268. In such a case it has been held in Victoria that the plaintiff may be cross-examined *in camerâ*, counsel and an expert on each side being allowed to be present and the Court forbidding any disclosure of the evidence: *Sandner* v. *Curnow* (1905), V. L. R. 648, following *Badische Anilin und Soda Fabrik* v. *Levinstein*, 24 Ch. D. 156, where Pearson, J., adopted a similar course in a patent action.

(*c*) *Morison* v. *Moat*, 9 Hare, 241. And see *Green* v. *Folgham*, 1 S. & S. 398; *James* v. *James*, L. R. 13 Eq. 421; *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276; *Weston* v. *Hemmons*, 2 V. L. R. Eq. 121. In *Canham* v. *Jones*, 2 V. & B. 218, and *Green* v. *Rooke*, W. N. 1872, p. 49; L. J. N. of C. 1872, p. 54, no fraud was proved.

(*d*) *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *Ansell* v. *Gaubert*, Dig. 163; *Birmingham Vinegar Brewery Co.* v. *Powell*, (1897) A. C. 710; *Daniel* v. *Whitehouse*, (1898) 1 Ch. 685; *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268.

(*e*) *Birmingham Vinegar Brewery Co.* v. *Powell*, (1897) A. C. 710, 715, *per* Lord Herschell.

(*f*) *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54; S. C. (2), 51 How. Pr. 455.

not arise (*a*), and such a person will not be restrained from using it at the suit of a person who has no right to use the recipe in the district in which the defendant trades (*b*).

Secret passes with owner's personal estate.

After the death of an inventor of a secret process, his son, who had learnt the secret in his employ, continued to make the article, but did not take out administration to the father, and it was held that, without becoming his father's personal representative, he could acquire no right to prevent the use of the secret by another (*c*).

Green v. *Folgham*.

The manner in which the Court deals with a secret process is well exemplified by the case of *Green* v. *Folgham* (*d*). There the grandfather of the plaintiffs and defendant possessed the secret of a recipe for an ointment called "Dr. Johnson's Ointment for the Eyes." This secret he settled on his daughter at her marriage, and directed that at the death of the survivor of her and her husband it should be sold for the benefit of the children. The daughter communicated the secret to her eldest son and destroyed the recipe. On a bill being filed against the eldest son by the younger children, Leach, V.-C., decreed an account of the profits made by the defendant since his mother's death by the sale of the ointment, a reasonable allowance being made him for his time and trouble in preparing and vending the same. And the Vice-Chancellor went on to remark that if the secret could be made a subject of sale, the plaintiffs would be next entitled to ask from the Court that a sale should be directed accordingly. But inasmuch as the Court had no possible means either to communicate the secret to a purchaser with certainty, or to protect him in the enjoyment of it, a sale was, he said, impracticable (*e*). But, he continued, although the Court could not direct a sale, it had the power of taking a course which, in point of advantage, would be equivalent to the plaintiffs. It could inquire what would be the 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

(*a*) *In re Magnolia Metal Co.*, (1897) 2 Ch. 371; *Witthaus* v. *Braun*, 44 Md. 303. And see *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453; *Chadwick* v. *Covell*, 151 Mass. 190.

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

(*c*) *Hovenden* v. *Lloyd*, 18 W. R. 1132. And see *Singleton* v. *Bolton*, 3 Doug. 293.

(*d*) 1 S. & S. 398.

(*e*) See *Newbery* v. *James*, 2 Mer. 446.

value might be estimated; and the Vice-Chancellor accordingly decreed the value to be ascertained at law, as at the date of the decree.

Fraudulent secret.

In connection with this subject it should be mentioned that when, as is frequently the case, the article manufactured by the secret process is a quack medicine, or an article intended to deceive the public, the Court will not struggle to protect the secret or to punish those who invade it (*a*).

Literary production.

The rights which are possessed by the owner of a magazine, newspaper, or other literary publication, are of a very similar character to those which a person has in the goodwill of a business carried on by him. Just as a name affixed to a shop conveys to customers the idea of a certain degree of excellence, with which the articles sold by the person using that name are associated in their minds; so the title prefixed to a periodical, or its general appearance, conveys to those who take it up the impression that the contents of that publication will be found to be up to the standard to which former editions of the simulated publication have attained. Like goods bearing a trade mark, literary publications carry with them wherever they go the guarantee for their quality, and the representations conveyed by their titles are made to all into whose hands they may come, not merely to the original purchaser. With the doctrine of trade marks that of the titles of literary works has also progressed, so that in this also it has been said that "a publisher or author has either in the title of his work, or in the application of his name to the work, or in the particular marks which designate it, a species of property similar to that which a trader has in his trade mark, and may, like a trader, claim the protection of a Court of Equity against such a use or imitation of the name, mark, or designations as is likely, in the opinion of the Court, to be a cause of damage to him in respect of that property" (*b*).

Hogg v. *Kirby*.

The earliest of the cases with respect to the titles of publications was *Hogg* v. *Kirby* (*c*), before Lord Eldon, C., in 1803. The

(*a*) *Williams* v. *Williams*, 3 Mer. 157; *Estcourt* v. *Estcourt Hop Essence Co.*, L. R. 10 Ch. 276.

(*b*) *Per* Miller, J., in *Robertson* v. *Berry*, 50 Md. 591. See, however, *Walter* v. *Emmott*, 54 L. J. Ch. 1059.

(*c*) 8 Ves. 215. And see the early Scotch cases of *In re Edinburgh Correspondent Newspaper*, Ct. Sess. Cas. 1st Ser. I. 407, n.; and *Constable & Co.* v. *Brewster*, *ib.* III. 215.

plaintiff was the proprietor of a monthly magazine, called "The Wonderful Magazine," which was in fact edited by the plaintiff, though the defendant's name was used as that of the publisher. At the completion of the fifth number, the defendant refused to allow the longer use of his name, and the arrangement was accordingly discontinued, and the accounts between the parties finally settled. The plaintiff then put out a notice stating that he would publish the sixth number, which he did; but on the following day a new magazine was published by the defendant, under the same title as the old one, but with the addition of "New Series Improved, printed for Kirby & Scott," and it was announced that it was intended to issue this monthly. The plaintiff then instituted a suit to check the piracy, and was able to point to several circumstances, in addition to the title, which indicated an intention of inducing the belief that the work was in fact a continuation of the plaintiff's. Lord Eldon, in his judgment, after alluding to the circumstance that the plaintiff's counsel had argued the case on the several grounds of copyright, fraud, and contract, said that he should state the question to be, "not whether the defendant's work was the same as the plaintiff's, but, in a question between those parties, whether the defendant had not represented it to be the same,"—in fact, resting the case upon fraud on the part of the defendant. His Lordship held that the defendant's intention did appear to be to represent his work as a continuation of the plaintiff's, "taking the credit which had been acquired by that to his own" (*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," and 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

(*a*) See *Longman* v. *Winchester*, 16 Ves. 269, in which Lord Eldon explained his decision in the present case.

(*b*) In *Strahan* v. *King*, Dig. 539, the proprietors of the "Contemporary Review" sought to restrain their publishers and a former assistant editor from issuing the "Nineteenth Century," alleging among other things that the defendants were representing the latter to be the plaintiffs' Review; the Vice-Chancellor, however, held that the charges failed, and refused to grant an injunction. And see *Clowes* v. *Hogg*, W. N. 1870, p. 268; *ib.* 1871, p. 40.

(*c*) 2 Ph. 164.

to believe that no fraud was intended, but that if such were the case, the attempt was very clumsy. And he felt so much doubt as to the legal right that, on the balance of convenience, he dissolved the injunction which had been granted by the Vice-Chancellor of England, giving the plaintiff leave to bring an action, and ordering the defendant to keep an account.

Title of periodical.

In both of the above cases fraud was the *ratio decidendi,* the actions of the defendants being examined with a view to the discovery of their motives and intentions. But at the present date the rule is that even though one person may have adopted in ignorance and *bonâ fide* a name coincident or nearly coincident with that employed by another person, yet he is bound to discontinue the use of that name so assumed as soon as he is made acquainted with the fact of its earlier employment, and the previous employer of the name is entitled to obtain an injunction against him, unless by his own laches or other default he has lost the rights which he otherwise would have had. The principle enunciated by Wood, V.-C., in *McAndrew* v. *Bassett* (*a*), would be equally applicable to the case of a title of a periodical: that is to say, that although A. may have innocently used the title employed by B., yet if he continues to trade upon B.'s reputation after being made aware of his error, he does so fraudulently.

Fraudulent intention need not be proved.

The modern doctrine was thus stated by the L. JJ. in the "Sporting Life" case (*b*): "It appears to us that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person from adopting the same name for any other similar publication." And in *Clement* v. *Maddick* (*c*), in which case the plaintiffs were the publishers of "Bell's Life," and the defendants the originators of a "Penny Bell's Life," it was said by Stuart, V.-C., that "This is an application in support of the right to property. It has been argued on behalf of the defendants that, unless a fraudulent intention is made out, the plaintiffs are not entitled to an injunction. That is a view of the law to which I cannot accede. Lord Cottenham, in the case of *Millington* v. *Fox* (*d*), has declared

(*a*) 33 L. J. Ch. 561. And see *Williams* v. *Osborne*, 13 L. T. N. S. 498; and *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15 (*per* Lord Blackburn); *Rose* v. *McLean Publishing Co.*, 24 Ont. App. R. 240.

(*b*) *Kelly* v. *Hutton*, L. R. 3 Ch. 708.

(*c*) 1 Giff. 98.

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

that where a trade mark has been innocently and even unconsciously made use of to the injury of another, the owner of the trade mark is entitled to the protection of this Court."—"The defendants' whole case appears to rest on the fact that they intended to commit no fraud; that they had no fraudulent intention in adopting the words 'Bell's Life,' and thought that by prefixing the word 'Penny' to the title they had sufficiently warned the public that they were not purchasing the plaintiffs' paper. But the absence of fraudulent intention is no defence against an application to the Court for an injunction by the person whose property has been injured," and where deception is probable, an injunction will be granted (*a*). In *Waller* v. *Emmolt* (*b*), however, the Court of Appeal did not take the same view as to the jurisdiction in such cases being founded on property, and Cotton, L. J., said that "the principle upon which the Court has to decide these cases is this: It is not a question of property; it is

Injunctions granted

(*a*) Thus, injunctions were granted in the following cases:—*Edmonds* v. *Benbow*, Dig. 33 ("The Real John Bull" imitated by "The Old Real John Bull"); *In re The Edinburgh Correspondent Newspaper*, Ct. of Sess. Cas. 1st Ser. I. (new ed.) 407, n. ("The Edinburgh Correspondent," name copied); *Constable & Co.* v. *Brewster*, Ct. of Sess Cas. 1st Ser. III. 215 (new ed. 152) ("The Edinburgh Philosophical Journal" by "The New Series of the Edinburgh Philosophical Journal"); *Prowett* v. *Mortimer*, 2 Jur. N. S. 114 ("The John Bull and Britannia" by "The True Britannia"); *Ingram* v. *Stiff*, 5 Jur. N. S. 947 ("The London Journal" by "The London Daily Journal"); *Chance* v. *Sheppard*, Dig. 317 ("The Bedfordshire Express and General Advertiser for the Counties of Cambridge, Hertfordshire, Huntingdonshire, and Middlesex" by "The Bedfordshire Express and General Advertiser for the County"); *Corns* v. *Griffiths*, W. N. 1873, p. 93 ("The Iron Trade Circular—Rylands" by "The Iron Trade Circular—edited by Samuel Griffiths"); *Metzler* v. *Wood*, 8 Ch. D. 606 ("Henry's Royal Modern Tutor for the Pianoforte" by "Henry's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor"); *Hutchings* v. *Sheard*, W. N. 1881, p. 20 ("The Violin School, by J. D. Loder" by "J. D. Loder's Celebrated Violin School, edited, revised, and enlarged by T. Westrop"); *Primrose Press Agency* v. *Knowles*, L. J. N. of C. 1886, p. 43 ("Church and State" in each case); *Licensed Victuallers' Newspaper Co.* v. *Bingham*, 38 Ch. D. 139; *Reuter's Telegram Co.* v. *International Guide Syndicate*, 94 L. T. (Journal) 137, 460 (unauthorised use of "Official" as applied to a guide to an exhibition); *Reed* v. *O'Meara*, 21 L. R. Ir. 216 ("The Grocer and Oil Trade Review" imitated by "The Grocer and Wine Merchant and Irish Brewer and Distiller." An injunction was granted to restrain the word "Grocer," into which the plaintiffs' title was commonly abbreviated, from being used as the first and principal part of the defendants' title); *Picture Press, Ld.* v. *Ross*, Joyce, J., Feb. 24th, 1909 ("Ally Sloper"); *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306 ("Beatty's Headline Copy Book" imitated by "Beatty's New and Improved Headline Copy Book"); *Carey* v. *Gow*, 11 Ont. Rep. 619 ("The Commercial Traveller and Mercantile Journal," commonly abbreviated to "The Commercial Traveller," and "The Traveller," by "The Traveller"); *Rose* v. *McLean Publishing Co.*, 24 Ont. App. R. 240 ("Canadian Bookseller and Library Journal," imitated by "Canada Bookseller and Stationer"). And see *Keene* v. *Harris*, 17 Ves. 338; *Walter* v. *Head*, 25 Sol. J. 742, 757 (imitations of "The Times").

(*b*) 54 L. J. Ch. 1059.

the question whether what has been done by the defendant is in reason calculated to induce people to take his goods as those of the plaintiff, or, in other words, to pass off his goods, whatever they may be, as the goods of the plaintiff." And Bowen, L. J., said, "The principle which is involved seems to me to be the right of the Court, and the duty of the Court, to prevent damage being done to the business of a person who is lawfully carrying on his business, by acts, conduct, or representations, consisting either of acts or language, which are calculated to deceive the public, and persons who otherwise would deal with the plaintiff." However, even in this case it was not suggested that a fraudulent intention was necessary to enable relief to be given; and if that is so, the question whether property is or is not involved seems of little practical importance. Even if the theory that there is property in the name of a newspaper is admitted, that right is not invaded without a probability of deception being produced.

But deception must be probable.

While, however, the fact that the defendant has adopted a title calculated to deceive is sufficient to entitle the plaintiff to his remedy, without it being necessary for him to go into the defendant's motives, he must prove the probability of deception, and if he cannot do this he will fail, even though there may be circumstances pointing to a fraudulent intention. Thus, where the proprietors of the "Era," one of the principal writers in which paper used the pseudonym of "Touchstone," sought to restrain the publication of "Touchstone, or the New Era," and alleged certain further resemblances between the two papers, the Court of Appeal rescinded the injunction which had been granted, on the ground that no deception could occur (*a*). And where the plaintiff sought

(*a*) *Ledger* v. *Ray*, Dig. 550. And no injunctions were granted in *Bradbury* v. *Beeton*, 39 L. J. Ch. 57 ("Punch" and "Punch and Judy"); *Dicks* v. *Yates*, 18 Ch. D. 76 ("Splendid Misery, or East End and West End, by C. H. Hazelwood," and "Splendid Misery, by the author of Lady Audley's Secret, Vixen, &c."); *Dale* v. *Smith*, W. N. 1882, p. 145 ("The Plumber and Decorator and Journal of Gas and Sanitary Engineering" and "The Decorator, Plumber, and Gasfitter's Journal"); *Dale* v. *General Newspaper Co.*, 1 Times L. R. 177 (same as above, and "The Plumbing and Decorating, Sanitary, Water, and Gas Engineering Chronicle"); *Coxen* v. *Hulton*, 46 L. T. N. S. 897 ("The Newcastle Daily Chronicle" and "The Sporting Chronicle and Prophetic Bell"); *Walter* v. *Emmott*, 54 L. J. Ch. 1059 ("The Mail" and "The Morning Mail." Here the style and price of the two papers were very different); *Jaffray* v. *Emmott*, Bacon, V.-C., July 3rd, 1885 ("The Birmingham Daily Mail" and "The Morning Mail"); *Borthwick* v. *The Evening Post, Ld.*, 37 Ch. D. 449 ("The Morning Post" and "The Evening Post"); *Brett* v. *Bowles*, L. J. N. of C. 1890, p. 43; affirmed by C. A. April 30th, 1890 ("The Princess' Novel-

Injunctions refused.

to restrain the defendant from using the name "Post Office Directory," and it was shown that the name had been used by others than the plaintiff, and that the defendant had had the assistance of post office servants, it was held that no injunction could be granted (*a*). So, where both plaintiff and defendant sold under the name of "Castle Album" albums illustrated with pictures of castles, it was held that the name was descriptive of the thing, and that, even if the name were capable of appropriation at all, no injunction would be granted to protect it, unless it were proved that it was recognised as denoting exclusively the plaintiff's albums (*b*). Even if the title is not descriptive, and has been taken without alteration by the defendant, no injunction will be granted unless the plaintiff's paper has been long enough on sale to have acquired some reputation under the name (*c*). And the plaintiff must come with clean hands (*d*).

Titles of literary works protected generally.

Although the title of a periodical publication as a newspaper, magazine, or almanack most closely resembles a trade mark, on account of its repeated and continued use from time to time upon articles of a certain class, the protection afforded by the Court is extended to the title of any kind of literary production. Thus, the publishers of "The Birthday Scripture Text Book" succeeded in obtaining an injunction against persons who had brought out "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" (*e*). 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 (*f*).

Incidents of title of publication.

The right which exists in the title of a publication is a right of property (*g*), a chattel interest (*h*), capable of assignment (*i*) or

ettes" and "The Princess"); *Houlston* v. *Morley*, 90 L. T. (Journal) 40 ("Enquire Within upon Everything" and "Enquire Within"); *Willox* v. *Pearson*, 18 Times L. R. 220 ("Evening Express" and "North Express").

(*a*) *Kelly* v. *Byles*, 13 Ch. D. 682.

(*b*) *Schorr* v. *Schmincke*, 33 Ch. D. 546.

(*c*) *Licensed Victuallers' Newspaper Co.* v. *Bingham*, 38 Ch. D. 139.

(*d*) *Talbot* v. *Judges*, 3 Times L. R. 398.

(*e*) *Mack* v. *Petter*, L. R. 14 Eq. 431. See *Weldon* v. *Dicks*, 10 Ch. D. 247.

(*f*) *Chappell* v. *Sheard*, 2 K. & J. 117; *Chappell* v. *Davidson*, *ib.* 123.

(*g*) *Clement* v. *Maddick*, 1 Giff. 98; *Kelly* v. *Hutton*, L. R. 3 Ch. 708. But this was disputed in *Walter* v. *Emmott*, 54 L. J. Ch. 1059.

(*h*) *Per* Wood, L. J., in *Kelly* v. *Hutton*, L. R. 3 Ch. 708.

(*i*) *Longman* v. *Tripp*, 2 Bos. & P.

bequest (*a*), passing, in the event of its proprietor's bankruptcy, to his trustee, but incapable of seizure by a sheriff (*b*), 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 (*c*).

No copyright in title.

Although the term copyright has been sometimes applied to the right in the title of a publication (*d*), there "cannot in general be any copyright in the title or name of a book" (*e*), but copyright and trade mark are things "totally distinct" (*f*), and registration under the Copyright Acts gives no further right to protection than exists independently of such registration (*g*).

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 (*h*), 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" (*i*). So, in one case (*k*), the defendants had registered

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.

(*a*) *Keene* v. *Harris*, 17 Ves. 338. In *McCormick* v. *McCubbin*, Ct. Sess. Cas. 1, Ser. I. 541 (new ed. 496) it was held by the Court of Session that the executors of the proprietor of a half-share in a newspaper were entitled to proceed to a sale of his share.

(*b*) *Ex parte Foss*, 2 De G. & J. 230.

(*c*) *Bradbury* v. *Dickens*, 27 Beav. 53.

(*d*) *E.g.*, *per* Lord Romilly, M. R., in *Mack* v. *Petter*, L. R. 14 Eq. 431; *per* Malins, V.-C., in *Weldon* v. *Dicks*, 10 Ch. D. 247; *per* Bacon, V.-C., in *Dicks* v. *Yates*, 18 Ch. D. 76.

(*e*) *Per* James, L. J., in *Dicks* v. *Yates*, 18 Ch. D. 76. And see *Kelly* v. *Hutton*, L. R. 3 Ch. 708; *Correspondent Newspaper Co.* v. *Saunders*, 11 Jur. N. S. 540; *Primrose Press Agency* v. *Knowles*, L. J. N. of C. 1886, p. 43; *Schove* v. *Schmincke*, 33 Ch. D. 546; *Licensed Victuallers' Newspaper Co.* v. *Bingham*, 38 Ch. D. 139.

(*f*) *Per* Jessel, M. R., in *Dicks* v. *Yates*, 18 Ch. D. 76. In *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306, it was said that the name of a newspaper was not a trade mark. Some such names have, however, been registered in this country.

(*g*) *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 399. See *Hirsch* v. *Jonas*, 3 Ch. D. 584.

(*h*) Or registered, since the Trade Marks Act of 1875.

(*i*) *Per* Turner, L. J., in *Maxwell* v. *Hogg*, L. R. 2 Ch. 307. And see *Correspondent Newspaper Co.* v. *Saunders*, 11 Jur. N. S. 540.

(*k*) *Primrose Press Agency* v. *Knowles*, L. J. N. of C. 1886, p. 43.

their newspaper at Stationers' Hall on December 24th, 1885, but did not publish the first number till January 16th, 1886; while in the meantime the plaintiffs had registered on January 1st, 1886, and begun to sell on January 2nd, 1886, a newspaper under the same name, and it was held that an injunction must be granted for the protection of the plaintiffs, who had been the first to actually use the title. The user must, however, be substantial (*a*). Where, on the other hand, a book has been once published under a particular title, it seems that the right in the title remains, notwithstanding that the book has been long out of print, and has, in fact, been treated as obsolete (*b*).

(*a*) *Licensed Victuallers' Newspaper Co.* v. *Bingham*, 38 Ch. D 139.
(*b*) *Weldon* v. *Dicks*, 10 Ch. D. 247.

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 last century it was said at the bar (*b*) to be a matter of common experience that contracts for the sale of a goodwill were enforced by actions at law at every sittings.

Connection between goodwill and trade marks.

The connection between goodwill and trade marks is very intimate. Thus, where in a suit for specific performance of a contract for sale of a business (*c*), one of the subjects of the contract was "goodwill, &c.." Romilly, M. R., said that those words united such things as were necessarily connected with and belonged to the goodwill, many of which were easily pointed out; for instance, the use of trade marks. Such things would be included in the words "et cætera," and would be included in the conveyance. The sale of a business carries with it the goodwill and trade marks (*d*), and the sale of a business and goodwill carries with it the right to the trade name (*e*), and the words "assets and effects of every kind and nature," in a bill of sale of a business, cover the trade

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

(*b*) *Bunn* v. *Guy*, 4 East, 190.

(*c*) *Cooper* v. *Hood*, 26 Beav. 293.

(*d*) *Shipwright* v. *Clements*, 19 W. R. 599; *Singer Manufacturing Co.* v. *Loog* (3), 8 App. Cas. 15, 33 (*per* Lord Blackburn); *Currie* v. *Currie*, 15 P. R. 339; *In re Zonophone Trade Mark*, 20 P. R. 450; *Inland Revenue Commrs.* v. *Muller & Co's Margarine, Ld.*, (1901) A. C. 217; *Gage* v. *Canada Publishing Co.*, 11 Can. Sup. Ct. 306. And see *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540. In *Churton* v. *Douglas*, Johns. 174, V.-C. Wood went so far as to say that the question of trade mark was in fact the same as the question of firm name, which, it was obvious, was an important part of the goodwill. See, too, *England* v. *Curling*, 8 Beav. 129; *In re Roger* (2), 12 P. R. 149; *Dickson* v. *McMaster & Co.*, 18 Ir. Jur. 202; *Congress & Empire Spring Co.* v. *High Rock Congress Spring Co.*, 57 Barb. 526; R. Cox, 599; *Dixon Crucible Co.* v. *Guggenheim*, 2 Brews. 321; R. Cox, 559; *Solier* v. *Johnson*, 111 Mass. 238; *Witthaus* v. *Braun*, 44 Md. 303; *Ex parte Young*, Dig. 537.

(*e*) *Per* James, L. J., in *Levy* v. *Walker*, 10 Ch. D. 436. See *Thompson* v. *Mackinnon*, 2 Steph. Dig. 726; *Attenborough* v. *Jay*, 14 Times L. R. 439.

marks used in the business (*a*). Again, a trade mark cannot exist in gross and apart from the goodwill of the business with which it has been connected (*b*).

Connection recognised by registration Act of 1875, and later Acts.

This close connection was fully recognised in the Trade Marks Registration Act, 1875 (*c*), by the second section of which it was provided that a registered trade mark should be assigned and transmitted only in connection with the goodwill of the business concerned in such particular goods or classes of goods, and should be determinable with such goodwill. By the third section the right of the registered proprietor to the exclusive use of the trade mark was made subject to the provisions in respect of its connection with the goodwill. These provisions have been repeated in §§ 70 and 76 of the Patents Act, 1883 (*d*), and § 22 of the Trade Marks Act, 1905 (*e*).

What constitutes goodwill.

"Goodwill, I apprehend," said Wood, V.-C., in the important case of *Churton* v. *Douglas* (*f*), "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" (*g*). And it carries with it the benefit of such matters as a covenant by a servant (*h*) or partner (*i*) not to carry on a similar business within prescribed limits.

Formerly treated as always local.

Previously to the case of *Churton* v. *Douglas* (*k*), the language of various eminent judges as to what constituted "goodwill" had

(*a*) *Morgan* v. *Rogers*, 19 Fed. Rep. 596. And see *Ferne* v. *Wilson*, 26 V. L. R. 422; *Russia Cement Co.* v. *Le Page*, 147 Mass. 206; *Horie* v. *Chaney*, 143 Mass. 592; *Mackinnon* v. *Thompson*, 5 Can. Leg. News 396.

(*b*) *Cotton* v. *Gillard*, 44 L. J. Ch. 90; *In re Wellcome*, 32 Ch. D. 213; *Rey* v. *Leconturier*, 25 P. R. 265; 27 *ib.* 268; *In re Johnson*, 26 P. R. 195; *Smith* v. *Fair*, 14 Ont. Rep. 729; *Dixon Crucible Co.* v. *Guggenheim*, 2 Brews. 321; R. Cox, 559; *Witthaus* v. *Braun*, 44 Md. 303; *Kidd* v. *Johnson*, 100 U. S. 617.

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

(*d*) 46 & 47 Vict. c. 57.

(*e*) 5 Edw. VII. c. 15.

(*f*) Johns. 174.

(*g*) *Per* Pollock, C. B., in *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147.

(*h*) *Jacoby* v. *Whitmore*, 49 L. T. N. S. 335; *Shoucll* v. *Winkup*, 60 *ib.* 389.

(*i*) *Townsend* v. *Jarman*, (1900) 2 Ch. 698.

(*k*) Johns. 174.

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 (*a*). Thus, Lord Eldon, C., in *Cruttwell* v. *Lye* (*b*), describes goodwill as "nothing more than the probability that the old customers will resort to the old place" (*c*). Leach, M. R., describes it (*d*) as "an advantage attaching to the possession of the house" in which the business had been carried on; and Lord Langdale, M. R. (*e*), as "the chance or probability that custom will be had at a certain place of business in consequence of the way in which that business has been previously carried on." In *King* v. *Midland Railway Co.* (*f*), Giffard, V.-C., gave effect to this view by holding that the assignees in liquidation of a mortgagor, whose business premises were taken by a railway company, were entitled to no part of the purchase-money, as having been paid in respect of the goodwill of the business, as against the mortgagee of the premises, whose debt exceeded the purchase-money; but that the goodwill was incident to the mortgaged premises and passed with them.

The judgment in *Churton* v. *Douglas*, which has been accepted by the House of Lords in the important case of *Trego* v. *Hunt* (*g*), has now established that the dictum of Lord Eldon in *Cruttwell* v. *Lye* (*h*) must be read as meaning that goodwill is the probability that the old customers will buy the old goods from the old firm or their successors in business, whether the means of identification be the place of business or otherwise (*i*). "It is the whole advantage, whatever it may be, of the reputation and connection of the firm" (*k*). The customers of a large wholesale

Not so now.

(*a*) See *Churton* v. *Douglas*, Johns. 174.

(*b*) 17 Ves. 335.

(*c*) In this case Sir A. Piggott, in the course of his argument, said that "goodwill" was "the advantage belonging to a house long accustomed to carry on a particular trade." See, too, *per* Plumer, V.-C., in *Harrison* v. *Gardner*, 2 Madd. 198.

(*d*) In *Chissum* v. *Dewes*, 5 Russ. 29.

(*e*) In *England* v. *Downs*, 6 Beav. 269, adopted in *Vonderbank* v. *Schmidt*, 44 La. Ann. 264; 32 Am. St. Rep. 346.

(*f*) 17 W. R. 113. See *Rutter* v. *Daniel*, 30 W. R. 724, 801; *Mitchell* v. *Read* (2), 26 N. Y. Sup. Ct. 418.

(*g*) (1896) A. C. 7, 17.

(*h*) 17 Ves. 335.

(*i*) And compare *Labouchere* v. *Dawson*, L. R. 13 Eq. 322; *Cooper* v. *Metropolitan Board of Works*, 25 Ch. D. 472.

(*k*) *Per* Lord Macnaghten in *Trego* v. *Hunt*, (1896) A. C. 7, 24. And see *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.*, (1901) A. C. 217, 223-4; *Hill* v. *Fearis*, (1905) 1 Ch. 466.

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" (*a*).

Local connection important.

While, however, there may be a species of goodwill not intimately connected with a particular spot, in many trades there can hardly be any goodwill apart from the premises on which business has been carried on. Thus, "it is quite plain that the goodwill of a public-house passes with the public-house. In such a case the goodwill is the mere habit of the customers resorting to the house. It is not what is called a personal goodwill" (*b*). Such a goodwill carries with it the public-house licences, since without them the business cannot be carried on (*c*). And wherever there is a connection between the goodwill and a particular locality it will be of great consequence; and a house of little value in itself, at a rack-rent, may have a peculiar value attached to it from the fact of a long-established business having been carried on there (*d*).

Another view of goodwill.

Looked at from another point of view, the goodwill may be said to be the money value of what has just been described as the goodwill (*e*). It has been held to be included in the phrases "assets" (*f*), "effects and securities" (*g*), "property and

(*a*) Brett, J., in *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456. The goodwill of a newspaper is another example. See the observations of Lord Lindley, in his work on Partnership. See, too, *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147; *Ginesi* v. *Cooper*, 14 Ch. D. 596; *Trego* v. *Hunt*, (1896) A. C. 7, 17, 21; *Donald* v. *Hodgart's Trustees*, Ct. Sess. Cas. 4th Ser. XXI. 246.

(*b*) *Per* Jessel, M. R., in *Ex parte Punnett*, 16 Ch. D. 226. As to the goodwill of a public-house, see also the following Scotch decisions: *Hughes* v. *Stirling*, Ct. Sess. Cas. 4th Ser. XIX. 840; *Philp's Executor* v. *Philp's Executor*, Ct. Sess. Cas. 4th Ser. XXI. 482; *Mason* v. *Queen*, 23 Scot. L. Rep. 641; *Leishman* v. *Henderson*, 6 Scot. L. T. 328; *Ross Trustees* v. *Ross*, 9 Scot. L. T. 286; *Town & County Bank* v. *McBain*, *ib.* 485; *Murray's Trustee* v. *McIntyre*, Ct. Sess. Cas. 5th Ser. VI. 588; *Graham* v. *Graham's Trustees*, *ib.* 1015; *Muirhead's Trustees* v. *Muirhead*, 42 Scot. L. Rep. 367; *Livingston* v. *Assessor for Paisley*, 46 *ib.* 433.

(*c*) *Rutter* v. *Daniel*, 30 W. R. 724. 801; *Copland's Trustee* v. *Copland*, 23 Sc. L. R. 456. As to the valuation of the goodwill of a brewery with tied houses, see *Page* v. *Ratcliffe*, 75 L. T. N. S. 371.

(*d*) *Parsons* v. *Hayward*, 31 L. J. Ch. 666; *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456. See *Cooper* v. *Metropolitan Board of Works*, 25 Ch. D. 472, *per* Cotton, L. J. So with a pottery: *Bell's Trustee* v. *Bell*, Ct. Sess. Cas. 4th Ser. XII. 85.

(*e*) *Austen* v. *Boys*, 2 De G. & J. 626; *Llewellyn* v. *Rutherford* (Brett, J.), L. R. 10 C. P. 456.

(*f*) *Jennings* v. *Jennings*, (1898) 1 Ch. 378.

(*g*) *In re David & Matthews*, (1899) 1 Ch. 378.

effects" (*a*), and a bequest of the goodwill of a business may carry the business premises (*b*).

Goodwill discussed in House of Lords.

An important discussion with regard to the nature of goodwill, looked at from the point of view of the Stamp Acts, took place in the House of Lords in *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ld.* (*c*), where Lord Macnaghten said: "It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will—of course, under the conditions attaching to property of that nature. Then comes the question—can it be said that goodwill has a local situation within the meaning of the Act? I am disposed to agree with an observation thrown out in the course of the argument, that it is not easy to form a conception of property having no local situation. What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyze goodwill and split it up into its component parts, to pare it down, as the Commissioners desire to do, until nothing is left but a dry residuum—ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one

(*a*) *In re Leas Hotel Co., Ld.*, (1902) 1 Ch. 334.

(*b*) *Blake* v. *Shaw*, Johns. 732.

(*c*) (1901) A. C. 217.

whole, and in a case like this it must be dealt with as such. For my part, I think that if there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again. No doubt, where the reputation of a business is very widely spread, or where it is the article produced rather than the producer of the article that has won popular favour, it may be difficult to localise goodwill."

And in the same case Lord Lindley said: "Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own. That in some cases and to some extent goodwill can and must be considered as having a distinct locality, is obvious, and was not, in fact, disputed. The goodwill of a public-house or of a retail shop is an instance. The goodwill of a business usually adds value to the land or house in which it is carried on if sold with the business; and so far as the goodwill adds value to land or buildings, the goodwill can only be regarded as situate where they are. In such a case the goodwill is said to be annexed to them."

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

Adverting to this distinction, Sir J. Cross, in *Ex parte*

Thomas (*a*), divided goodwill into personal and local, adding that there might be a goodwill partly personal and partly local (*b*). 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* (*c*), and to unduly narrow the meaning to be assigned to "goodwill," which, as has been seen, comprehends, not merely the advantage of local situation, but every positive advantage connected with an established trade. personal and local.

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 (*d*), and in *Arundell* v. *Bell* (*e*), Jessel, M. R., went so far as to say that "there is nothing analogous to the goodwill in an ordinary trade, which you can sell, in the case of a partnership of living solicitors"; but, on the other hand, there are points of resemblance in which both classes are governed by the same general rule, and there is a convenience in following an established phraseology. Division into goodwill of profession and of trade.

In *Bunn* v. *Guy* (*f*), the Lord Chancellor (Lord Eldon) was impressed by the difference between the goodwill of a profession and that of a trade, and caused the opinion of the Court of King's Bench to be taken as to whether a contract by a practising attorney (among other things) to relinquish his business and recommend his clients to two other attorneys, for valuable consideration, and not to practise within certain limits, and to permit them to use his name for a certain time, was good at law, so that Contract by attorney to transfer goodwill enforced.

(*a*) 2 Mont. D. & De G. 294. And see *Ex parte Pannell*, 16 Ch. D. 226.

(*b*) This division corresponds to that of trade marks into personal and local, made by Romilly, M. R., in *Hall* v. *Barrows*, 32 L. J. Ch. 548, which, however, was not indorsed by Westbury, C. See 4 De G. J. & S. 150.

(*c*) Johns. 174.

(*d*) See *Austen* v. *Boys*, 2 De G. & J. 626; *Burchell* v. *Wilde*, (1900) 1 Ch. 551; and *Bain* v. *Munro*, Ct. Sess. Cas. 4th Ser. V. 416, *per* Lord Curriehill.

(*e*) 52 L. J. Ch. 537. And see *per* Denman, J., in *James* v. *James* (2), 60 L. T. N. S. 560.

(*f*) 1 East, 190, in 1803. See the medical case of *Rawlinson* v. *Clarke*, 14 M. & W. 187.

the vendor could recover in an action. The answer was that the contract was good in law.

Decision doubted.

This decision did not long remain uncriticised. In *Bozon* v. *Farlow* (*a*), 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* (*b*), Leach, V.-C., strongly supported the personal character of a profession as contrasted with a commercial business.

Sale of solicitor's practice.

Where, however, a solicitor had actually sold his practice for valuable consideration, and undertaken not to practise as a solicitor in Great Britain for twenty years, Lord Langdale, M. R., granted an injunction to restrain him from so practising, and from endeavouring to induce any persons who were the clients of the former and then present firm to cease to employ that firm (*c*). But an assignment of the goodwill of a solicitor's practice does not carry with it the right to his clients' papers (*d*).

Thornbury v. *Bevill.*

In a case (*e*) which was "not quite a case of dissolution of partnership, but something between a dissolution of the partnership and a purchase of an attorney's business and firm name," Knight-Bruce, V.-C., having refused specific performance of the alleged contract, on the ground of non-acceptance by the plaintiff, said that, "notwithstanding the case of *Bunn* v. *Guy* (*f*), from which he did not mean to express dissent, decided as it was by judges of high authority, he was not prepared to say that it was fit that a Court of Equity should enforce an agreement between two solicitors that one on retiring from the business should permit the other to carry on the business in his name. Whether such an agreement were or were not within the strict policy of the law, it might be doubtful whether the Court of Chancery ought to assist it."

Partnership between solicitors dissolved.

But where, on a dissolution by two solicitors of a *bonâ fide* partnership between them, it was agreed that one should carry

(*a*) 1 Mer. 459.
(*b*) 3 Madd. 74.
(*c*) *Whittaker* v. *Howe*, 3 Beav. 383.
(*d*) *Per* Denman, J., in *James* v. *James* (2), 60 L. T. N. S. 569.
(*e*) *Thornbury* v. *Bevill*, 1 Y. & C. Ch. 554.
(*f*) 4 East, 190.

on the business under the old firm name, paying the other certain annuities, it was held by Wood, V.-C., that the agreement contained nothing illegal or contrary to the public policy (*a*).

Rights on dissolution.

Again, on a dissolution of a professional partnership, a retiring partner is not entitled to compensation in respect of his share in the goodwill (*b*), and a surviving partner may continue the business (*c*).

Goodwill of deceased solicitor.

In *Spicer* v. *James* (*d*), a country attorney having died intestate, his administrator carried on the business until the intestate's son came of age, when he handed over the business to the son. The son becoming insolvent, a bill for an account of profits, and insisting that a sum was due to the intestate's estate in respect of the goodwill, was filed against the administrator by a creditor of the son, but was dismissed by Leach, M. R., on the ground that the goodwill of an attorney's business was not a subject of administration. So, in *Arundell* v. *Bell* (*e*), the Court of Appeal decided that the estate of a solicitor, who had retired from a partnership and shortly afterwards died, was not entitled to any allowance in respect of his interest in the goodwill of the business; and Jessel, M. R., said that "as a general rule there is nothing in the nature of a partnership asset to be sold which can fairly be termed goodwill in an ordinary partnership between solicitors."

Estate of professional man interested in proceeds of goodwill.

Where, however, the widow of a surgeon dentist, being one of his executors, sold the goodwill of his business with an introduction to patients, Knight-Bruce, V.-C., held that either the whole, or, at all events, some part of the price paid, belonged to the testator's estate (*f*). But in the similar Scotch case of *Bain* v. *Munro* (*g*), it was held by the Lord Ordinary and Court of Session that the price which was paid was in fact the price of the widow's recommendation, and that she was entitled to retain it for her own benefit, and in another Scotch case it was held that no goodwill could be considered to be attached to the practice of a deceased doctor (*h*). In the particular circumstances

(*a*) *Aubin* v. *Holt*, 2 K. & J. 66.

(*b*) *Austen* v. *Boys*, 2 De G. & J. 626; *Farr* v. *Pearce*, 3 Madd. 74. See *Burchell* v. *Wilde*, (1900) 1 Ch. 551.

(*c*) *Ib.* And see *Milner* v. *Reed*, Dig. 328; *Chappell* v. *Griffith*, 53 L. T. N. S. 459.

(*d*) Collyer on Partnership, 2nd ed. p. 104.

(*e*) 52 L. J. Ch. 537.

(*f*) *Smale* v. *Graves*, 3 De G. & S. 706.

(*g*) Ct. Sess. Cas. 4th Ser. V. 116.

(*h*) *Thatcher* v. *Thatcher*, 11 Scot. L. T. 605.

of the case the same was held with regard to a stockbroker's business (*a*), but as a rule the goodwill of a stockbroker's business is a saleable asset, and when a partner dies, in the absence of special agreement, his personal representatives are entitled to a share of the goodwill (*b*).

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 may be attributed to the estate. If professional partners dissolve partnership, without sale or assignment of the goodwill, and without any provision as to the use of the firm name, each may continue to use the name in any way which does not expose his former partners to any risk of liability (*c*).

Goodwill of a trade.

"The goodwill of a trade," said Tindal, C. J. (*d*), "is a subject of value and price. It may be sold (*e*), bequeathed (*f*), or become assets in the hands of the personal representatives of a trader" (*g*). A sale may be conditional (*h*), and may be effected by a mortgagee (*i*). Though incapable, by reason of its incorporeal nature, of seizure by a sheriff (*k*), goodwill is "goods and chattels within the Bankruptcy Acts (*l*), and may be dealt with by the trustee in bankruptcy just as the bankrupt's other pro-

(*a*) *Wilson* v. *Williams*, 29 L. R. Ir. 176.

(*b*) *Hill* v. *Fearis*, (1905) 1 Ch. 466, where *Wilson* v. *Williams*, 29 L. R. Ir. 176, is distinguished.

(*c*) *Burchell* v. *Wilde*, (1900) 1 Ch. 551.

(*d*) In *Hitchcock* v. *Coker*, 6 Ad. & E. 438, 451.

(*e*) See *Darbey* v. *Whitaker*, 4 Dr. 139; *Churton* v. *Douglas*, Johns. 174; *Cooper* v. *Hood*, 26 Beav. 293; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Shipwright* v. *Clements*, 19 W. R. 599; *Howe* v. *Searing*, 10 Abb. Pr. 264; R. Cox, 244.

(*f*) See *Keene* v. *Harris*, 17 Ves. 338 *Robertson* v. *Quiddington*, 28 Beav. 529.

(*g*) See *Worral* v. *Hood*, Peake, 105; *Dakin* v. *Cope*, 2 Russ. 170; *Chissum* v. *Dewes*, 5 Russ. 29; *McCormick* v. *McCubbin*, Ct. Sess. Cas. 1st Ser. I. 541; *Donald* v. *Hodgart's Trustees*, Ct. Sess. Cas. 4th Ser. XXI. 246.

(*h*) *Boon* v. *Moss*, 70 N. Y. 465.

(*i*) *Ex parte Punnett, In re Kitchin*, 16 Ch. D. 226.

(*k*) *Ex parte Foss*, 2 De G. & J. 230; *Helmore* v. *Smith*, 35 Ch. D. 436. And see *Grgg* v. *Bassett*, 30 Ont. L. R. 263.

(*l*) *Longman* v. *Tripp*, 2 Bos. & P. N. R. 67; *Ex parte Foss*, 2 De G. & J. 230.

party" (*a*). It is also "property" within the Stamp Acts (*b*). But where a business consists in manufacturing in accordance with a secret process, the goodwill cannot pass without the knowledge of the secret (*c*).

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 (*d*), brewers (*e*), bankers (*f*), tailors (*g*), mercers (*h*), dyers (*i*), milliners (*k*), upholsterers (*l*), pencil-makers (*m*), tobacco-brokers (*n*), snuff-makers (*o*), paper-makers (*p*), provision merchants (*q*), cheesemongers (*r*), glass-blowers (*s*), glass-stainers (*t*), manufacturing chemists (*u*), commission agents (*x*), iron-masters (*y*), carriers (*z*). 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 (*a*).

Firm name part of goodwill.

"The name of a firm," says Wood, V.-C., in *Churton* v. *Douglas* (*b*), "is a very important part of the goodwill of the

(*a*) See *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Hammond* v. *Malcolm, Brunker & Co.*, 9 P. R. 301: *In re Bolanachi's Empire Chocolate Co.*, 89 L. T. (Journal) 273.

(*b*) *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147; *Benjamin Brooke & Co., Ld.* v. *Inland Revenue Commissioners*, (1896) 2 Q. B. 356; *West London Syndicate* v. *Inland Revenue Commissioners*, (1898) 2 Q. B. 507; *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.*, (1901) A. C. 217. And see *Inland Revenue Commissioners* v. *Angus*, 23 Q. B. D. 579; *Inland Revenue Commissioners* v. *Glasgow & South Western Railway Co.*, 12 App. Cas. 315.

(*c*) *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268.

(*d*) *Coslake* v. *Till*, 1 Russ. 376; *Spratt* v. *Jeffery*, 10 B. & C. 249; *Ex parte Thomas*, 2 Mont. D. & De G. 294; *Tweed* v. *Mills*, L. R. 1 C. P. 39; *Llewellyn* v. *Rutherford*, L. R. 10 C. P. 456; *Ex parte Pannett, In re Kitchin*, 16 Ch. D. 226; *Philp's Executor* v. *Philp's Executor*, Ct. Sess. Cas. 4th Ser. XXI. 182.

(*e*) *Cooper* v. *Watson*, 3 Doug. 413; *Wade* v. *Jenkins*, 2 Giff. 509; *Hall* v. *Hall*, 20 Beav. 139.

(*f*) *Smith* v. *Everett*, 27 Beav. 446.

(*g*) *Nueling* v. *Dobell*, 38 L. J. Ch. 111; *Parsons* v. *Hayward*, 31 L. J. Ch. 666.

(*h*) *Morris* v. *Moss*, 25 L. J. Ch. 194.

(*i*) *Bryson* v. *Whitehead*, 1 S. & S. 74.

(*k*) *Shackle* v. *Baker*, 14 Ves. 468.

(*l*) *Chissum* v. *Dewes*, 5 Russ. 29.

(*m*) *Banks* v. *Gibson*, 34 Beav. 566.

(*n*) *Davies* v. *Hodgson*, 25 Beav. 177.

(*o*) *Hammond* v. *Douglas*, 5 Ves. 539.

(*p*) *Potter* v. *The Commissioners of Inland Revenue*, 10 Ex. 147.

(*q*) *Scott* v. *Mackintosh*, 1 V. & B. 503.

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

(*s*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.

(*t*) *Scott* v. *Rowland*, 20 W. R. 508.

(*u*) *Turner* v. *Major*, 3 Giff. 442.

(*x*) *Macdonald* v. *Richardson*, 1 Giff. 81.

(*y*) *Cooper* v. *Hood*, 26 Beav. 293; *Hall* v. *Barrows*, 4 De G. J. & S. 150.

(*z*) *Crutwell* v. *Lye*, 17 Ves. 335.

(*a*) *Giblett* v. *Read*, 9 Mod. 459; *Kemp* v. *Harris*, 17 Ves. 338; *Longman* v. *Tripp*, 2 Bos. & P. N. R. 67; *Ex parte Foss*, 2 De G. & J. 230; *Marshall* v. *Watson*, 25 Beav. 501; *Bradbury* v. *Dickens*, 27 *ib.* 53; *McCormick* v. *McCubbin*, Ct. Sess. Cas. 1st Ser. I. 511.

(*b*) Johns. 174.

business carried on by the firm. A person says, 'I have always bought good articles as 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" (*a*).

Sale of goodwill.

Goodwill is a subject of sale (*b*), 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 (*c*), but this question was set at rest by Kindersley, V.-C., in *Darbey* v. *Whitaker* (*d*). "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

(*a*) And see *Lewis* v. *Langdon*, 7 Sim. 421; *Banks* v. *Gibson*, 34 Beav. 566; *Bond* v. *Milbourn*, 20 W. R. 197; *Scott* v. *Rowland*, 20 *ib.* 508; *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Levy* v. *Walker*, 10 Ch. D. 436; *Beazley* v. *Soares*, 22 *ib.* 660; *Gray* v. *Smith*, 43 *ib.* 208; *Hill* v. *Faris*, (1905) 1 Ch. 466. See *Currie* v. *Currie*, 15 P. R. 339, where the goodwill was sold minus the right to use the firm name.

(*b*) 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 *ib.* 53; *Churton* v. *Douglas*, Johns. 174; *Ex parte Punnett*, *In re Kitchin*, 16 Ch. D. 226; *Buckingham* v. *Walters*, 14 Cal. 246.

(*c*) *Baxter* v. *Connolly*, 1 Jac. & W. 580. And see *Coslake* v. *Till*, 1 Russ. 376; *Bozon* v. *Farlow*, 1 Mer. 459; *Cassidy* v. *Metcalf*, 1 Mo. App. 593.

(*d*) 4 Dr. 139.

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 (*a*). Such would be the case with the goodwill of a quack medicine or a newspaper, which is practically independent of locality (*b*). The connection between the business and the goodwill is such that the sale of the business (*c*), or of a share in the business (*d*), as a going concern, carries with it the goodwill, or the corresponding share in the goodwill, even without its being specifically mentioned, and so does the sale of a hotel or public-house (*e*). And if the goodwill is sold, the trade name goes with it (*f*). If the business consists in manufacturing under a trade secret, neither the goodwill nor the trade name can pass without the secret (*g*).

Rights of vendor of goodwill.

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" (*h*), and in the absence of any express restrictive covenant, the vendor is at liberty to set up a business of precisely the same description as that of which he had sold the goodwill, and that next door to the place where his former business was carried on, and to state his connection with that former business (*i*): but he is not entitled to represent that he is carrying

After sale may set up new business.

(*a*) Thus, Romilly, M. R., says, in *Robertson* v. *Quiddington*, 28 Beav. 529: "Goodwill is never a tangible thing unless it is connected with the *business* itself, from which it cannot be separated. I never knew a case in which it has been so treated." In *England* v. *Downs*, 6 Beav. 269, and *Morris* v. *Moss*, 25 L. J. Ch. 194, the goodwill of a business was held, under the circumstances, to pass with the stock, and not with the premises. 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.

(*b*) 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.

(*c*) *Shipwright* v. *Clements*, 19 W. R. 599. And see *Rolt* v. *Bulmer*, W. N. 1878, p. 119; *Reynolds* v. *Bullock*, 47 L. J. Ch. 773; *Rickerby* v. *Reay*, 20 P. R. 380.

(*d*) *Churton* v. *Douglas*, Johns. 174; *Currie* v. *Currie*, 15 P. R. 339. See *Innes* v. *Smith*, 1 Scot. L. T. 45; *Ferne* v. *Wilson*, 26 V. L. R. 422.

(*e*) *Ex parte Pannett*, *In re Kitchin*, 16 Ch. D. 226.

(*f*) *Banks* v. *Gibson*, 31 Beav. 566; *Churton* v. *Douglas*, Johns. 174; *Levy* v. *Walker*, 10 Ch. D. 436; *Gray* v. *Smith*, 43 Ch. D. 208; *Rosher* v. *Young*, 17 Times L. R. 347; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Ferne* v. *Wilson*, 26 V. L. R. 422.

(*g*) *Rey* v. *Lecouturier*, 25 P. R. 265; 27 *ib.* 268.

(*h*) *Hudson* v. *Osborne*, 39 L. J. Ch. 79. And see *Harrison* v. *Gardner*, 2 Madd. 198; *Churton* v. *Douglas*, Johns. 174.

(*i*) *Clark* v. *Leach*, 32 Beav. 14; *Hookham* v. *Pottage*, L. R. 8 Ch. 91; *Shipwright* v. *Clements*, 19 W. R. 599; *Cassidy* v. *Metcalfe*, 1 Mo. App. 593.

on the same identical business, either by direct representations, or by assuming the trade name under which the business he has sold acquired its reputation, or the trade mark by which its goods have become known in the market (*a*); nor can he after the sale give a right to others to use the trade marks (*b*). 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 (*c*), but in the absence of such evidence, the *bonâ fide* use by a man of his own name will not be prohibited (*d*). But where the trade name in question consisted of the name of the defendant, John Douglas, with the addition "& Co.," it was held that the use of that was an important ingredient in the case, as proving fraudulent intention (*e*). And so where the name of the firm had been "Benjamin Finch & Co.," and on dissolution B. Finch agreed to carry on business only under his own name, he was restrained from trading as "Benjamin Finch & Co." (*f*).

Solicitation of former customers.

The rights of a vendor of a business and goodwill with respect to soliciting his former customers and dealing with them has been the subject of much difference of judicial opinion. In *Labouchere* v. *Dawson* (*g*) Lord Romilly, M. R., laid down a stringent rule, saying that when the vendor of a goodwill has established a new firm for the purpose of carrying on a business similar to that which has been sold, "the new firm is entitled to publish any advertisement he pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world to say that he is carrying on such

(*a*) *Shackle* v. *Baker*, 14 Ves. 468; *Cruttwell* v. *Lye*, 17 Ves. 335; *Kennedy* v. *Lee*, 3 Mer. 441, 452; *Sedon* v. *Senate*, 2 V. & B. 220; *Harrison* v. *Gardner*, 2 Madd. 198; *Churton* v. *Douglas*, Johns. 174; *Hudson* v. *Osborne*, 39 L. J. Ch. 79; *Labouchere* v. *Dawson*, L. R. 13 Eq. 322; *Ginesi* v. *Cooper*, 14 Ch. D. 596; *Leggott* v. *Barrett*, 15 *ib.* 306; *Walker* v. *Mottram*, 19 *ib.* 355; *Dawson* v. *Beeson*, 22 *ib.* 504; *Mrs. Pomeroy, Ld.* v. *Scalé*, 21 P. R. 177; *Smith* v. *McBride*, Ct. Sess. Cas. 4th Ser. XVI. 36; *Melrose Drover* v. *Hoddle*, *ib.* 5th Ser. IV. 1120; *Massop* v. *Mason*, 18 Grant, Up. Can. Ch. 453. See *Ferne* v. *Wilson*, 26 V. L. R. 422.

(*b*) *Sohl* v. *Geisendorf*, 1 Wils. (Ind.) 60.

(*c*) *Churton* v. *Douglas*, John. 174; *Holloway* v. *Holloway*, 13 Beav. 209.

(*d*) *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Bond* v. *Milbourn*, 20 W. R. 197; *Turton* v. *Turton*, 42 Ch. D. 128.

(*e*) *Churton* v. *Douglas*, Johns. 174. And see *Fullwood* v. *Fullwood* (1), W. N. 1873, p. 185. In *Bond* v. *Milbourn*, 20 W. R. 197 (very shortly reported), it seems that the plaintiff would have been entitled to an injunction at all events against the use of the words "& Co." by the defendant, if that had been the relief prayed.

(*f*) *Day* v. *Finch*, 25 Sol. J. 354.

(*g*) L. R. 13 Eq. 322. See *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191.

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 (*a*). And Jessel, M. R., was of opinion that this doctrine should be extended so as to entitle the purchaser of the goodwill of a business to restrain the vendor from having any dealings with his former customers, irrespective of whether he had solicited their custom or not (*b*).

Leggott v. *Barrett.*

On the other hand, in *Leggott* v. *Barrett* (*c*), the Court of Appeal held that, assuming the vendor could be restrained from soliciting his old customers in accordance with the order of the Court below, which was not appealed from on this point, he could not be restrained from dealing with his old customers, even though he had solicited them prior to the date of the injunction.

Walker v. *Mottram.*

The question next arose with reference to the case in which the goodwill had not been voluntarily alienated by the person entitled to it, and the distinction between this case and the case of a voluntary sale was clearly pointed out in *Walker* v. *Mottram* (*d*), in which Jessel, M. R., and the Court of Appeal held that a trader, the goodwill of whose business had been sold by his trustees in liquidation, could not be prevented from actually soliciting his former customers. "An assignment of a business and its goodwill, without more, appears to us," said Lush and Lindley, L. JJ., "to pass now just as much as and no more than in the days of Lord Eldon (*e*). As against the assignor it confers on the assignee the exclusive right to carry on the business assigned, and, as incidental to this, it also confers on him the exclusive right to represent himself as carrying on that business, and consequently the right, not only to sue the assignor for damages if he has infringed these rights, but also to restrain him from infringing them if he manifests an intention to infringe them. Moreover, to this extent a bankrupt who does not concur in his trustee's assignment is in no better position than a bankrupt who

(*a*) 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.

(*b*) *Ginesi* v. *Cooper & Co.*, 14 Ch. D. 596.

(*c*) 15 Ch. D. 306.

(*d*) 19 Ch. D. 355.

(*e*) Cf. *Trego* v. *Hunt*, (1896) A. C. 7, in which Lord Herschell criticises the language of Lord Eldon in *Cruttwell* v. *Lye*, 17 Ves. 335, 346. And see p. 335.

does. Every bankrupt, whether he concurs or not, is bound by every lawful disposition of his property by the trustee, and whatever rights such a disposition confers on a purchaser must be respected by the bankrupt, whether he joins in the conveyance or not. But, in our opinion, the right of a purchaser of the goodwill of a business from the trustee in bankruptcy does not extend to restrain the bankrupt (even if he joins in the conveyance) from *bonâ fide* commencing a fresh business, and from seeking assistance in it from his old friends and customers. It would, in our opinion, be contrary to the policy of the bankruptcy laws to extend *Labouchere* v. *Dawson* (*a*) to such a case. It is not necessary to overrule that decision; we leave it where it is, that is to say, it will still be applicable to voluntary sales. But we do not think it ought to be extended to alienations which are compulsory" (*b*). On this principle it was held by the Court of Appeal in *Dawson* v. *Beeson* (*c*), that an expelled partner was entitled to solicit the customers of his old firm.

Pearson v. *Pearson.*

In *Pearson* v. *Pearson* (*d*), it was definitely laid down by Baggallay and Cotton, L. JJ., Lindley, L. J., dissenting, that *Labouchere* v. *Dawson* (*a*) was wrongly decided, and that a vendor of a business and goodwill cannot, in the absence of an express restrictive covenant, be restrained from soliciting the old customers of the business.

Trego v. *Hunt.*

This much-debated question was at length set at rest by the decision of the House of Lords in *Trego* v. *Hunt* (*e*), in which the view expressed by Lord Romilly in *Labouchere* v. *Dawson* (*a*) was unanimously approved, and the view of the majority of the Court in *Pearson* v. *Pearson* (*d*) was overruled. The decision of the House of Lords finally establishes that the vendor of the goodwill of a business is not entitled to canvass the customers of the old firm, although it was treated as settled law that the sale of the goodwill did not, in the absence of special covenants, prevent the vendor from setting up a rival business in the same neighbourhood. The distinction between the two cases is thus pointed out by Lord

(*a*) L. R. 13 Eq. 322.

(*b*) See *Ferne* v. *Wilson*, 26 W. L. R. 422; *Helmbold* v. *Helmbold Manufacturing Co.*, 53 How. Pr. 453; *Hegeman & Co.* v. *Hegeman*, 8 Daly, 1; *Iowa Seed Co.* v. *Dorr*, 70 Iowa, 481.

(*c*) 22 Ch. D. 504.

(*d*) 27 Ch. D. 145. See *Vernon* v. *Hallam*, 34 Ch. D. 748.

(*e*) (1896) A. C. 7. See *Dumbarton Steamboat Co.* v. *Macfarlane*, Ct. Sess Cas. 5th Ser. I. 993.

Herschell: "If a person who has previously been a partner in a firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do, and which those carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him: but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would have done if he had never been a member of the firm to which he previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm, he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he had previously acquired, to take that which constitutes the goodwill away from the persons to whom it has been sold and to restore it to himself." The principle of *Trego* v. *Hunt* equally applies where, on the creation of a partnership, it has been agreed that the goodwill shall belong exclusively to one of the partners (*a*); and the same principle has since been extended to a case where a partnership was dissolved by consent upon the terms that the continuing partner should, on payment of a money consideration to the retiring partner, retain the assets, no express mention being made of the goodwill (*b*). It has also been held by Farwell, J., that the principle of *Trego* v. *Hunt* extends to the solicitation of persons who, while remaining customers of the old firm, have independently of solicitation become also customers of the new firm, and he expressed regret that the law did not more effectually prevent the vendor of a business from attracting away all the business he has sold (*c*). But it seems that the prohibition against soliciting former customers does not extend to a receiver and manager who has been carrying on, under the order of the Court, the business sold (*d*). An express stipulation in articles of partnership that on the sale of the goodwill to the continuing partner the outgoing partner may set up a rival business in the neighbourhood will not authorise the solicitation of customers (*e*). The decision of the House of

(*a*) *Per* Lord Herschell, (1896) A. C. 21.
(*b*) *Jennings* v. *Jennings*, (1898) 1 Ch. 378.
(*c*) *Curl Bros., Ld.* v. *Webster*, (1904) 1 Ch. 685.
(*d*) *In re Irish*, 40 Ch. D. 49.
(*e*) *Gillingham* v. *Baldow*, (1900) 2 Ch. 242.

Lords is only directed to voluntary transactions, and cannot be said to impeach the authority of *Walker* v. *Mottram* (*a*).

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 (*b*).

Express restrictive covenant usual.

In the sale of a business and goodwill, it is customary to insert an express restrictive covenant, which will be binding on the vendor, restraining him from setting up the same trade within a certain limit of time or space, or using his name or allowing it to be used for that purpose (*c*): and this has become so usual that where (*d*), in a contract for sale, one of the items was "goodwill, &c.," Romilly, M. R., held that in the "&c." would be included, amongst other things, a covenant by the vendor not to carry on a similar business in Great Britain, for a reasonable time, to be limited in the conveyance, having regard to the nature of such undertakings. Such a covenant may even have the effect of compelling the vendor to quit his trade altogether for the period specified, as was held by Lord Mansfield, C. J., and the Court of King's Bench, in *Cooper* v. *Watson* (*e*); and it has been held that a breach of a covenant "not to carry on or be concerned or interested in" a certain business, was committed by the inventor entering into the service of a nephew, who carried on the same trade, under the same name, within the prescribed limits (*f*). Again, a covenant not to carry on a certain business directly or indirectly

(*a*) 19 Ch. D. 355. And see *Ferne* v. *Watson*, 26 V. L. R. 422.

(*b*) *Harrison* v. *Gardner*, 2 Madd. 198.

(*c*) *Cooper* v. *Watson*, 3 Doug. 413: *Bryson* v. *Whitehead*, 1 S. & S. 74; *Williams* v. *Williams*, 2 Swanst. 253; *Whittaker* v. *Howe*, 3 Beav. 383; *Turner* v. *Evans*, 2 De G. M. & G. 740; *Nevling* v. *Dobell*, 38 L. J. Ch. 111; *Wolmershausen* v. *O'Connor*, 36 L. T. N. S. 921; *Rawlinson* v. *Clarke*, 14 M. & W. 187; *Rolfe* v. *Rolfe*, 15 Sim. 88; *Shipwright* v. *Clements*, 19 W. R. 599; *Lee* v. *Ehrhart*, 19 L. T. N. S. 637; *Hagg* v. *Darley*, 17 L. J. Ch. 567; *Davis* v. *Smaggasgale*, W. N. 1890, pp. 158, 169; *Woods* v. *Sands*, Dig. 467; and similarly upon the sale of a trade mark together with the right to manufacture according to a secret recipe: *Filkins* v. *Blackman*, 13 Bl. C. C. 440.

(*d*) *Cooper* v. *Hood*, 26 Beav. 293. See *Jacoby* v. *Whitmore*, 49 L. T. N. S. 335.

(*e*) 3 Doug. 413.

(*f*) *Nevling* v. *Dobell*, 38 L. J. Ch. 111. See *Rolfe* v. *Rolfe*, 15 Sim. 88; and compare *Lee* v. *Ehrhart*, 19 L. T. N. S. 637, where there was held to be no breach.

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 (*a*). A vendor of a business who had covenanted not to carry on such a business, will not be allowed to do so under the pretext of acting as a commission merchant (*b*), and the fact that former customers have requested the vendor to supply them does not prevent his so doing from being a breach of his covenant (*c*). But where the defendant was shown to have so acted in a few instances only, and with the plaintiff's knowledge and consent, and in fact at his request, it was held that there was no breach (*d*).

Damages in respect of improper solicitation.

In an American case (*e*) it was held that a person who had retired from a firm by sale of his interest, and had agreed not to trade in C. under the old firm name, but had nevertheless traded there under the same name, and had solicited former customers of the firm, must pay damages calculated, not upon the total amount of improper solicitation of such customers, but upon the amount of business which could be proved to have been lost through such solicitation.

Covenant to make profitable.

"Where a man sells the goodwill of a trade, and covenants to make it as profitable as he can, the actual profit made is not that which the vendee is bound to take; but he will have an action of covenant, if he can establish his title to more, through the default of the vendor" (*f*). But no such covenant will be implied where it is not expressed: thus the sale of the goodwill of a school involves no personal effort on the part of the vendor to influence the attendance of pupils (*g*). Where a servant (*h*) or partner (*i*) has covenanted not to carry on a business similar to his master's or partner's within certain limits, the benefit of the covenant passes to a purchaser of the goodwill of the business.

Rights of purchaser of goodwill.

The purchaser of a business and goodwill is entitled to all the

(*a*) *Turner* v. *Evans*, 2 De G. M. & G. 740. And the question of solicitation of customers is frequently made the subject of express agreement. See *Badhan* v. *Williams*, 83 L. T. N. S. 141: *Harris* v. *Mansbridge*, 17 Times L. R. 21.

(*b*) *Richardson* v. *Peacock*, 26 N. J. Eq. 40.

(*c*) *Sauder* v. *Hoffman*, 64 N. Y. 248.

(*d*) *Rawlinson* v. *Clarke*, 14 M. & W. 187.

(*e*) *Burckhardt* v. *Burckhardt*, 36 Ohio St. 261.

(*f*) *Per* Lord Eldon, C., in *Scott* v. *Mackintosh*, 1 V. & B. 503.

(*g*) *McCord* v. *Williams*, 96 Penn. St. 18.

(*h*) *Jacoby* v. *Whitmore*, 49 L. T. N. S. 335; *Shorell* v. *Winkup*, 60 L. T. N. S. 389; *Automobile Carriage Builders, Ld.* v. *Sayers*, 101 L. T. N. S. 419.

(*i*) *Townsend* v. *Jarman*, (1900) 2 Ch. 698.

advantages of the reputation and connection of the business as previously conducted, except such benefit as the vendor, on setting up a *bonâ fide* new business (as he is at liberty to do if there is no covenant to the contrary), may derive from the fact of his being known to have belonged to the former business; and the purchaser is entitled to restrain the vendor by injunction from interfering with what he has sold. With respect to the right of the purchaser to continue to trade under the old trade name, it has been thought that, at all events if it consisted in whole or in part of the name of the vendor, injury (*a*), or at least inconvenience (*b*), might result to the latter from its continued use by the purchaser, and in *Scott* v. *Rowland* (*c*), Wickens, V.-C., granted an injunction to restrain the purchaser of the business of "John Scott & Co." from trading under that name. So in *Thynne* v. *Shore* (*d*), where the business had been carried on in the name of "A. Thynne." In *Banks* v. *Gibson* (*e*), however, Romilly, M. R., said that the firm name was an asset of the business, and would pass as a trade mark upon a sale of the business and goodwill; and it seems that the question of the purchaser's right to use the name, where it can be done without injury to the vendor, must now be taken to be settled in the affirmative by the decision of the Court of Appeal in *Levy* v. *Walker* (*f*), in which Jessel, M. R., and James and Brampwell, L. JJ., denied that any liability could be occasioned to the vendor by the use of his name, and held that the plaintiff (Mrs. Levy), who, while Miss Charbonnel, had traded in partnership with the defendant as "Charbonnel & Walker," was not entitled to restrain the defendant, who had bought the goodwill of the business as a going concern, from continuing to use the old name.

Levy v. *Walker.*

(*a*) *Per* Wickens, V.-C., in *Scott* v. *Rowland*, 20 W. R. 508, and Hall, V.-C., in *Levy* v. *Walker*, 10 Ch. D. 436. See *Chatterton* v. *Isaacson*, 57 L. T. N. S. 177: *Thynne* v. *Shore*, 45 Ch. D. 577.

(*b*) *Per* Wood, V.-C., in *Churton* v. *Douglas*, Johns. 174.

(*c*) 20 W. R. 508. And see *Lewis* v. *Langdon*, 7 Sim. 421; *Turner* v. *Major*, 3 Giff. 442; *Dence* v. *Mason*, 41 L. T. N. S. 573; *Dickson* v. *McMaster & Co.*, 18 Ir. Jur. 202, 212. In *Tudor* v. *Tudor*, W. N. 1873, p. 72, there was an express contract.

(*d*) 45 Ch. D. 577.

(*e*) 31 Beav. 566.

(*f*) 10 Ch. D. 436. And see *Webster* v. *Webster*, 3 Swanst. 490, n.; *Clark* v. *Leach*, 32 Beav. 14; *Bond* v. *Melbourn*, 20 W. R. 197; *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Coulson & Sons* v. *Coulson & Co.*, 3 Times L. R. 816; *Tussaud* v. *Tussaud*, 44 Ch. D. 678; *Attenborough* v. *Jay*, 14 Times L. R. 439; *In re David & Matthews*, (1899) 1 Ch. 375; *Mrs. Pomeroy, Ld.* v. *Scott*, 24 P. R. 177; *Smith* v. *McBride*, Ct. Sess. Cas. 4th Ser. XVI. 36; *Woods* v. *Sands*, Dig. 467; *Mossop* v. *Mason*, 18 Grant, Up. Can. Ch. 453; *Ferne* v. *Wilson*, 26 U. C. R. 422.

James, L. J., said: "It should never be forgotten in these cases that the sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade mark: that is to say, a man has a right to say, 'You must not use a name, whether fictitious or real—you must not use a description, whether true or not—which is intended to represent, or calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me.' That is the principle, and the sole principle, on which this Court interferes. The Court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything. If there is any misleading, that may be for the Criminal Courts of the country to take notice of, or for the Attorney-General to interfere with; but an individual plaintiff can only proceed on the ground that, having established a business reputation under a particular name, he has a right to restrain any one else from injuring his business by using that name. . . . But there is another point upon which I myself cannot entertain any doubt: which is this -that the assignment of the goodwill and business of Charbonnel & Walker did convey the right to use the name of Charbonnel & Walker, and the exclusive right to use that name, as between the vendor and the purchaser of that business. Whether it would prevent another person from afterwards using the name of Charbonnel. I do not say; but the trade name, made up of parts of two real names, as the Master of the Rolls says, the trade name of Charbonnel & Walker (whether it was entirely a fictitious name can make no difference) was the name of the business, and that business was sold. That was a name with which every article sold might have been impressed, just as in the case of *Millington* v. *Fox* (*a*), where the name was continued as part of the designation of the article sold. I think it right to say that the sale of the goodwill and business conveyed the right to the use of the partnership name as a description of the articles sold in that trade, and that that right is an exclusive right as against the person who sold it, and an exclusive right

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

as against all the world, so that no other person could represent himself as carrying on the same business" (*a*). The result of the authorities seems to be that the old firm name may be used in any way which does not expose the vendor to liability (*b*), but not in any way which would do this (*c*). But where a partner retires without assigning the goodwill to the continuing partner, the latter cannot continue to use the name of the retiring partner (*d*), and the sale of the goodwill and business of a company in the course of winding up has been held by Kay, J., not to include the right to use the name of the company (*e*).

Rights of purchaser.

The purchaser of the goodwill is, *à fortiori*, entitled to represent himself as continuing the old business: thus, where the business of John Douglas & Co. was sold, it was held that the purchasers alone had the right to describe themselves as "late John Douglas & Co.," and the vendor was restrained from calling his new firm "John Douglas & Co.," that being an interference with that right (*f*). But a purchaser has no right to use the name of the business he has bought in such a way as to create confusion in the minds of the public (*g*); and it is a fraud for a person to purchase the goodwill of a small business in order to gain a right to use a name generally identified with a different and important business (*h*). In *Warner* v. *Warner* (*i*), it was held that the purchaser of the goodwill of a business in proprietary medicines had the right to continue to use the old name, but that the change of the name to the purchaser's own name, so as to assimilate it to the name of an old rival business, should be restrained by injunction. And where a business has been carried on under a name somewhat resembling that under which a similar old-established business is carried on, the purchaser of the

(*a*) And see *Thorneloe* v. *Hill*, (1894) 1 Ch. 569.

(*b*) *Thynne* v. *Shove*, 45 Ch. D. 577; *Townsend* v. *Jarman*, (1900) 2 Ch. 698.

(*c*) *Burchell* v. *Wilde*, (1900) 1 Ch. 552; *Townsend* v. *Jarman*, (1900) 2 Ch. 698; *Walter* v. *Ashton*, (1902) 2 Ch. 282.

(*d*) *Gray* v. *Smith*, 13 Ch. D. 208.

(*e*) *In re Bolanachi's Empire Chocolate*, 89 L. T. Journal) 273. And see *Montreal Lithographing Co.* v. *Sabiston*, (1899) A. C. 610; *Cropper Minerva Machines Co., Ld.* v. *Cropper, Charlton & Co., Ld.*, 23 P. R. 388.

(*f*) *Charton* v. *Douglas*, Johns. 174. And see *Lewis* v. *Langdon*, 7 Sim. 421. In a Cape Colony case a person who had carried on a business under the name of "Jones & Co.," sought to restrain the defendant, who had bought from the plaintiff's trustee the business and the right to use the trade name, from trading as "Jones & Co.," but the action failed: *Jones* v. *Brown*, Cape Good Hope, 25 S. C. R. 20.

(*g*) *Chinn* v. *Thomas*, 5 V. L. R. Eq. 188.

(*h*) *Perks* v. *Hall & Co.*, W. N. 1881, p. 111; *Abel Morrall, Ld.* v. *Hessin*, 19 P. R. 557; 20 *ib.* 429.

(*i*) 5 Times L. R. 359.

newer business must not change the name of his business so as to assimilate it to that of the older business (*a*). The mortgagee of the goodwill of a business, including the right to use the name under which the business is carried on, has no such right in that name as to be able to restrain the use of it by another person, if he has himself never traded under it (*b*).

Implied contract to keep up business.

Where, on a purchase of a business and goodwill, it was agreed that the purchaser should pay the vendor at the end of each of the first ten years a certain proportion of the profits, but there was no special agreement by the purchaser to keep up the business, it was held by Erle, C. J., and the Court of Common Pleas, that the purchaser had entered into an implied contract to keep up the business, at all events for the ten years over which the instalments were to extend (*c*). It seems that while such an implied contract would give a right to damages if broken, it could not be specifically enforced in Equity (*d*), though carrying on a similar business under a different style could be restrained (*e*).

Goodwill of mortgaged property.

In some cases questions have been raised with respect to the ownership of the goodwill of a business carried on on mortgaged premises. This has most frequently been when the mortgaged premises have been taken under compulsory powers, so that it has been necessary to decide to whom, or in what proportions, the purchase-money was payable. The principle which governs such cases was thus laid down by Cotton, L. J. (*f*). "Goodwill is a word of which few people understand the meaning. It is obvious that to certain kinds of goodwill a mortgagee will be entitled. The goodwill which attaches to a house increases the value of that house, and therefore the mortgagee is entitled to that. By that I mean, for instance, there is a well-known public-house, and from its position being well known, people go to it: or a well known shop, from its being situated in a good thoroughfare, people go to it. The goodwill is attaching to the house, and adds to the value of the house. But there may be other

(*a*) *Holt* v. *Smith*, 1 Times L. R. 329.
(*b*) *Beazley* v. *Soares*, 22 Ch. D. 660.
(*c*) *McIntyre* v. *Belcher*, 14 C. B. N. S. 654. Compare *Harrison* v. *Gardner*, 2 Madd. 198.
(*d*) *Lewis* v. *Langdon*, 7 Sim. 421.
(*e*) *Evans* v. *Hughes*, 18 Jur. 691. And see *Turner* v. *Major*, 3 Giff. 442.
(*f*) *Cooper* v. *Metropolitan Board of Works*, 53 L. J. Ch. 109 (this passage is given rather less fully at 25 Ch. D. 179, and see *Chissum* v. *Dewes*, 5 Russ. 29; *King* v. *Midland Railway Co.*, 17 W. R. 113; *Pile* v. *Pile*, 3 Ch. D. 36; *Ex parte Pannell, In re Kitchen*, 16 *id.* 226.

goodwills attaching to the personal reputation which a man has made for himself. That, of course, does not go to the mortgagee, but is a thing personal to the man whose skill and whose name have acquired that goodwill. It does not follow at all that because it is called 'goodwill' the mortgagee will be entitled to it. So far as it is incident to the house, and is connected with the house, and increases the value of the house, it goes as part of the value of the house to the mortgagee."

Goodwill is partnership assets.

In a case of partnership, the goodwill of a business, newspaper, &c., including the firm name, is partnership assets, and, on a sale of the partnership business, must be sold with it, for the benefit of the partners or their creditors (*a*), and a receiver may be appointed until the sale (*b*).

Disposal on dissolution.

On a dissolution of partnership the business and goodwill may be disposed of in three different ways: by sale, for the benefit of the partners or their creditors; by the whole concern, including the trade name, being taken by one partner at a valuation; or by a simple division of the tangible assets of the partnership, in which case each is at liberty to use the trade name just as the partnership did previously (*c*) (subject to the qualification that the use of the old name must not expose the other partners to liability) (*d*), or at all events to state his connection with the old firm (*e*). But where a partnership was entered into for a certain term, an injunction was granted to restrain one of the partners from carrying on business with others under the old partnership name, the partnership term not having expired (*f*).

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 (*g*). Thus,

(*a*) *Bradbury* v. *Dickens*, 27 Beav. 53; *Banks* v. *Gibson*, 34 Beav. 566; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *McCormick* v. *McCubbin*, 1 Ct. Sess. Cas. 1st Ser. I. 541.

(*b*) *Marten* v. *Van Schaick*, 4 Paige, 479; *Williams* v. *Wilson*, 4 Sandf. Ch. 379.

(*c*) *Banks* v. *Gibson*, 34 Beav. 566; *Condy* v. *Mitchell*, 37 L. T. N. S. 268, 766; *Levy* v. *Walker*, 10 Ch. D. 436; *Fenton* v. *Levy*, 29 Sol. J. 735; *Chappell* v. *Griffith*, 53 L. T. N. S. 459. And see *per* Lindley, M. R., in *Burchell* v. *Wilde*, (1900) 1 Ch. 551, at p. 563.

(*d*) *Burchell* v. *Wilde*, (1900) 1 Ch. 551; *Rosher* v. *Young*, 17 Times L. R. 347. And see *Townsend* v. *Jarman*, (1900) 2 Ch. 698.

(*e*) *Clark* v. *Leach*, 32 Beav. 14; *Hookham* v. *Pottage*, L. R. 8 Ch. 91; *Dickson* v. *McMaster & Co.*, 18 Ir. Jur. 202. See *Matthews* v. *Hodgson*, 2 Times L. R. 899.

(*f*) *England* v. *Curling*, 8 Beav. 129.

(*g*) *Hall* v. *Hall*, 20 Beav. 139; *Kennedy* v. *Lee*, 3 Mer. 441, 452; *Farr* v. *Pearce*, 3 Madd. 74; *Steuart* v. *Gladstone*, 10 Ch. D. 626; *Innes* v. *Smith*, 1 Sc. L. T. 45.

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 (*a*).

What terms include goodwill.

But for a retiring partner to be entitled to compensation for his share in the goodwill, it is not necessary for the word "goodwill" to be mentioned in the article governing the distribution of the partnership property. In *Hall* v. *Hall* (*b*), indeed, it was held that a provision in the articles for the valuation, on the determination of the partnership, of the "property, credits, and effects," and "the stock in trade and effects," did not include the goodwill; and so, in *Dickson* v. *McMaster & Co.* (*c*), with respect to the term "stock in trade, goods, chattels, and effects." But those cases must be taken to be overruled by the cases in which the terms "stock belonging to the partnership" (*d*), "property and effects" (*e*), and "effects and things" (*f*), have been held to include goodwill.

Stewart v. *Gladstone.*

Where, however, the partnership articles of a firm of commission merchants provided that a retiring partner should receive the share in the partnership property to which he was entitled upon the basis of annual accounts taken, under another article, of the partnership "estate and effects," provision being made thereby for a fair valuation and appraisement of all the particulars included in such accounts, which might be in their nature susceptible of valuation, but no mention being made of the goodwill of the business, it was held by the Court of Appeal that, the share of partners in the goodwill of a commission business not being ordinarily estimated in calculating their annual shares of profits, and that not having been the practice in the case before them, the goodwill could not be taken into account and valued as being included in the partnership "estate and effects" (*g*).

(*a*) *Burfield* v. *Rouch*, 31 Beav. 241.
(*b*) 20 Beav. 139.
(*c*) 18 Ir. Jur. 202.
(*d*) *Hall* v. *Barrows*, 4 De G. J. & S. 150.
(*e*) *Reynolds* v. *Bullock*, 47 L. J. Ch. 773. And see *Wilmer* v. *Thomas*, 74 Md. 485 ("all the estate and property wherever situated").
(*f*) *Barrow* v. *Barrow*, 27 L. T. N. S. 431; *Rolt* v. *Bulmer*, W. N. 1878, p. 119. And see *Shipright* v. *Clements*, 19 W. R. 599; *In re David & Matthews*, (1899) 1 Ch. 378.
(*g*) *Stewart* v. *Gladstone*, 10 Ch. D. 626. Compare *Hill* v. *Fearis*, (1905) 1 Ch.

Goodwill included in valuation.

On the other hand, where the articles of partnership provided that the goodwill should belong to the partners in the proportion of their shares in the business, but should not be taken into account in the accounts of the partnership, and that on the determination of the partnership a general account and valuation of the property and effects of the partnership should be taken, the partnership being dissolved by the death of one of the partners, it was held by Stuart, V.-C., that the goodwill must be included in the valuation of the partnership property (*a*).

One partner cannot monopolise goodwill, when no articles.

In *Featherstonhaugh* v. *Fenwick* (*b*), it was decided that on a dissolution of a partnership, not provided for by articles, one partner could not secure to himself the whole benefit of the goodwill by claiming to take the share of the other at a valuation, or requiring him to remove his proportion from the premises, or clandestinely obtaining a renewal to himself of the lease of the premises occupied by the partnership; but where the goodwill goes with the premises, it has been held in America that the partners who quit the premises have no claim in respect of goodwill against a partner who remains on the premises (*c*); and where, under a power contained in the articles, a majority of the partners in a firm expelled another partner, it was decided that in the valuation of the amount to which he was entitled, the value of the goodwill could not be taken into account (*d*).

Estate of dead partner shares in partnership profits until settlement.

If, after a dissolution of partnership by the death of a partner, "the surviving partners think proper to make that which is in Equity the joint property of the deceased and them the foundation and plant of increased profit, if they do not think proper to settle with the executors and put an end to the concern, they must be understood to proceed upon the principle which regulated the property before the death of their partner" (*e*); that is to say, capital belonging to the estate of the deceased partner having

466, where that case was explained and distinguished; also *Hunter* v. *Dowling*, (1895) 2 Ch. 223.

(*a*) *Wade* v. *Jenkins*, 2 Giff. 509.

(*b*) 17 Ves. 298. And see *Parsey* v. *Armstrong*, 18 Ch. D. 698; *Mitchell* v. *Read* (1), 61 N. Y. 128. As to a trade mark, see *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54.

(*c*) *Musselman & Clarkson's Appeal*, 62 Penn. St. 81.

(*d*) *Stewart* v. *Gladstone*, 10 Ch. D. 626.

(*e*) *Per* Lord Eldon, C., in *Crawshay* v. *Collins*, 15 Ves. 227. And see *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Heathcote* v. *Hulme*, 1 Jac. & W. 122; *Brown* v. *De Tastet*, Jac. 284; *Cook* v. *Collingridge*, Jac. 607; *Macdonald* v. *Richardson*, 1 Giff. 81; and *Parsons* v. *Hayward*, 31 L. J. Ch. 666.

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" (*a*).

Similarly with goodwill.

In the same manner, on the death of a partner, the goodwill ought, if there is no provision regulating its destination in such an event, to be sold for the benefit of the partnership (*b*), 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 Loughborough, C., that upon a dissolution of a partnership without articles the goodwill survives to the surviving partner. This position was, however, doubted by Lord Eldon, C., in *Crawshay* v. *Collins* (*d*); 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" (*e*). The share of the deceased partner in the con-

(*a*) *Per* Wigram, V.-C., in *Willett* v. *Blandford*, 1 Hare, 253. And see *Simpson* v. *Chapman*, 4 De G. M. & G. 154, where these remarks were highly approved by Turner, L. J., and it was held that under the circumstances of the case, nothing was due to the estate of the deceased partner.

(*b*) *E.g.*, *Hill* v. *Fearis*, (1905) 1 Ch. 466.

(*c*) *Hammond* v. *Douglas*, 5 Ves. 539. And see *Lewis* v. *Langdon*, 7 Sim. 421; *Robertson* v. *Quiddington*, 28 Beav. 529.

(*d*) 15 Ves. 227.

(*e*) *Per* Romilly, M. R., in *Wedderburn* v. *Wedderburn*, 22 Beav. 84. And see

cern is not, however, the sole guide to the interest of his estate in the goodwill. The various circumstances alluded to by Wigram, V.-C., in *Willett* v. *Blandford* (*a*) 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 £1,700, it was held by Jessel, M. R., that the surviving partner was only liable to account to the estate of his deceased partner for the value of a moiety of the goodwill at the time of the latter's death (*b*).

Firm name.

With respect to the trade name, Shadwell, V.-C., in *Lewis* v. *Langdon* (*c*), expressed an opinion that it survived, but the decision in that case only amounted to this: that one of three executors of a deceased partner in the firm of "Brookman & Langdon" had no right to set up in business as "Brookman & Langdon," and that the surviving partner, who was carrying on business as "James Lewis & Co., successors to Brookman & Langdon," had sufficient interest in the name of the old firm to restrain an unauthorised use of it (*d*); and it seems that one member of a firm cannot, on the death of his partner, monopolise all the benefit to be derived from the use of the firm name (*e*), although, if he purchases the interest of his deceased partner from the latter's executors, he will be entitled to the exclusive use of the old firm name (*f*).

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.,"

Macdonald v. *Richardson*, 1 Giff. 81; *Bradbury* v. *Dickens*, 27 Beav. 53; *Smith* v. *Everett*, 27 Beav. 446; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *In re David & Matthews*, (1899) 1 Ch. 378; *Hill* v. *Fearis*, (1905) 1 Ch. 466; *McCormick* v. *McCubbin*, Ct. Sess. Cas. 1st Ser. I. 541.

(*a*) 1 Hare, 253.

(*b*) *Broughton* v. *Broughton*, 44 L. J. Ch. 526. And compare *Simpson* v. *Chapman*, 4 De G. M. & G 154.

(*c*) 7 Sim. 421. See *Milner* v. *Reed*, Dig. 328.

(*d*) 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.

(*e*) A decided opinion to this effect is expressed in Lindley on Partnership. And see *In re David & Matthews*, (1899) 1 Ch. 378; *Hill* v. *Fearis*, (1905) 1 Ch. 466.

(*f*) *Phelan* v. *Collender*, 13 N. Y. Sup. Ct. 244.

or "B. & C., successors to A. & B.," or by using any similar words (*a*). If they continue to use the style of the old business, "A. & B.," as before, then, as regards the partner by whose retirement or death the dissolution has been brought about, it does not appear that he or his estate will be exposed to loss or inconvenience, or that he or his representatives are likely to have any ground for complaint (*b*), although they will be entitled to object if the result is to expose them to liability, and the right to the name has not been expressly assigned (*c*); and, as regards the public, it seems that the use of the old name does not, as a rule, constitute any false representation, the only statement being that the new firm is carrying on the business of the old one (*d*). Such continued user, however, will not be permitted when it can be only for an improper and fraudulent purpose, and in order to deceive the public (*e*); 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 (*f*).

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 (*g*). To use the language of Fry, J., in *Mogford* v. *Courtenay* (*h*), "the rights of a late partner who has no interest in the goodwill of the old business, to carry on trade are somewhat refined. They amount shortly to this—that he may carry on a similar trade or similar business; he cannot carry on the identical

(*a*) *Churton* v. *Douglas*, Johns. 174; *Lewis* v. *Langdon*, 7 Sim. 421; *Hookham* v. *Pottage*, L. R. 8 Ch. 91.

(*b*) See *Levy* v. *Walker*, 10 Ch. D. 436, and cases at p. 352, *supra*

(*c*) *Troughton* v. *Hunter*, 18 Beav. 470; *Hodges* v. *London Trams Co.*, 12 Q. B. D. 105; *Townsend* v. *Jarman*, (1900) 2 Ch. 898.

(*d*) *Banks* v. *Gibson*, 34 Beav. 566; *Aubin* v. *Holt*, 2 K. & J. 66. And see *Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 H. & M. 271; 4 De G. J. & S. 137; 11 H. L. C. 523,

(*e*) *Dence* v. *Mason*, Dig. 534; 41 L. T. N. S. 573.

(*f*) *Thornbury* v. *Bevill*, 1 Y. & C. Ch. 554.

(*g*) *Kennedy* v. *Lee*, 3 Mer. 441, 452; *Harrison* v. *Gardner*, 2 Madd. 198; *Churton* v. *Douglas*, Johns. 174; *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Clark* v. *Leach*, 32 Beav. 14; *Bond* v. *Milbourn*, 20 W. R. 197; *Hookham* v. *Pottage*, L. R. 8 Ch. 91; *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191; *Wolmershausen* v. *O'Connor*, 36 L. T. N. S. 921; *Leggott* v. *Barrett*, 15 Ch. D. 306; *In re David & Matthews*, (1899) 1 Ch. 378.

(*h*) 45 L. T. N. S. 303.

business. He is at liberty to do everything which flows from the right to carry on a similar business; he is prohibited or liable to be restrained from doing anything which conduces to his carrying on the identical business; but what acts come within either of those classes is a question of very considerable nicety." To this extent the rights of an expelled partner are the same as if he had retired voluntarily (*a*). 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 (*b*); 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 (*c*). In *Smith* v. *Everett* (*d*), the survivor of two partners in a banking business sold the business, and it was held that the estate of the deceased partner was entitled to a share of so much of the purchase-money as was attributable to the goodwill. Romilly, M. R., directed that this value should be ascertained, regard being had to the facts that: 1st, the partnership premises belonged to the survivor; 2ndly, the survivor had the right to carry on the business of a banker on the same premises after the sale of the goodwill; 3rdly, the sole right of issuing bank notes survived to him.

Retiring or surviving partner may state former connection.

Unless he has specially contracted not to do so (*e*), 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 (*f*), and he may style himself "formerly" or "late" of the firm, and, if he occupies the premises formerly occupied by the firm, may state that they were so occupied; but he may not describe himself as "successor to" the old firm.

And the termination of that connection.

A retiring partner may advertise the discontinuance of his par-

(*a*) *Dawson* v. *Beeson*, 22 Ch. D. 504.

(*b*) *Mellersh* v. *Keen*, 28 Beav. 453; *Davies* v. *Hodgson*, 25 Beav. 177; *In re David & Matthews*, (1899) 1 Ch. 378.

(*c*) *Cook* v. *Collingridge*, Jac. 607; *Hall* v. *Barrows*, 4 De G. J. & S. 150. And see the form settled by the L. JJ. in *Johnson* v. *Helleley*, 2 De G. J. & S. 446. See also *Jennings* v. *Jennings*, (1898) 1 Ch. 378; *In re David & Matthews*, (1899) 1 Ch. 378.

(*d*) 27 Beav. 446. Cf. *Smith* v. *Nelson*, 92 L. T. N. S. 313.

(*e*) *Wolmershausen* v. *O'Connor*, 36 L. T. N. S. 921.

(*f*) *Bradbury* v. *Dickens*, 27 Beav. 53; *Clark* v. *Leach*, 32 Beav. 14; *Labouchere* v. *Dawson*, L. R. 13 Eq. 322; *Graveley* v. *Winchester*, Seton, 6th ed. 395; *Burrows* v. *Foster*, 1 N. R. 156: *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191; *Leggott* v. *Barrett*, 15 Ch. D. 306; *Walker* v. *Mottram*, 19 *ib.* 355; *Dawson* v. *Beeson*, 22 *ib.* 504.

ticipation 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 (*a*). And where an ex-partner knowingly allowed his former firm to continue to use his name, it was held in America that he was estopped from denying his partnership as against a person who had acted in the belief that he was still a partner (*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 district, agreed to dissolve partnership, the premises, stock, and goodwill to be sold, or until sale to vest in a receiver, Stuart, V.-C., restrained one partner from carrying on the business on his own account in one district, and directed him to account for the profits (*e*).

Right of election protected.

Again, where it was provided by the partnership articles that, on the death of one of the partners, his personal representative should have the right to elect, within three months, to take the deceased partner's share in the business, Wood, V.-C., restrained the surviving partner from carrying on the business under any other firm or style than that used in the lifetime of the deceased partner, for three months, or until election by his representative (*f*). 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 (*g*).

(*a*) *Bradbury* v. *Dickens*, 27 Beav. 53. In *England* v. *Curling*, 8 Beav. 129, an injunction was granted to restrain a partner from publishing notices of the dissolution of the partnership during the term for which it was to subsist.

(*b*) *Richards* v. *Hunt*, 65 Ga. 342. So in *Backus* v. *Taylor*, 84 Ind. 503.

(*c*) *Bradbury* v. *Dickens*, 27 Beav. 53.

(*d*) *Marshall* v. *Watson*, 25 Beav. 501.

(*e*) *Turner* v. *Major*, 3 Giff. 442.

(*f*) *Evans* v. *Hughes*, 18 Jur. 691.

(*g*) *Lewis* v. *Langdon*, 7 Sim. 421.

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 (*a*); thus, in *Mellersh* v. *Keen* (*b*), it was fixed at one year's purchase of the net annual profits, calculated on an average of three years (*c*).

(*a*) *Austen* v. *Boys*, 2 De G. & J. 626.

(*b*) 28 Beav. 453; and see *Donald* v. *Hodgart's Trustees*, Ct. Sess. Cas. 4th Ser. XXI. 246.

(*c*) 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.

THE TRADE MARKS ACT, 1905, AND THE RULES AND INSTRUCTIONS THEREUNDER.

THE TRADE MARKS ACT, 1905.

5 EDW. VII. c. 15.

An Act to consolidate and amend the Law relating to Trade Marks.

[11th August, 1905.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. This Act may be cited as the Trade Marks Act, 1905. Short title.

2. This Act shall, save as otherwise expressly provided, come into operation on the first day of April one thousand nine hundred and six. Commencement of Act.

PART I.

Definitions.

3. In and for the purposes of this Act (unless the context otherwise requires) :— Definitions. See Pat. Acts. S. 64 and notes.

A "mark" shall include a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof (*a*) :

A "trade mark" shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale (*b*) :

A "registrable trade mark" shall mean a trade mark which is capable of registration under the provisions of this Act :

"The register" shall mean the register of trade marks kept under the provisions of this Act :

A "registered trade mark" shall mean a trade mark which is actually upon the register ;

"Prescribed" shall mean, in relation to proceedings before the Court, prescribed by rules of court, and, in other cases, prescribed by this Act or the Rules thereunder:

"The Court" shall mean (subject to the provisions for Scotland, Ireland, and the Isle of Man) His Majesty's High Court of Justice in England.

(*a*) This definition is new. It corresponds to some extent with the definition contained in sect. 64 of the previous Acts, and has to be taken in conjunction with sect. 9, by which a name or signature or word which complies with the provisions of sub-sects. 1, 2, 3 or 4, constitutes an essential particular. By sub-sect. 5 of that section any other distinctive mark constitutes an essential particular, thus including such names, signatures and words as do not come within the earlier sub-sections, provided that an order of the Board of Trade or of the Court can be obtained. A letter, numeral (in former Acts called "figure"), or any combination thereof is now introduced for the first time into the class of marks which may be registrable though not used before August 13th, 1875. Some marks consisting of letters or figures are of considerable value—*e.g.*, *In re Birmingham Small Arms Co., Ltd.*, 24 P. R. 563 ("B.S.A."); *Bouke, Roberts & Co., Ltd.* v. *Wayland & Co.*, 26 P. R. 251 ("K.M.S."). See also the observations of Kekewich, J., in *In re Apollinaris Brunnen*, 24 P. R. 436. The name of a patented article cannot come within this definition, see *per* Neville, J., *In re Gestetner*, 24 P. R. 545, at p. 549; (1907) 2 Ch. 478; and on appeal (1908) 1 Ch. 513. Again in *In re Philippart*, 25 P. R. 565, Parker, J., held that the word "Diabolo," which had been registered for tops used in the game of that name, was not used upon the goods for the purpose of indicating that they were the goods of the registered proprietor, and was therefore improperly registered. So also "Gramophone": *In re Gramophone Co., Ltd.*, 27 P. R. 689.

(*b*) This definition is also new, but, except in one respect, it does not materially differ from previous practice. Ever since the first Trade Marks Act was passed, not only manufacturers' marks, but also marks used by merchants and dealers for the purpose of indicating that the goods to which the marks are attached have passed through their hands and are guaranteed by them, have been recognized as constituting registrable trade marks, and this is substantially the meaning of the word "selection" as here used—*i.e.*, it means that the goods on which the mark is placed are goods which have been selected by a trader as approved by him for sale in the course of his business. An instance of this is afforded by the case of *Major Bros.* v. *Franklin & Son*, 25 P. R. 406, in which Jelf, J., held that fruit salesmen who had their baskets packed with fruit by a particular grower, and then sold the fruit as their own, although as between themselves and the grower the fruit was sold on commission, were properly registered for a trade-mark used by them on baskets of fruit. In all the instances above mentioned the goods pass through the hands of the person marking them for the purpose of sale, but "certification" introduces a new principle, which is explained in sect. 62. In this case the mark is not a trade mark in the strict sense—*i.e.*, it is not a mark used for the purpose of indicating that the goods are the manufacture or merchandise of a particular person, but it means that the marked goods have been examined, and are certified by the person whose mark they bear as being of a particular origin, &c., as specified in sect. 62.

Register of Trade Marks.

Register of trade marks.

See Pat. Acts. S. 78 and note.

4. There shall be kept at the Patent Office for the purposes of this Act a book called the Register of Trade Marks, wherein shall be entered all registered trade marks with the names and addresses of their proprietors, notifications of assignments and transmissions, disclaimers, conditions, limitations, and such other matters relating to such trade marks as may from time to time be prescribed. The register shall be kept under the control and management of the Comptroller-General of Patents, Designs, and Trade Marks, who is in this Act referred to as the Registrar.

This section comes from sect. 78 of the Act of 1883.

5. There shall not be entered in the register any notice of any trust expressed, implied, or constructive, nor shall any such notice be receivable by the Registrar.

Trust not to be entered on register.

This section comes from sect. 85 of the Act of 1883.

See Pat. Acts.

S. 85 and note.

6. The register of trade marks existing at the date of the commencement of this Act, and all registers of trade marks kept under previous Acts, which are deemed part of the same book as such register, shall be incorporated with and form part of the register (*a*). Subject to the provisions of sections thirty-six and forty-one of this Act the validity of the original entry of any trade mark upon the registers so incorporated shall be determined in accordance with the statutes in force at the date of such entry, and such trade mark shall retain its original date, but for all other purposes it shall be deemed to be a trade mark registered under this Act (*b*).

Incorporation of existing register.

See Pat. Acts.

S. 114 and note.

(*a*) This comes from sect. 114 (2) of the Act of 1883.

(*b*) Except for its being made subject to the provisions of sects. 36 and 41 of this Act, this branch of the section is in accordance with the law which previously existed, by which the validity of a registered trade mark has always had to depend upon its compliance with the provisions of the Act in force at the date of its registration; *e.g.*, a word registered as a trade mark prior to the Act of 1883 was bad unless it could be shown to have been used *per se* as a trade mark prior to the 13th August, 1875. Similarly, a word registered under the Act of 1883, which was not an old mark, had to be justified as a fancy word; and a word registered under the Act of 1888, which was not an old mark, had to be justified as an invented word, or a word having no reference to the character or quality of the goods. Inasmuch as by sect. 36 a trade mark registered prior to the commencement of this Act is not to be removed from the register on the ground that it was not registrable under the Act under which it was registered, there does not seem to be much value in this part of sect. 6. Where a registered mark is attacked on the ground that it does not fall within the definition of registrable marks, it has first to be ascertained whether it is within the definition of the Act under which it was registered, and if not, then whether it falls under the definition in the present Act. (See *In re Gestetner*, (1907) 2 Ch. 478: (1908) 1 Ch. 513; *In re Philippart*, 25 P. R. 565.)

7. The register kept under this Act shall at all convenient times be open to the inspection of the public, subject to such regulations as may be prescribed; and certified copies, sealed with the seal of the Patent Office, of any entry in any such register shall be given to any person requiring the same on payment of the prescribed fee.

Inspection of and extract from register.

See Pat. Acts.

S. 88 and note.

This comes from sect. 88 of the Act of 1883.

Registrable Trade Marks.

8. A trade mark must be registered in respect of particular goods or classes of goods.

Trade mark must be for particular goods.

This comes from sect. 65 of the Act of 1883. See classification of goods in Third Schedule to Rules.

See P. Acts.

S. 65 and note.

9. A registrable trade mark (*a*) must contain or consist of at least one of the following essential particulars:—

Registrable trade marks.

(1) The name of a company, individual, or firm represented in a special or particular manner;

See P. Acts.

(2) The signature of the applicant for registration or some predecessor in his business (*b*);

S. 64 and notes,

(3) An invented word or invented words (*c*);
(4) A word or words having no direct reference to the character or quality of the goods (*d*), and not being according to its ordinary signification a geographical name or a surname (*e*);
(5) Any other distinctive mark (*f*), but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1), (2), (3), and (4), shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark:

Provided always that any special or distinctive word or words, letter, numeral, or combination of letters or numerals used as a trade mark by the applicant or his predecessors in business before the thirteenth day of August one thousand eight hundred and seventy-five, which has continued to be used (either in its original form or with additions or alterations not substantially affecting the identity of the same) down to the date of the application for registration shall be registrable as a trade mark under this Act (*g*).

For the purposes of this section "distinctive" shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons (*h*).

In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered (*i*).

(*a*) This section comes, with very important modifications, from sect 64 of the Act of 1883 and the amended form of the same section contained in sect. 10 of the Act of 1888. It will be necessary to bear in mind that in the case of cotton marks the provisions of this section are varied by sect. 64 (10).

(*b*) This sub-section for the first time recognizes the signature of a former proprietor of the applicant's business as an essential particular. Hitherto only the signature of the person applying was so recognized. (See *In re Albert Baker & Co.* (1898) *Ltd.*, 25 P. R. 513, at p. 524.)

(*c*) These words come from sect. 64 of the Act of 1888, and are governed by the decision in the "Solio" case—*In re Eastman Photographic Materials Co., Limtd.*, (1898) A. C. 571. Prior to that decision many words capable of registration under that decision had been rejected on grounds derived from the rules previously laid down with regard to fancy words under the Act of 1883, and since that decision many words have been rejected on grounds based on some *dicta* of the Lords therein, but which it is thought might fairly have been sanctioned. Until those *dicta* have been further explained by the House of Lords, it is probable that the same effect will continue to be given to them, but applicants whose marks are rejected on such grounds will in future have the opportunity of endeavouring to satisfy the Board of Trade or the Court, under sub-sect. 5 of this section, that their words are really capable of constituting a distinctive mark, and, if so, registration will be conceded notwithstanding those *dicta*. A word which has been created and applied as the name of a patented article cannot be regarded as an invented word (*In re Gestetner*, (1907) 2 Ch. 478; (1908) 1 Ch. 513). In *In re Philippart*, 25 P. R. 565, "Diabolo," being an Italian variant for Diavolo, was held not to be an invented word.

(*d*) These words come from sect. 64 of the Act of 1888, except that the word "direct" is now introduced for the purpose of rendering registrable words which, though they may contain some indirect allusion to character or quality, are nevertheless capable of being regarded as distinctive. A word which has been created and applied as the name of a patented article is not a word having no direct reference, &c. (*In re Gestetner*, (1907) 2 Ch. 478; (1908) 1 Ch. 513). So the word "Diabolo," registered for tops intended for use in the game of that name, was held not to be a word having no direct reference, &c. (*In re Philippart*, 25 P. R. 565). On the other hand, in *In re*

Compagnie Industrielle des Petroles (24 P. R. 585), the word "Motorine" was held to be a word which had no direct reference, &c. to the goods to which it was intended to be applied, consisting of lubricating oil for use with motor cars and the like.

(*e*) This provision contains a very liberal modification of the corresponding prohibition in sect. 64 (1) (c) of the Act of 1888. By that sub-section a geographical name was rendered incapable of registration, and difficulties often arose in the case of words which did not suggest to ordinary observers a geographical origin, although in fact they had been used to define particular geographical spots in remote parts of the world. The decision of the Court of Appeal in the "Magnolia" case (*In re Magnolia Metal Co.*, (1897) 2 Ch. 385) in effect interpreted the old prohibition in the sense which now becomes statutory by means of the introduction of the words "according to its ordinary signification." Even if a word is geographical according to its ordinary signification, it may still be registered in a proper case by leave of the Board of Trade or the Court (*In re Apollinaris Brunnen*, 24 P. R. 436; *In re National Starch Co.*, 25 P. R. 802; *In re California Fig Syrup Co.*, 26 P. R. 846); but not if it is calculated to deceive (*In re Royal Worcester Corset Co.*, 26 P. R. 185). The provision as to a surname is new, and will apply to such instances as "Swan," "Pears," and the like, which have in point of fact constituted the surnames of occasional families, though not suggesting that as their primary meaning. See sect. 44.

(*f*) This is an important provision, enabling, as it does, any mark falling within the definition in sect. 3 to be registered so long as it is distinctive, subject to the provision requiring an order of the Board of Trade or the Court in the particular cases specified. In such cases the usual course is that the applicant sends in to the registrar an application on the special Form T. M. No. 5, on which the registrar reports whether there are any existing marks with which it appears to conflict or not. Then the applicant sends in to the registrar a statement of the facts on which he relies to support his application. If, as is usual, he desires his case to be dealt with by the Board of Trade, the documents are transmitted by the registrar to the Board, who then call upon the applicant to supply evidence in support of his application, and it is usually expected that such evidence shall consist of a statutory declaration by the applicant himself, or someone representing him, and further declarations (three or more), by persons engaged in the trade to bear out the contention that, whatever may originally have been the case, the word has by actual use come to be in fact distinctive of the goods of the applicant. When this has been done, the word is either passed for registration by the Board of Trade, or they appoint a hearing at which the applicant is heard personally, or by counsel or agent, in support of his application, and the matter is then dealt with by the Board. When the applicant desires his application to be dealt with by the Court, or where his application has been referred to the Court by the Board of Trade under sect. 59, the same course must in substance be followed (see *In re Apollinaris Brunnen*, 24 P. R. 436), in which case the name of a mineral water spring was allowed to be registered for mineral water upon an undertaking being given by the applicants not to use the mark except in respect of the water from the applicant's property at Neuenahr or in the neighbourhood thereof. The Board of Trade have dealt with a large number of applications under these special provisions, and have allowed many to pass upon production of sufficient evidence of *de facto* distinctiveness arising from long and exclusive user, although such words have been originally geographical or surnames, or descriptive in other ways. The fact that the word has been passed by the Board of Trade or by the Court does not preclude an opposition after advertisement in the *Trade Marks Journal*, as down to that point the application has been dealt with *ex parte*, and without an opportunity having been afforded to the trade or to any person having special grounds of objection to appear and be heard. In case of an opposition under such circumstances, the effect of the word having been passed for registration amounts to no more than a *primâ facie* decision, open to being varied or set aside upon evidence produced by the opponents which, of course, would not have been before the Board of Trade or the Court. The application is, in other words, only allowed to proceed to advertisement, its further progress being dependent on reason to the contrary not being made out. (See *In re Crosfield*, 26 P. R. 561, 837; *In re Akt. Hjorth*, 27 P. R. 461.)

The principles on which the Court will act are laid down by the judgment of Cozens-Hardy, M. R., in the "Perfection" case (*In re Crosfield*, 26 P. R. 837, at

p. 854) in the following terms:—"The duty of the tribunal is not to declare that the mark ought to be registered, but only to give liberty to proceed with the application. Such liberty ought to be given where there is a sufficient *primâ facie* case made out; and wherever there has been long continued and extensive user as a trade mark, that circumstance should, in ordinary cases, suffice to establish a right to proceed. But mere user is not necessarily decisive. The words in the proviso are 'may take into consideration,' and these words must not be treated as equivalent to a positive command to grant the application. A wide discretion is vested in the tribunal. It is apparent that no word can be registered under this paragraph unless it is 'distinctive,' that is to say, is 'adapted to distinguish' the goods of the proprietor from the goods of other persons. There are some words which are incapable of being so 'adapted,' such as 'good,' 'best' and 'superfine,' they cannot have a secondary meaning as indicating only the goods of the applicant. There are other words which are capable of being so 'adapted,' and as to such words the tribunal may be guided by evidence as to the extent to which use has rendered the word distinctive. It is easy to apply this paragraph to geographical words, and it is possible to suggest words having direct reference to character or quality which might be brought within it. But an ordinary laudatory epithet ought to be open to all the world, and is not, in my opinion, capable of being registered. It may be that within a particular area the applicant might succeed in a passing-off action against a trader who used the epithet without sufficiently distinguishing his goods from the goods of the applicant. But that would not justify the Court in giving the applicant a monopoly throughout the United Kingdom in the use of a laudatory epithet. Whether in any particular case the word is or is not something more than a laudatory epithet is for the tribunal to decide. If it is open to doubt, the tribunal may direct the application to proceed; if, however, the tribunal is satisfied that the word is purely laudatory, the application ought not to be allowed to proceed, and if the application has been allowed to proceed it ought to be refused at the second stage." In *In re Cassella* (27 P. R. 453), the same principle was held to apply to other directly descriptive words, and Buckley, L. J., said (p. 459) that "the principle is not confined, in my opinion, to laudatory epithets. It extends so far as to forbid the appropriation by one trader of any word forming part of the common stock of the English language, unless the word is one adapted to distinguish the goods in the sense which I have mentioned," *i.e.*, "from those of other persons." It is suggested, however, that the sub-section must be interpreted in such a way as to enable some marks to be registered which could not be registered without it, and that this is the view taken by the Court is shown by the cases in which marks have in fact been allowed.

In any case a word which is the popular name for an article ought not to be allowed to be registered for that article, even though to the trade it may connote a particular maker: *In re Gramophone Co., Ltd.*, 27 P. R. 689.

Where the mark is one which is not within the first four sub-sections of sect. 9, nor a word requiring the sanction of the Board of Trade or the Court, but is claimed as a distinctive mark of some other description, *e.g.*, a device, it will be dealt with by the registrar on the usual lines, but if it is of such a description as would not have been admitted to registration under the old Acts, *e.g.*, if it consists only of letters or numerals, evidence is sometimes required to prove that it is in fact distinctive within the definition in this section. In *In re United States Playing Card Co.* (W. N. (1907) p. 251), it was held that if a device was distinctive it could be registered, whether it could or could not also be registered as a design.

Under this sub-section the Court has passed the words "Apollinaris" (*In re Apollinaris Brunnen*, 24 P. R. 436); "Oswego" (*In re National Starch Co.*, 25 P. R. 802); "Lawson Tait" (*In re Whitfield's Bedsteads, Ltd.*, 26 P. R. 657); "California Syrup of Figs" (*In re California Fig Syrup Co.*, 26 P. R. 846); "Primus" (*In re Akt. Hjorth*, 27 P. R. 461); "Itala" (*In re Itala Fabbrica*, 27 P. R. 493). But the Court has refused to pass "Perfection" (*In re Crosfield*, 26 P. R. 561, 837); "Diamine" (*In re Cassella*, 27 P. R. 453); "Gramophone" (*In re Gramophone Co., Ltd.*, 27 P. R. 689). See also *In re Orlwoola, Ltd.* ("Orlwoola"), 26 P. R. 850.

A mark which is calculated to deceive will not be passed as "distinctive" (*In re Royal Worcester Corset Co.*, 26 P. R. 185), nor the name of a patented article (*In re Bowden Patent Syndicate, Ltd.*, 26 P. R. 205).

As to the form in which the order should be made, see *In re National Starch Co.*, 25 P. R. 802; *In re Akt. Hjorth*, 27 P. R. 461; *In re Itala Fabbrica*, 27 P. R. 493.

(*g*) This proviso is derived from sect. 64 (3), (ii), of the Act of 1888, which has appeared with various modifications in all the Acts regulating the registration of

trade marks. The previous proviso is, however, now considerably varied in its language in several material respects. The expression "special and distinctive" now becomes "special or distinctive," so that either the one or the other condition has to be fulfilled instead of both, as hitherto. The word "numeral" is substituted for "figure," thus expressing in terms the interpretation which has always been placed upon the earlier word. It is now stated (as had previously been understood to be implied) that the user as a trade mark must have been by the applicant or his predecessors in business. Continued user is now made expressly necessary, though this also had previously been regarded as implied. The most important alteration is contained in the provision that the user may have been "either in its original form or with additions or alterations not substantially affecting the identity of the same." It has constantly happened that in the course of years various trifling alterations have been introduced into an old mark which yet remained for all purposes of distinction the same. The proprietor was naturally desirous of registering it in the form in which he was actually using it, but was unable to allege that the mark had been used in that form prior to 1875, and was, on the other hand, unable to allege that the identical mark used before 1875 had been continued to be used down to the date of the application. Now it will be possible for him to bring such a mark within the precise language of the present section. But if there have been alterations he must show that the mark remains in substance the same.

(*h*) This is a legislative recognition of the interpretation which had previously been placed upon the word "distinctive" (*e.g.*, *Wood* v. *Lambert*, 32 Ch. Div. 24; *Perry, Davis & Son* v. *Harbord*, 15 App. Cas. 316). The great importance of the words "adapted to distinguish" may be seen from the judgments in *In re Crosfield* (26 P. R. 561, 837); *In re Cassella* (27 P. R. 453), and the other cases of special applications. It is suggested that the words may have been introduced to meet the point that a mark not actually in use can hardly be described as *de facto* distinctive, while it may well be "adapted to distinguish." If this suggestion were correct the words would be intended to widen the scope of the section by letting in unused marks. This is, however, not the effect which has been given to them by the Courts.

(*i*) This provision is new and useful. In the leading cases on the subject of fancy names under the Act of 1883, the Court of Appeal laid down that evidence as to the practical distinctiveness of words claimed as fancy words was to be excluded, and although since the disappearance of the term "fancy word" from the definition section this rule has not been so rigidly adhered to, it was very desirable that statutory authority should be given to the practice of having regard to the teaching of experience. The user of which evidence may be admitted must, however, be used for distinguishing, and not for merely descriptive purposes: *In re Gramophone Co., Ltd.*, 27 P. R. 689.

See Rules 11—16 for further regulations as to registrable trade marks.

Coloured trade marks.

10. A trade mark may be limited in whole or in part to one or more specified colours, and in such case the fact that it is so limited shall be taken into consideration by any tribunal having to decide on the distinctive character of such trade mark (*a*). If and so far as a trade mark is registered without limitation of colour it shall be deemed to be registered for all colours.

See Pat. Acts. S. 67 and note.

(*a*) The previous provisions as to registration in colour or colours are to be found in sect. 67 of the Act of 1883, as amended by sect. 11 of the Act of 1888. That section, however, did not contain any provision as to the limitation of a trade mark to any specified colour or colours, and this is now for the first time made possible. The object is to enable a trade mark in distinctive colouring to be registered by virtue of such colouring. An instance of an application for such purpose will be found in the case of *In re Hanson* (37 Ch. Div. 112), where the mark tendered consisted of a well-known red, white and blue label for coffee, which was refused registration because of the want of a provision enabling distinctiveness to consist in colour. Under the present section such an application might probably succeed, especially if the circumstances allowed advantage to be taken of the authority given by the concluding paragraph of sect. 9 for the admission of evidence as to practical distinctiveness. Where a trade mark contains matter which irrespective of colour is distinctive, it would appear inadvisable to limit the registration to a particular

colour or colours, as this would leave it open to other firms, so far, at all events, as trade marks are concerned, to imitate the distinctive matter, but colour it differently. Where such marks are concerned it is preferable to register without any limitation in respect of colour, and then, if thought advisable, to effect some further registration in which colour is made of the essence of the mark.

Restriction on registration.

See Pat. Acts.

Ss. 73, 86 and notes.

11. It shall not be lawful to register as a trade mark or part of a trade mark any matter, the use of which would by reason of its being calculated to deceive (*a*) or otherwise be disentitled to protection in a Court of justice, or would be contrary to law or morality, or any scandalous design.

(*a*) This comes from sects. 73 and 86 of the Act of 1883. From the decision of the House of Lords in *Eno* v. *Dunn* (15 App. Cas. 252), it seems that the words "calculated to deceive" must be taken as extending to cases in which the deception would result from similarity to marks previously in use by a different trader, and this was so held by Warrington, J., in *In re Compagnie Industrielle des Petroles* (24 P. R. 585), and adopted by Eve, J., in *In re Albert Baker & Co.* (1898), *Ltd.* (25 P. R. 513.) The onus is on the applicant to prove that the mark which he is seeking to register is not calculated to deceive by reason of its similarity to previous marks. In the earlier of the cases cited it was held that this onus was not discharged, the word "Motricine" for spirit for motive power purposes being held to be too similar to "Motorine" already registered for lubricating oil. On the other hand, in the later case, it was held that two marks, each containing the letters A. B. C., having both been used for several years without confusion the onus was discharged. In *In re Philippart* (25 P R. 565), Parker, J., doubted very much whether the word "Diabolo" did not fall within the prohibition in this section as being a mark disentitled to protection. In *In re McGlennon* (25 P. R. 797), a "Shamrock" mark was refused registration on the ground that it was calculated to deceive, as suggesting an Irish origin for goods which did not come from Ireland. In *In re Gutta Percha Co., Ltd.* (26 P. R. 84, 428), a mark was not allowed to be registered in Class 38 for indiarubber boots and shoes on the ground of similarity to another mark already registered in Class 40 for indiarubber goods which did not include boots and shoes. In *In re Royal Worcester Corset Co.* (26 P. R. 185), it was held that the words "Royal Worcester," as applied to American-made corsets, were calculated to deceive, both because they might suggest an English origin and also because they might suggest Royal patronage, which was not in accordance with the fact. As to "Royal," see also *In re Carron Co.* (27 P. R. 412). In *Thorne & Sons, Ltd.* v. *Pimms, Ltd.*, (26 P. R. 221), it was held that a whiskey label containing the name "Glen Thorne," though not calculated to deceive so long as the whiskey sold under it was Thorne's whiskey, became so when the registered proprietors ceased to obtain their supplies from Thorne & Sons, Ltd., and the mark was expunged. In *In re Postum Cereal Co.* (Nov. 12, 1906), the Board of Trade refused an application for the registration of the words "Elijah's Manna," as being irreverent.

Registration of Trade Marks.

Application for registration.

See Pat. Acts.

S. 62 and notes.

12.—(1) Any person claiming to be the proprietor of a trade mark who is desirous of registering the same must apply in writing to the registrar in the prescribed manner.

(2) Subject to the provisions of this Act the registrar may refuse such application, or may accept it absolutely or subject to conditions, amendments, or modifications (*a*).

(3) In case of any such refusal or conditional acceptance the registrar shall, if required by the applicant, state in writing the grounds of his decision and the materials used by him in arriving at the same (*b*), and such decision shall be subject to appeal to the Board of Trade or to the Court at the option of the applicant (*c*).

(4) An appeal under this section shall be made in the prescribed manner, and on such appeal the Board of Trade or the Court, as the

case may be, shall, if required, hear the applicant and the registrar, and shall make an order determining whether, and subject to what conditions, amendments, or modifications, if any, the application is to be accepted (*d*).

(5) Appeals under this section shall be heard on the materials so stated by the registrar to have been used by him in arriving at his decision, and no further grounds of objection to the acceptance of the application shall be allowed to be taken by the registrar, other than those stated by him, except by leave of the tribunal hearing the appeal. Where any further grounds of objection are taken the applicant shall be entitled to withdraw his application without payment of costs on giving notice as prescribed (*e*).

(6) The registrar or the Board of Trade or the Court, as the case may be, may at any time, whether before or after acceptance, correct any error in or in connection with the application, or may permit the applicant to amend his application upon such terms as they may think fit (*f*).

This section comes from sect. 62 of the Act of 1883, as modified by sect. 8 of the Act of 1888.

See Rules 17 - 41 for regulations as to applications and subsequent procedure.

(*a*) The only point to which it seems necessary to refer here is that relating to the condition which has frequently been imposed by the authorities at the Patent Office of the obtaining the consent of the proprietor of a previously registered mark. In the case of *In re Deehurst & Sons, Limtd.* (1896, 2 Ch. 137), the Court of Appeal refused to accept the consent of the proprietor of such a mark as conclusive; but in case of doubt there seems no reason why such consents should not continue to be accepted, as they have in fact been in the past, as a sufficient justification for allowing registration to proceed. It may be added that when the condition which the registrar desires to impose is with respect to association under sect. 24, he is not at liberty to require association going beyond the provisions of that section. (*In re Birmingham Small Arms Co., Ltd.*, 24 P. R. 563.)

(*b*) Before the present Act it was not the usual practice for anything in the nature of a written judgment to be given in such cases, nor for the materials used to be stated, although this has occasionally been done. The result was that an appellant against a refusal to register had to go to the Board of Trade without any accurate knowledge as to the grounds of the refusal. Now, if he desires to appeal, he will have an opportunity of knowing exactly what he has to meet.

(*c*) Hitherto an unsuccessful applicant has had to appeal to the Board of Trade by whom the appeal might or might not be referred to the Court. Usually, appeals against refusals to register not resulting from oppositions were heard by the Board of Trade, but occasionally they were referred to the Court against the wish of the appellant, who preferred to abandon his appeal rather than incur the expense of a proceeding in Court. On the other hand, it occasionally happened that the Board themselves decided a case which the appellant would have preferred to be disposed of before the Court. Where the Board heard the case their decision was final. Where it was heard by the Court the decision was open to the usual possibilities of appeal. Now the applicant will have his option. If he desires to go to the Court he can do so; if, on the other hand, he prefers to go to the Board of Trade, and the appeal is heard by the Board, their decision will be final, but they will still be at liberty to refer the appeal to the Court, under sect. 59, if they so think fit. Where the appeal is taken into Court the appellant may or may not be ordered to pay the costs of the registrar, according to the discretion of the Court, but he will not in any event be able to obtain an order for costs against the registrar. (See sect. 48.) If the refusal of the registrar is on the ground of similarity to a previous mark, it is convenient for the owner of such previous mark to be served with notice. (*Per* Parker, J., *In re Royal Worcester Corset Co.*, 26 P. R. 185.) See also *In re Shamrock & Co.*, 24 P. R. 569; *In re Carborundum Co.*, 26 P. R. 504; *In re Holbrooks, Ltd.*, 26 P. R. 791; *In re Itala Fabbrica*, 27 P. R. 493, where the persons cited were the applicants' agents in this country, and were left to oppose, if

they thought fit, after the mark had been advertised. The practice of giving notice existed under the old Acts. (See *In re Milne & Co.*, Chitty, J., July 6th, 1883, where the direction to serve the third party was given by the learned judge; *In re Bancroft & Co.*, 5 P. R. 209; *In re Baschiera & Co.*, 33 Sol. J. 469; *In re Sone and Fleming Mfg. Co.*, 30 Ch. D. 505; *In re Extract of Meat (Baron Liebig) Photograph Brand, Ltd.*, 17 P. R. 161, where the Court refused to proceed until the third party had been served; *In re Pomril, Ltd.*, 18 P. R. 181; *In re Booth's Distillery Co., Ltd.*, 21 P. R. 18; *In re Capsuloid Co., Ltd.*, 23 P. R. 782.) As to security for costs, see sect. 14 and notes thereto.

Appeals to the Court are to be by motion (Rule 121). As to appeals to the Board of Trade, see Rules 122—7.

(*d*) In *In re Shamrock & Co.* (24 P. R. 569), the registrar had refused to register a shamrock mark on the ground of its similarity to another shamrock mark, whose proprietors had not consented to the registration, but on appeal the proprietors of the earlier mark not thinking fit to attend the hearing, although they had had express notice, and the Court being of opinion that the two marks were not too similar to one another, registration was allowed. In *In re Apollinaris Brunnen* (24 P. R. 436), a special application under sect. 9 (5), registration was allowed subject to an undertaking given to the Court limiting the manner of user.

(*e*) The object of this provision is to enable a mark which is shown to be objectionable, though not on grounds originally taken, to be excluded from the register without exposing the applicant to the risk of having to pay costs incurred in reliance upon the insufficiency of the original objections.

See Rule 128.

(*f*) This provision disposes satisfactorily of the question which has sometimes been raised as to the date up to which amendments might be introduced into applications, *e.g.*, by the introduction of disclaimers. It is thought that the correct view is that applications have always remained applications, whether accepted or not, up to complete registration, and that throughout this inchoate state amendments were permissible. This has not, however, always been the view taken by the Court, *e.g.*, *In re Player*, (1901) 1 Ch. 382.

Advertisement of application.

See Pat. Acts.

S. 68 and notes.

13. When an application for registration of a trade mark has been accepted, whether absolutely or subject to conditions, the registrar shall, as soon as may be after such acceptance, cause the application as accepted to be advertised in the prescribed manner. Such advertisement shall set forth all conditions subject to which the application has been accepted.

This section comes from sect. 68 of the Act of 1883, as amended by sect. 12 of the Act of 1888. The language is somewhat altered, but the substance remains the same. It has been the practice for a number of years past to set forth any disclaimers in the advertisement in the *Trade Marks Journal*. This practice is now to be extended to any conditions imposed under the new Act.

See Rules 47—50.

Opposition to registration.

See Pat. Acts.

S. 69 and notes.

14.—(1) Any person may, within the prescribed time from the date of the advertisement of an application for the registration of a trade mark, give notice to the registrar of opposition to such registration.

(2) Such notice shall be given in writing in the prescribed manner, and shall include a statement of the grounds of opposition (*a*).

(3) The registrar shall send a copy of such notice to the applicant, and within the prescribed time after the receipt of such notice, the applicant shall send to the registrar, in the prescribed manner, a counter-statement of the grounds on which he relies for his application, and, if he does not do so, he shall be deemed to have abandoned his application.

(4) If the applicant sends such counter-statement, the registrar shall furnish a copy thereof to the persons giving notice of opposition, and

shall, after hearing the parties, if so required, and considering the evidence (*b*), decide whether, and subject to what conditions, registration is to be permitted.

(5) The decision of the registrar shall be subject to appeal to the Court or, with the consent of the parties, to the Board of Trade (*c*).

(6) An appeal under this section shall be made in the prescribed manner, and on such appeal the Board of Trade or the Court, as the case may be, shall, if required, hear the parties and the registrar, and shall make an order determining whether, and subject to what conditions, if any, registration is to be permitted (*d*).

(7) On the hearing of any such appeal any party may either in the manner prescribed or by special leave of the tribunal bring forward further material for the consideration of the tribunal (*e*).

(8) In proceedings under this section no further grounds of objection to the registration of a trade mark shall be allowed to be taken by the opponent or the registrar other than those stated by the opponent as herein-above provided except by leave of the tribunal hearing the appeal. Where any further grounds of objection are taken the applicant shall be entitled to withdraw his application without payment of the costs of the opponent on giving notice as prescribed (*f*).

(9) In any appeal under this section, the tribunal may, after hearing the registrar, permit the trade mark proposed to be registered to be modified in any manner not substantially affecting the identity of such trade mark, but in such case the trade mark as so modified shall be advertised in the prescribed manner before being registered (*g*).

(10) The registrar, or in the case of an appeal to the Board of Trade the Board of Trade, shall have power in proceedings under this section to award to any party such costs as they may consider reasonable, and to direct how and by what parties they are to be paid (*h*).

(11) If a party giving notice of opposition or of appeal neither resides nor carries on business in the United Kingdom, the tribunal may require such party to give security for costs of the proceedings before it relative to such opposition or appeal, and in default of such security being duly given may treat the opposition or appeal as abandoned (*i*).

This section is founded on sect. 69 of the Act of 1883, as altered by sect. 13 of the Act of 1888.

See Rules 51—61.

(*a*) There is no limitation of the grounds on which registration may be opposed, but any person is allowed to object for any reason which he supposes to disentitle the applicant to registration. It has, however, been held that offences alleged to have been committed by the applicant against the Companies Acts are not available as grounds for opposition (*In re Albert Baker & Co.* (1898) *Ltd.*, 24 P. R. 513).

(*b*) Hitherto the evidence on an opposed application has taken the form of statutory declarations. In future, the practice will be governed by sect. 49 of the Act, by which evidence will ordinarily be taken in the form of statutory declaration as before; but *viva voce* evidence may, by consent of the parties, be taken in lieu of, or in addition to, evidence by declaration. Hitherto the statutory declarations used in the Registry Office have not been able to be used before the Court without verification by affidavit (see *In re Kingsford & Sons*, 15 P. R. 197); but now, by sect. 49, the declarations may be used before the Court in case of appeal in place of affidavits.

(*c*) Hitherto the appeal from the registrar has been to the Board of Trade, which in opposition cases has almost invariably referred the appeal to the Court. Now the parties may agree for the appeal to be heard by the Board of Trade, whose decision will be final; but the Board may, if it thinks fit, refer the appeal to the

Court under sect. 59. But unless the appeal is taken to the Board of Trade by consent it will have to be made to the Court, and whether the appeal is taken to the Court direct, or is referred to the Court by the Board of Trade, there will be the usual opportunities of further appeal.

Appeals to the Court are to be by motion. (Rule 121.) As to appeals to the Board of Trade, see Rules 122—7.

(*d*) In *In re Compagnie Industrielle des Petroles* (24 P. R. 585), the refusal of the registrar to register "Motricine," in view of the existing registration of "Motorine," was upheld, and registration, even subject to suggested conditions, was refused. In *In re Albert Baker & Co.* (1898) *Ltd.* (25 P. R. 513), one of the marks alleged to be in conflict was allowed to be registered without conditions, and the other was also allowed to be registered subject to a disclaimer which had been offered by the applicants. In *In re Crosfield* (26 P. R. 561, 837), a mark which had been passed by the Board of Trade on a special application was refused on opposition. In *In re Kenrick & Jefferson, Ltd.* (26 P. R. 641), an opposition to a mark which had been in use for many years was held to fail. In *In re Brock & Co.* (26 P. R. 681), the word "Osowoolo" was refused registration on account of its similarity to the word "Orlwoola." The latter word was removed from the register on appeal (*In re Orlwoola, Ltd.* (26 P. R. 850)), but no appeal was brought against the refusal to register "Osowoolo." In *In re Chemische Fabrik Griesheim Elektron* (27 P. R. 201), a representation of an Eastern dye works was refused registration on opposition by the owners of another dye works mark, though the pictures were different. (See also *In re Carborundum Co.*, 26 P. R. 504: *In re Holbrooks, Ltd.*, 26 P. R. 791: *In re Akt. Hjorth*, 27 P. R. 461.)

(*e*) In *In re Ogston & Tennant, Ltd.* (26 P. R. 816), further evidence was allowed to be adduced on appeal, and see *In re Extract of Meat (Baron Liebig) Photograph Brand, Ltd.* (17 P. R. 161).

(*f*) Under Rule 31 (8) of the Rules of 1890, an opponent has been strictly confined to grounds of objection taken by his notice of opposition. Now the ordinary rule will remain the same, but the tribunal hearing an appeal may permit further grounds to be introduced; but if this is done the applicant will be entitled to withdraw his application without paying the opponent's costs. He will probably be required to pay the costs of the registrar, if any, but the Court will have a discretion under sect. 48. In *In re Albert Baker & Co.* (1898), *Ltd.* (25 P. R. 513, see p. 516), further grounds of objection were allowed, but the application was pressed with success. Where an opponent refrains from pleading in his notice of opposition grounds of objection already known to him, and his opposition has been disallowed, he will not be allowed, on appeal to the Court, to introduce such grounds of objection on the appeal (*In re Kenrick & Jefferson, Ltd.*, 26 P. R. 641). But he may do so on a subsequent application to the Court for rectification: *ib.* Warrington, J., Dec. 9th, 1910. In *In re Royal Worcester Corset Co.* (reported on the hearing at 26 P. R. 185), the Worcester Royal Porcelain Co., Ltd., who had been served with notice of the application, before appearing to the notice, applied for an order that the applicants, being an American company of Boston, U.S.A., without assets in the United Kingdom, should give security for costs. The American company contended that if the case had been heard by the Board of Trade instead of being referred to the Court, no security could have been ordered, and that, the application having been referred to the Court contrary to the wish of the company, they were unwilling litigants and ought not to be ordered to give security, but it was held that security must be given (Warrington, J., Nov. 16, 1908).

See Rule 128.

(*g*) The requirement of re-advertisement in case of modification of the trade mark is new as a statutory provision, but the practice thus recognized has been followed in the Registry Office for some years past.

(*h*) The power of giving costs is new, except in cases taken to the Court, and except that the registrar had power to allow reasonable costs if an application were abandoned after notice of opposition. There appears to be no appeal against an award of costs by the registrar.

(*i*) This is in substance a re-enactment in the case of opponents or appellants residing and trading outside the United Kingdom of the provisions of sect. 69 of the Act of 1883 as it stood before the alteration introduced by the Act of 1888.

Disclaimers. See Pat. Acts. S. 64, 74 and notes.

15. If a trade mark contains parts not separately registered by the proprietor as trade marks, or if it contains matter common to the trade or otherwise of a non-distinctive character, the registrar or the Board of Trade or the Court, in deciding whether such trade mark shall be entered or shall remain upon the register, may require, as a condition of its being upon the register, that the proprietor shall disclaim any right to the exclusive use of any part or parts of such trade mark, or of all or any portion of such matter, to the exclusive use of which they hold him not to be entitled, or that he shall make such other disclaimer as they may consider needful for the purpose of defining his rights under such registration (*a*): Provided always that no disclaimer upon the register shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made (*b*).

This section comes from sects. 64 and 74 of the Act of 1883, as altered by sects. 10 and 16 of the Act of 1888, but important alterations are introduced.

(*a*) Under the former Acts it was made a condition of registration that an applicant should in his application state the essential particulars of his trade mark and disclaim any right to the exclusive use of the added matter. Now there is substituted for this a power given to the tribunal to require a disclaimer if it thinks fit. The disclaimer need not be made at the time of application, but may be subsequently introduced by direction of the tribunal. A disclaimer entered on the register may be injurious to the proprietor of the mark and will not be directed except for good cause shown, the object of the legislature in varying the provisions of the former Acts having been to relieve traders from the necessity of disclaiming except in special cases. The fact that the applicant has sought in good faith to claim a monopoly in matter contained in the mark is not of itself sufficient ground for requiring a disclaimer (*In re Albert Baker & Co.* (1898), *Ltd.*, 25 P. R. 513), in which it was further thought that if the mark is such that a disclaimer would not have been required under the repealed Acts it ought to be free from disclaimer under the present Act.

(*b*) This is a very important provision, as it clears away for the future any such difficulty as was raised in the case of *Rosenthal* v. *Reynolds* (1892, 2 Ch. 301), and recognizes the view taken by the Scotch Court in *Bayer* v. *Baird* (15 P. R. 615). An applicant who is willing to forego any registration rights in respect of matter included in his trade mark may now safely disclaim it without apprehending danger to any common law rights he may possess. The decision in *In re Loftus* (1894, 1 Ch. 193) may possibly still hold good in cases in which matter disclaimed on one registration appears in another mark tendered for registration.

Date of registration. See Pat. Acts. S. 75 and note.

16. When an application for registration of a trade mark has been accepted and has not been opposed, and the time for notice of opposition has expired, or having been opposed the opposition has been decided in favour of the applicant, the registrar shall, unless the Board of Trade otherwise direct, register the said trade mark, and the trade mark, when registered, shall be registered as of the date of the application for registration, and such date shall be deemed for the purposes of this Act to be the date of registration.

The latter part of this section comes from sect. 17 of the Act of 1888. The earlier part of the section reproduces the old practice.

See Rules 63—66.

Certificate of registration.

17. On the registration of a trade mark the registrar shall issue to the applicant a certificate in the prescribed form of the registration of

such trade mark under the hand of the registrar, and sealed with the seal of the Patent Office.

This section is new. The former practice was to issue a notification of registration when the registration was completed. If the registered proprietor desired a certificate he had to make application for it and pay a special fee.

See Rule 67.

Non-completion of registration.

See Pat. Acts. S. 63 and note.

18. Where registration of a trade mark is not completed within twelve months from the date of the application by reason of default on the part of the applicant, the registrar may, after giving notice of the non-completion to the applicant in writing in the prescribed manner, treat the application as abandoned unless it is completed within the time specified in that behalf in such notice.

This section comes from sect. 63 of the Act of 1883, as amended by the Act of 1888. See Rule 62.

Identical Trade Marks.

Identical marks.

See Pat. Acts. S. 72 and notes.

19. Except by order of the Court or in the case of trade marks in use before the thirteenth day of August one thousand eight hundred and seventy-five (*a*), no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor (*b*) which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive (*c*).

This comes from sect. 72 of the Act of 1883, as amended by sect. 14 of the Act of 1888.

(*a*) The exception made in the case of "old marks," *i.e.*, marks used before the date of the first Trade Marks Registration Act, seems to allow the registration of such marks although similar marks are standing on the register in other names, but it would appear that if such marks are common to the trade registration would be refused.

(*b*) The introduction of the words "belonging to a different proprietor" are intended to do away with the rule laid down in *Baker* v. *Rawson* (45 Ch. D. 519) and in *In re Player* (1961, 1 Ch. 382), to the effect that a mark ought not to be registered if the same proprietor had a mark substantially the same already on the register. The theory was that such a registration was a needless cumbering of the register, but this theory entirely disregarded the fact that the proprietor might have thoroughly good reasons for desiring a fresh registration in a slightly altered form; *e.g.*, if he were in fact using or desiring to use a mark which only differed slightly from his previous mark, and he wished to obtain registration of this in a country in which a British certificate of registration of the identical mark used was required as a condition of registration. In view of the enormous number of trade marks already registered, the presence on the register of a few more on payment of the prescribed fees could not really be objectionable, and now objections based on previous registrations by the same proprietor are excluded. In *In re Compagnie Industrielle des Petroles* (24 P. R. 585), "Motricine" was refused registration in view of the existing registration of "Motorine," but in *In re Shamrock & Co.* (24 P.R. 569), an application for the registration of a shamrock mark was allowed to proceed, notwithstanding the previous registration of another shamrock mark. This mark was, however, subsequently refused on the ground of its untruly suggesting an Irish origin for goods which did not come from Ireland (*In re McGlennon*, 25 P. R. 797). In *In re La Union Agricola* (25 P. R. 295), it was sought to register certain diamond-shaped marks divided by a line across the centre into two triangles, and which in practice were half yellow and half green, in respect of elixirs and liqueurs, but registration was refused on the ground of similarity to certain diamond marks registered in respect of beers (which were treated as goods of the same description as

elixirs and liqueurs), such beer marks being in practice coloured in a single colour, either red, brown, blue or green. In *In re Gutta Percha Co., Ltd.* (26 P. R. 84, 428), it was held that india-rubber boots and shoes were goods of the same description as other india-rubber goods, and that in view of the registration of a mark for india-rubber goods in Class 48, a similar mark could not be registered for india-rubber boots and shoes in Class 38. Where two firms were concurrently entitled to the words "Guinea Gold" for tobacco goods, and owned registered marks in which those words appeared, one of such firms was allowed to register an additional "Guinea Gold" mark, the other firm, who had been served with notice of the application and had refused to consent, not appearing to oppose (*In re Phillips*, 26 P. R. 121; see *In re Royal Worcester Corset Co.*, 26 P. R. 185). On an appeal from a refusal to register, referred to the Court by the Board of Trade, the practice of the Board of Trade to direct notice to be served on the registered proprietor of the mark with which the mark tendered for registration is considered to conflict, is a convenient practice. If notice is not served the Court can proceed without it, or can itself direct it, as the circumstances may appear to require (*Ibid.*). If notice is served and the party served appears, and the application is refused, costs can be given to the party appearing (*Ibid.*). In *In re Carborundum Co.* (26 P. R. 504), an application which had been refused by the registrar on the ground of similarity to a previous mark, was allowed to proceed, the one claimed being antecedent to the registration of the registered mark, and the proprietors of that mark not appearing to oppose, though they had been served with notice and refused to consent. In *In re Holbrooks, Ltd.* (26 P. R. 791), a mark had been refused registration on the ground of a suggested similarity to a previously registered mark. The mark applied for had been in use for many years and, notwithstanding that the owners of the registered mark appeared on the appeal and resisted the application, the registration was allowed to proceed. (See also *In re Akt. Hjorth*, 27 P. R. 461, and the opposition cases under sect. 14.)

(*c*) Where similar, though not identical, trade marks are registered by the same proprietor, the provisions of sects. 24—27 as to associated trade marks appear to be applicable.

Rival claims to identical marks.

20. Where each of several persons claims to be proprietor of the same trade mark, or of nearly identical trade marks in respect of the same goods or description of goods, and to be registered as such proprietor, the registrar may refuse to register any of them until their rights have been determined by the Court (*a*), or have been settled by agreement in a manner approved by him or (on appeal) by the Board of Trade (*b*).

See Pat. Acts. S. 71 and note.

This comes from sect. 71 of the Act of 1883.

(*a*) The manner in which the determination of the Court is to be obtained is not defined. In *In re Hudson* (24 P. R. 582) the registrar had declined to register either of two conflicting marks without a decision of the Court. One of the applicants thereupon applied for a direction to the registrar to proceed with his application notwithstanding the rival application, and the rival applicant not proceeding with his application, the matter was disposed of on the application of the applicant who did desire to proceed, and in the result neither mark was registered, the mark appearing to be common to the trade. Each applicant was left to pay his own costs, the costs of the registrar being borne by the applicant who had applied to the Court. In *In re Albert Baker & Co.* (1898), *Ltd.* (25 P. R. 513), the registrar similarly declined to proceed with either application, and each party applied to the Court for leave to proceed, which in the result was granted in both cases.

(*b*) The provision with respect to agreements between parties claiming similar marks is new, and the wording of the section is otherwise altered. The old section seems rather to be aimed at trade marks of which the ownership was disputed between different claimants, but the present section appears to contemplate rival applications for competing marks being made practically simultaneously. Very little use was made of the old section, and it seems unlikely that the present one will often be put into force. It will, however, apparently meet such cases as *In re Ehrmann* (1897, 2 Ch. 495), in which two persons who had dissolved partnership were both refused registration, although each consented to the other's application.

Cases have already occurred in which the same marks have been allowed to be registered by different firms upon agreements approved by the registrar, *e.g.*, with respect to the place of user, one applicant reserving certain countries as his district and the other applicant other countries. The Board of Trade may refer any appeal to the Court under sect. 59.

Concurrent user.

21. In case of honest concurrent user or of other special circumstances which, in the opinion of the Court, make it proper so to do, the Court may permit the registration of the same trade mark, or of nearly identical trade marks, for the same goods or description of goods by more than one proprietor, subject to such conditions and limitations, if any, as to mode or place of user or otherwise, as it may think it right to impose.

This is a new section. Sect. 74 of the old Act recognized the registration of similar old marks by three, but not more different proprietors. Now there is no limitation to old marks, and the limitation in respect of number has also disappeared, but it seems probable that a mark will be held to be common to the trade if it has been used by more than three proprietors. On the other hand, the section now contemplates the registration of similar marks, even though new, subject to conditions in respect of the mode or place of user, or otherwise. Such restrictions were not infrequently imposed in the early years of trade mark registration, chiefly for the purpose of avoiding conflicts between persons who had used similar marks in different ways or in different parts of the country or world, but more recently such limitations have not been favoured. Now their practicability is recognized and sanctioned, and has been acted on in the Trade Marks Registry. In *In re Compagnie Industrielle des Petroles* (24 P. R. 585) "Motricine" was not allowed to be registered having regard to the presence of "Motorine" on the register, even with suggested conditions as to the mode of user. And a similar refusal was given in *In re Gutta Percha Co., Ltd.* (26 P. R. 84, 428). Weight will be given to long user of the later mark tendered for registration. (*In re Sen and Fleming Mfg. Co.*, 30 Ch. D. 505; *In re Carborundum Co.*, 26 P. R. 504; *In re Kenrick and Jefferson, Ltd.*, 26 P. R. 641; *In re Holbrooks, Ltd.*, 26 P. R. 791; and see *In re Akt. Hjorth*, 27 P. R. 461.) In *McKenzie* v. *Leslie* (9 C. L. R. 247), where A. and B. had each used the same mark in New South Wales, but in different districts, and B. had obtained registration, it was held that there had been honest concurrent user, and A. was allowed to register, subject to conditions for preventing confusion.

Assignment.

Assignment and transmission of trade marks.

See Pat. Acts. S. 70 and notes.

22. A trade mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the goods for which it has been registered and shall be determinable with that goodwill (*a*). But nothing in this section contained shall be deemed to affect the right of the proprietor of a registered trade mark to assign the right to use the same in any British possession or protectorate or foreign country in connection with any goods for which it is registered together with the goodwill of the business therein in such goods (*b*).

This comes from sect. 70 of the Act of 1883. See Rules 76–81.

(*a*) The indissoluble character of the connection between the trade mark and goodwill has always been recognized. The provision, however, that the trade mark shall be determinable with the goodwill has not, so far as is known, been put into force in connection with registration. The old rectification section, in fact, did not contain any words directly applicable to the case of a mark which was on the register, but which had ceased to be connected with an existing goodwill. The decision in *In re Batt* (1898, 2 Ch. 432; 1899, A. C. 428), however, met this difficulty to some extent, and sect. 35 (1) of the present Act expressly provides

for rectification at the instance of a person aggrieved by any entry wrongly remaining on the register. Where a person procured himself to be registered as the subsequent proprietor of a trade mark, but had not acquired the goodwill, the mark was expunged from the register (*In re Johnson*, 26 P. R. 195). In the "Chartreuse" case, *Rey* v. *Lecouturier* (25 P. R. 265; 27 P. R. 268), the entry of the name of a subsequent proprietor, who was held not to have acquired the goodwill, was ordered to be expunged, restoring the register to its previous condition.

(*b*) The latter part of this section is in harmony with the provisions of sect. 21, and recognizes the possibility of the same mark belonging to and being used by different persons in different countries, even though they may have been originally in the same ownership.

Apportionment of marks on dissolution of partnership.

23. In any case where from any cause, whether by reason of dissolution of partnership or otherwise, a person ceases to carry on business, and the goodwill of such person does not pass to one successor but is divided, the registrar may (subject to the provisions of this Act as to associated trade marks), on the application of the parties interested, permit an apportionment of the registered trade marks of the person among the persons in fact continuing the business, subject to such conditions and modifications, if any, as he may think necessary in the public interest. Any decision of the registrar under this section shall be subject to appeal to the Board of Trade.

This is a new section. The intention seems to be to do away with any supposed indivisibility of goodwill, where the marks are sufficiently distinct from one another to allow them to be apportioned and placed in different names. The provision as to associated trade marks (see sects. 24—27) prevents any apportionment which might create confusion arising from the similarity *inter se* of marks apportioned to different proprietors. The Board of Trade may refer any appeal to the Court under sect. 59.

See Rules 87—89.

Associated Trade Marks.

Associated trade marks.

24. If application be made for the registration of a trade mark so closely resembling a trade mark of the applicant already on the register for the same goods or description of goods as to be calculated to deceive or cause confusion if used by a person other than the applicant, the tribunal hearing the application may require as a condition of registration that such trade marks shall be entered on the register as associated trade marks.

This is a new section. The central idea of this group of sects. 24—27, of which 26 alone appeared in a somewhat more limited form in the earlier Acts, seems to be that trade marks are to be allowed to be placed on the register by the same proprietor which resemble one another in their distinctive characteristics, but which are to be treated as independent marks, except that they may not devolve on different proprietors so as to bring about the existence on the register, in different names, of marks which would conflict with one another in material respects if they were not the property of the same owner. Sect. 24 deals with the case of an application by a person already on the register for a particular trade mark to register a new trade mark bearing such a similarity to the first that it would be disallowed if applied for by a different applicant. Sect. 25 deals with the case in which the proprietor of a registrable trade mark, which contains within itself something which by itself would be a registrable trade mark, desires to obtain protection for the part in addition to the protection which he desires to acquire for the whole. Sect. 26 deals with the case in which a person desires to register several trade marks at the same time, which agree in essentials but differ in non-essentials.

Sect. 27 relates to the transmissibility of associated trade marks and the effects of their registration. Sect. 24 is in substance the same as sect. 26, except that the latter section has to do with cases in which several marks are applied for at the same time, and the earlier section with the case in which the applications are made successively. It will be noticed that under sect. 24 the mark previously registered has to be entered on the register as associated with the later mark besides a corresponding entry as to the later mark. The jurisdiction to require association is limited by this section to cases in which the mark sought to be registered is claimed in respect of the same goods or description of goods as the mark already on the register which it resembles, just as by sect. 19 the prohibition against registering a mark too similar to a mark already registered, belonging to a different proprietor, is limited to cases in which the goods are the same or of the same description. In *In re Birmingham Small Arms Co., Ltd.* (24 P. R. 563), the registrar objected to register a mark in Class 22 for cycles, motor cycles and automobiles, unless this were associated with an identical mark already registered in Class 19 for arms, ammunition and stores. It was held, however, that the goods were not the same nor of the same description, and that the condition of association could not be imposed, even under the general powers of sect. 12 (2). In this case it seems also to have been considered that a mark which is identical with and not merely similar to a mark already registered is outside the language of this section, but this point will probably require further consideration. The mischief aimed at would certainly be the same in this case as where the marks were similar but not identical.

See Rule 65.

Combined trade marks.

25. If the proprietor of a trade mark claims to be entitled to the exclusive use of any portion of such trade mark separately he may apply to register the same as separate trade marks (*a*). Each such separate trade mark must satisfy all the conditions and shall have all the incidents of an independent trade mark, except that when registered it and the trade mark of which it forms a part shall be deemed to be associated trade marks (*b*) and shall be entered on the register as such, but the user of the whole trade mark shall for the purposes of this Act be deemed to be also a user of such registered trade marks belonging to the same proprietor as it contains (*c*).

This section is new.

(*a*) The ordinary case would probably be that of the registration of a distinctive label containing within itself some distinctive device or word: in other cases the presumption is that the marks would be registered separately.

(*b*) The result of associating trade marks as provided by this section may apparently lead to a device becoming inseparable from any one of the labels in which it appears, however numerous they may be; but this seems only reasonable as the device will still be infringed by the use of a similar device notwithstanding that no two of the labels are similar in other respects, seeing that the user of the whole label is by this section to be deemed to be user of the device, and that by sect. 27 the device is, except for the purposes of transmission, to be deemed to have been registered separately.

(*c*) The provision contained in the last portion of this section is useful as removing any doubt, though it could hardly be asserted with success that a device or word was not being used when it was in fact used as part of a larger mark.

Series of trade marks.

See Pat. Acts. S. 66 and note.

26. When a person claiming to be the proprietor of several trade marks for the same description of goods which, while resembling each other in the material particulars thereof, yet differ in respect of—

(a) Statements of the goods for which they are respectively used or proposed to be used; or

(b) statements of number, price, quality, or names of places; or

(c) other matter of a non-distinctive character which does not substantially affect the identity of the trade mark (*a*); or

(d) colour (*b*);

seeks to register such trade marks, they may be registered as a series in one registration. All the trade marks in a series of trade marks so registered shall be deemed to be, and shall be registered as, associated trade marks.

This section is founded upon sect. 66 of the Act of 1883.

(*a*) This is a provision which did not appear in the earlier section. It would probably meet such cases as where there is some difference in non-distinctive decoration or the like.

(*b*) This is also new. It cannot apply in cases in which colour is made essential under sect. 10, and in other cases it seems scarcely of much importance in view of the fact that by sect 10 registration in one colour is to be deemed registration for all colours unless colour is specially claimed.

Assignment and user of associated trade marks.

27. Associated trade marks shall be assignable or transmissible only as a whole and not separately, but they shall for all other purposes be deemed to have been registered as separate trade marks (*a*). Provided that where under the provisions of this Act user of a registered trade mark is required to be proved for any purpose, the tribunal may if and so far as it shall think right accept user of an associated registered trade mark, or of the trade mark with additions or alterations not substantially affecting its identity, as an equivalent for such user (*b*).

This section is new.

(*a*) The provision that a trade mark associated with other trade marks is, except for purposes of transmission, to be deemed to have been registered separately, seems to involve the possibility of obtaining a separate certificate of registration in respect of it.

(*b*) The material part of a registered trade mark is the essential particular of which it consists or which it contains, and so long as the essential particular is used it is only reasonable to provide that the additions are to be treated as immaterial, and to allow user of the essential particular in combination with certain non-essentials to be equivalent to its user in combination with different non-essentials. It will be observed, however, that this principle is not to be pressed further than the tribunal dealing with the matter may consider to be reasonable. (See *In re Birmingham Small Arms Co., Ltd.*, 24 P. R. 563.)

Renewal of Registration.

Duration of registration.

See Pat. Acts. S. 79 and notes.

28. The registration of a trade mark shall be for a period of fourteen years, but may be renewed from time to time in accordance with the provisions of this Act.

This comes from sect. 79 of the Act of 1883.

See Rules 68—75 with reference to this group of sections.

Renewal of registration.

See Pat. Acts. S. 79 and notes.

29. The registrar shall, on application made by the registered proprietor of a trade mark in the prescribed manner and within the prescribed period, renew the registration of such trade mark for a period of fourteen years from the expiration of the original registration or of the last renewal of registration, as the case may be, which date is herein termed "the expiration of the last registration."

This comes from sect. 79 of the Act of 1883.

Procedure on expiry of period of registration.

See Pat. Acts. S. 79 and notes.

30. At the prescribed time before the expiration of the last registration of a trade mark, the registrar shall send notice in the prescribed manner to the registered proprietor at his registered address of the date at which the existing registration will expire and the conditions as to payment of fees and otherwise upon which a renewal of such registration may be obtained, and if at the expiration of the time prescribed in that behalf such conditions have not been duly complied with, the registrar may remove such trade mark from the register, subject to such conditions (if any) as to its restoration to the register as may be prescribed.

This comes from sect. 79 of the Act of 1883. It does not at present appear what conditions may be imposed upon renewal other than the payment of a renewal fee. Possibly, however, some requirement may be made for furnishing evidence of user or the like.

Status of unrenewed trade mark.

See Pat. Acts. S. 75 and notes.

31. Where a trade mark has been removed from the register for nonpayment of the fee for renewal, such trade mark shall, nevertheless, for the purpose of any application for registration during one year next after the date of such removal, be deemed to be a trade mark which is already registered, unless it is shown to the satisfaction of the registrar that there had been no *bonâ fide* trade user of such trade mark during the two years immediately preceding such removal (*a*).

This comes from sect. 79 of the Act of 1883, as altered by sect. 19 of the Act of 1888.

(*a*) This varies the provision of the older section, and substitutes proof of non-user for two years for proof that the non-payment of the renewal fee is due to the death or bankruptcy of the registered proprietor, or to his retirement from business, and that no person claiming under him is using the mark.

Correction and Rectification of the Register.

Correction of register.

See Pat. Acts. S. 91 and note.

32. The registrar may, on request made in the prescribed manner by the registered proprietor or by some person entitled by law to act in his name,—

(1) Correct any error in the name or address of the registered proprietor of a trade mark (*a*); or
(2) Enter any change in the name or address of the person who is registered as proprietor of a trade mark (*b*); or
(3) Cancel the entry of a trade mark on the register (*c*); or
(4) Strike out any goods or classes of goods from those for which a trade mark is registered (*d*); or
(5) Enter a disclaimer or memorandum relating to a trade mark which does not in any way extend the rights given by the existing registration of such trade mark (*e*).

Any decision of the registrar under this section shall be subject to appeal to the Board of Trade (*f*).

This comes from sect. 91 of the Act of 1883; but the first sub-division of that section is provided for by sect. 12 (6) of the present Act, by which errors in or in connection with the application may be corrected.

See Rules 90—92.

(*a*) This is not confined to clerical errors, as was the case with the old sect. 91 (b).

(*b*) This is new, and meets such cases as that of *In re New Ormonde Cycle Co.* (1896, 2 Ch. 520), in which a difficulty was disclosed in meeting the case of a change of name on the part of the proprietor.

See Rule 82 as to alterations of address.

(*c*) This corresponds with the old sect. 91 (c), except that the power to cancel part of the entry is now omitted. This is, however, sufficiently provided for by the following sub-section.

(*d*) This provides for the only case in which it is to be anticipated that a cancellation of a part of the entry is likely to be desired. There have been many cases in which marks have been registered for too wide a description of goods, and in which the mark has consequently been exposed to compulsory rectification.

(*e*) This enables the proprietor of a registered trade mark to put his registration in order by introducing a limitation which ought to have been provided for in the first instance.

(*f*) The Board of Trade may refer any appeal to the Court under sect. 59, if it thinks fit.

See Rules 122–7.

Registration of assignments, &c. **See Pat. Acts. S. 87 and notes.**

33. Subject to the provisions of this Act where a person becomes entitled to a registered trade mark by assignment, transmission, or other operation of law, the registrar shall, on request made in the prescribed manner, and on proof of title to his satisfaction, cause the name and address of such person to be entered on the register as proprietor of the trade mark. Any decision of the registrar under this section shall be subject to appeal to the Court or, with the consent of the parties, to the Board of Trade.

This comes from sect. 87 of the Act of 1883; but the provision as to licences is omitted, that being obviously inappropriate to the case of trade marks, the whole object of which is to indicate the goods of a particular firm and of no one else. The provision of the old section as to the enforcement of equities in respect of trade marks is omitted, apparently as being unnecessary. (See sect. 38.) Appeals under this section are placed on the same footing as appeals from decisions under sect. 14 in cases of oppositions to registration.

See Rules 121–7.

Alteration of registered trade mark. **See Pat. Acts. S. 92 and notes.**

34. The registered proprietor of any trade mark may apply in the prescribed manner to the registrar for leave to add to or alter such trade mark in any manner not substantially affecting the identity of the same, and the registrar may refuse such leave or may grant the same on such terms as he may think fit, but any such refusal or conditional permission shall be subject to appeal to the Board of Trade (*a*). If leave be granted, the trade mark as altered shall be advertised in the prescribed manner (*b*).

This section corresponds with sect. 92 of the Act of 1883, except that the application is now to be made to the registrar instead of to the Court as has previously been the rule.

See Rules 93, 94; and as to appeals, Rules 122-7.

(*a*) The Board of Trade may refer the appeal to the Court under sect. 59, if it thinks fit. This was done in *In re Carron Co.* (27 P. R. 412), in which the registrar had refused to allow certain alterations in registered marks and the applicants had appealed. The principal alteration desired was to enclose the marks, which were of an oval shape, in an outer ring bearing the words "Carron Company, Incorporated by Royal Charter 1773." This addition was refused, in view of Rule 12, as to the word "Royal," and the refusal was affirmed by the Court.

(*b*) This carries out the previous practice by which it has been usual to re-advertise an altered mark, though express provision was not made for this being done.

Rectification of register.

See Pat. Acts. S. 90 and notes.

35. Subject to the provisions of this Act (*a*)—

(1) The Court may on the application in the prescribed manner of any person aggrieved by the non-insertion in or omission from the register of any entry (*b*), or by any entry made in the register without sufficient cause (*c*), or by any entry wrongly remaining on the register (*d*), or by any error or defect in any entry in the register (*e*), make such order for making, expunging, or varying such entry, as it may think fit (*f*):

(2) The Court may in any proceeding under this section decide any question that it may be necessary or expedient to decide in connection with the rectification of the register (*g*):

(3) In case of fraud in the registration or transmission of a registered trade mark, the registrar may himself apply to the Court under the provisions of this section (*h*):

(4) Any order of the Court rectifying the register shall direct that notice of the rectification shall be served upon the registrar in the prescribed manner who shall upon receipt of such notice rectify the register accordingly (*i*).

This comes from sect. 90 of the Act of 1883.

(*a*) These words introduce two very important limitations on the power to rectify, which are imported for the first time into the present Act. These are to be found in sects. 36 and 41, by the first of which sections a mark which was wrongly registered at the time of its registration is not to be expunged if it complies with the conditions qualifying for registration under the present Act; while by the later section a mark is not to be expunged at all after the specified period unless the original registration was obtained by fraud, or unless the mark offends against sect. 11 of this Act.

(*b*) The word "non-insertion" now appears for the first time. It would seem that this provision does not entitle an applicant whose application has been refused to proceed under this section instead of appealing in the prescribed manner. (See *In re Normal Co., Ltd.*, 35 Ch. Div. 231.)

(*c*) These words cover any registration of a trade mark which does not comply with the conditions qualifying for registration.

(*d*) These words did not occur in the old sect. 90, and in *In re Gramophone Co., Ltd.* (27 P. R. 689), Parker, J., pointed out (p. 699) that "none of the earlier Acts provided machinery for taking a mark off the register, if once it had been properly put on." In *In re Batt* (1898, 2 Ch. 432; 1899, A. C. 428), it was contended that if a mark had been justifiably placed on the register there was no provision for removing it by reason of non-user, unless, at all events, it was possible to treat the fact of non-user as showing that the registration had been made without any *bonâ fide* intention of using. The Court of Appeal, however, in that case treated the words of the section then in existence as extending to any registration existing on the register without sufficient cause, irrespective of what might have been the state of things at the date of the actual registration. It will now be possible to deal with such cases without any straining of the words of the Act of Parliament, and in *Thorne & Sons, Ltd.* v. *Pimms, Ltd.* (26 P. R. 221), a whiskey label containing the name "Glen Thorne," which had been innocuous so long as only Thorne's whiskey was sold under it, was held to be calculated to deceive when other whiskey began to be supplied, and was expunged. The words incidentally cover the case of a registered trade mark having determined with the goodwill under sect. 22 (sect. 70 of the Act of 1883), for which formerly no express provision was made, and in such a case the mark was expunged (*In re Johnson*, 26 P. R. 195). In *Rey* v. *Lecouturier* (25 P. R. 265; 27 P. R. 268), only the later entry was expunged, leaving the previous registration standing.

(*e*) These words are new. They seem to be intended to lead up rather to the variation or correction of an entry than to its entire removal from the register.

(*f*) Under this section orders have been made for the removal of marks from the register on various grounds. Thus, in *In re Knapton* (24 P. R. 550), on the ground that the words "Sugar Soap" were common to the soap trade; in *In re Gestetner*

(1907, 2 Ch. 478; 1908, 1 Ch. 513), on the ground that the mark consisted of a word which was the name of a patented article (and compare *In re Bowden Patent Syndicate Ltd.*, 26 P. R. 205); in *In re Philippart* (25 P. R. 565), on the ground that the mark consisted of a word which was the name of a game, and of the implements used in it; in *In re Paine & Co., Ltd.* (25 P. R. 329), a registration was cut down so as to exclude goods in which the registered proprietors did not deal. On the other hand, in *In re Compagnie Industrielle des Petroles* (24 P. R. 585), an application to rectify on the ground that the word "Motorine" was not a registrable word was refused. In *Boake, Roberts & Co., Ltd.* v. *Wayland & Co.* (26 P. R. 251), it was held that the letters "K. M. S." were distinctive, and a motion to rectify failed. In *In re Orlwoola, Ltd.* (26 P. R. 850), the word "Orlwoola," which had been allowed to remain on the register by the Court below on the ground that it could have been registered on a special application under the present Act, and was therefore saved by sect. 36 (26 P. R. 681), was ordered by the Court of Appeal to be expunged, the word being held incapable of registration under either Act. In *In re Casson* (27 P. R. 65), a mark which had been registered by an employee inconsistently, as the Court held, with his duty towards his employers, was removed from the register on application by the employers. In *Paterson* v. *Kit Coffee Co.* (27 P. R. 594), it was held in Scotland that user of a mark so as to cause confusion with the mark of another firm would not be a sufficient ground for its removal from the register after it had passed into the hands of other owners who had not used it improperly. Further, that mis-statements not contained in a mark, but made extraneously with regard to it, would not justify rectification. Particulars of the grounds of objection to the mark attacked are usually directed, and objections not taken on a previous opposition may be introduced: *In re Kenrick & Jefferson, Ltd.*, Warrington, J., Dec. 9th, 1910.

(*g*) It will be noticed that the power given to the Court by the old Act to direct an issue to be tried for the decision of any question of fact, and to award damages to the party aggrieved, is now omitted. It is believed that this power was never exercised.

(*h*) Power is now for the first time given to the registrar to apply to the Court for rectification. Such power is, however, limited to the case of fraud. What interpretation is in this connection to be placed on this expression remains to be decided.

(*i*) See Rules 129, 130.

Trade marks registered under previous Acts.

36. No trade mark which is upon the register at the commencement of this Act, and which under this Act is a registrable trade mark, shall be removed from the register on the ground that it was not registrable under the Acts in force at the date of its registration (*a*). But nothing in this section contained shall subject any person to any liability in respect of any act or thing done before the commencement of this Act to which he would not have been subject under the Acts then in force (*b*).

This is a new section.

(*a*) Up to the present time the validity of a registered trade mark, so far as its composition is concerned, has had to be determined by examining its compliance or non-compliance with the definition contained in the Act under which it was registered. Thus a new mark consisting of a word or words which was registered under the Act of 1883 has had to be proved to consist of a fancy word or words, whereas if registered under the Act of 1888 it has had to be proved to consist of an invented word or words, or of a word or words having no reference to the character or quality of the goods, and not being a geographical name. For the future the question as to the inherent registrability of a mark will have to be determined by an examination of the provisions of the present Act, and of its compliance or non-compliance with them. It has hitherto been thought that if it were sought to justify the registration of a trade mark under an Act different from that under which it was actually registered, the proper manner of dealing with the question was to submit the trade mark afresh to the ordeal of advertisement, and possible opposition, thus placing possible opponents in the position of being able to resist the placing of the mark on the register instead of in the less advantageous position of having to seek to remove it after registration. This being now altered, persons desiring to question the registrability of an actually registered mark will have to

show that it falls outside the wider definition provided by the present Act, and will be deprived of the opportunity of resisting a new application to register a mark for non-compliance with the old definition. A somewhat difficult question has been raised under this section as to the date at which a registered mark which was not properly registrable at the time of its registration under the Act then in force, must be qualified for registration under the present Act in order to escape removal. In *In re Gestetner* (1907, 2 Ch. 478; 1908, 1 Ch. 513), it was held by the Court of Appeal that such a case cannot be dealt with on the footing that the more liberal definition of a registrable trade mark contained in the present Act should be regarded as relating back to the date of the actual registration, and in this view Parker, J., concurred in *In re Philippart* (25 P. R. 565). But as to the date at which the mark, if it is to be saved, must be registrable under the present Act, Buckley, L. J., says in the former of these cases, "that sect. 36 of the Act of 1905 is a saving clause. I think one can read it thus:—Take the facts of to-day and the law of to-day and enquire whether if the mark were taken off it would, on the facts of to-day and the law of to-day, be entitled to go on again. If so, leave it alone." And in this view Kennedy, L. J., concurred, while Lord Alverstone, L. C. J., did not express any dissent. In *In re Philippart* (25 P. R. 565) (see p. 571), Parker, J., suggested that "the section might well be interpreted as meaning:—Take the facts as they existed at the commencement of the Act of 1905. If on those facts the mark could then have been registered, it becomes by virtue of the Act rightly on the register, and cannot therefore be removed on the ground that it was not registrable under the earlier Acts." The point thus suggested for consideration is whether for a mark to be saved by means of this section it must be registrable at the date of the application for rectification, or at the date of the commencement of the Act of 1905, *i.e.*, 1st April, 1906, and the materiality of the question is in effect that between 1st April, 1906, and the date of the application for rectification circumstances may have occurred which would prevent the mark from being registrable at the later date, but which had not occurred at the earlier date. As time goes on this question may become one of considerable importance, as the greater the period which has elapsed since the commencement of the Act of 1905, the greater will be the possibility of events having intervened to interfere with the registrability of the mark. If the right view is that the object of the section is to save the unnecessary circumlocution of taking off the register a mark which could immediately be replaced, the view taken by the Court of Appeal would seem the nearest to the intent of the legislature, but it must be admitted that considerable force attaches to the reference to the exemption from liability in respect of things done before the commencement of the present Act contained in the latter part of sect. 36, to which Parker, J., drew attention as supporting his suggestion. A consideration of the above cases will show that the proper way of dealing with a rectification motion, based on alleged non-registrability of the mark, is, first of all, to see if it was properly registered at the time. If it was, *cadit quæstio;* but, if it was not, it then has to be seen whether the provisions of the present section will save it.

(*b*) It will be observed that the exoneration from liability is confined to acts done before the commencement of this Act, so that a person attacked for infringement, who wishes to escape liability for such past acts by establishing the invalidity of the mark relied on, will apparently have to show that the mark was not registrable under the Act under which it was in fact registered, and will further, if he desires to continue the acts complained of, have to show that the mark does not come within the provisions of the present Act, unless, that is, he is able to make out that what he is doing is no infringement at all.

Non-user of trade mark.

37. A registered trade mark may, on the application to the Court of any person aggrieved, be taken off the register in respect of any of the goods for which it is registered, on the ground that it was registered by the proprietor or a predecessor in title without any *bonâ fide* intention to use the same in connection with such goods, and there has in fact been no *bonâ fide* user of the same in connection therewith, or on the ground that there has been no *bonâ fide* user of such trade mark in connection with such goods during the five years immediately preceding the application, unless in either case such non-user is shown to

be due to special circumstances in the trade, and not to any intention not to use or to abandon such trade mark in respect of such goods.

This is a new section. Under the old sect. 90 it was held in *In re Batt* (1898, 2 Ch. 432; 1899, A. C. 428) that a trade mark had been registered without sufficient cause if it had been registered without a *bonâ fide* intention of user. If such absence of intention to use the mark in connection with any goods was proved, the mark would be removed from the register entirely; whereas, if the registration were only in respect of too wide a description of goods, the registration would be cut down so far as the registration exceeded the intention of user. Absence of a *bonâ fide* intention of user would be considered to have been made out if the registration had continued for a substantial period without actual user, but no rule has hitherto been laid down as to the length of registration without user, which would justify an application to rectify. Under the present section non-user for five years immediately preceding the application (except under special circumstances) will now be sufficient to warrant rectification, whether the mark was originally intended to be used or not. On the other hand, if absence of a *bonâ fide* intention to use the mark is made out, and this has been followed by non-user, it is apparently not essential to show that such non-user has continued for as long as five years. It is not very easy to say what special circumstances would justify non-user, and it will be difficult to apply the saving clause to the first branch of the section, viz., to cases in which there was no *bonâ fide* intention of using, inasmuch as in such cases it cannot be made out that there was any intention to use, and abandonment of the mark can hardly be said to exist where the mark has never been used at all. In *In re Hare* (24 P. R. 263), and *In re Paine & Co., Ltd.* (25 P. R. 329), registrations were limited by excluding certain goods in which the registered proprietors did not deal. In *In re Philippart* (25 P. R. 565), Parker, J., suggested (see p. 573) that sect. 37 might be construed as enabling the Court to remove a mark which had ceased to be used, or had never been used for the legitimate purposes of a trade mark.

Effect of Registration.

38. Subject to the provisions of this Act—

Powers of registered proprietor. **See Pat. Acts. S. 87 and notes.**

(1) The person for the time being entered in the register as proprietor of a trade mark shall, subject to any rights appearing from such register to be vested in any other person, have power to assign the same, and to give effectual receipts for any consideration for such assignment (*a*):

(2) Any equities in respect of a trade mark may be enforced in like manner as in respect of any other personal property (*b*).

This comes from sect. 87 of the Act of 1883 (and see sect. 33, *ante*).

(*a*) This provision is subject to the conditions of sect. 22, by which a registered trade mark can only be assigned or transmitted in connection with the goodwill of the business, and to those of sect. 27, by which an associated trade mark can only be assigned or transmitted in conjunction with the other trade marks associated with it.

(*b*) By sect. 5 notice of any trust is not to be entered on the register or received by the registrar, but if a trust in fact exists, the beneficial owner is given an opportunity of enforcing his rights as against the trustee.

Rights of proprietor of trade mark. **See Pat. Acts. S. 76 and notes.**

39. Subject to the provisions of section forty-one of this Act (*a*) and to any limitations and conditions entered upon the register (*b*), the registration of a person as proprietor of a trade mark shall, if valid, give to such person the exclusive right to the use of such trade mark upon or in connection with the goods (*c*) in respect of which it is registered: Provided always that where two or more persons are registered proprietors of the same (or substantially the same) trade mark in respect of the same goods no rights of exclusive user of such trade mark shall (except so far as their respective rights shall have been defined by the Court) be acquired by any one of such persons as

against any other by the registration thereof, but each of such persons shall otherwise have the same rights as if he were the sole registered proprietor thereof (*d*).

This is a modification of sect. 76 of the Act of 1883.

(*a*) This appears to refer to the proviso in favour of a person who has used a mark prior to the user of the same or a similar mark which is registered by a different proprietor. See also sect. 44.

(*b*) See sect. 12 (2), (4), sect. 14 (4), (6), and sect. 21.

(*c*) See *C. A. Peters, Ltd.* v. *Domestic Inventions Co.*, 25 P. R. 387: *Société Benedictine* v. *Green*, 22 P. R. 618.

(*d*) This proviso is new. It gives effect to what has hitherto been understood to be the rule with regard to similar old marks registered by virtue of what was known as the Three Marks Rule, but now for the first time similar new marks are, by sect. 21, allowed to be registered under special circumstances, and subject to special conditions.

Registration to be *primâ facie* evidence of validity.

See Pat. Acts. S. 76 and notes.

40. In all legal proceedings relating to a registered trade mark (including applications under section thirty-five of this Act) the fact that a person is registered as proprietor of such trade mark shall be *primâ facie* evidence of the validity of the original registration of such trade mark and of all subsequent assignments and transmissions of the same.

This is a new section, though founded in part upon sect. 76 of the Act of 1883. By that section registration was made *primâ facie* evidence of the right of the registered proprietor to the exclusive use of the mark. Now registration is to be *primâ facie* evidence of the validity of the registration, not only in actions brought to restrain infringements, but also in proceedings for rectification. As to rectification, however, very little practical difference seems to exist, inasmuch as the mark would always have been assumed to have been rightly registered until the contrary was made out, and if the contrary is made out under the present Act rectification will follow, subject, of course, to the provisions of sect. 41.

Registration to be conclusive after seven years.

41. In all legal proceedings relating to a registered trade mark (including applications under section thirty-five of this Act) the original registration of such trade mark shall after the expiration of seven years from the date of such original registration (or seven years from the passing of this Act, whichever shall last happen) be taken to be valid in all respects (*a*) unless such original registration was obtained by fraud (*b*), or unless the trade mark offends against the provisions of section eleven of this Act (*c*):

Provided that nothing in this Act shall entitle the proprietor of a registered trade mark to interfere with or restrain the user by any person of a similar trade mark upon or in connection with goods upon or in connection with which such person has, by himself or his predecessors in business, continuously used such trade mark from a date anterior to the user of the first-mentioned trade mark by the proprietor thereof or his predecessors in business, or to object (on such user being proved) to such person being put upon the register for such similar trade mark in respect of such goods under the provisions of section twenty-one of this Act (*d*).

This is a new section.

(*a*) This is a very important alteration of the law. It has hitherto been considered that if a trade mark was registered, which was not entitled to registration, such registration was wrongful as against any person who might be affected by it, and the wrong so inflicted was open to correction at any time at the instance of the person improperly interfered with. In future, if a person has had for seven years

a registration which never ought to have been effected at all, he will be entitled to retain it for all time subject to the usual periodical renewals. It is apparently intended that persons affected by a wrongful registration shall for seven years have an opportunity of correcting the registration, but shall after the termination of that period be deprived of their right to do so. As a matter of fact, experience has shown that when a mark is once on the register persons affected by it, but who are not sued in respect of it, either never discover the registration at all or, if they do, do not consider it incumbent on them to provoke litigation for the purpose of rectifying until it is sought to make the registration operative as against them by taking proceedings for infringement. Now that rectification must be effected within seven years, if it is to be effected at all, it may be anticipated that persons who are alive to their own interests will seek to purge the register of improper registrations without waiting to be attacked. All registrations existing at the date of the Act will be open to attack for seven years, after which they will become conclusive. Future registrations will similarly be open to attack for seven years, but such seven years will date from the date of registration.

(*b*) What effect will be given to this provision remains to be seen. Registrations which are wrongful, only because the mark does not comply with the definition section, will be protected; but what will be regarded as amounting to fraud cannot be defined with any certainty.

(*c*) This proviso excludes from protection marks which are inherently immoral or offensive, and if the reasoning of the House of Lords, in *Eno* v. *Dunn* (15 App. Cas. 252), is applied, as it will be (see *In re Compagnie Industrielle des Petroles*, 24 P. R. 585; *In re Albert Baker & Co.* (1898), *Ltd.*, 25 P. R. 513), it will also exclude from protection marks which, though registered, are calculated to deceive by reason of their similarity to marks previously in use by other firms.

(*d*) It would appear that cases may well arise in which protection will be necessary, not only for anterior users, but also for persons who have subsequently used similar marks *bonâ fide* and without interference. In some of such instances laches might possibly be implied with success, but it must be anticipated that hard cases will sometimes arise under the altered state of the law which will be without remedy, and a greater burden will certainly be cast upon traders for the future of watching the register, and purging it without delay, than has hitherto been the case.

Unregistered trade mark.

42. No person shall be entitled to institute any proceeding to prevent or to recover damages for the infringement of an unregistered trade mark unless such trade mark was in use before the thirteenth of August one thousand eight hundred and seventy-five, and has been refused registration under this Act (*a*). The registrar may, on request, grant a certificate that such registration has been refused.

See Pat. Acts. S. 77 and notes.

This section comes from sect. 77 of the Act of 1883, with material alterations.

(*a*) In order for an action to be brought for infringement of trade mark, the mark must either be registered, or, if unregistered, it must be shown that such mark is an old mark which was in use before the 13th August, 1875, and has been refused registration under *this* Act. Hitherto the refusal of an application under any Act to register an old mark has been sufficient to entitle the proprietor to sue for infringement. Now it will apparently be necessary for old marks, which have been already refused, to be tendered afresh for registration, and for a fresh certificate of refusal under the present Act to be obtained. In the case of a mark not used before the 13th August, 1875, registration is made a *sine quâ non*. It will, however, still be open to the proprietor of an unregistered mark to bring an action for passing off. (See sect. 45.)

Infringement.

43. In an action for the infringement of a trade mark the Court trying the question of infringement shall admit evidence of the usages of the trade in respect to the get-up of the goods for which the trade

mark is registered, and of any trade marks or get-up legitimately used in connection with such goods by other persons.

This is a new section. Trade evidence was formerly admitted much more freely than has recently been the case, and it may be hoped that a large interpretation will be placed upon the language of the section, as it is manifestly unsatisfactory that judges, who cannot themselves be familiar with all the details of trade, should be debarred from having recourse to the assistance of those who spend their lives in commerce. Reference may be made in this connection to the concluding paragraph of sect. 9, which introduces evidence as to the effects of user of a trade mark.

User of name, address, or description of goods.

44. No registration under this Act shall interfere with any *bonâ fide* use by a person of his own name or place of business or that of any of his predecessors in business, or the use by any person of any *bonâ fide* description of the character or quality of his goods.

This is a new section, and makes it easy to place a liberal construction upon the provisions of sect. 9 (1). Thus, if it is desired to register a word such as "Swan," although it is occasionally used as a surname, no injustice will be done to any person whose surname it is. Again, if such a word as "Absorbine" is tendered for registration, there will be no reason for refusing to register on the ground that such registration might interfere with the *bonâ fide* use of the word "Absorbing" to describe the nature of another firm's goods. It would appear, however, that if registration is sought for a word which, apart from this section, would not be allowed to be registered, it will not be allowed to go upon the register merely because this section provides some protection for persons who might otherwise be injuriously affected. (Cf. *In re Crosfield*, 26 P. R. 561, 837; *In re Gramophone Co., Ltd.*, 27 *ib.* 689.) Registration of a descriptive word would apparently throw upon a retailer reselling goods sold to him by another firm of makers with the word on them the onus of proving his *bona fides*, which would be a distinct hardship to him even if in the result he were able to prove that he had, in fact, acted *bonâ fide*, and the result must be, to a certain extent, to hamper trade.

"Passing-off" action.

45. Nothing in this Act contained shall be deemed to affect rights of action against any person for passing off goods as those of another person or the remedies in respect thereof.

This is a new section, and sets at rest any doubt which might have arisen under the provisions of sect. 42, making registration a condition precedent to an infringement actior

Legal Proceedings.

Certificate of validity.

See Pat. Acts.

S. 77a. and note.

46. In any legal proceeding in which the validity of the registration of a registered trade mark comes into question and is decided in favour of the proprietor of such trade mark, the Court may certify the same, and if it so certifies then in any subsequent legal proceeding in which such validity comes into question the proprietor of the said trade mark on obtaining a final order or judgment in his favour shall have his full costs, charges, and expenses as between solicitor and client, unless in such subsequent proceeding the Court certifies that he ought not to have the same.

This comes from sect. 18 of the Act of 1888, introduced into the Act of 1883 as sect. 77 (a). It will be observed that it is not confined to an action for infringement, but is extended to any legal proceeding in which the validity of a registration comes into question, *e.g.*, a motion to rectify. Certificates have been granted in *In re Compagnie Industrielle des Petroles* (24 P. R. 585), and in *Major Bros.* v. *Franklin & Son* (25 P. R. 406).

47. In any legal proceeding in which the relief sought includes alteration or rectification of the register, the registrar shall have the right to appear and be heard, and shall appear if so directed by the Court (*a*). Unless otherwise directed by the Court, the registrar in lieu of appearing and being heard may submit to the Court a statement in writing signed by him, giving particulars of the proceedings before him in relation to the matter in issue or of the grounds of any decision given by him affecting the same or of the practice of the office in like cases, or of such other matters relevant to the issues, and within his knowledge as such registrar, as he shall think fit, and such statement shall be deemed to form part of the evidence in the proceeding (*b*). Registrar to have notice of proceeding for rectification.

This is a new section.

(*a*) Under the Trade Marks Rules of 1890 four days' notice of any application to the Court to rectify the register had to be given to the comptroller (Rule 49), and fourteen days' notice had to be given him of any application to the Court for leave to add to or alter a trade mark. (Rule 51.) Applications for the alteration of trade marks are now to be made to the registrar under sect. 34, but a refusal or conditional permission may come before the Court on appeal by way of reference by the Board of Trade. It is unusual for the registrar to appear on ordinary applications for the rectification of the register, unless some order other than the removal of the mark is asked for

(*b*) This provision is a new one. Hitherto the registrar has, when necessary, given his evidence in the ordinary manner. Apparently it will be open to parties desirous of showing that the practice of the registry office, as stated by the registrar, is inaccurate or incomplete, to give evidence impugning his statement; but such cases are not likely to arise frequently.

Costs.

48. In all proceedings before the Court under this Act the costs of the registrar shall be in the discretion of the Court, but the registrar shall not be ordered to pay the costs of any other of the parties. Costs of proceedings before the Court.

This is a new section. It has been the practice to assume, without any statutory provision to that effect, that the registrar was entitled to his costs, even on an appeal against a decision which was overruled. There were cases to the contrary in the early years of trade mark registration, but those cases have been regarded as no longer effective. Now the registrar will still be free from any liability to pay costs, but the Court will be at liberty to refrain from giving him costs without it being possible to allege that any rule of law or practice is being infringed by its so doing. It appears, however, that even if an objection is taken by the registrar and overruled by the Court, the successful applicant will still have to pay his costs unless he has done something to disentitle himself to them, which can very rarely be the case. (See *In re Apollinaris Brunnen*, 24 P. R. 436; *In re Birmingham Small Arms Co., Ltd.*, 24 P. R. 563; *In re Shamrock & Co.*, 24 P. R. 569; *In re United States Playing Card Co.*, W. N. (1907) p. 251; *In re National Starch Co.*, 25 P. R. 802.) In *In re California Fig Syrup Co.* (26 P. R. 846), in which a mark which had been refused registration in the Court below was allowed by the Court of Appeal to proceed, the applicants were left to bear the costs of the registrar in the Court below, but no costs were given of the appeal. (See p. 864.)

Evidence.

49. In any proceeding under this Act before the Board of Trade or the registrar, the evidence shall be given by statutory declaration in Mode of giving evidence.

the absence of directions to the contrary, but, in any case in which it shall think it right so to do, the tribunal may (with the consent of the parties) take evidence *viva voce* in lieu of or in addition to evidence by declaration. Any such statutory declaration may in the case of appeal be used before the Court in lieu of evidence by affidavit, but if so used shall have all the incidents and consequences of evidence by affidavit.

In case any part of the evidence is taken *viva voce* the Board of Trade or the registrar shall in respect of requiring the attendance of witnesses and taking evidence on oath be in the same position in all respects as an official referee of the Supreme Court.

This is a new section. Under the former Acts the practice was as follows:—In cases in which an application has been objected to by the registrar, evidence in the strict sense has usually been required, either before the registrar or before the Board of Trade on appeal from him. When the Board of Trade has referred such appeals to the Court, *e.g.*, *In re Verschure*, 22 P. R. 569, the party appealing against the registrar's refusal has brought his evidence before the Court by way of affidavits sworn on his behalf, after delivering his notice of motion, and the matter has been dealt with on such evidence and on any evidence given by the registrar in the same manner in answer thereto. In cases in which the application has been advertised and opposed by some other person or firm, the evidence before the registrar has been given in the form of statutory declarations. The Board of Trade has invariably, or almost so, referred an appeal against the registrar's decision in an opposition case to the Court without itself dealing with it, and before the Court evidence on both sides has been given by way of affidavit. A party desirous of using the declarations filed on his behalf in the Patent Office has been required to verify such declarations by the affidavits of the declarants before such declarations could be used, *e.g.*, *In re Kingsford*, 15 P. R. 197. Now, evidence may, by consent of the parties, be taken *viva voce*, in lieu of or in addition to evidence by declaration. This section does not appear to provide for cross-examination on the declarations before the registrar, or the Board of Trade, in the absence of consent. Now the declarations are made available for use before the Court without verification by affidavit, but evidence so given will be dealt with in the same manner as evidence in the form of affidavits. The exact effect of these new provisions remains to be seen, but the introduction of *viva voce* evidence will much increase the cost of proceedings in the Patent Office, and it seems probable that it will only be in cases of some importance that such evidence will be consented to.

See Rules 105, 106 as to declarations.

Sealed copies to be evidence.

See Pat. Acts. S. 89.

50. Printed or written copies or extracts of or from the register, purporting to be certified by the registrar and sealed with the seal of the Patent Office, shall be admitted in evidence in all Courts in His Majesty's dominions, and in all proceedings, without further proof or production of the originals.

This comes from sect. 89 of the Act of 1883.

Certificate of registrar to be evidence.

See Pat. Acts. S. 96 and note.

51. A certificate purporting to be under the hand of the registrar as to any entry, matter, or thing which he is authorised by this Act, or rules made thereunder, to make or do, shall be *primâ facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or not done.

This comes from sect. 96 of the Act of 1883.
See Rules 102—104.

52.—(1) All documents purporting to be orders made by the Board of Trade and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or by any person authorised in that behalf by the President of the Board, shall be received in evidence, and shall be deemed to be such orders without further proof, unless the contrary is shown.

(2) A certificate, signed by the President of the Board of Trade, that any order made or act done is the order or act of the Board, shall be conclusive evidence of the fact so certified.

Certificate of Board of Trade to be evidence.

See Pat. Acts. S. 102a. and note.

This comes from sect. 25 of the Act of 1888, also numbered as 102 (a) of the Act of 1883.

PART II.

Powers and Duties of Registrar of Trade Marks.

53. Where any discretionary or other power is given to the registrar by this Act or rules made thereunder he shall not exercise that power adversely to the applicant for registration or the registered proprietor of the trade mark in question without (if duly required so to do within the prescribed time) giving such applicant or registered proprietor an opportunity of being heard.

Exercise of discretionary power by registrar.

See Pat. Acts. S. 94 and note.

This comes from sect. 94 of the Act of 1883.
See Rules 83—86. Also 95—104.

54. Except where expressly given by the provisions of this Act or rules made thereunder there shall be no appeal from a decision of the registrar otherwise than to the Board of Trade, but the Court in dealing with any question of the rectification of the register (including all applications under the provisions of section thirty-five of this Act), shall have power to review any decision of the registrar relating to the entry in question or the correction sought to be made.

Appeal from registrar.

This is a new section. Hitherto all appeals from the registrar have been to the Board of Trade, with power, however, to the Board of Trade in cases of refusal to register (sect. 62 of the Act of 1883), or in cases of opposition (sect. 69 of the Act of 1883, as modified by sect. 13 of the Act of 1888), to refer the appeal to the Court. By the present Act an appellant against a refusal (before advertisement) to register a trade mark may elect to appeal direct to the Court. (Sect. 12 (3).) And an appellant against a decision of the registrar in an opposition case must appeal direct to the Court, unless both parties consent to the appeal being brought to the Board of Trade. (Sect. 14 (5).) Again, by sect. 33 an appeal against a refusal of the registrar to register an assignment has to be taken to the Court, unless the parties consent to the appeal going to the Board of Trade. In certain special cases the registrar cannot act without an order of the Court, *e.g.*, sects. 19, 20, 21. Any appeal to the Board of Trade may be referred by the Board of Trade to the Court under sect. 59. By that section a decision of the Board is to be final, but when the appeal is brought or referred to the Court an unsuccessful party is left at liberty to appeal from the decision of the Court in the usual way.

55. Where by this Act any act has to be done by or to any person in connection with a trade mark or proposed trade mark or any procedure relating thereto, such act may under and in accordance with

Recognition of agents.

rules made under this Act or in particular cases by special leave of the Board of Trade be done by or to an agent of such party duly authorised in the prescribed manner.

This is a new section.

Registrar may take directions of law officers.

See Pat. Acts. S. 95.

56. The registrar may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to His Majesty's Attorney-General or Solicitor-General for England for directions in the matter.

This comes from sect. 95 of the Act of 1883. It is understood that before the present Act the registrar not unfrequently applied for and obtained the directions of the law officers under that section, though no public announcement has been made of such directions.

Annual reports of comptroller. 46 & 47 Vict. c. 57.

See Pat. Acts. S. 102. Also P. & D. Act, 1907, s. 76.

57. The Comptroller General of Patents, Designs, and Trade Marks shall in his yearly report on the execution by or under him of the Patents, Designs, and Trade Marks Act, 1883, and Acts amending the same, include a report respecting the execution by or under him of this Act as though it formed a part of or was included in such Acts.

This comes from sect. 102 of the Act of 1883. It serves to continue the inclusion in one report of all matters relating to patents, designs and trade marks, although the provisions as to trade marks are now contained in a separate Act of Parliament.

Powers and Duties of the Board of Trade.

Proceedings before Board of Trade.

See Pat. Acts. S. 102a.

58. All things required or authorised under this Act to be done by to or before the Board of Trade may be done by to or before the President or a secretary or an assistant secretary of the Board or any person authorised in that behalf by the President of the Board.

This comes from sect. 25 of the Act of 1888, also numbered sect. 102 (a) of the Act of 1883. Power is now given to the President of the Board of Trade to authorise any person to act on behalf of the Board, although such person is neither the President, nor a secretary, nor an assistant secretary of the Board.

Appeals to Board of Trade.

See Pat. Acts. Ss. 62, 69 and notes.

59. Where under this Act an appeal is made to the Board of Trade, the Board of Trade may, if they think fit, refer any such appeal to the Court in lieu of hearing and deciding it themselves, but, unless the Board so refer the appeal, it shall be heard and decided by the Board, and the decision of the Board shall be final.

This is new as a separate section. By sects. 62 and 69 of the Act of 1883 the Board of Trade had power to refer an appeal, under either of those sections, to the Court, but now they may refer any appeal. There has hitherto been no express provision that a decision of the Board of Trade on a matter dealt with by them was to be final; but this has been understood to be the rule, and in *In re Normal Co., Ltd.* (35 Ch. Div. 231), it was held that the Court had no jurisdiction to deal with an application refused by the comptroller, except upon a reference of an appeal to the Court by the Board of Trade. Although this section is in terms confined to appeals, the Board of Trade has in various instances referred to the Court under Rule 39 original applications for registration made to it under sect. 9 (5). The Board has, in such cases, occasionally intimated that if it dealt with the application, it would refuse it, but has given the applicant an opportunity of taking his application to the Court instead of pressing the Board to deal with it.

Power of Board of Trade to make rules.

60.—(1) Subject to the provisions of this Act the Board of Trade may from time to time make such rules, prescribe such forms, and generally do such things as they think expedient (*a*)—

(a) For regulating the practice under this Act:

(b) For classifying goods for the purposes of registration of trade marks:

(c) For making or requiring duplicates of trade marks and other documents:

(d) For securing and regulating the publishing and selling or distributing in such manner as the Board of Trade think fit, of copies of trade marks and other documents:

(e) Generally, for regulating the business of the office in relation to trade marks and all things by this Act placed under the direction or control of the registrar, or of the Board of Trade.

See Pat. Acts. S. 101 and notes.

(2) Rules made under this section shall, whilst in force, be of the same effect as if they were contained in this Act.

(3) Before making any rules under this section the Board of Trade shall publish notice of their intention to make the rules and of the place where copies of the draft rules may be obtained in such manner as the Board consider most expedient, so as to enable persons affected to make representations to the Board before the rules are finally settled (*b*).

(4) Any rules made in pursuance of this section shall be forthwith advertised twice in the *Trade Marks Journal*, and shall be laid before both Houses of Parliament, if Parliament be in session at the time of making thereof, or, if not, then as soon as practicable after the beginning of the then next session of Parliament.

(5) If either House of Parliament within the next forty days after any rules have been so laid before such House, resolve that such rules or any of them ought to be annulled, the same shall after the date of such resolution be of no effect, without prejudice to the validity of anything done in the meantime under such rules or rule or to the making of any new rules or rule.

This comes from sect. 101 of the Act of 1883. See Rules, *post*. For forms, see Second Schedule to Rules. For classification of goods, see Third Schedule to Rules. As to documents, see Rules 6—9. As to agents, see Rule 10.

(*a*) As to the power of the Board of Trade to direct notice of an application for registration to be served upon the registered proprietor of a trade mark with which the mark tendered for registration may conflict, see *In re Royal W ster Corset Co.*, 26 P. R. 185.

(*b*) This provision is new, and will probably be found useful, as it will give an opportunity to persons likely to be affected by new rules to lay their views before the Board of Trade before such rules are made. It is understood that the views of bodies representing the mercantile community have sometimes been unofficially elicited before rules have been made, but in future an opportunity will be afforded to any person desiring to make representations on the subject.

Fees.

Fees.

See Pat. Acts.

S. 80.

61. There shall be paid in respect of applications and registration and other matters under this Act, such fees as may be, with the sanction of the Treasury, prescribed by the Board of Trade.

This comes from sect. 80 of the Act of 1883.
See Rule 3, and First Schedule to Rules.

Special Trade Marks.

Standardization, &c., trade marks.

62. Where any association or person undertakes the examination of any goods in respect of origin, material, mode of manufacture, quality, accuracy, or other characteristic, and certifies the result of such examination by mark used upon or in connection with such goods, the Board of Trade may, if they shall judge it to be to the public advantage, permit such association or person to register such mark as a trade mark in respect of such goods, whether or not such association or person be a trading association or trader or possessed of a goodwill in connection with such examination and certifying. When so registered such trade mark shall be deemed in all respects to be a registered trade mark, and such association or person to be the proprietor thereof, save that such trade mark shall be transmissible or assignable only by permission of the Board of Trade.

This is a new section, and one likely to prove useful. A mark not used, or intended to be used, by a person in trade for the purposes of such trade is unconnected with any goodwill, and cannot be regarded as a trade mark in the true legal sense, and it has hitherto been difficult to devise a suitable means for protecting marks used for the purpose of indicating that the goods to which they are applied are not the goods of the person applying the mark, but goods certified by him to possess certain characteristics. The registration and transmission of such marks are now rendered possible, but only with the permission of the Board of Trade, and the Board of Trade will have authority to permit or refuse registration according as they consider it to be, or not to be, to the public advantage. When registration has been permitted the registered proprietors will be able to suppress imitations just as if such marks were trade marks in the proper sense. The description of marks authorised by this section as standardization marks seems hardly as suitable as the expression "Certification marks" (see sect. 3). *e.g.*, a mark certifying goods to be of Irish origin can hardly be said to standardize the goods.

For regulations as to certification marks, see Rules 42—46.

Sheffield Marks.

Sheffield marks.

See Pat. Acts.

S. 81 and notes.

63. With respect to the master, wardens, searchers, assistants, and commonalty of the Company of Cutlers in Hallamshire, in the county of York (in this Act called the Cutlers' Company), and the marks or devices (in this Act called Sheffield marks) assigned or registered by the master, wardens, searchers, and assistants of that company, the following provisions shall have effect:—

(1) The Cutlers' Company shall continue to keep at Sheffield the register of trade marks (in this Act called the Sheffield register) kept by them at the date of the commencement of this Act, and, save as otherwise provided by this Act, such register shall for all purposes form part of the register:

(2) The Cutlers' Company shall, on request made in the prescribed manner, enter in the Sheffield register, in respect of metal

goods as defined in this section, all the trade marks which shall have been assigned by the Cutlers' Company and actually used before the first day of January one thousand eight hundred and eighty-four, but which have not been entered in such register before the passing of this Act:

(3) An application for registration of a trade mark used on metal goods shall, if made after the commencement of this Act by a person carrying on business in Hallamshire, or within six miles thereof, be made to the Cutlers' Company:

(4) Every application so made to the Cutlers' Company shall be notified to the registrar in the prescribed manner, and, unless the registrar within the prescribed time gives notice to the Cutlers' Company of any objection to the acceptance of the application, it shall be proceeded with by the Cutlers' Company in the prescribed manner:

(5) If the registrar gives notice of an objection as aforesaid, the application shall not be proceeded with by the Cutlers' Company, but any person aggrieved may in the prescribed manner appeal to the Court:

(6) Upon the registration of a trade mark in the Sheffield register the Cutlers' Company shall give notice thereof to the registrar, who shall thereupon enter the mark in the register of trade marks: and such registration shall bear date as of the day of application to the Cutlers' Company, and have the same effect as if the application had been made to the registrar on that day:

(7) The provisions of this Act, and of any rules made under this Act with respect to the registration of trade marks, and all matters relating thereto, shall, subject to the provisions of this section (and notwithstanding anything in any Act relating to the Cutlers' Company), apply to the registration of trade marks on metal goods by the Cutlers' Company, and to all matters relating thereto; and this Act and any such rules shall, so far as applicable, be construed accordingly with the substitution of the Cutlers' Company, the office of the Cutlers' Company, and the Sheffield register, for the registrar, the Patent Office, and the Register of Trade Marks respectively; and notice of every entry, cancellation, or correction made in the Sheffield register shall be given to the registrar by the Cutlers' Company:

(8) When the registrar receives from any person not carrying on business in Hallamshire or within six miles thereof an application for registration of a trade mark used on metal goods, he shall in the prescribed manner notify the application and proceedings thereon to the Cutlers' Company:

(9) Any person aggrieved by a decision of the Cutlers' Company in respect of anything done or omitted under this Act may, in the prescribed manner, appeal to the Court (*a*):

(10) For the purposes of this section the expression "metal goods" means all metals, whether wrought, unwrought, or partly wrought, and all goods composed wholly or partly of any metal:

(11) For the purpose of legal proceedings in relation to trade marks entered in the Sheffield register a certificate under the hand of the Master of the Cutlers' Company shall have the same effect as the certificate of the registrar.

This comes from sect. 81 of the Act of 1883, as amended by sect. 20 of the Act of 1888.

See Rules 107—112.

(*a*) It will be observed that an appeal against a decision of the Cutlers' Company is now to be brought direct to the Court. Hitherto such appeals have had to be brought to the comptroller in the first instance, his decision being subject to a further appeal to the Court. (Sect. 81 (12) of the Act of 1883, as amended by the Act of 1888.)

Cotton Marks.

Cotton marks.

64.—(1) The Manchester Branch of the Trade Marks Registry of the Patent Office (herein-after called "the Manchester Branch") shall be continued according to its present constitution. A chief officer of the Manchester Branch shall be appointed who shall be styled "the Keeper of cotton marks," and shall act under the direction of the registrar. The present keeper of the Manchester Branch shall be the first Keeper of cotton marks.

(2) As regards cotton goods which have hitherto constituted classes 23, 24, and 25, under the classification of goods under the Patents, Designs, and Trade Marks Acts, 1883 to 1902, the Register of Trade Marks for all such goods, except such as may be prescribed (*a*), shall be called "the Manchester Register," and a duplicate thereof shall be kept at the Manchester Branch.

(3) All applications for registration of trade marks for such cotton goods in the said classes (herein-after referred to as "cotton marks") shall be made to the Manchester Branch (*b*).

(4) Every application so made to the Manchester Branch shall be notified to the registrar in the prescribed manner together with the report of the Keeper of cotton marks thereon, and unless the registrar, after considering the report and hearing, if so required, the applicant, within the prescribed time gives notice to the Keeper of cotton marks of objection to the acceptance of the application, it shall be advertised by the Manchester Branch and shall be proceeded with in the prescribed manner.

(5) If the registrar gives notice of objection as aforesaid the application shall not be proceeded with, but any person aggrieved may in the prescribed manner appeal to the Court or the Board of Trade, at the option of the applicant (*c*).

(6) Upon the registration of a trade mark in the Manchester Register the Keeper of cotton marks shall upon notice thereof from the registrar thereupon enter the mark in the duplicate of the Manchester Register, and such registration shall bear date as of the day of application to the Manchester Branch, and shall have the same effect as if the application had been made to the registrar on that day.

(7) When any mark is removed from or any cancellation or correction made in the Manchester Register notice thereof shall be given by the registrar to the Keeper of cotton marks, who shall alter the duplicate register accordingly.

(8) For the purpose of all proceedings in relation to trade marks entered in the Manchester Register a certificate under the hand of the Keeper of cotton marks shall have the same effect as a certificate of the registrar (*d*).

(9) In every application for registration of a cotton mark, if such mark has been used by the applicant or his predecessors in business prior to the date of application, the length of time of such user shall be stated on the application (*e*).

(10) As from the passing of this Act (*f*)—

(a) In respect of cotton piece goods and cotton yarn no mark consisting of a word or words alone (whether invented or otherwise) shall be registered, and no word or words shall be deemed to be distinctive in respect of such goods (*g*):

(b) In respect of cotton piece goods no mark consisting of a line heading alone shall be registered, and no line heading shall be deemed to be distinctive in respect of such goods (*h*):

(c) No registration of a cotton mark shall give any exclusive right to the use of any word, letter, numeral, line heading, or any combination thereof (*i*).

(11) The right of inspection of the Manchester Register shall extend to and include the right to inspect all applications whatsoever that have been since the passing of the Trade Marks Registration Act, 1875, and hereafter shall have been made to the Manchester Branch in respect of cotton goods in classes 23, 24, and 25, whether registered, refused, lapsed, expired, withdrawn, abandoned, cancelled, or pending (*j*). 39 & 40 Vict. c. 33.

(12) The Keeper of cotton marks shall, on request, and on production of a facsimile of the mark, and on payment of the prescribed fee, issue a certified copy of the application for registration of any cotton mark, setting forth in such certificate the length of time of user (if any) of such mark as stated on the application, and any other particulars he may deem necessary (*k*).

(13) As regards any rules or forms affecting cotton marks which are proposed by the Board of Trade to be made, the draft of the same shall be sent to the Keeper of cotton marks and also to the Manchester Chamber of Commerce. And the said Keeper, and also the said Chamber, shall, if they or either of them so request, be entitled to be heard by the Board of Trade upon such proposed rules before the same are carried into effect (*l*).

(14) The existing practice whereby the Keeper of the Manchester Branch consults the Trade and Merchandise Marks Committee appointed by the Manchester Chamber of Commerce upon questions of novelty or difficulty arising on applications to register cotton marks shall be continued by the Keeper of cotton marks (*m*).

This is a new section, inserted at the instance of the Manchester Chamber of Commerce for the purpose of giving legislative sanction to the practice already obtaining with regard to the Manchester Branch of the Trade Marks Registry, and modifying the general provisions of this Act in certain directions desired by the Manchester trade. It is largely based upon the provisions relating to Sheffield marks now contained in sect. 63, *ante*.

See Rules 113—120.

(*a*) No distinction appears to be drawn by the Rules between the goods comprised

in the three cotton classes, so that all would seem to be subject to the provisions of this section.

(*b*) By this sub-section all applications for registration of cotton marks are to be made at Manchester, whether the applicants carry on their business at Manchester or elsewhere. This is convenient, as enabling all cotton marks to be compared, whether Manchester marks or not. Under the previous sub-section existing registrations of cotton marks are to be recorded at Manchester.

(*c*) By this sub-section an applicant has his option of appealing either to the Court or to the Board of Trade in the same way as an applicant for the registration of any other trade mark has under sect. 12 (3).

(*d*) This is new, and corresponds with sect. 63 (11) relating to Sheffield marks.

(*e*) This is a new and useful provision, and it is difficult to understand why a similar provision was not introduced with regard to trade marks generally. So far as appears from the register, a trade mark used since the 14th August, 1875, is indistinguishable from a trade mark first used on the 14th August, 1910, both being technically new marks, but the one having in fact thirty-five years' user as against none. In any amendment of the Act it may be hoped that this provision of the Manchester section may be made generally applicable, so as to form some guide to those who have to deal with such matters of the strength of the case which can be set up.

(*f*) The provisions of this sub-section are entirely new, but in substance they are a statutory recognition of the rules which have hitherto been enforced with respect to cotton marks, and which have been considered to give effect to the special requirements of the cotton trade.

(*g*) According to the evidence given before the Parliamentary Committee, it has been the practice at Manchester for many years to reject all word marks which any plausible excuse could be found for rejecting, with the result that it has only been in the rarest cases that word marks have been registered for cotton goods. There was no authority to be found in the Act of Parliament for this distinction between cotton marks and other trade marks, but it was considered to be necessary in the interests of the cotton trade, and no objection seems to have been taken to it, so it may be assumed to have been recognized as reasonable. The sub-section does not appear to control the provisions contained in sect. 45 as to passing-off actions; but this is a point which will, no doubt, some day have to be considered by the Court. It must be observed that this prohibition of word marks does not extend to all cotton goods, but is confined to piece goods and yarn.

(*h*) The number of lino headings used on Manchester goods has been so vast, and the differences between them have been so trifling, that it has been the rule at Manchester not to regard such headings as distinctive, although the word "heading" has appeared in the definition section of the Act. Having regard to this sub-section, little effect is likely to be given to the fact that the word "heading" is still included in the definition of a mark in sect. 3. The same remark with respect to passing-off actions applies as with respect to words.

(*i*) This clause introduces letters and numerals, and extends to combinations of words, letters, numerals and lino headings. It does not, however, appear to prevent such matters from being considered when comparing combination marks used by different traders.

(*j*) This is a new provision, but it continues the practice at the Manchester Office. It would be useful if made applicable generally, but it is more especially needed for the purposes of the cotton trade on account of the large proportion of applications which have had to be rejected for various reasons, all of which are capable of being regarded, and are in fact regarded, as anticipations of later marks whether they have been followed by registration or not.

(*k*) This is a new provision, and enables unsuccessful applicants for registration to obtain official evidence of the fact that their applications have been made.

(*l*) This affords special opportunities for the Keeper of cotton marks and the Manchester Chamber of Commerce to represent their views to the Board of Trade with respect to proposed new rules before such rules are made. (Compare sect. 60 (3).)

(*m*) The practice here recognized was recommended by the Departmental Committee presided over by Lord Herschell in 1887, and has prevailed ever since.

International and Colonial Arrangements.

65. The provisions of sections one hundred and three and one hundred and four of the Patents, Designs, and Trade Marks Act, 1883 (as amended by the Patents, Designs, and Trade Marks (Amendment) Act, 1885) (*a*), relating to the registration of trade marks both as enacted in such Acts and as applied by any Order in Council made thereunder (*b*), shall be construed as applying to trade marks registrable under this Act.

International and Colonial arrangements.
48 & 49 Vict. c. 63.
See P. & D. A., 1907, s. 91.

(*a*) See *post*, p. 521. For these sections is now substituted sect. 91 of the Patents and Designs Act, 1907.
(*b*) See list of Orders in Council, *post*, p. 573.

Offences.

66. If any person makes or causes to be made a false entry in the register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanour.

Falsification of entries in register.
See Pat. Acts.
S. 93.

This comes from sect. 93 of the Act of 1883.

67.—(1) Any person who represents a trade mark as registered which is not so, shall be liable for every offence on summary conviction to a fine not exceeding five pounds.

(2) A person shall be deemed, for the purposes of this enactment, to represent that a trade mark is registered, if he uses in connection with the trade mark the word "registered," or any words expressing or implying that registration has been obtained for the trade mark (*a*).

Penalty on falsely representing a trade mark as registered.
See Pat. Acts.
S. 105 and notes.

This comes from sect. 105 of the Act of 1883.
(*a*) An indication of origin may be a trade mark, though unregistered, and the mere use of the words "trade mark" in connection with an unregistered mark does not imply, and is not punishable as implying, that such trade mark is registered. (See *Sen-Sen Co.* v. *Britten*, (1899) 1 Ch. 692: *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*, 18 P. R. 95.)

Royal Arms.

68. If any person, without the authority of His Majesty, uses in connection with any trade, business, calling, or profession, the Royal Arms (or arms so closely resembling the same as to be calculated to deceive) in such manner as to be calculated to lead to the belief that he is duly authorised so to use the Royal Arms, or if any person without the authority of His Majesty or of a member of the Royal Family, uses in connection with any trade, business, calling, or profession any device, emblem, or title (*a*) in such manner as to be calculated to lead to the belief that he is employed by or supplies goods to His Majesty or such member of the Royal Family, he may, at the suit of any person who is authorised to use such arms or such device, emblem, or title, or is authorised by the Lord Chamberlain to take proceedings in that behalf, be restrained by injunction or interdict from continuing so to use the same: Provided that nothing in this section shall be construed as affecting the right, if any, of the proprietor of a trade mark con-

Unauthorised assumption of Royal Arms.
See Pat. Acts.
S. 106 and note.
Also P. & D. A., 1907, s. 90.

taining any such arms, device, emblem or title to continue to use such trade mark (*b*).

This is a new section, extending the provisions of sect. 106 of the Act of 1883, now replaced by sect. 90 of the Patents and Designs Act, 1907. The language of sect. 106, if strictly construed, would seldom be applicable to such cases as actually arise. As a matter of fact, the metropolitan magistrates have usually disregarded the actual language of the section, and have given effect to what was understood to be its intention. The object of the present section is to get over this difficulty, and to provide a more suitable remedy by enabling persons likely to be aggrieved to proceed by way of injunction instead of in the police court. Under this section it is not necessary to show that the effect of the user of the Royal Arms is calculated to lead to the belief that the person using them is carrying on his business under the authority of the Sovereign or of a member of the Royal Family or of a Government department. No mention is made of any Government department, and it is sufficient to show that the user of the Arms is calculated to lead to the belief that they are being used by the authority of His Majesty, or that the person using them is employed by or supplies goods to His Majesty or a member of the Royal Family. In such a case a person entitled to take proceedings as provided by this section is enabled to obtain an injunction in England or Ireland or an interdict in Scotland to prevent the continuance of the wrongful practice. An injunction has been granted with costs in *Royal Warrant Holders Association* v. *Slade & Co., Ltd.* (25 P. R. 245); *Same* v. *E. J. Kitson, Ltd.* (26 P. R. 157): and other actions have been brought successfully by the same association.

(*a*) *E.g.*, "By Royal Appointment" (*Royal Warrant Holders Assn.* v. *E. J. Kitson, Ltd.*, 26 P. R. 157), and as to the word "Royal" see *In re Royal Worcester Corset Co.* (26 P. R. 185), and see *In re Curron Co.* (27 P. R. 412).

(*b*) It has always been the practice under the Acts regulating the registration of trade marks to refuse to allow the Royal Arms to appear in trade marks admitted to registration, unless such marks were already in use at the date of the passing of the first Trade Marks Registration Act—*i.e.*, before 13th August, 1875. Consequently, the proviso with which the present section concludes can hardly apply to any marks introduced since that date. The proviso, however, is not limited to cases of registered trade marks, and until the Act of 1883 was passed there seems to have been no legal authority for saying that the unauthorized use of the Royal Arms was contrary to any statutory enactment. It will be observed that neither the present section, nor sect. 106 of the Act of 1883, nor sect. 90 of the Act of 1907, extends to the use of any arms other than the Royal Arms of the United Kingdom or arms which might be supposed to be such arms. See, however, Rules 12—14, *post*.

Courts.

General saving for jurisdiction of Courts.

See Pat. Acts. S. 111.

69. The provisions of this Act conferring a special jurisdiction on the Court as defined by this Act shall not, except so far as the jurisdiction extends, affect the jurisdiction of any Court in Scotland or Ireland in any proceedings relating to trade marks; and with reference to any such proceedings in Scotland the term "the Court" shall mean the Court of Session; and with reference to any such proceedings in Ireland the term "the Court" shall mean the High Court of Justice in Ireland.

This section comes from sect. 111 of the Act of 1883. Under that section it was held, in *In re King & Co.* (1892, 2 Ch. 462), that the High Court of Justice in England (see sect. 3, *ante*) had jurisdiction to expunge a mark registered in the name of a domiciled Scotchman or Irishman. The question whether the Scotch and Irish Courts had concurrent jurisdiction was there left open, and those Courts have since differed on the subject, the Court of Session having held, in *Concie* v. *Herbert* (14 P. R. 436), that it had authority to rectify the register (but see *Dewar* v. *Dewar*, 17 P. R. 341; *Dawson* v. *Stewart*, 22 P. R. 250; *Reid* v. *Thomson*, *ib.* 376); while the Irish Master of the Rolls held, in *Bayer* v. *Connell* (1897, 1 Ir. R. 514), that he had no such jurisdiction. Even if such a jurisdiction exists,

it would seem well that it should not be exercised, having regard to the obvious inconvenience of the same register being controlled by different Courts, which might well take different views as to the principles to be applied.

70. This Act shall extend to the Isle of Man, and— Isle of Man.

(1) Nothing in this Act shall affect the jurisdiction of the Courts in the Isle of Man in proceedings for infringement or in any action or proceeding respecting a trade mark competent to those Courts: See Pat. Acts. S. 112.

(2) The punishment for a misdemeanour under this Act in the Isle of Man shall be imprisonment for any term not exceeding two years, with or without hard labour and with or without a fine not exceeding one hundred pounds, at the discretion of the Court:

(3) Any offence under this Act committed in the Isle of Man which would in England be punishable on summary conviction may be prosecuted, and any fine in respect thereof recovered at the instance of any person aggrieved, in the manner in which offences punishable on summary conviction may for the time being be prosecuted.

This comes from sect. 112 of the Act of 1883.

71. The Court of Chancery of the County Palatine of Lancaster shall, with respect to any action or other proceeding in relation to trade marks, the registration whereof is applied for in the Manchester Branch, have the like jurisdiction under this Act as His Majesty's High Court of Justice in England, and the expression "the Court" in this Act shall be construed and have effect accordingly: Jurisdiction of Lancashire Palatine Court. See Pat. Acts. S. 112a.

Provided that every decision of the Court of Chancery of the County Palatine of Lancaster in pursuance of this section shall be subject to the like appeal as decisions of that Court in other cases.

This section comes from sect. 26 of the Act of 1888, introduced into the Act of 1883 as sect. 112 (a).

72. In Scotland any offence under this Act declared to be punishable on summary conviction may be prosecuted in the Sheriff Court. Offences in Scotland. See Pat. Acts. S. 108.

This comes from sect. 108 of the Act of 1883.

Repeal; Savings.

73. The enactments described in the schedule to this Act are repealed to the extent mentioned in the third column, but this repeal shall not affect any rule, table of fees, or classification of goods made under any enactment so repealed, but every such rule, table of fees, or classification of goods shall continue in force as if made under this Act until superseded by rules, tables of fees, or classification under this Act. Repeal and saving for rules, &c. See Pat. Acts. Ss. 113, 115.

This comes from sects. 113 and 115 of the Act of 1883. The effect of this repeal is that the whole of the Trade Marks Part of the Act of 1883, comprising sects. 62 to 81, is repealed, and that of the General Part of that Act, comprising sects. 82 to

117, the only sections which are left unrepealed with respect to trade marks are sects. 82 to 84, relating to the administration of the Patent Office (see sect. 74, *post*); sects. 103 and 104, relating to International and Colonial arrangements (see sect. 65, *ante*); and sect. 106, relating to the Royal Arms. Sects. 82 to 84 of the Act of 1883 are since replaced by sects. 62 to 64 of the Patents and Designs Act, 1907, sects. 103, 104 by sects. 91 and 88 of that Act, and sect. 106 by sect. 90 of that Act. With respect to the Act of 1888, the Trade Marks Part of this Act, comprising sects. 8 to 20, is repealed, and the remainder of the Act is also repealed, so far as it relates to trade marks.

Application of 46 & 47 Vict. c. 57, ss. 82—84.

See P. & D. A., 1907, ss. 62—64.

74. The provisions of sections eighty-two to eighty-four of the Patents, Designs, and Trade Marks Act, 1883, as amended by any subsequent enactment, shall continue to apply with respect to the administration at the Patent Office of the Law relating to the registration of trade marks, and shall accordingly be construed as if this Act formed part of that Act.

Sect. 73.

SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
46 & 47 Vict. c. 57.	The Patents, Designs, and Trade Marks Act, 1883.	Sections sixty-two to eighty-one, and, so far as they respectively relate to trade marks, sections eighty-five to ninety-nine, one hundred and one, one hundred and two, one hundred and five, one hundred and eight, and one hundred and eleven to one hundred and seventeen.
51 & 52 Vict. c. 50.	The Patents, Designs, and Trade Marks Act, 1888.	Sections eight to twenty, and, so far as they respectively relate to trade marks, sections twenty-one to twenty-six.

THE TRADE MARKS RULES, 1906.

Dated March 24th, 1906.

By virtue of the provisions of the Trade Marks Act, 1905, the Board of Trade do hereby make the following rules :—

Preliminary.

1. These rules may be cited as the Trade Marks Rules, 1906, and shall come into operation from and immediately after the 31st day of March, 1906.

Interpretation.

2. In the construction of these rules any words herein used the meaning of which is defined by the said Act or the Interpretation Act, 1889,* shall have the meanings thereby assigned to them respectively. Interpretation.

"Agent" means an agent duly authorized to the satisfaction of the registrar.

"Office" means Patent Office, Trade Marks Branch, 25, Southampton Buildings, London, W.C.

"Journal" means "*Trade Marks Journal*" (*a*).

(*a*) The *Trade Marks Journal* is published at short intervals. It contains illustrations of all the trade marks for which application is made, or a reference to the places where they may be seen, as well as the name, address and calling of each applicant, the description of the goods, and the length of user as an old mark, if any: thus affording all persons interested in the use of trade marks authentic information as to the nature of the marks applied for in their respective trades. The journal may be obtained from the Patent Office, Sale Branch. Copies of the journal are open to inspection at the Patent Office Library, Southampton Buildings, Chancery Lane.

Fees.

3. The fees to be paid in pursuance of the said Act shall be the fees specified in the First Schedule to these rules. Fees.

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* Note.—The more material definitions of the Interpretation Act are :—
"Statutory Declaration" means a declaration made by virtue of the Statutory Declarations Act, 1835.
"Month" means calendar month.
"Person," unless the contrary intention appears, includes any body of persons corporate or unincorporate.
Words in the singular shall include the plural and words in the plural shall include the singular.
See this Act, App. L., *post*.

Forms.

Forms.

4. The forms herein referred to are the forms contained in the Second Schedule to these rules, and such forms shall be used in all cases to which they are applicable, and shall be modified as directed by the registrar to meet other cases.

Classification of Goods.

Classification of goods.

5. For the purposes of trade marks registration and of these rules goods are classified in the manner appearing in the Third Schedule hereto (*a*).

If any doubt arises as to what class any particular description of goods belongs to, the doubt shall be determined by the registrar.

(*a*) See Instructions, par. 14, and Guide to Classification, *post*, p. 463.

Documents.

Size, &c. of documents.

6. Subject to any other directions that may be given by the registrar, all applications, notices, counter-statements, papers having representations affixed, or other documents required by the said Act or by these rules to be left with or sent to the registrar or to the Keeper of cotton marks or to the Cutlers' Company, shall be upon foolscap paper of a size of approximately 13 inches by 8 inches, and shall have on the left-hand part thereof a margin of not less than one inch and a half.

Service of documents.

7. Any application, statement, notice, or other document authorized or required to be left, made, or given at the Office, or to or with the registrar, or with or to any other person may be sent through the post by a prepaid or official-paid letter; any document so sent shall be deemed to have been delivered 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 was properly addressed and put into the post. A letter addressed to a registered proprietor of a trade mark at his address as it appears on the register, or address for service, or to any applicant for or person opposing the registration of a trade mark at the address appearing in the application or notice of opposition or given for service as hereinafter provided shall be deemed to be sufficiently addressed.

Address.

8. Where any person is by the said Act or these rules bound to furnish the registrar with an address the following provisions shall apply:—

The address given shall in all cases be as full as possible, for the purpose of enabling any person easily to find the place of business of the person whose address is given.

When a person does not reside in a town with streets, the registrar may require the address to include all indications which he thinks necessary for such purpose so far as it can be attained.

When an applicant resides in a town where there are streets, the address given shall include the name of the street, and the number in the street or name of premises, if any.

Address for service.

9. Every applicant for the registration of any trade mark, and every opponent to such registration, and every agent, who does not reside or

carry on business in the United Kingdom, shall, if so required, give an address for service in the United Kingdom, and such address may be treated as the actual address of such applicant, opponent, or agent for all purposes connected with such application for registration or the opposition thereto.

The registrar may require the proprietor of a registered trade mark who does not reside or carry on business within the United Kingdom to give an address for service within the United Kingdom, and such address may be treated as the actual address of the proprietor for all purposes connected with such trade mark (*a*).

(*a*) See Instructions, par. 6.

Agents.

Agency.

10. An application for registration and an opposition to registration and all other communications between an applicant, an opponent and the registrar, or the Board of Trade, and between the proprietor of a registered trade mark and the registrar, or the Board of Trade, or any other person, may be made by or through an agent (*a*).

Any such applicant, opponent, or proprietor may appoint an agent to represent him in the matter of the trade mark by signing and sending to the registrar an authority in writing to that effect in the Form TM No. 1, or in such other form as the registrar may deem sufficient. In case any proprietor of a registered trade mark shall appoint such an agent, service upon such agent of any document relating to such trade mark shall be deemed to be service upon the person so appointing him, and all communications directed to be made to such person in respect of such trade mark may be addressed to such agent.

The registrar shall not be bound to recognise as such agent any person who has been convicted criminally or struck off the Roll of Solicitors, or whose name, by reason of his having been adjudged guilty of disgraceful professional conduct, has been erased from the Register of Patent Agents, kept under the provisions of the Patents, Designs, and Trade Marks Act, 1888 (*b*), relating to the registration of Patent Agents, and not since restored.

(*a*) An agent signing should add after his signature the word "Agent," see Instructions, par. 6.

(*b*) See now sect. 84 of the Patents and Designs Act, 1907.

Registrable Trade Marks.

Registrable trade marks.

11. The registrar may refuse to accept any application upon which the following appear:—

(a) The words "Patent," "Patented," or "By Royal Letters Patent," "Registered," "Registered Design," "Copyright," "Entered at Stationers' Hall," "To counterfeit this is forgery," or words to like effect (*a*).

(b) Representations of their Majesties or of any member of the Royal Family (*a*).

(*a*) See Instructions, par. 16.

Royal Arms.

12. Representations of the Royal Arms or Royal crests, or arms or crests so nearly resembling them as to lead to mistake, or of British Royal crowns, or of the British national flags, or the word Royal or any other words, letters, or devices calculated to lead persons to think that the applicant has Royal patronage or authorization, may not appear on trade marks the registration of which is applied for (*a*). Provided always that nothing contained in this rule shall preclude the registrar from allowing the registration as an "old mark," that is as a mark which was used by the applicant or his predecessors in business before the 13th August, 1875, of any mark which was capable of being so registered before the Trade Marks Act, 1905, came into operation.

(*a*) See notes to sect. 68, *ante*; also Instructions, par. 16.

Arms of foreign State.

13. Where representations of the arms of a foreign State or place appear on a mark the registrar may call for such justification as he may deem necessary for their use (*a*).

(*a*) See Instructions, par. 16.

Arms of city, &c.

14. Where a representation of the arms or emblems of any city, borough, town, place, society, body corporate, or institution appears on a mark, the applicant shall, if so required, furnish the registrar with a consent from such official as the registrar may consider entitled to give consent to the use of such arms or emblems (*a*).

(*a*) See Instructions, par. 16.

Representations of living person or persons recently dead.

15. Where the names or representations of living persons appear on a trade mark, the registrar shall, if he so require, be furnished with consents from such persons before proceeding to register the mark. In the case of persons recently dead the registrar may call for consents from their legal representatives before proceeding with registration of a trade mark on which their names or representations appear (*a*).

(*a*) See Instructions, par. 16.

Name or description of goods.

16. Where the name or a description of any goods appears on a trade mark the registrar may refuse to register such mark in respect of any goods other than the goods so named or described.

Where the name or description of any goods appears on a trade mark which name or description in use varies, the registrar may permit the registration of the mark with the name or description upon it for goods other than those named or described, the applicant stating in his application that the name or description varies (*a*).

(*a*) See Instructions, par. 16.

Application for Registration.

Application by firm.

17. If application for registration of a trade mark be made by a firm or partnership it may be signed in the name or for and on behalf of the firm or partnership by any one or more members thereof.

If the application be made by a body corporate it may be signed by a director or by the secretary or other principal officer of such body corporate.

Any application may be signed by an agent (*a*).

(*a*) See Instructions, pars. 4—7.

Address of application.

18. Where application is made for registration of a cotton mark the applicant shall address and send his application to the keeper of cotton marks at the Manchester Branch, 48, Royal Exchange, Manchester. Other applications (except applications which under sect. 63 of the said Act should be made to the Cutlers' Company) shall be addressed and sent to the registrar at the office (*a*).

(*a*) See Instructions, par. 4.

Acknowledgment of application.

19. On or after receipt of the application the registrar shall furnish the applicant with an acknowledgment thereof.

Application for old mark.

20. Where application is made to register a trade mark which was used (*a*) by the applicant or his predecessors in business (*b*) before the 13th of August, 1875 (*c*), the application shall contain a statement of the time during which and by whom it has been used in respect of the goods mentioned in the application. The registrar may require a statutory declaration verifying such user with exhibits showing the mark as used (*d*).

(*a*) *I.e.*, in respect of the same goods for which the application is being made. Registration must be applied for as for a new mark when the mark has been used on different goods. (See *In re Jelley, Son & Jones*, 51 L. J. Ch. 639: *Edwards* v. *Dennis*, 30 Ch. D. 454.)

(*b*) Upon an application by a firm for registration of a mark which has been used by that firm before August 13, 1875, though the members of the firm have changed since the date of the first user, it is not necessary to state the names of the members of the firm for the time being since the first user or to insert the words "or their predecessors, members of the firm for the time being" (*In re Wright, Crossley & Co.* (1900), 2 Ch. 218). It seems that where the whole beneficial interest in the trade mark has passed from the original proprietor although there has been no actual assignment, an application may be made in the name of the person having such beneficial interest, but the point was not decided, since the application failed for want of user as a trade mark (*In re Heddle & Co.*, 20 P. R. 599).

(*c*) This is the date of the passing of the Act of 1875, and at this point the line is drawn between old and new marks, various indulgences being allowed to the former and not to the latter. (See the proviso to sect. 9, sub-sect. 5.)

(*d*) Unless the registrar requires a statutory declaration, a mere statement is sufficient.

Contents of form of application.

21. Every application for registration of a trade mark shall contain a representation of the mark affixed to it in the square which the Form TM No. 2 contains for that purpose.

Where the representation exceeds such square in size the representation shall be mounted upon linen, tracing cloth or other material that the registrar may consider suitable. Part of the mounting shall be affixed in the space aforesaid, and the rest may be folded over.

Additional

22. There shall be sent with every application for registration of

representations. a trade mark four additional representations of such mark on the Form TM No. 3, exactly corresponding to that affixed to the application Form TM No. 2, and noted with all such particulars as may from time to time be required by the registrar or by the keeper of cotton marks. Such particulars shall, if required, be signed by the applicant or his agent.

Representations to be durable. 23. All representations of marks must be of a durable nature, but the applicant may in case of need supply in place of representations on the Form TM No. 3, half sheets of strong foolscap of the size aforesaid with the representations affixed thereon and noted as aforesaid.

Separate applications. 24. Applications for the registration of the same mark in different classes shall be treated as separate and distinct applications, and in all cases where a trade mark is registered under the same official number for goods in more than one class, the registration shall henceforth for the purpose of fees and otherwise be deemed to have been made on separate and distinct applications in respect of the goods included in each class.

Representations to be satisfactory. 25. The registrar, if dissatisfied with any representation of a mark, may at any time require another representation satisfactory to him to be substituted before proceeding with the application.

Specimens of trade marks in exceptional cases 26. Where a drawing or other representation or specimen cannot be given in manner aforesaid, a specimen or copy of the trade mark may be sent either of full size or on a reduced scale, and in such form as the registrar may think most convenient.

The registrar may also, in exceptional cases, deposit in the office a specimen or copy of any trade mark which cannot conveniently be shown by a representation, and may refer thereto in the register in such manner as he may think fit.

Series of trade marks. 27. When application is made for the registration of a series of trade marks under sect. 26 of the said Act, a representation of each trade mark of the series shall be affixed, as aforesaid, to the application upon Form TM No. 2, and to each of the accompanying Forms TM No. 3.

Transliteration and translation. 28. When a trade mark contains a word or words in other than Roman characters, there shall be indorsed on the application in Form TM No. 2, and on each of the accompanying representations in Form TM No. 3, a sufficient transliteration and translation to the satisfaction of the registrar of each of such words, and every such indorsement shall be signed by the applicant or his agent.

Where a trade mark contains a word or words in a language other than English, the registrar may ask for an exact translation thereof, and if he so requires such translation shall be indorsed and signed as aforesaid.

Procedure on Receipt of Application.

Search. 29. Subject to the provisions for special applications under para. 5 of sect. 9 of the said Act, upon receipt of an application for registration the registrar shall cause a search to be made amongst the registered marks and pending applications for the purpose of ascertaining whether there are on record any marks for the same goods or

description of goods identical with the mark applied for or so nearly resembling it as to be calculated to deceive.

Acceptance.

30. If after such search and a consideration of the application the registrar thinks there is no objection to the mark being registered, he may accept it absolutely or subject to conditions, amendments, and modifications which he shall communicate to the applicant in writing.

Objections.

31. If after such search and consideration of the application any objections appear, a statement of those objections shall be sent to the applicant in writing, and unless within one month the applicant applies for a hearing, he shall be deemed to have withdrawn his application.

Hearings.

32. If the registrar accepts an application subject to any conditions, amendments, or modifications, and the applicant objects to such conditions, amendments, or modifications, he shall within one month from the date of the communication notifying such acceptance apply for a hearing, and if he does not do so he shall be deemed to have withdrawn his application. If the applicant does not object to such conditions, amendments, or modifications, he shall forthwith notify the registrar in writing.

Decision of registrar.

33. The decision of the registrar at such hearing as aforesaid shall be communicated to the applicant in writing, and if he objects to such decision, he may within one month apply upon Form TM No. 4, requiring the registrar to state in writing the grounds of his decision and the materials used by him in arriving at the same.

Upon receipt of such form the registrar shall send to the applicant such statement as aforesaid in writing, and the date when such statement is sent shall be deemed to be the date of the registrar's decision for the purpose of appeal.

Disclaimers.

34. The registrar may call on an applicant to insert in his application such disclaimer as the registrar may think fit, in order that the public generally may understand what the applicant's rights, if his mark is registered, will be.

Special Applications under Paragraph 5 of Section 9 (a).

Special applications under sect. 9, para. 5.

35. An application to register a name, signature, or word or words under paragraph 5 of section 9 of the said Act shall be made on the Form TM No. 5, and not otherwise.

Search.

36. Upon receipt of such an application the registrar shall cause a search to be made amongst the registered marks and pending applications for the purpose of ascertaining whether there are on record any marks for the same goods or description of goods identical with the mark applied for or so nearly resembling it as to be calculated to deceive.

Result of search.

37. If after such search the registrar thinks there are no such marks, he shall notify the applicant accordingly, but if after such search any such marks appear, he shall notify to the applicant the numbers of those marks and the journals (if any) in which they have been advertised.

Appeal by applicant.

38. Within one month from the receipt of such notification the applicant shall send to the registrar in writing a case in duplicate

stating at length the grounds upon which he relies in support of his application, and whether he desires to be heard by the Board of Trade or by the Court. If he fails to do so his application shall be deemed to be withdrawn. If he desires to be heard by the Board of Trade, he shall send with his case Form TM No. 10. If the Board think fit to refer the appeal to the Court, the registrar may certify the spoilt fee on such form for allowance.

Upon receipt of such case the registrar shall send the same to the Board of Trade for their information, together with a copy of all communications that have passed between the registrar and the applicant.

Hearing.

39. Upon receipt of such case the Board of Trade shall if the applicant desires to be heard by them fix a day for such hearing at which the applicant and the registrar may attend and be heard, and the Board shall make an order determining whether and subject to what conditions, amendments, or modifications, if any, the application is to be accepted, or may require the applicant to apply to the Court and limit a time for that purpose.

Order of the Court.

40. If the applicant desires to obtain an order of the Court he shall within one month from sending to the registrar his case as aforesaid bring the matter before the Court by motion, and if he does not do so he shall be deemed to have withdrawn his application.

Advertisement, &c. of application.

41. If the application is accepted either by the Board of Trade or the Court it shall be advertised and proceedings thereafter shall be had in respect of it as if it had been accepted by the registrar in the ordinary course.

(*a*) See notes to sect. 9 of the Act.

Special Trade Marks under Section 62 (*a*).

Application under sect. 62.

42. Where an association or person desires to register a mark under sect. 62 of the said Act they shall apply to the registrar in writing upon the Form TM No. 6.

Mode of application.

43. Such application shall be in duplicate and shall be accompanied by six copies of the mark applied for.

Report by registrar.

44. Upon the receipt of such application the registrar shall as soon as may be notify the same to the Board of Trade together with his report upon the application, and shall at the same time send a copy of the application together with three copies of the mark applied for to the Board. The registrar shall also send the applicants a copy of his report, and within one month from the receipt of such report the applicants shall send the Board in duplicate a case setting out the grounds upon which they rely in support of their application, and if they fail so to do their application shall be deemed to be abandoned.

Hearing.

45. Upon receipt of such case the Board may call for such evidence, if any, as they think fit and shall, if necessary, hear the applicants and the registrar, and make an order determining whether and subject to what conditions, amendments, or modifications, if any, the application may be permitted to proceed.

Advertisement, &c.

46. If such application is permitted to proceed the mark shall be advertised and the application shall be treated in all respects as if it

were an ordinary application, and it shall be open to opposition in the same way and all such proceedings shall be had thereon as if it were an application under sect. 12 of the said Act.

(*a*) This group of rules refer to certification marks, *e.g.*, marks indicative of Irish origin.

Advertisement of Application.

Advertisement of application.

47. Every application when accepted shall be advertised by the registrar in the Journal during such times and in such manner as the registrar may direct.

If no representation of the trade mark be inserted in connection with the advertisement of an application, the registrar shall refer in such advertisement to the place or places where a specimen or representation of the trade mark is deposited for exhibition (*a*).

(*a*) See Instructions, par. 15.

The object of the advertisement is to give to persons who might be claimants of the trade mark proposed to be registered the opportunity of coming forward and objecting (*per* Hall, V.-C., in *In re Meikle*, 24 W. R. 1067), and an advertisement is therefore indispensable (*Ibid.*). It is not, however, incumbent on persons to see the advertisement, and if a common mark has been registered after advertisement, and without opposition, it may be removed from the register on application by persons aggrieved (*In re Hyde & Co.*, 7 Ch. D. 724). As to the importance of the advertisement, see also *In re Apollinaris Co.* (1891, 2 Ch. 186, 231).

Wood block or electrotype.

48. For the purposes of such advertisement the applicant may be required to furnish a wood block or electrotype (or more than one, if necessary) of the trade mark, of such dimensions as may from time to time be directed by the registrar, or such other information or means of advertising the trade mark as may be required by the registrar; and the registrar, if dissatisfied with the block or electrotype furnished by the applicant or his agent, may require a fresh block or electrotype before proceeding with the advertisement.

Advertisement of series.

49. When an application relates to a series of trade marks differing from one another in respect of the particulars mentioned in sect. 26 of the said Act, the applicant may be required to furnish a wood block or electrotype (or more than one, if necessary) of any or of each of the trade marks constituting the series; or the registrar may, if he thinks fit, insert with the advertisement of the application a statement of the manner in respect of which the several trade marks differ from one another.

Advertisement under sect. 14 (9).

50. Advertisements under sect. 14 (9) of the said Act shall *mutatis mutandis* be made in the same manner as advertisements relating to an application for registration.

Opposition to Registration.

Opposition.

51. Any person may within one month from the date of any advertisement in the Journal of an application for registration of a trade mark give notice in writing at the Office of opposition to the registration (*a*).

(*a*) It must be noted that the times fixed by these rules may be enlarged by the registrar (see Rule 99). Also as to appeals (Rules 121, 127).

Notice of opposition.

52. Such notice shall be in Form TM No. 7, and shall contain a statement of the grounds upon which the opponent objects to the registration. If registration is opposed on the ground that the mark resembles marks already on the register, the numbers of such marks and the numbers of the Journals in which they have been advertised shall be set out. Such notice shall be accompanied by a duplicate which the registrar will forthwith send to the applicant.

Counter-statement.

53. Within one month from the receipt of such duplicate the applicant shall send to the registrar a counter-statement (Form TM No. 8) in writing setting out the grounds on which he relies as supporting his application. The applicant shall also set out what facts, if any, alleged in the Notice of Opposition he admits. Such counter-statement shall be accompanied by a duplicate in writing.

Evidence in support of opposition.

54. Upon receipt of such counter-statement and duplicate the registrar will forthwith send the duplicate to the opponent and within one month from the receipt of the duplicate the opponent shall leave at the Office such evidence by way of statutory declaration as he may desire to adduce in support of his opposition and shall deliver to the applicant copies thereof.

Evidence in support of application.

55. If an opponent leaves no evidence, he shall be deemed to have abandoned his opposition, but if he does then within one month from the receipt of the copies of declarations, the applicant shall leave at the Office such evidence by way of statutory declaration as he desires to adduce in support of his application and shall deliver to the opponent copies thereof.

Evidence in reply by opponent.

56. Within fourteen days from the receipt by the opponent of the copies of the applicant's declarations the opponent may leave at the Office evidence by statutory declaration in reply, and shall deliver to the applicant copies thereof. Such evidence shall be confined to matters strictly in reply.

Further evidence.

57. In any proceedings before the registrar, he may at any time, if he thinks fit, give leave to either the applicant or the opponent to file any evidence upon such terms as to costs or otherwise as the registrar may think fit.

Exhibits.

58. Where there are exhibits to declarations filed in an opposition, copies or impressions of such exhibits shall be sent to the other party on his request, or, if such copies or impressions cannot conveniently be furnished, the originals shall be sent to the Office, so that they may be open to inspection. The original exhibits shall be produced at the hearing unless the registrar otherwise directs.

Hearing.

59. Upon completion of the evidence the registrar shall give notice to the parties of a date when he will hear the arguments in the case. Such appointment shall be for a date at least fourteen days after the date of the notice, unless the parties consent to a shorter notice. Within seven days from the receipt of such notice both parties shall file Form TM No. 9. A party who receives such notice and who does not, within seven days from the receipt thereof, give notice on Form TM No. 9 that he intends to appear, may be treated as not desiring to be heard and the registrar may act accordingly.

Extension of time.

60. Where in opposition proceedings any extension of time is granted to any party, the registrar may thereafter, if he thinks fit, without giving the said party a hearing, grant any reasonable

extension of time to the other party in which to take any subsequent step.

Security for costs.

61. Where a party giving notice of opposition neither resides nor carries on business in the United Kingdom, the registrar may call upon him to give a security in such form as the registrar may deem sufficient for the costs of the proceedings before the registrar, for such amount as to the registrar may seem fit, and at any stage in such opposition may require further security to be given at any time before giving his decision in the case.

NOTE.—Under the old Acts and Rules it was held that the notice of opposition might be amended, even after the counter-statement had been put in (*In re Moet*, 7 P. R. 226): but not after an appeal had been presented to the Board of Trade (*In re Robertson, Sanderson & Co.*, (1892) 2 Ch. 245. Under the Act of 1875 the practice was to require the opponent to take proceedings for the purpose of bringing the matter before the Court. The opponent thereupon took out a summons for directions as to the course to be followed, upon which it was usual for the applicant to be directed to apply for registration by way of motion or summons. In *In re Salamon* (Dig. 569), Jessel, M.R., said that the best mode of trying the case was by special case, when it was a simple question of law; by summons, when it was a question as to directions for carrying out the Act; by motion, when it was a question as to disputed facts. In *In Re Simpson, Davies & Sons* (15 Ch. D. 525), he said he usually directed a summons, but had in one or two cases directed a motion. In *Ex parte King of Saxony* (Dig. 598), Hall, V.-C., directed a motion. Latterly a summons was almost invariably directed. See also *In re Johnston* (43 L. T. N. S. 672), as to the course of procedure where there was an action pending. Under the early Rules, and while the first step had to be taken by the opponent, who had to give notice thereof to the office, two cases occurred in which trade marks were registered, though the registration was opposed, in consequence of no notice having been given to the office by the opponents of their having brought the matter before the Court. In one of these cases, *In re The Patent Nut and Bolt Screw Co.*, Chitty, J., March 9th, 1883, with a view to remedying the slip, a consent order was taken to rescind the registration, without prejudice to the applicant's summons for leave to register, the object being to restore matters to their *status quo ante* the registration. The opposition was subsequently withdrawn, but the registrar now objected to register, on the ground that the application had been finally disposed of, and that a new application was necessary. It was, however, held that the proper course was to discharge the former order for the removal of the mark from the register, and to direct the registrar to restore the register to its condition previous to such removal. In the other case, *In re Esbensen*, Pearson, J., Jan. 25th, 1883, the opponent moved to cancel the registration, with a view to the prosecution of the opposition as if there had been no registration; but it was held that the proper course was for the opponent to move to rectify the register in the ordinary way. See also *In re Paton* (Dig. 601). Under the Act of 1883 a summons for leave to register was taken out by the applicant.

NON-COMPLETION.

Non-completion within twelve months.

62. Where registration of a trade mark is not completed within twelve months from the date of the application by reason of default on the part of the applicant, the registrar shall give notice to the applicant in writing in the Form O No. 1 of such non-completion, and if the applicant has an agent, shall send a duplicate of such notice to such agent. If after fourteen days from the date when such notice was sent the registration is not completed, the application shall be deemed to be abandoned, but the registrar may with such notice, where the applicant lives at a distance, give a further time after such fourteen days for the completion of such application.

Refusal after Acceptance.

Refusal after acceptance.

63. In pursuance of sect. 16 of the said Act the Board of Trade hereby direct that in cases where a mark has been accepted by error, the registrar need not register the mark but may withdraw his acceptance and refuse to register, but any such refusal shall be deemed to be a refusal under sub-sect. 2 of sect. 12 of the said Act, and an applicant shall have thereafter the same right of being heard, and of appealing, as he would have had if the mark had been refused immediately upon its receipt. In any other case the Board, having regard to any special facts, will give special directions under sect. 16 of the said Act.

Entry on the Register.

Entry on register.

64. As soon as may be after the expiration of one month from the date of the advertisement in the Journal of any application, the registrar shall, subject to any opposition and the determination thereof, and subject to the provisions of Rule 63, and upon payment of the prescribed fee, on Form TM No. 11, enter the trade mark on the register. The entry of a trade mark on the register shall give the date of the registration, the goods in respect of which it is registered, and all particulars named in sect. 4 of the Act, together with particulars of the trade, business, profession, or occupation, if any, of the proprietor, and such other particulars as the registrar may deem necessary.

Associated marks.

65. Where a mark is registered as associated with any other mark or marks the registrar shall note upon the register in connection with such mark the numbers of the marks with which it is associated and shall also note upon the register in connection with each of the associated marks the number of the newly registered mark as being an associated mark with each of them.

Death of applicant before registration.

66. In case of the death of any applicant for a trade mark after the date of his application, and before the trade mark applied for has been entered on the register, the registrar, after the expiration of the prescribed period of advertisement, may, on being satisfied of the applicant's death, enter on the register, in place of the name of such deceased applicant, the name, address, and description of the person owning the goodwill of the business, on such ownership being proved to the satisfaction of the registrar.

Certificate of registration.

67. Upon the registration of a trade mark the registrar shall issue to the applicant a certificate in the Form O No. 2.

Renewal.

Renewal of registration.

68. At any time not less than two months and not more than three months before the expiration of the last registration of a trade mark any person may leave at the Office a fee for the renewal of the registration of the mark upon Form TM No. 12. Such person shall indorse upon such form his name and address, and before taking any further step the registrar may require such person to furnish within five days

an authority to pay such fee signed by the registered proprietor, and if such person does not furnish such authority, may return such fee and treat it as not received.

Notification of receipt of renewal fee.

69. When he does not require such authority, the registrar shall upon receipt of such fee communicate with the registered proprietor at his registered address, stating that the fee has been received and that the registration will in due course be renewed.

Notice before removal of trade mark from register.

70. At a date not less than one month and not more than two months before the expiration of the last registration of a mark, if no fee upon the Form TM No. 12 has been received, the registrar shall send to the registered proprietor at his registered address a notice in the Form O No. 3.

Second notice before removal of trade mark from register.

71. At a time not less than fourteen days and not more than twenty-eight days before the expiration of the last registration of a mark, the registrar shall, if no renewal fee has been received, send a notice to the registered proprietor at his registered address in the Form O No. 4.

Advertisement of non-payment.

72. If at the date of the expiration of the last registration of a mark the renewal fee has not been paid, the registrar shall advertise the fact forthwith in the Journal, and if within one month of such advertisement the renewal fee upon Form TM No. 13, together with an additional fee upon Form TM No. 14, is received, he may renew the registration without removing the mark from the register.

Removal of trade mark from register.

73. Where after one month from such advertisement such fees have not been paid, the registrar may remove the mark from the register as of the date of the expiration of the last registration, but may upon payment of the renewal fee upon Form TM No. 13, together with the additional fee upon the form TM No. 15, restore the mark to the register if satisfied that it is just so to do, and upon such conditions as he may think fit to impose.

Removal of mark from register.

74. Where a trade mark has been removed from the register, the registrar shall cause to be entered in the register a record of such removal and of the cause thereof.

Notice and advertisement of renewal.

75. Upon the renewal of a registration a notice to that effect shall be sent to the registered proprietor at his registered address and the renewal shall be advertised in the Journal.

Assignment.

Joint request for entry of assignment.

76. The registrar may on request made jointly by a registered proprietor of a mark and the person to whom he has assigned such mark, together with the goodwill of the business concerned in the goods for which it has been registered, register the assignee as proprietor of the mark. Such application shall be in the Form TM No. 16. If the registrar so require, the assignee shall furnish a declaration in Form TM No. 17.

Request for entry of assignment by subsequent proprietor.

77. Where no such joint request is made, any person who has become entitled to a registered trade mark by assignment, transmission, or other operation of law, may leave a request at the Office for the entry of his name in the register as proprietor of such trade mark. The request shall be on the Form TM No. 18, and such request shall

contain the name, address, and description of the person claiming to be entitled to the trade mark, hereinafter called the claimant.

Case accompanying request.

78. Together with such request the claimant shall leave a case stating full particulars of the assignment, transmission, or other operation of law by virtue of which he claims to be entitled to be entered in the register as proprietor of the trade mark, so as to show the manner in which and the person or persons to whom the trade mark has been assigned or transmitted, and so as to show further that it has been so assigned or transmitted in connection with the goodwill of the business concerned in the goods for which the trade mark has been registered.

Signature of request.

79. Such request shall in the case of an individual be made and signed by the claimant, and in the case of a firm or partnership by one or more members of such firm or partnership, and in the case of a body corporate shall be signed by a director or by the secretary or other principal officer of such body corporate.

Statutory declaration in support of request.

80. Where the registrar shall determine that the case sets out particulars such as entitle the claimant to be registered as proprietor of such trade mark, he shall call upon the claimant to furnish a statutory declaration (Form TM No. 19) verifying the several statements in the case and declaring that the particulars given comprise every material fact and document affecting the proprietorship of the trade mark claimed by such request.

Proof of title.

81. In any case, the registrar may call on any person who desires to be registered as proprietor of a trade mark for such proof or additional proof of title and of the existence and ownership of such goodwill as aforesaid as the registrar may require for his satisfaction (*a*).

(*a*) If the proofs required are supplied, and the subsequent proprietor's name is entered on the register, it may be removed again on an application under sect. 35 by a person aggrieved (*Rey* v. *Lecouturier*, 25 P. R. 265; 27 P. R 268).

Alteration of Address.

Alteration of address in register.

82. Every registered proprietor of a trade mark who alters his address shall forthwith apply to the registrar on the Form TM No. 20 to insert the new address on the register, and the registrar shall alter the register accordingly.

Discretionary Power.

Hearing.

83. Before exercising any discretionary power given to the registrar by the said Act adversely to any person, the registrar shall, if so required, hear the person who will be affected by the exercise of such power.

Application for hearing.

84. An application for a hearing shall be made within one month from the date when the matter on which the registrar is called on to exercise discretionary power has arisen.

Notice of hearing.

85. Upon receiving such application the registrar shall give the person applying ten days' notice of a time when he may be heard by himself or his agent.

Within five days from the date when such notice would be delivered in the ordinary course of post the person applying shall notify the registrar whether or not he intends to be heard on the matter.

86. The decision of the registrar in the exercise of any such discretionary power as aforesaid shall be notified to the person affected. Notification of decision.

Applications under Section 23.

87. All applications to the registrar under section 23 of the said Act shall be upon the form TM No. 21. Such application shall be accompanied by a case setting out fully the facts relating to the marks which the registrar is requested to permit an apportionment of. Application under sect. 23.

88. Upon receipt of such request and of such case the registrar shall enquire into the facts and call for such evidence as he may deem necessary upon the subject of such application. Before giving his decision the registrar shall, if necessary, give the parties an opportunity of attending before him at a hearing either by themselves or by their agents. Registrar to enquire and decide.

The decision of the registrar shall be in writing.

89. Upon any apportionment of marks under this section the registrar shall insert in the register a note in connection with each of the registered trade marks of the fact of such apportionment, and shall in such note refer to the date of the decision under which such apportionment has taken place. Note in register.

Applications under Section 32.

90. Applications under section 32 to the registrar may be made by the registered proprietor, or by the trustee in bankruptcy of the registered proprietor, or where the registered proprietor is a company in liquidation by the liquidator, and in other cases by such person as the registrar may decide to be entitled to act in the name of the registered proprietor. Application under sect. 32.

91. Where such application is made the registrar may require such evidence by statutory declaration or otherwise as he may think fit as to the circumstances in which the application is made. Evidence.

92. Where application is made, on Form TM No. 26, to enter a disclaimer or memorandum relating to a trade mark, the registrar, before deciding upon such application, shall advertise the application in the Journal for one month in order to enable any person desiring so to do to state any reasons in writing against the applicant being allowed to make such disclaimer or enter such memorandum. Advertisement of application.

Applications under Section 34.

93. Where a person desires to apply under section 34 to alter a trade mark he shall make his application in writing on Form TM No. 27, and shall furnish the registrar with six copies of the mark as it will appear when altered. Alteration of trade mark.

Advertisement of alteration.

94. Before proceeding with such application the registrar may call on the applicant to furnish a block suitable to advertise in the Journal the fact that such application has been made, or, if he think fit, the registrar, without calling for a block, may insert an advertisement describing the alteration proposed in words so that it can be understood by persons interested in the matter.

Where leave is granted the registrar may, if he is not already in possession of a block showing the trade mark as altered, cause the applicant to furnish a block showing the trade mark as altered for advertisement in the Journal, and upon receipt of such block shall forthwith advertise the mark as altered in the Journal.

Search.

Searches.

95. The registrar, if requested so to do in writing upon a Form TM No. 28, may cause a search to be made in any class to ascertain whether any marks are on record at the date of such search which may resemble any mark sent in duplicate to him by the person requesting such search and may cause that person to be informed of the result of such search (*a*).

(*a*) See Instructions, par. 8.

Hours of Inspection.

Hours of inspection.

96. The office shall be open to the public every weekday, except Saturday, between the hours of ten and four, and on Saturday between the hours of ten and one, except on the days following:—

Christmas Day; Good Friday; the day observed as His Majesty's birthday; the days observed as days of public fast or thanksgiving, or as holidays at the Bank of England; and days which may from time to time be notified by a placard posted in a conspicuous place at the office.

Power to Dispense with Evidence.

Dispensing with evidence.

97. Where under these rules any person is required to do any act or thing, or to sign any document, or to make any declaration on behalf of himself or of any body corporate, or any document or evidence is required to be produced to or left with the registrar, or at the office, and it is shown to the satisfaction of the registrar that from any reasonable cause such person is unable to do such act or thing, or to sign such document, or make such declaration, or that such document or evidence cannot be produced or left as aforesaid, it shall be lawful for the registrar, and upon the production of such other evidence, and subject to such terms as he may think fit, to dispense with any such act or thing, document, declaration, or evidence.

Amendments.

Amendment of documents.

98. Any document or drawing or other representation of a trade mark may be amended, and any irregularity in procedure which in the opinion of the registrar may be obviated without detriment to the

interests of any person may be corrected, if the registrar think fit, and on such terms as he may direct.

Enlargement of Time.

Enlargement of time.

99. The time prescribed by these rules for doing any act, or taking any proceeding thereunder, may be enlarged by the registrar, if he think fit, and upon such notice to other parties, and proceedings thereon, and upon such terms, as he may direct, and such enlargement may be granted though the time has expired for doing such act or taking such proceeding.

Excluded days.

100. Whenever the last day fixed by the said Act, or by these rules, for leaving any document or paying any fee at the office shall fall on Christmas Day, Good Friday, or on a Saturday or Sunday, or any day observed as a holiday at the Bank of England, or any day observed as a day of public fast or thanksgiving, herein referred to as excluded days, it shall be lawful to leave such document or to pay such fee on the day next following such excluded day or days if two or more of them occur consecutively.

Fees paid late by persons living at distances from office.

101. Where a time for paying a fee is limited by these rules and the person who is bound to pay such fee resides at such distance from the office that he cannot reasonably be expected to pay the fee on the date limited by the rule, the registrar, if satisfied that the omission to pay the fee has not been from any want of diligence on the part of the person whose business it is to pay it, may accept the fee even though the date for paying the fee has passed, and treat it as if received on the correct date, provided always that the fee is actually paid with such promptitude as can be expected in the circumstances.

Certificates.

Certificates by registrar.

102. The registrar, when required otherwise than under section 17 of the said Act to give a certificate as to any entry, matter, or thing which he is authorised by the said Act or any of these rules to make or do, may, on receipt of a request in writing, and on payment of the prescribed fee, give such certificate, but every certificate of registration so given shall have specified on the face thereof, whether the same is to be used in legal proceedings, or for the purpose of obtaining registration abroad, or for purposes other than use in legal proceedings or obtaining registration abroad (*a*).

(*a*) See Instructions, par. 20.

Marks registered without limitation of colour.

103. Where a mark is registered without limitation of colour it shall be lawful for the registrar to grant a certificate of its registration for the purpose of obtaining registration abroad either in the colour in which it appears upon the register or in any other colour or colours.

Certificates for use in obtaining registration abroad.

104. Where a certificate of registration is desired for use in obtaining registration abroad, the registrar shall affix to the said certificate a copy of the mark, and shall state in such certificate such particulars concerning the registration of the mark as to him may seem fit, and may omit therefrom reference to any disclaimers appearing on the register.

Declarations.

Manner in which, and person before whom, declaration is to be taken.

105. The statutory declarations required by the said Act and these rules, or used in any proceedings thereunder, shall be made and subscribed as follows:—

(a) In the United Kingdom, before any justice of the peace, or any commissioner or other officer authorised by law in any part of the United Kingdom to administer an oath for the purpose of any legal proceeding;

(b) In any other part of His Majesty's dominions, before any Court, judge, justice of the peace, or any officer authorised by law to administer an oath there for the purpose of a legal proceeding; and

(c) If made out of His Majesty's dominions, before a British Minister, or person exercising the functions of a British Minister, or a Consul, Vice-Consul, or other person exercising the functions of a British Consul, or a notary public, or before a judge or magistrate.

Notice of seal of officer taking declaration to prove itself.

106. Any document purporting to have affixed, impressed, or subscribed thereto or thereon the seal or signature of any person hereby authorised to take such declaration in testimony of such declaration having been made and subscribed before him, may be admitted by the 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 declarations.

Cutlers' Company.

Applications.

107. All applications to the Cutlers' Company for registration of a trade mark, under section 63 of the said Act, shall be in duplicate, accompanied by the prescribed fees and representations. Requests to enter old corporate marks on the Sheffield Register, under section 63 (2), should be made on Form Sheffield No. 1 (*a*).

(*a*) See Instructions, par. 18.

Notice to registrar.

108. The Cutlers' Company shall, within seven days of the receipt by them of an application to register a trade mark, send the registrar one copy of such application, by way of notice thereof, together with two representations of the mark for each class for which the applicant seeks registration.

Objections by registrar to acceptance.

109. The time within which the registrar shall give notice to the Cutlers' Company of any objection he may have to the acceptance of an application for registration made to the said Company shall be one month from the date of the receipt by the registrar of the notice from the said Company of the making of the application.

Advertisement of application.

110. If no such objection is made by the registrar, the Cutlers' Company shall require the applicant to send the registrar a wood block or electrotype as the registrar may direct, and the registrar shall, if satisfied with such wood block or electrotype, advertise the application in the same manner as an application made to him at the office.

111. The manner in which the registrar shall notify to the Cutlers' Company an application and proceedings thereon made as mentioned in sub-section 8 of section 63 of the said Act shall be by sending to the Cutlers' Company a copy of the Journal containing the application of which notice is required to be given, with a note distinguishing such application. Notification to Cutlers' Company of application.

112. The provisions of these rules as to forms, representations, the proceedings on opposition to registration, registration, and all subsequent proceedings, shall, as far as the circumstances allow, apply to all applications to register made to the Cutlers' Company, and to all proceedings consequent thereon. Similarity of proceedings in London and Sheffield.

Cotton Marks.

113. An application to the Manchester Branch for registration of a trade mark under section 64 of the said Act shall be in duplicate. The special forms for cotton marks contained in the Second Schedule to these rules shall be used. One of the forms of application shall be stamped and the other unstamped (*a*). Application.

(*a*) See Instructions, par. 19.

114. The Keeper of Cotton Marks shall forthwith, on receipt of such application, send the registrar one representation of the mark applied for. One representation to be sent to registrar.

115. As soon as may be after receiving any application the Keeper of Cotton Marks shall make a search amongst the marks on the Manchester register, in the B list, and those which have been refused and those which are pending, and shall notify to the registrar the application and the marks, if any, which he has found so nearly resembling the mark applied for as to be calculated to deceive, and together with such notification shall send a report upon the application. Search.

116. Upon considering such report, if the registrar thinks it will be necessary to object to the acceptance of the application, he shall give notice to the applicant of a time when he can be heard, and, within one month after hearing the applicant, may give notice to the Keeper of Cotton Marks of objection to the acceptance of the application, or that he has no objection, as the case may be. If no notice of objection, or if notice of no objection is received from the registrar, the application shall be advertised in the Journal by the Manchester Branch. Hearings.

If the applicant, being notified as aforesaid of a time for hearing, does not attend, his application shall be deemed to be refused.

117. If the mark is advertised by the Manchester Branch and is not opposed, the Keeper of Cotton Marks may call upon the applicant for the prescribed fee for the registration of such trade mark, and upon receipt thereof shall report to the registrar, who shall forthwith, if he think fit, register the same. Registration.

118. Where under the said Act or these rules an application has to be made to the Keeper of Cotton Marks, such application shall be made and such proceedings shall be had thereon as if in these rules the expression "Manchester Branch, 48, Royal Exchange, Manchester," were substituted for the word "office," and the expression "Keeper of Cotton Marks" were substituted for the word "registrar." Procedure.

Service of documents.

119. Where any document is by these rules directed to be served upon the registrar it shall, in respect of cotton marks, be served in duplicate upon the Keeper of Cotton Marks, who shall forthwith transmit one copy to the registrar.

Search under Rule 95.

120. Where under rule 95 a search has to be made by the Keeper of Cotton Marks, such search shall cover all marks of which there is a right of inspection under section 64 (11) of the said Act.

Appeals to the Court.

Appeal to Court.

121. When any person intends to appeal to the Court, such appeal shall be made by motion in the usual way, and no such appeal shall be entertained unless notice of motion be given within one month from the date of the decision appealed against or within such further time as the registrar shall allow.

Appeals to Board of Trade.

Appeal to Board of Trade.

122. When any person intends to appeal to the Board of Trade he shall, before doing so, apply to the registrar for a hearing and obtain a decision from him upon the point raised. Within one month from the date of such decision (*a*) he shall, if he is advised to appeal to the Board of Trade in any case in which an appeal is given by the said Act, leave at the office a notice of such his intention, on Form TM No. 29.

Such notice shall be accompanied—

(1) In case the appeal concerns an application not yet advertised, by a copy of the form of application and six representations of the mark applied for and a copy of the grounds of the registrar's decision.

(2) In case of an opposition by a copy of the decision of the registrar, and if the appeal is by the applicant also by a copy of the form of application and six representations of the mark opposed.

(3) In other cases by a copy of the decision of the registrar and a statement of the date of the hearing before him.

(*a*) As to date of decision, see Rule 33.

Grounds of appeal to be stated.

123. Such notice shall also be accompanied by a statement in writing of the grounds of appeal, and of the appellant's case in support thereof.

Transmission of notice.

124. A copy of the notice and all the accompanying documents shall also be forthwith sent by the appellant to the Secretary of the Board of Trade, No. 7, Whitehall Gardens, London; and where there has been an opposition before the registrar to the opponent or applicant as the case may be.

Directions by Board.

125. The Board of Trade may thereupon give such directions (if any) as they may think fit with respect to parties and evidence, or otherwise, for the purpose of the hearing of the appeal by the Board

of Trade, or for the purpose of their referring the appeal to the Court to hear and determine the same (*a*).

(*a*) Where the Board of Trade on referring an appeal to the Court under the corresponding rule of the Trade Marks Rules, 1890, directed that additional parties should be served with notice of the application to the Court with liberty to adduce further evidence, the Court declined to hear the application until the additional parties were served (*In re Extract of Meat (Baron Liebig) Photograph Brand, Ltd.*, 17 P. R. 161).

Hearing of appeal.

126. Where the Board of Trade intend to hear the appeal, seven days' notice, or such shorter notice as the Board of Trade may in any particular case direct, of the time and place appointed for the hearing, shall be given to the registrar and to the appellant, and where there has been an opposition before the registrar to the opponent or applicant as the case may be.

No appeal unless notice duly given.

127. No appeal shall be entertained of which notice has not been given within one month from the date of the decision appealed against, or such further time as the registrar may allow, except by special leave of the Board of Trade.

Withdrawal of Appeals.

Withdrawal of appeal.

128. Where under section 12 (5) or section 14 (8) of the said Act an appellant is entitled to withdraw his appeal, such withdrawal shall be effected by notice given to the registrar and to the other parties, if any, to such appeal within seven days after the leave referred to in such sections has been obtained.

Applications to and Orders of the Court.

Order of Court.

129. Where an order has been made by the Court in any case under the said Act, the person in whose favour such order has been made, or such one of them, if more than one, as the registrar may direct, shall forthwith leave at the office an office copy of such order, together with Form TM No. 30 if required. The register may, if necessary, thereupon be rectified or altered by the registrar.

Every application to the Court under the said Act shall be served on the registrar.

Publication of order of Court.

130. Whenever an order is made by the Court under the said Act, the registrar may, if he thinks that such order should be made public, publish it in the Journal.

Dated this 24th day of March, 1906.

(Signed) D. Lloyd-George,
President of the Board of Trade.

SCHEDULES.

FIRST SCHEDULE.

Fees.

The following fees shall be paid in connection with applications, registrations, and other matters under the Act. Such fees must in all cases be paid before or at the time of the doing of the matter in respect of which they are to be paid:—

	£ s. d.	Corresponding Form.
1. On application not otherwise charged to register a trade mark for one or more articles included in one class.....	0 10 0	T.M. No. 2 or 5, Cotton No. 1.
1*a*. On application not otherwise charged to register a series of trade marks for one or more articles included in one class	0 10 0	T.M. No. 2 or 5, Cotton No. 1.
1*b*. On request to the Cutlers' Company to enter a mark on the Sheffield Register under sect. 63, sub-sect. (2)	5 0 0	Sheffield No. 1.
1*c*. On application to the Board of Trade under sect. 62 for leave to register a mark for goods in one class.....	0 10 0	T.M. No. 6.
1*d*. On application to the Board of Trade under sect. 62 for leave to register a mark for goods in more than one class—		
In respect of every class	0 10 0	T.M. No. 6.
Total fee in no case to exceed £10 for any number of classes.		
2. On an application to registrar to state grounds of decision and materials used under sect. 12, sub-sect. 3	0 10 0	T.M. No. 4.
3. On request to be heard by the Board of Trade on application to register a name, signature, word or words under sect. 9, para. (5)	1 0 0	T.M. No. 10.
4. On notice of opposition for each application opposed, by opponent	1 0 0	T.M. No. 7.
4*a*. On filing a counter-statement in answer to a notice of opposition, by the applicant for each application opposed	0 10 0	T.M. No. 8.
4*b*. On the hearing of each opposition, by applicant and by opponent respectively	1 0 0	T.M. No. 9.
5. For registration of a trade mark for one or more articles included in one class	1 0 0	T.M. No. 11.
5*a*. For registration of a series of marks for one or more articles included in one class—		
For the first mark	1 0 0	T.M. No. 11.
And for every other mark of the series	0 5 0	
5*b*. For registration under sect. 62 of a mark for goods in more than one class—		
In respect of every class	1 0 0	T.M. No. 11.
Total fee in no case to exceed £20 for any number of classes.		

	£ s. d.	Corresponding Form.
6. Upon each entry in the register of a mark of a note that the mark is associated with a newly registered mark	0 1 0	—
7. On application to register a subsequent proprietor in cases of assignment or transmission of a single mark	1 0 0	T.M. No. 16 or 18.
7a. On application to register a subsequent proprietor of more than one mark standing in the same name, the devolution of title being identical in each case—		
For the first mark	1 0 0	T.M. No. 16
And for every other mark	0 2 0	or 18.
8. On application to change the name of a proprietor of a single mark where there has been no alteration in the proprietorship	0 5 0	T.M. No. 23.
8a. On application to change the name of a proprietor of more than one mark standing in the same name, the change being the same in each case—		
For the first mark	0 5 0	T.M. No. 23.
And for every other mark	0 1 0	
9. For renewal of registration of a mark at expiration of last registration	1 0 0	T.M. No. 12 or 13.
9a. For renewal of registration of a series of marks at the expiration of last registration—		
For the first mark of the series	1 0 0	T.M. No. 12
And for every other mark of the series	0 2 0	or 13.
9b. For renewal of a mark registered under sect. 62 for goods in more than one class—		
In respect of every class	1 0 0	T.M. No. 12
Total fee in no case to exceed £20 for any number of classes.		or 13.
10. Additional fee under Rule 72	0 10 0	T.M. No. 14.
11. Additional fee under Rule 73	1 0 0	T.M. No. 15.
12. For altering a single entry of the address of a registered proprietor	0 5 0	T.M. No. 20.
12a. For altering more than one entry of the address of a registered proprietor where the address in each case is the same and is altered in the same way—		
For the first entry	0 5 0	T.M. No. 20.
And for every other entry	0 1 0	
13. For every entry in the register of a rectification thereof or an alteration therein, not otherwise charged	0 10 0	T.M. No. 30.
14. For cancelling the entry or part of the entry of a trade mark upon the register on the application of the owner of such trade mark	0 5 0	T.M. No. 24 or 25.
15. On request, not otherwise charged, under sect. 12 (6) or under sect. 32	0 5 0	T.M. No. 22 or 26.
16. For a search under Rule 95	0 10 0	T.M. No. 28.
17. For certificate of registrar of registration to be used in legal proceedings	1 0 0	T.M. No. 34.
18. For certificate of registrar of the registration of a trade mark to be used for the purpose of obtaining registration abroad	0 5 0	T.M. No. 33.
18a. For certificate of registrar of the registration of a series of marks for the purpose of obtaining registration abroad	0 10 0	T.M. No. 33.

	£ s. d.	Corresponding Form.
19. For certificate of registrar other than certificate under sect. 17 or certificate of registration to be used in legal proceedings, or for the purpose of obtaining registration abroad	1 0 0	T.M. No. 31 or 32.
20. For certificate of Keeper of Cotton Marks	0 5 0	Cotton No. 3 or 4.
21. On appeal from registrar to Board of Trade in respect of each decision appealed against by appellant	1 0 0	T.M. No. 29.
22. On an application to the registrar under sect. 23 ..	5 0 0	T.M. No. 21.
23. On an application to the registrar for leave to add to or alter a single mark.....	1 0 0	T.M. No. 27.
23*a*. On an application to the registrar for leave to add to or alter more than one mark of the same proprietor, the addition or alteration to be made, in each case being the same—		
For the first mark	1 0 0	T.M. No. 27.
And for every other mark	0 10 0	
24. For inspecting register in connection with any particular trade mark, for every quarter of an hour.....	0 1 0	—
25. For making a search amongst the classified representations of trade marks, for every quarter of an hour	0 1 0	—
26. For office copy of documents for every 100 words (but never less than 1s.)	0 0 4	—
27. For certifying office copies MS. or printed matter...	0 10 0	—
28. In cases where the wood block or electrotype of the trade mark exceeds two inches in breadth or depth, or in breadth and depth—		
For every inch or part of an inch over two inches in breadth	0 2 0	—
For every inch or part of an inch over two inches in depth	0 2 0	—

The fees to be paid on any proceeding at the Manchester Branch and at Sheffield (except as specially provided above) shall be the same as for the similar proceeding at the London office.

For the purpose of these fees (except as specially provided above) every mark of a series under sect. 66 of the Patents Designs and Trade Marks Act, 1883, or sect. 26 of this Act, shall be deemed to be a mark separately registered.

Dated this 24th day of March, 1906.

(Sd.) D. Lloyd-George,
President of the Board of Trade.

Approved

(Sd.) J. Herbert Lewis,
Cecil Norton,
Lords Commissioners
of His Majesty's Treasury.

SECOND SCHEDULE.

Forms.

	Page.	Corresponding Fee.
		No.
Authorisation	433	—
Application for registration of trade mark	433	1, 1*a*
Additional representation of trade mark	434	—
Request for statement of grounds of decision under sect. 12 (3)	434	2
Application for registration of trade mark under sect. 9 5)	435	1
Application for registration of trade mark under sect. 62	436	1*c* or 1*d*
Opposition to application for registration	437	4
Counter-statement to opposition to application for registration	437	4*a*
Application for hearing in cases of opposition	438	4*b*
Application for hearing by the Board of Trade under sect. 9 5)	438	3
Notice of non-completion of registration	438	—
Fee for registration of a trade mark	439	5, 5*a*, or 5*b*
Certificate of registration under sect. 17	439	—
Renewal of registration	439	9, 9*a*, or 9*b*
First notice before removal of mark from register, under sect. 30	440	—
Second notice before removal of mark from register, under sect. 30	440	—
Renewal of registration after notice has been given by registrar	441	9, 9*a*, or 9*b*
Additional fee to accompany renewal fee within one month after advertisement of non-payment of renewal fee	441	10
Restoration of trade mark where removed for non-payment of fee	441	11
Request by registered proprietor and assignee to register assignee as subsequent proprietor	442	7, 7*a*
Declaration by assignee in support of request by registered proprietor and assignee to register assignee as subsequent proprietor	442	—
Request to enter name of subsequent proprietor	443	7, 7*a*
Declaration in support of request to enter name of subsequent proprietor	443	—
Application for alteration of address on register	444	12, 12*a*
Application for apportionment of trade marks	444	22
Correction of clerical error or amendment of application.	444	15

	Page.	Correspond. ing Fee.
		No.
Request to enter change of name of registered proprietor	445	8, 8*a*
Application to cancel entry on register	445	14
Request to strike out goods from those for which a mark is registered	446	14
Request to enter disclaimer, &c.	446	15
Application to add to or alter a trade mark	446	23 or 23*a*
Request for search under Rule 95	447	16
Request to enter a mark on the Sheffield Register under sect. 63 (2)	447	1*b*
Application for registration of cotton mark	448	1
Additional representation of cotton mark	449	—
Request for certificate under sect. 64 (12)	450	20
Request for certificate of Keeper of Cotton Marks	450	20
Certificate under sect. 64 (12)	451	—
General certificate (cotton marks) other than under sect. 64 (12)	451	—
Appeal from registrar to Board of Trade	452	21
Notice of order of Court for alteration of register	452	13
Request for general certificate	453	19
Request for certificate of refusal to register	453	19
Request for certificate of registration for use in obtaining registration abroad	454	18 or 18*a*
Request for certificate of registration for use in legal proceedings	454	17

FORM TM No. 1.

TRADE MARKS ACT, 1905.

FORM OF AUTHORISATION.

SIR, I beg to inform you that I have appointed (*a*) of to act as my agent for (*b*) .

I am, Sir,
Your obedient Servant,
(*c*)
Address .

Dated the day of , 19 .

(*a*) Here insert name and address of agent.

(*b*) Here state the particular purpose for which the agent is appointed.

(*c*) To be signed by the person appointing the agent.

To the Registrar,
Patent Office, Trade Marks Branch,
25, *Southampton Buildings, Chancery Lane, London, W.C.*

FORM TM No. 2.

TRADE MARKS ACT, 1905.

[TRADE MARKS. 10*s.*]

APPLICATION FOR REGISTRATION OF TRADE MARK (other than Cotton Mark).

One representation to be fixed within this square, and four others to be sent on separate Forms TM No. 3.

Representations of a larger size may be folded, but must then be mounted upon linen and affixed hereto.

Application is hereby made for registration of the accompanying Trade Mark in Class in respect of (*a*)

in the name of (*b*) of

[*Address and description*]
trading as

who claims to be the proprietor thereof (*c*).

do not claim the registration of this Trade Mark under the special provisions of paragraph 5 of section 9 of the Trade Marks Act, 1905, in regard to names, signatures, or words.

(Signed)

Dated the day of , 19 . .

(*a*) Only goods contained in one and the same class should be set out here. A separate application form is required for each separate class.

(*b*) Here insert legibly the full name, address and description of the individual, firm, or company. Add trading style (if any).

(*c*) Alter to "claim to be the proprietors thereof" in the case of a firm or company.

To the Registrar,
Patent Office, Trade Marks Branch,
25, *Southampton Buildings, Chancery Lane, London, W.C.*

FORM TM No. 3.

TRADE MARKS ACT, 1905.

ADDITIONAL REPRESENTATION OF TRADE MARK, TO ACCOMPANY APPLICATION FOR REGISTRATION (other than Cotton Mark).

	One representation of the trade mark to be affixed within this square. It must correspond *exactly*, in all respects with the representation affixed to the Application Form.
	Any representation of a larger size than foolscap may be folded, but must then be mounted upon linen and affixed hereto.

Four of these Additional Representations of the Trade Mark must accompany *each* Form of Application.

FORM TM No. 4.

[TRADE MARKS. 10s.]

TRADE MARKS ACT, 1905.

REQUEST FOR STATEMENT OF GROUNDS OF DECISION UNDER SECTION 12 (3).

You are hereby requested under sub-section 3 of section 12 of the Trade Marks Act, 1905, and Rule 33 made thereunder to state in writing the grounds of your decision, dated the day of 19 , after the hearing on the day of 19 , and the materials used by you in arriving at such decision.

(Signed)

Dated the day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 5.

TRADE MARKS ACT, 1905.

[TRADE MARKS. 10s.]

SPECIAL APPLICATION FOR REGISTRATION OF TRADE MARK UNDER PARAGRAPH 5 OF SECTION 9.

One representation to be fixed within this square, and four others to be sent on separate Forms TM No. 3.

Application is hereby made for registration of the accompanying Trade Mark in Class , in respect of (*a*)

in the name of (*b*)
[*address and description*]

trading as
who claims to be the proprietor thereof (*c*) and desires an order of the Board of Trade or the Court directing registration of the same.

(*a*) Only goods contained in one and the same class should be set out here. A separate application form is required for each separate class.

(*b*) Here insert legibly the full name, address and description of the individual, firm, or company. Add trading style (if any).

(*c*) Alter to "claim to be the proprietors thereof" in the case of a firm or company.

(Signed)

Dated the day of . 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

[TRADE MARKS. Fee 1*s* or 1*d*.] FORM TM No. 6.

TRADE MARKS ACT, 1905.

SPECIAL APPLICATION FOR REGISTRATION OF TRADE MARK UNDER SECTION 62.

(To be accompanied by an unstamped duplicate.)

One representation to be fixed within this square, and six others to be sent on separate half-sheets of foolscap.

Representations of a larger size may be folded, but must then be mounted upon linen and affixed hereto.

Application is hereby made for registration of the accompanying trade mark in Class , in respect of (*a*)

in the name of

of

[*address and description*]

who desire the Board of Trade under section 62 of the said Act to permit the registration thereof.

(Signed)

Dated the day of , 19 .

(*a*) Only goods contained in one and the same class should be set out here. A separate application form is required for each separate class.

To the Registrar,

Patent Office, Trade Marks Branch,

25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 7.

TRADE MARKS ACT, 1905.

[TRADE MARKS. £1.]

NOTICE OF OPPOSITION TO APPLICATION FOR REGISTRATION.

[*To be accompanied by an unstamped duplicate.*]

In the matter of an application,
No. by
of

* I, hereby give notice of my intention to oppose the registration of the trade mark advertised under the above number for Class in the *Trade Marks Journal* of the day of . 19 , No. , page .

* Here state full name and address.

The grounds of opposition are as follows:—

(Signed)

Dated the day of , 19 .

Address for Service:—

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 8.

TRADE MARKS ACT, 1905.

[TRADE MARKS. 10s.]

FORM OF COUNTER-STATEMENT.

[*To be accompanied by an unstamped duplicate.*]

In the matter of an Opposition,
No. , to Application
No. .

I,
the applicant for the above Trade Mark, hereby give notice that the following are the grounds on which I rely as supporting my application:—

I admit the following allegations in the notice of Opposition:—

Signature

Dated this day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 9.

[TRADE MARKS. £1.]

TRADE MARKS ACT, 1905.

FORM OF APPLICATION FOR HEARING BY THE REGISTRAR IN CASES OF OPPOSITION.

SIR,

In reply to your Notice dated the giving of (a) a date on which you will hear the arguments in the case of Opposition No. to Application No. , I beg to say that I intend to appear before you on the date you have fixed, namely the day of , 19 .

(a) Here insert address.

I am,
Sir,
Your obedient Servant,

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 10.

[TRADE MARKS. £1.]

TRADE MARKS ACT, 1905.

Application is hereby made to the Board of Trade to hear the matter of the Application No. under Rule 38.

* Signature. *

Dated this day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM O No. 1.

NOTICE OF NON-COMPLETION OF REGISTRATION.

No.

The Registrar has to call your attention to Section 18 of the Trade Marks Act, 1905, and to Rule 62 of the Trade Marks Rules made thereunder. The section and the rule are printed on the back hereof.

Your application numbered as above was made on the day of 19 . Registration has not been completed by reason of your default. Unless it is completed within days from this date the application will be treated as abandoned.

Dated this day of , 19 .

To

The Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 11.

TRADE MARKS ACT, 1905.

[TRADE MARKS. Fee 5 or 5*a*.]

FEE FOR REGISTRATION OF A TRADE MARK.

SIR.

In reply to your request I hereby transmit the prescribed fee for the registration of the Trade Mark No. in Class .

I am,

Sir,

Your obedient Servant,

* • signature.

Dated the day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM O No. 2.

TRADE MARKS ACT, 1905.

CERTIFICATE OF REGISTRATION UNDER SECTION 17.

To

I hereby certify, pursuant to Rule 67 of the Rules under the above Act, that the Trade Mark in your application No. was duly advertised in the *Trade Marks Journal* and has been registered in your name in Class , in respect of the goods specified by you.

Witness my hand this day of , 19 .

(Seal of Patent Office.)

Registrar.

The Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 12.

TRADE MARKS ACT, 1905.

[TRADE MARKS. Fee 9 or 9*a*.]

RENEWAL OF REGISTRATION BEFORE NOTICE GIVEN.

I hereby leave the prescribed fee of for the renewal of the registration of the Trade Mark No. , in Class .

Dated the day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

N.B.—This Form must be indorsed with the name and address of the person leaving the same.

FORM O No. 3.

TRADE MARKS ACT, 1905.

NOTICE BEFORE REMOVAL OF TRADE MARK FROM THE REGISTER, UNDER SECTION 30.

The Registrar hereby gives you notice that in conformity with the provisions of section 30 of the above Act (printed at back hereof), your Trade Mark No. , registered in Class , will be removed from the Trade Marks Register, unless the prescribed fee of (payable by Form TM No. 13) be received at this Office *before* the day of , 19 , on which date the existing registration will expire.

A stamped Form TM No. 13, for payment of the fee, may be obtained as directed at the back of this Notice, *but cannot be obtained from this Office.*

Dated this day of , 19 .

To

The Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

Cheques, money orders, or cash cannot be accepted in payment of fees.

FORM O No. 4.

TRADE MARKS ACT, 1905.

SECOND NOTICE.

NOTICE BEFORE REMOVAL OF TRADE MARK FROM THE REGISTER, UNDER SECTION 30.

The Registrar hereby gives you notice that, in conformity with the provisions of section 30 of the above Act (printed at back hereof), your Trade Mark No. , registered in Class , will be removed from the Trade Marks Register, unless the prescribed fee of (payable by Form TM No. 13) be received at this Office *before* the day of , 19 , on which date the existing registration will expire.

If the above fee be not paid *before* the date above named, the Trade Mark will, after the end of one month from the date on which the omission to pay the fee has been advertised in the *Trade Marks Journal*, be removed from the Trade Marks Register, unless an *additional* fee of 10s. (payable by Form TM No. 14) be remitted.

Stamped Forms for payment of renewal fees may be obtained as directed at the back of this Notice, *but cannot be obtained from this Office.*

Dated this day of , 19 .

To

The Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

Cheques, money orders, or cash cannot be accepted in payment of fees.

FORM TM No. 13.

TRADE MARKS ACT, 1905. [TRADE MARKS. Fee 9 or 9*a*.]

RENEWAL OF REGISTRATION OF MARK AFTER NOTICE.

SIR,

In pursuance of the notice received from you, I hereby transmit the prescribed fee of for Renewal of Registration of the Trade Mark No. , in Class .

Dated the day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

N.B.—This Form must be indorsed with the name and address of the person transmitting the same.

FORM TM No. 14.

TRADE MARKS ACT, 1905. [TRADE MARKS. 10*s*.]

ADDITIONAL FEE OF 10s. TO ACCOMPANY RENEWAL FEE (FORM TM No. 13), WITHIN ONE MONTH AFTER ADVERTISEMENT OF NON-PAYMENT OF RENEWAL FEE.

SIR,

In pursuance of the notices issued by you, I hereby transmit the additional fee of 10*s*. (along with Form TM No. 13) for the Renewal of the Registration of the Trade Mark No. in Class .

Dated the day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

N.B.—This Form must be indorsed with the name and address of the person transmitting the same.

FORM TM No. 15.

TRADE MARKS ACT, 1905. [TRADE MARKS. £1.]

RESTORATION OF TRADE MARK WHERE REMOVED FOR NON-PAYMENT OF FEE.

[*To accompany Form TM No.* 13.]

SIR,

In pursuance of the notices issued by you, I hereby transmit the additional fee of £1 (along with Form TM No. 13) for restoration to the Trade Marks Register of the Trade Mark No. in Class .

Dated the day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

N.B.—This Form must be indorsed with the name and address of the person transmitting the same.

FORM TM No. 16.

TRADE MARKS ACT, 1905.

[TRADE MARKS. Fee 7 or 7*a*.]

JOINT REQUEST BY REGISTERED PROPRIETOR AND ASSIGNEE TO REGISTER THE ASSIGNEE AS SUBSEQUENT PROPRIETOR OF A TRADE MARK.

We, (*a*) ,
of (*b*) ,
and (*c*) ,
of (*d*) ,
hereby request, under Rule 76, that the name of (*e*) , carrying on business as (*f*) , at (*g*) , may be entered in the Register of Trade Marks as proprietor of the Trade Mark No. in Class .

(*h*)
(*i*)

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

(*a*) Name of Registered Proprietor.
(*b*) Address of Registered Proprietor.
(*c*) Name of Assignee.
(*d*) Address of Assignee.
(*e*) Name of Assignee.
(*f*) Trade or business of Assignee.
(*g*) Address of Assignee.
(*h*) Signature of Registered Proprietor.
(*i*) Signature of Assignee.

FORM TM No. 17.

TRADE MARKS ACT, 1905.

FORM OF DECLARATION ONLY TO BE FURNISHED WHEN REQUESTED BY REGISTRAR) BY ASSIGNEE IN SUPPORT OF FORM TM No. 16.

I (*a*) ,
of (*b*) ,
do hereby solemnly and sincerely declare that the Trade Mark No. in Class has been assigned to me by (*c*) together with the goodwill of the business of (*d*) concerned in the goods for which it has been registered, and that I have accepted such Assignment.

(*e*) And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act, 1835.

(*f*)

Declared at

this day of , 19 .

Before me (*g*)
(*h*)

[If the declaration be made before any authority other than a Justice of the Peace, it will require to be stamped with a 2*s*. 6*d*. impressed Inland Revenue Stamp.]

(*a*) Name of Assignee.
(*b*) Address of Assignee.
(*c*) Name of Assignor.
(*d*) Address of Assignor.
(*e*) This paragraph is not required when the declaration is made out of the United Kingdom.
(*f*) Signature of Assignee.
(*g*) Signature of Authority.
(*h*) Title of Authority.

FORM TM No. 18.

TRADE MARKS ACT, 1905.

[TRADE MARKS. Fee 7 or 7*a*.]

REQUEST TO ENTER NAME OF SUBSEQUENT PROPRIETOR OF TRADE MARK UPON THE REGISTER.

I, (*a*) . (*a*) *Or* We. Here insert name, address, and description.

hereby request that you will enter (*b*) name (*c*) in the Register of Trade Marks as proprietor of the Trade Mark No. in Class .

(*d*) entitled to the said Trade Mark and to the goodwill of the business concerned in the goods with respect to which the said Trade Mark is registered.

(*b*) My *or* our.
(*c*) *Or* names.
(*d*) I am *or* We are.

Accompanying this Request is a statement of (*e*) case.

(*e*) My *or* Our.

* Signature.

Dated this day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 19.

TRADE MARKS ACT, 1905.

FORM OF DECLARATION (ONLY TO BE FURNISHED WHEN REQUESTED BY REGISTRAR) IN SUPPORT OF STATEMENT OF CASE ACCOMPANYING FORM TM No. 18.

I, of ,
do hereby solemnly and sincerely declare that the particulars set out in the statement of case, exhibit marked and left by me in connection with my request to be registered as subsequent proprietor of the Trade Mark, No. , in Class , are true and comprise every material fact and document affecting the proprietorship of the said Trade Mark as above claimed.

(*a*) And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

(*a*) This paragraph is not required when the declaration is made out of the United Kingdom.

(*b*)

Declared at)
)
this day of , 19 .)

Before me,

(*c*)

(*b*) To be signed here by the person making the declaration.

(*c*) Signature and title of the authority before whom the declaration is made.

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

[If the declaration be made before any authority other than a Justice of the Peace it will require to be stamped with a 2*s.* 6*d.* impressed Inland Revenue Stamp.]

FORM TM No. 20.

[TRADE MARKS. Fee 12 or 12*a*.]

TRADE MARKS ACT, 1905.

NOTICE OF APPLICATION FOR ALTERATION OF ADDRESS ON REGISTER OF TRADE MARKS.

In the matter of the Trade Mark, No. registered in Class .

I , of , the registered proprietor of the Trade Mark numbered as above desire that my address on the Register of Trade Marks be altered to .

Dated this day of , 19 .

* Signature of Proprietor. *

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 21.

[TRADE MARKS. 55.]

TRADE MARKS ACT, 1905.

APPLICATION TO PERMIT AN APPORTIONMENT OF TRADE MARKS.

In the matter of the Registered Trade Marks Nos. .

We, being the parties interested within the meaning of section 23 of the Trade Marks Act, 1905, in certain marks of , who has ceased to carry on business, request you to permit an apportionment of those marks amongst the persons in fact continuing the business. With this application we send a case in pursuance of Rule 87.

(Signed) .
(Signed) .

Dated this day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 22.

[TRADE MARKS. 58.]

TRADE MARKS ACT, 1905.

FORM OF REQUEST FOR CORRECTION OF CLERICAL ERROR OR FOR PERMISSION TO AMEND APPLICATION UNDER SECTION 12 (6) OR SECTION 32 (1).

SIR,

I hereby request that

* Signature. *

Dated this day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 23.

TRADE MARKS ACT, 1905.

[TRADE MARKS. Fee 8 or 8*a*.]

REQUEST TO ENTER CHANGE OF NAME OF REGISTERED PROPRIETOR OF TRADE MARK UPON THE REGISTER.

I, (*a*) hereby request that you will enter (*b*) name (*c*) in the Register of Trade Marks as proprietor of the Trade Mark No. in Class .

(*d*) entitled to the said Trade Mark and to the goodwill of the business concerned in the goods with respect to which the said Trade Mark is registered.

There has been no change in the actual proprietorship of the said Trade Mark, but (*e*)

*

Dated this day of , 19 .

(*a*) *Or* We. Here insert name, address, and description.
(*b*) My *or* Our.
(*c*) *Or* Names.
(*d*) I am *or* We are.
(*e*) Here state the circumstances under which the change of name took place.
* Signature.

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 24.

TRADE MARKS ACT, 1905.

[TRADE MARKS. 5*s*.]

FORM OF APPLICATION BY PROPRIETOR OF REGISTERED TRADE MARK TO CANCEL ENTRY ON REGISTER.

Trade Mark No. , Class , advertised in *Trade Marks Journal*, No. , page .

Name of registered proprietor

Place of business

Description

I, the undersigned of [*or* I, the undersigned a member of the firm of of on behalf of my said firm] apply that the entry upon the Register of Trade Marks of the Trade Mark No. in Class may be cancelled.

* * Signature.

Dated this day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 25.

[TRADE MARKS 5s.]

TRADE MARKS ACT, 1905.

REQUEST TO STRIKE OUT GOODS FROM THOSE FOR WHICH A TRADE MARK IS REGISTERED.

I, of , hereby request that you will strike out from the goods for which the Trade Mark No. is registered in Class .

* Signature. *

Dated this day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 26.

[TRADE MARKS. 5s.]

TRADE MARKS ACT, 1905.

REQUEST TO ENTER DISCLAIMER OR MEMORANDUM RELATING TO A TRADE MARK.

I, , of , hereby request that you will enter in the Register in connection with Trade Mark No. , in Class , the following , namely—

* Signature. *

Dated this day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 27.

[TRADE MARKS. Fee 2*3* or 23*a*.]

TRADE MARKS ACT, 1905.

APPLICATION UNDER SECTION 34 TO ADD TO OR ALTER A TRADE MARK.

In the matter of the Trade Mark No. , in Class .

Application is hereby made on behalf of the registered proprietor of the Trade Mark numbered as above to alter it in the following particulars, that is to say—

(Here fill in full particulars.)

Six copies of the mark as it will appear when so altered are filed herewith.

Signed .

Dated this day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 28.

TRADE MARKS ACT, 1905.

[TRADE MARKS. 10s.]

REQUEST FOR SEARCH UNDER RULE 95.

You are hereby requested to search under Rule 95 in Class to ascertain whether any Trade Marks are on record which resemble the Trade Mark sent herewith in duplicate each mounted on a half-sheet of foolscap.

* Signature.
† Address.

*
†

Dated this day of , 19 .

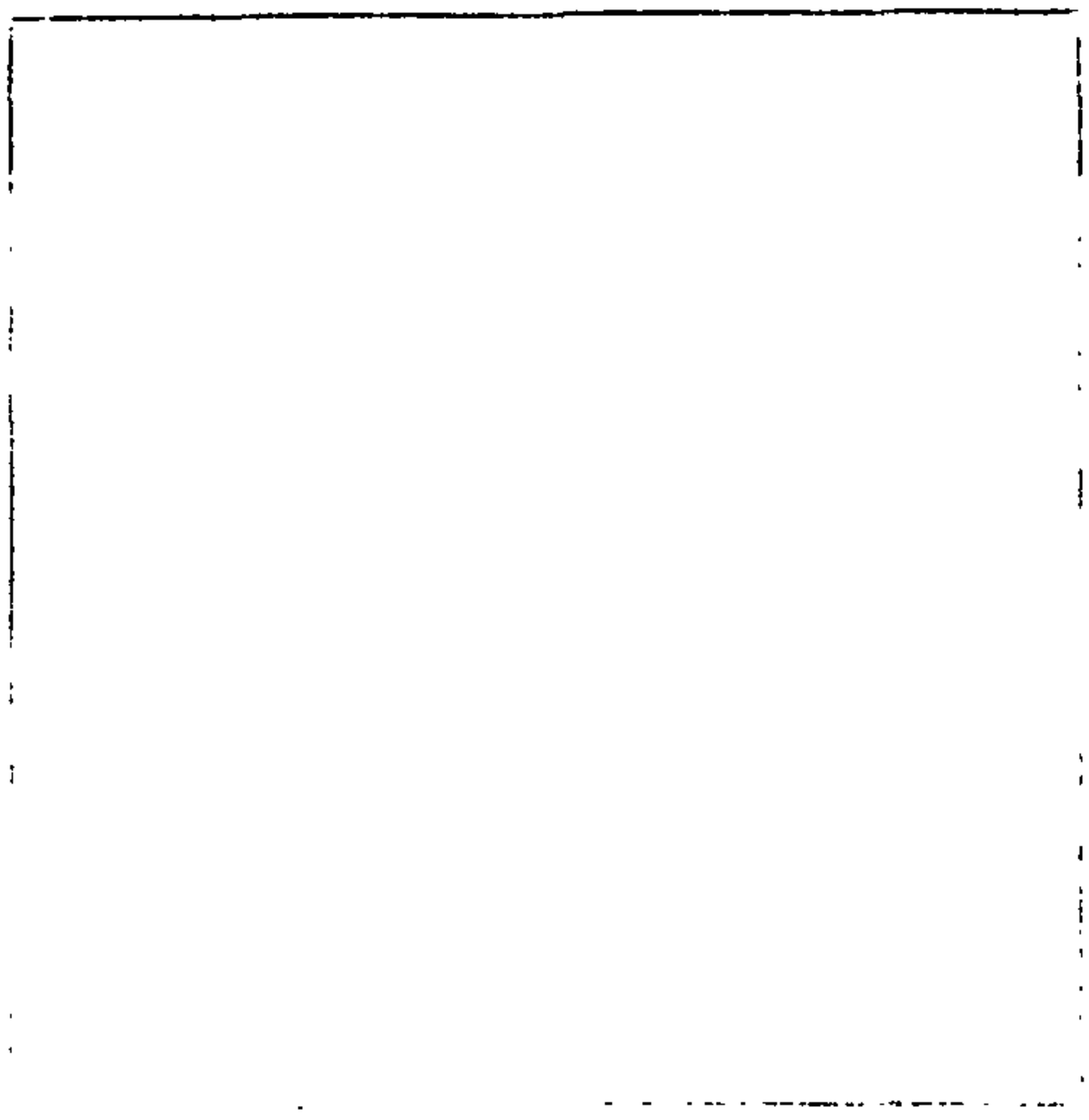
To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM SHEFFIELD No. 1.

TRADE MARKS ACT, 1905.

[CORPORATE MARK. £5.]

REQUEST TO ENTER A MARK UNDER SECTION 63, SUB-SECTION (2).



You are hereby requested to register the accompanying Old Corporate Mark in Class in respect of in the name of , who claims to be the proprietor thereof.

(Signed)

Dated this day of , 19 .

To the Cutlers' Company,
Cutlers' Hall,
Sheffield.

COTTON No. 1.

[STAMP. 10*s.*]

TRADE MARKS ACT, 1905.

COTTON MARKS.

APPLICATION FOR REGISTRATION OF TRADE MARK.

(See the annexed Extracts from the Trade Marks Act.)

(To be accompanied by an unstamped duplicate of this Form, and also by four Additional Representations on Form Cotton No. 2.)

One representation to be affixed within the square.

Representations of a larger size may be folded, but must then be mounted upon cloth and affixed hereto

(*a*) Insert the class.

(*b*) Insert "all goods included in this class" or, if it is not desired that the registration should cover the whole class, the description of the goods.

Only goods contained in one and the same class may be set out here. A separate application form is required for each separate class.

(*c*) If the applicant is outside the U.K. an address for service in the U.K. must be given before the application can be proceeded with

(*d*) Strike out the alternative paragraph which does not apply to the case.

Application is hereby made for registration of the accompanying Trade Mark in Class (*a*) .

in respect of (*b*) , in the Name of .

Address and description (*c*) ,

Trading as , who claim to be the proprietor thereof.

No claim of exclusive right is made to any of the letterpress appearing on the said Trade Mark, except in so far as it consists of the applicant's own name and address, or the foreign equivalent thereof.

The said Trade Mark has not hitherto been used by the applicant upon or in connection with the above-mentioned goods, but is proposed to be so used [*or* (*d*) The said Trade Mark has been used by the applicant (and/or by the predecessors in business of the applicant) upon or in connection with the above-mentioned goods since the , 19].

(Signed) .

Dated the day of , 19 .

To the Keeper of Cotton Marks,
Manchester Branch of the Trade Marks Registry,
48, *Royal Exchange, Manchester.*

COTTON No. 2.

TRADE MARKS ACT, 1905.

COTTON MARKS.

ADDITIONAL REPRESENTATION OF TRADE MARK TO ACCOMPANY APPLICATION FOR REGISTRATION.

One representation of the Trade Mark to be affixed within this square.

It must correspond *exactly*, in all respects, with the representation affixed to the application on "Form Cotton No. 1."

Any representation of a larger size than foolscap may be folded, but must then be mounted upon cloth and affixed hereto.

Class .

Description of Goods .

Length of User (if any) .

Name of Applicant .

Address .

Description .

No claim of exclusive right is made to any of the letterpress appearing on the mark except in so far as it consists of the applicant's own name and address, or the foreign equivalent thereof.

Four of these additional representations of the Trade Mark must accompany *each* form of application.

COTTON No. 3.

[STAMP. 5s.]

TRADE MARKS ACT, 1905.

COTTON MARKS.

REQUEST FOR CERTIFICATE UNDER SUB-SECTION (12) OF SECTION 64.

SIR,

You are hereby requested to issue a certified copy of the application numbered and dated the day of , 19 , for registration in Class of the Cotton Mark of which a fac-simile is sent herewith, setting forth in such certificate the length of time of user (if any) of such mark as stated on the application, and any other particulars you may deem necessary.

Dated this day of , 19 .

(Signed)

Address

To the Keeper of Cotton Marks,
Manchester Branch of the Trade Marks Registry,
48, *Royal Exchange, Manchester.*

COTTON No. 4.

[STAMP. 5s.]

TRADE MARKS ACT, 1905.

COTTON MARKS.

REQUEST FOR CERTIFICATE OF KEEPER OF COTTON MARKS AS TO A TRADE MARK ENTERED IN THE MANCHESTER REGISTER.

In the matter of the Trade Mark No. in Class .

SIR,

I hereby request you to furnish me with your Certificate of Registration of the mark numbered as above for use*

Dated this day of , 19 .

(Signed)

Address

* Here state the purpose for which the certificate is required, *i.e.*, whether for use in legal proceedings, or for obtaining registration abroad, or for what other purpose.

To the Keeper of Cotton Marks,
Manchester Branch of the Trade Marks Registry,
48, *Royal Exchange, Manchester.*

MB No. 1.

TRADE MARKS ACT, 1905.

Cotton Marks.

Certificate under Sub-Section (12) of Section 64.

Manchester Branch of the Trade Marks Registry,
48, Royal Exchange,
Manchester.

It is hereby certified by the Keeper of Cotton Marks, that a true copy of the application numbered and dated the day of , 19 , for registration in Class of the Cotton Mark therein referred to is contained in the paper hereto annexed and that a fac-simile of the said mark is attached thereto, and that the length of time of user of such mark as stated on the application is

and

Space for any other particulars the Keeper may deem necessary.

that the said mark is on deposit at this office.

Witness my hand this day of , 19 .

(Seal of Patent Office.)

Keeper of Cotton Marks.

MB No. 2.

TRADE MARKS ACT, 1905.

Cotton Marks.

General Certificate.

Manchester Branch of the Trade Marks Registry,
48, Royal Exchange,
Manchester.

It is hereby certified by the Keeper of Cotton Marks that

Representation of Trade Mark.

Witness my hand this day of , 19 .

(Seal of Patent Office.)

Keeper of Cotton Marks.

FORM TM No. 29.

[TRADE MARKS. £1.]

TRADE MARKS ACT, 1905.

FORM OF APPEAL FROM THE REGISTRAR TO THE BOARD OF TRADE.

I, (a) ,
of (a) ,
hereby give notice of my intention to appeal to the Board of Trade
from (b) ,
of the registrar of the day of , 19 ,
whereby he (c)

(a) Here insert full name and address of appellant.

(b) Here insert "the decision" or "that part of the decision" as the case may be.

(c) Here insert the decision complained of.

Accompanying this notice is a statement of my case for the decision of the Board of Trade.

(Signed)

Dated this day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.
and to
[Name of Opponent, if any].

FORM TM No. 30.

[TRADE MARKS. 10s.]

TRADE MARKS ACT, 1905.

NOTICE OF ORDER OF COURT FOR ALTERATION OR RECTIFICATION OF REGISTER OF TRADE MARKS.

In the matter of the Trade Mark,
No. , registered
in Class in the name
of

SIR,

Notice is hereby given that by an order of the Court made on the day of , 19 , it was directed that

An office copy of the order of the Court is enclosed herewith.

Dated this day of , 19 .

*

* To be signed by the person interested or his agent.

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 31.

TRADE MARKS ACT, 1905.

[TRADE MARKS. £1.]

REQUEST FOR GENERAL CERTIFICATE OF REGISTRAR (OTHER THAN CERTIFICATE FOR USE IN LEGAL PROCEEDINGS OR FOR USE IN OBTAINING REGISTRATION ABROAD).

In the Matter of the Trade Mark No.
in Class .

SIR,

I,
of
hereby request you to furnish me with your Certificate that (a)

(b)

Dated this day of , 19 .

(a) Here set out the particulars which the registrar is requested to certify.

(b) Signature.

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 32.

TRADE MARKS ACT, 1905.

[TRADE MARKS. £1.]

REQUEST FOR CERTIFICATE OF REFUSAL TO REGISTER A TRADE MARK.

In the matter of an Application for registration of a Trade Mark, No. in Class .

SIR,

I,
of
the Applicant in the above matter, hereby request you to furnish me with your Certificate of Refusal to register the said Trade Mark.

*

Dated this day of , 19 .

* Signature of applicant.

To the Registrar,
Patent Office, Trade Marks Branch,
25, Southampton Buildings, Chancery Lane, London, W.C.

FORM TM No. 33.

[TRADE MARKS. Fee 18 or 18*a*.]

TRADE MARKS ACT, 1905.

REQUEST FOR CERTIFICATE OF REGISTRATION OF TRADE MARK FOR USE IN OBTAINING REGISTRATION ABROAD.

In the matter of the Trade Mark,
No. , registered
in Class in the name
of .

SIR,

I, , of , the registered proprietor of the above Trade Mark hereby request you to furnish me with your Certificate of Registration for use in obtaining registration of the same in* .

* Here state name of country in which registration is to be sought.

†

+ Signature.

Dated this day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, *Southampton Buildings, Chancery Lane, London, W.C.*

FORM TM No. 34.

[TRADE MARKS. £1.]

TRADE MARKS ACT, 1905.

REQUEST FOR CERTIFICATE OF REGISTRATION OF TRADE MARK TO BE USED IN LEGAL PROCEEDINGS.

In the matter of the Trade Mark,
No. , registered
in Class in the name
of .

SIR,

I, , of , the registered proprietor of the above Trade Mark, hereby request you to furnish me with your Certificate of Registration to be used in legal proceedings.

*

* Signature.

Dated this day of , 19 .

To the Registrar,
Patent Office, Trade Marks Branch,
25, *Southampton Buildings, Chancery Lane, London, W.C.*

Dated this 24th day of March, 1906.

(Sd.) *D. Lloyd-George,*
President of the Board of Trade.

THIRD 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. Alkalis. Artists' colours. Pigments. Mineral dyes.
Class 2.	
Chemical substances used for agricultural, horticultural, veterinary, and sanitary purposes.	Such as— Artificial manure. Cattle medicines. Deodorisers. Vermin destroyers.
Class 3.	
Chemical substances prepared for use in medicine and pharmacy.	Such as— Cod liver oil. Medicated articles. Patent medicines. Plasters. Rhubarb.
Class 4.	
Raw or partly prepared vegetable, animal, and mineral substances used in manufactures, not included in other classes.	Such as— Resins. Oils used in manufactures and not included in other classes. Dyes, other than mineral. Tanning substances. Fibrous substances (*e.g.*, cotton, hemp, flax, jute). Wool. Silk. Bristles. Hair. Feathers. Cork. Seeds. Coal. Coke. Bone. Sponge.

Class 5.

Unwrought and partly wrought metals used in manufacture.	Such as— Iron and steel, pig or cast. Iron, rough. ,, bar and rail, including rails for railways. ,, bolt and rod. ,, sheet, and boiler and arm. our plates. ,, hoop. Lead, pig. ,, rolled. ,, sheet. Wire. Copper. Zinc. Gold, in ingots.

Class 6.

Machinery of all kinds, and parts of machinery, except agricultural and horticultural 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.	Such as— Ploughs. Drilling machines. Reaping machines. Thrashing machines. Churns. Cyder presses. Chaff cutters.

Class 8.

Philosophical instruments, scientific instruments, and apparatus for useful purposes. Instruments and apparatus for teaching.	Such as— Mathematical instruments. Gauges. Logs. Spectacles. Educational appliances.

Class 9.

Musical instruments.

Class 10.

Horological instruments.

Class 11.

Instruments, apparatus, and contrivances, not medicated, for surgical or curative purposes, or in relation to the health of men or animals.	Such as— Bandages. Friction gloves. Lancets. Fleams. Enemas.

Class 12.

Cutlery and edge tools.	Such as— Knives. Forks. Scissors. Shears. Files. Saws.

Class 13.

Metal goods not included in other classes.	Such as— Anvils. Keys. Basins (metal). Needles. Hoes. Shovels. Corkscrews.

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. Sheffield and other plated goods. Gilt and ormolu work.

Class 15.

Glass.	Such as— Window and plate glass. Painted glass. Glass mosaic. Glass beads.

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. Asphalt.
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.
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. Bicycles. Bath chairs.

Class 23.

(*a*) Cotton yarn.
(*b*) Sewing cotton.

Class 24.

Cotton piece goods of all kinds.	Such as— Cotton shirtings. Long cloth.

Class 25.

Cotton goods not included in Classes 23, 24, or 38.	Such as— Cotton lace. Cotton braids. Cotton tapes.

Class 26.

Linen and hemp yarn and thread.

Class 27.

Linen and hemp piece goods.

Class 28.

Linen and hemp goods not included in Classes 26, 27 and 50.

Class 29.

Jute yarns and tissues, and other articles made of jute not included in Class 50.

Class 30.

Silk, spun, thrown, or sowing.

Class 31.

Silk piece goods.

Class 32.

Other silk goods not included in Classes 30 and 31.	

Class 33.

Yarns of wool, worsted, or hair.	

Class 34.

Cloths and stuffs of wool, worsted, or hair.	

Class 35.

Woollen and worsted and hair goods not included in Classes 33 and 34.	

Class 36.

Carpets, floor-cloth, and oil-cloth.	Such as— Drugget. Mats and matting. Rugs.

Class 37.

Leather, skins unwrought and wrought, and articles made of leather not included in other classes.	Such as— Saddlery. Harness. Whips. Portmanteaus. Furs.

Class 38.

Articles of clothing.	Such as— Hats of all kinds. Caps and bonnets. Hosiery. Gloves. Boots and shoes. Other ready-made clothing.

Class 39.

Paper (except paperhangings), stationery, and bookbinding.	Such as— Envelopes. Sealing wax. Pens (except gold pens). Ink. Playing cards. Blotting cases. Copying presses.

Class 40.	
Goods manufactured from india-rubber 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. 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 and sporting articles not included in other classes.	Such as— Billiard tables. Roller skates. Fishing nets and lines. Toys.

Class 50.

Miscellaneous— (1.) Goods manufactured from ivory, bone or wood, not included in other classes. (2.) Goods manufactured from straw or grass, not included in other classes. (3.) Goods manufactured from animal and vegetable substances, not included in other classes. (4.) Tobacco pipes. (5.) Umbrellas, walking sticks, brushes and combs. (6.) Furniture cream, plate powder. (7.) Tarpaulins, tents, rick-cloths, rope, twine. (8.) Buttons of all kinds other than of precious metal or imitations thereof. (9.) Packing and hose of all kinds. (10.) Goods not included in the foregoing classes.	Such as— Coopers' wares.

Dated this 24th day of March, 1906.

(Sd.) D. Lloyd-George,
President of the Board of Trade.

GUIDE TO THE CLASSIFICATION OF GOODS UNDER THE TRADE MARKS ACT, 1905.

Printed by Order of the Registrar.
1909.

CLASSES OF GOODS.

(*See Third Schedule to Rules, ante.*)

The numbers in the following list refer to the Class in which the particular goods named have been placed for the purpose of Trade Marks Registration.

If any person intending to apply for registration of a trade mark is, on examining the following enumeration of goods, uncertain as to the Class to which his goods belong, he should send to the Registrar a letter addressed—

The Registrar,
The Patent Office, Trade Marks Branch,
25, Southampton Buildings,
Chancery Lane,
London, W.C.

giving a full description of the goods and of the purposes for which they are used. He will then be informed by the Registrar what Class he should name in his application.

N.B.—For *metal* read *metal other than precious metal or imitation of precious metal.*

For *precious metal* read *precious metal or imitation of precious metal.*

For *machinery* read *machinery except agricultural and horticultural machinery.*

Abdominal supporters. 11.
Abrasive preparations for polishing and grinding. 50.
Absinthe. 43.
Accordions. 9.
Account books. 39.
Accumulators, Electric (for medical purposes). 11.
——————— (not for medical purposes). 8.
Acetylene gas. 1.
———————, Carbide of calcium for producing. 1.
———————, Chemical mixture for purifying. 1.
Acid, Carbolic (prepared for sanitary purposes). 2.
——, Tartaric (for use as an ingredient in food). 42.

Acids for use in manufactures, photography or philosophical research. 1.
—— prepared for use in medicine and pharmacy. 3.
Acoustical tubes for the deaf. 11.
Actinometers. 8.
Actions, Gun and rifle. 19.
——, Pianoforte. 9.
Adding machines. 8.
Adhesives (mucilage, paste, gum, labelling solution) prepared as articles of stationery. 39.
——— (made of gutta-percha for tailors' use). 40.
——— (for celluloid, for leather, for mending broken articles, for tipping billiard cues). 50.
Adzes. 12.
Aerated beverages (not alcoholic, not medicinal). 44.
——— waters (natural and artificial, including ginger beer). 44.
Aerometers. 8.
Aeroplanes. 6.
Agricultural and horticultural implements of the larger kind. 7.
——————————— implements of the smaller kind (metal), without a cutting edge. 13.
——————————— implements of the smaller kind (metal), with a cutting edge. 12.
——————————— machinery and parts thereof. 7.
Agriculture, Chemical substances used in. 2.
Ague pads (not medicated). 11.
Air beds, cushions and pillows (india-rubber or gutta-percha). 40.
— bricks (metal). 13.
— compressing engines. 6.
— guns. 19.
Air-pumps (for steam-engines, and for supplying air). 6.
——— (philosophical). 8.
Air saddles for bicycles (india-rubber). 40.
— tubes of india-rubber for tyres. 40.
Alarms, Electric and pneumatic (as systems in buildings). 18.
Albumen prepared for use in medicine and pharmacy. 3.
Albumenized paper. 39.
Albums. 39.
Alcoholic beverages. 43.
Alcoholometers. 8.
Ale, Ginger (an aerated water). 44.
Ales. 43.
Alizarine (artificial). 1.
Alkalies used in manufactures, photography or philosophical research. 1.
——— used for agricultural, horticultural and veterinary purposes. 2.
Alkalies prepared for use in pharmacy. 3.
Alloys, Metallic (unwrought or partly wrought). 5.
Almanacs. 39.
Alpaca (in the piece). 34.
Aluminium wares. 14.
Amalgams, Dental (containing no precious metal). 11.
——————————— (of precious metal). 14.
Amber. 4.
——— beads and mouthpieces. 50.
Ambulance cases containing surgical appliances. 11.
Ambulances. 22.
Ammeters. 8.
Ammonia for use as a detergent. 47.
Ammunition (explosive). 20.
——————— (not explosive). 19.
Ampere meters. 8.
Anaesthetics for human use 3.
Anchors. 21.
Anemometers. 8.
Angle iron. 5.
Aniline dyes (mineral). 1.
——— ——— (not mineral). 4.
Animal oils used in manufactures and not included in other classes. 4.
——— substances (raw or partly prepared) used in manufactures and not included in other classes. 4.
Animals, Chemical preparations for destroying noxious. 2.
——— (stuffed). 50.
Animated pictures, Apparatus for shewing. 8.
Anklets for curative purposes (not of precious metal). 11.
Annatto for use as an ingredient in food. 42.
Annealing metals, Preparations for. 1.
Anthracene dyes. 1.
Anti-asthmatic cigarettes (not containing tobacco). 3.
——————— paper. 3.
Anti-corrosives. 1.
Anti-ferment for liquors. 42.
Anti-friction grease. 47.
Anti-incrustation composition. 1.
Antimacassars (cotton). 25.
——————— (linen). 28.
——————— (silk). 32.
——————— (woollen). 35.
Anti-rheumatic rings, anklets and bracelets (not of precious metal). 11.
—— (of precious metal). 14.
Anvils. 13.
Apparel, Wearing. 38.
Aprons (wearing apparel). 38.
———, Carriage (wholly or principally of india-rubber). 40.
——— for machinery (cotton). 25.

Aprons for machinery (india-rubber or gutta-percha). 40.
Archery, Implements for. 49.
Architectural contrivances. 18.
Arithmometers. 8.
Armour plates. 5.
Arms (in the nature of weapons). 19.
Arrowroot (for food). 42.
Arsenic salts used in manufactures. 1.
Artists' brushes and canvas. 39.
—— colours. 1.
—— materials (except colours and the like). 39.
Asbestos. 4.
—— cement sheets and plates for building. 17.
—— high-pressure packing, rope, yarn. 50.
—— paint. 1.
—— prepared for preventing the radiation of heat. 1.
——prepared for use in stoves. 50.
Ash, Soda. 1.
—, Volcanic, raw or partly prepared for use in manufactures. 4.
Ash-pans, Metal. 13.
Asphalt. Paving made from. 17.
Asphaltum. 4.
Atomizers (architectural and building contrivances). 18.
—— for agricultural and horticultural purposes. 7.
—— for surgical and curative purposes. 11.
Attachments or fastenings of metal for neckties, scarves, and similar articles. 13.
Augers. 12.
Automatic apparatus for detecting bad coins; for lighting and regulating gas. 8.
—— coin-freed delivery machines. 6.
—— fire extinguishers (as systems in buildings). 18.
—— musical instruments. 9.
Awls. 13.
Awnings. 50.
Axes. 12.
Axle caps for carts. 13.
Axles and axle plates, Grinders'. 13.
—— for machines. 6.
—— (metal) for railway wagons and common roads. 13.
—— (wood). 50.
Azimuth instruments. 8.

Babbitt metal. 5.
Baby carriages. 22.
—— clothing. 38.
—— jumpers. 41.
—— soothers. 11.
Back protectors. 11.
Bacon. 42.
Bactericides. 2.
Badges (metal). 13.
—— (precious metal). 14.
—— (textile), as small wares according to the class of material.
Bags, Cricket; Golf. 49.
——, Hand or Travelling (leather). 37.
—— (india-rubber) not for surgical or curative purposes. 40.
——, Paper. 39.
—— (of textile materials). 50.
Bait, Anglers' wheaten. 42.
—— (artificial). 49.
Baize (woollen). 34.
——, Table, being an oil-cloth. 36.
Baking apparatus. 18.
—— dishes (metal). 13.
—— powder. 42.
Balances (except Letter balances). 6.
——, Letter. 39.
Balata goods, not included in other classes. 40.
Bale studs (metal). 13.
Balls for ball bearings. 13.
—— games. 49.
Balsam for toilet purposes. 48.
—— use in pharmacy. 3.
—— veterinary use. 2.
Balusters (metal). 13.
Bandages (medical and surgical). 11.
Bandboxes. 50.
Bands and belts for wear. 38.
——, Elastic (stationery). 39.
—— for tyres (leather). 37.
—— (india-rubber). 40.
——, Galvanic. 11.
——, Hat, as small wares according to the class of the material.
——, Machine driving (cotton). 25.
—— —— (flax or hemp). 28.
—— —— (hair). 35.
—— —— (india-rubber, gutta-percha or balata). 40.
—— —— (leather). 37.
——, Picking (leather). 37.
Bangles (precious metal). 14.
Banjoes. 9.
Barbed wire fencing. 13.
Bar bells. 49.
Barges. 21.
Bark, Extract of (for tanning purposes). 4.
Barks for use in medicine and pharmacy. 3.
Barometers. 8.
Barrels (rifle and pistol). 19.
—— (wood). 50.
Bars, Furnace. 13.
Basic slag for use as a manure. 2.
Basil leather. 37.
Basins (metal). 13.
—— (pottery ware). 16.

Basket furniture, Articles of. 41.
Baskets (metal). 13.
——— (not of metal). 50.
——— fitted for luncheons. 50.
Bassinette perambulators. 22.
Bassinettes. 41.
Bate for tanning purposes. 4.
Bath brick for polishing. 50.
—— cabinets, Portable Turkish. 11.
—— chairs. 22.
—— gloves. 11.
—— mineral waters. 44.
—— salts (for toilet purposes). 48.
———— (medicated). 3.
—— stone in blocks. 4.
Bathing sabots or slippers. 38.
Baths and trays for copying, being articles of stationery. 39.
—— (fireclay, earthenware or porcelain). 16.
—— (india-rubber or gutta-percha). 40.
—— (metal). 13.
Battens (wood). 50.
Batteries, Electric (medical). 11.
———————— (not for medical purposes). 8.
Batting gloves. 49.
Bats for games. 49.
Bay-leaf water and bay rum. 48.
Bayonets. 19.
Beads (glass). 15.
—— (ivory, wood, bone, horn, vegetable ivory, jet, mother of pearl or amber). 50.
—— (metal). 13.
—— (precious metal). 14.
Beams, being parts of machinery. 6.
——— (metal), not being parts of machinery. 13.
———, Plough. 7.
——— (wood). 50.
Bearings, being parts of machinery. 6.
———— (metal), not being parts of machinery. 13.
Bed-coverlets (textile). as small wares according to the class of the material.
Bed quilts, Down, as small wares according to the class of the covering material.
Bed rests and tables. 41.
Bedding, not being bed clothing. 41.
Beds, Air and Water (india-rubber or gutta-percha). 40.
——, Feather. 41.
Bedsteads. 41.
Beef, Essence of. 42.
Bechives. 7.
———, Comb foundations for; Wooden sections for. 50.
Beer. 43.
—— engines. 6.
——, Ginger. 44.
—— preservatives and finings. 42.
Beeswax for use in manufactures. 4.
Bellows. 50.
Bell systems, Electric and Pneumatic. 18.
Bells. 13.
——, Dumb and Bar. 49.
Belt clasps (jet or imitation jet, horn, or celluloid). 50.
———————— (metal). 13.
———————— (precious metal). 14.
—— composition. 50.
—— fasteners (metal). 13.
Belts, Cartridge and Shot. 19.
—— Electric (being for medical purposes). 11.
—— for wear. 38.
——, Medical and Surgical. 11.
——, Swimming and Life. 21.
Belting, Machine (cotton). 25.
———————— (flax or hemp). 28.
———————————— (hair). 35.
———————————— (leather). 37.
———————————— (india-rubber, gutta-percha, or balata). 40.
Bench screws (metal). 13.
———————— (wood). 50.
Benzine for motors. 47.
Benzolino. 47.
Berlin black for stoves and grates. 50.
——— wool. 33.
Bessemer steel plates. 5.
——— tuyeres (earthenware or porcelain). 16.
Bevels, Workmen's (metal). 13.
———————— (wood). 50.
Beverages, Aerated (not alcoholic and not medicated). 44.
———, Alcoholic. 43.
———, Medicated. 3.
——— (not alcoholic, not medicated, and not aerated). 42.
———, Preparations for. 42.
Bezique markers. 49.
Bicycles. 22.
Billets (steel). 5.
Bill files. 39.
—— hooks. 12.
Billiard balls, cues, markers, and tables. 49.
——— chalk (prepared). 50.
——— table cushions (india-rubber). 40.
Billing machines (in the nature of typewriting machines). 39.
Bills with a cutting edge. 12.
—— without a cutting edge. 13.
Binder belts. 11.
Binders, Sheaf. 7.
Binding (cotton). 25.
——— (linen). 28.
———— (silk). 32.
——— (woollen, worsted, and hair). 35.
———, Cases for book-. 39.
Binocular glasses. 8.

Bins, Cabinet wine. 41.
——, Corn and Wine (metal). 13.
Bird cages (wood). 50.
——— (metal or wood and metal combined). 13.
—— food. 42.
—— lime, bird medicine. 2.
Birds, Stuffed. 50.
Biscuits. 42.
———, Dog. 42.
Bits, Horses'. 13.
—— (cutting). 12.
Bitters (alcoholic). 43.
———, Aerated (not alcoholic and not medicinal). 44.
Bitumastic roofing material, 50.
Bitumen, raw or partly prepared for use in manufactures. 4.
——— sheeting for roofing and similar purposes. 50.
Blacking, Foundry. 4.
——— for leather and harness. 50.
Black-lead (for polishing). 50.
——— points for pencils. 39.
Black oil for harness. 50.
—— plates and taggers. 5.
—— varnish. 1.
Bladders, Football (india-rubber). 40.
Blades, Sword; Saw. 12.
Blancmange powder. 42.
Blankets in the piece (cotton). 24.
——— ——— (woollen). 34.
——— not in the piece (cotton). 25.
——— ——— (woollen). 35.
——— Printers' cotton. 25.
Blanks, Key. 13.
Blasting compounds. 20.
Bleaching powder. 47.
Blending glasses (graduated). 8.
Blinds (metal). 13.
—— (paper). 39.
—— (textile) as small wares in the class of the material.
———, Venetian (wood). 50.
Blisters for human use. 3.
——— horses and cattle. 2.
Blocks, Printers' (metal). 13.
——— (wood). 50.
Blotting cases. 39.
Blouses. 38.
Blow lamps for burning off and brazing. 18.
Blowing engines and machine blowers. 6.
Blue, Laundry. 47.
Boards (composition or wood). 50.
Boas. 38.
Boat chocks (wood). 50.
—— covers. 50.
—— hooks and boat lowering gear. 21.
Boats. 21.
Bobbins (parts of machines). 6.
—— (wood). 50.
Bodice steels. 13.
——— stiffeners (featherbone, whalebone). 50.
Bodkins. 13.
Boiled oil. 4.
Boiler composition to prevent radiation of heat. 1.
—— plates. 5.
—— rivets. 13.
—— scale, Preparations for the prevention or removal of. 1.
—— tubes. 6.
Boilers, Steam, for agricultural purposes. 7.
———, not for agricultural purposes. 6.
——— (stove). 18.
Bolt iron. 5.
Bolts and nuts. 13.
—— for doors. 13.
Bonbons. 42.
Bone. 4.
—— manure. 2.
—— mills (portable). 7.
Bonnet boxes (wood or cardboard). 50.
Bonnets. 38.
Bookbinders' blocking varnish. 1.
Bookbinding. 39.
Bookbinding cloth (specially prepared). 39.
Book cases. 41.
—— markers (silk). 32.
—— slides and rests. 39.
Books. 39.
Boot and shoe linings (linen), in the piece. 27.
——— protectors (metal). 13.
——— socks. 38.
——— varnish and polish; stretchers (wood); trees (wood); heels (wood). 50.
—— top powder. 50.
—— uppers (leather). 37.
Boots. 38.
Borderings, as small wares, according to the class of the material.
Boring machines. 6.
Bottle envelopes (corrugated paper). 39.
——— (grass, straw, or wood). 50.
—— filling, stoppering, and washing machines. 6.
—— stoppers (earthenware). 16.
——— (glass). 15.
——— (india-rubber). 40.
——— (vulcanized fibre). 50.
Bottles (except feeding bottles or bottles mounted in precious metal) in the class of the substance of which they are made.
———, Feeding. 50.
——— mounted in precious metal. 14.
Bottling gloves. 38.
——— trays (wood). 50.

Bottling wax. 39.
Bougies. 11.
Bouquets of cut flowers. 46.
Bowls, Hand (earthenware). 16.
——— ——— (metal). 13.
———, Playing. 49.
Bows for archery. 49.
——— musical instruments. 9.
——— wear. 38.
Box irons for laundry use. 13.
Boxes, Despatch. 39.
——— (earthenware junction) for electric cables. 16.
——— (india-rubber). 40.
——— (leather). 47.
——— (metal). 13.
———, Musical. 9.
——— (wood, ivory, wicker-work, bone, straw, pasteboard or cardboard). 50.
Boxing gloves. 49.
Brace bits. 12.
Brace girths (leather). 37.
Bracelets (precious metal). 14.
——— for curative purposes (not being of precious metal). 11.
Braces, Drill. 13.
——— for wear. 38.
———, Ratchet and crank. 13.
Brackets (metal). 13.
——— (wood). 50.
Bradawls. 13.
Brads. 13.
Braid (cotton). 25.
—— (gold and silver). 14.
—— (linen and hemp). 28.
—— (silk). 32.
—— (straw and chip). 50.
—— (woollen, worsted, mohair, alpaca). 35.
Brake blocks (india-rubber). 40.
——— (vulcanized fibre). 50.
Brakes, being agricultural or horticultural machinery, or parts of such machinery. 7.
——— machinery or parts of machinery, other than agricultural or horticultural machinery. 6.
——— metal goods not included in Classes 6 and 7. 13.
Branding irons. 13.
——— stoves. 18.
Brandy. 43.
Brass polish. 50.
—— sheets and wire. 5.
Brasses, Memorial. 13.
Brattice cloth. 50.
Brawn. 42.
Brazing fluxes. 1.
——— furnaces. 18.
Bread. 42.
—— platters (wood). 50.
Breaking machines (agricultural and horticultural. 7.
Breaking machines (other than agricultural and horticultural). 6.
Breast-exhausters. 11.
Breasts, Plough. 7.
Brecches paste. 50.
Breeze. 4.
Brewing sugar. 42.
Brick presses. 6.
Bricks. 16.
——— (metal). 13.
———, Toy. 49.
Bridges (iron). 18.
——— (wood) for stringed instruments. 50.
Bridles. 37.
Brimstone roll. 1.
Briquettes, Artificial fuel. 50.
Bristles. 4.
Britannia metal wares. 14.
Broad cloths. 34.
Brocade powder. 1.
Bronze, Articles of. 14.
——— powder. 1.
——— (ingot and wire). 5.
Brooches (ivory, jet, wood, bone, horn, or mother of pearl). 50.
——— (precious metal). 14.
Brooders for rearing poultry, 50.
Brooms. 50.
Bruising machines (agricultural). 7.
Brunswick black. 1.
Brushes, Artists'. 39.
———, Dynamo. 6.
———, except artists' brushes and brushes of metal. 50.
———, Gilders'. 50.
———, Wire. 13.
Buckets (leather). 37.
——— (metal). 13.
——— (wood). 50.
Buckles (metal). 13.
——— (precious metal). 14.
Buffalo hides. 37.
Buffers (india-rubber). 40.
——— (metal) not being parts of machinery. 13.
Building blocks, Toy. 49.
Buildings, Portable. 18.
Bulbs, Glass. 15.
——, Horticultural. 46.
Bullet moulds and bullets. 19.
Bullion fringe (gold and silver). 14.
Bung bushes (metal). 13.
Bunting, Flags of. 35.
Buoys, Life. 21.
Burners, Gas, Lamp and Stove (metal). 13.
Burnishing ink for boots. 50.
Burrs, Fire (of clay). 16.
Bushes, being metal goods not included in other classes. 13.
——— (parts of machinery). 6.
Busks (metal). 13.

Busts (papier mâché) for tailors and dressmakers. 50.
Butter. 42.
—— colouring. 42.
—— coolers (wood). 50.
—— working machines. 7.
Button hooks and fastening devices (metal). 13.
Buttons of all kinds (other than of precious metal or imitations thereof). 50.
—— (precious metal). 14.
——, Press (being metal dress fasteners and not being ordinary buttons). 13.
Butts (leather). 37.
— (metal). 13.

Cabinet furniture. 41.
Cabinets, Filing (in the nature of furniture). 41.
——, Portable Turkish bath. 11.
Cables, Electric. 8.
——, Ships' chain. 21.
Cachous (confectionery). 42.
Cabs. 22.
Caddies (wood). 50.
Cages, Bird (wood). 50.
—— (metal or metal and wood combined). 13.
Cake crushers. 7.
— for feeding cattle. 42.
Cakes. 42.
Calcareous cements for building. 17.
Calculating machines. 8.
Calendars. 39.
Calf skins. 37.
Calico (in the piece,. 24.
Callipers. 8.
Calomel, prepared for use in medicine and pharmacy. 3.
Cambooses. 18.
Cambric in the piece (cotton). 24.
—— —— (linen). 27.
—— smallwares (cotton). 25.
—— —— (linen). 28.
Camera stands (wood). 50.
Cameras, Photographic. 8.
Camp ovens. 18.
Camphor prepared for use in pharmacy. 3.
Camphorated chalk for toilet purposes. 48.
Canada plates. 5.
Candles. 47.
Candlesticks (metal). 13.
—— (precious metal). 14.
—— (wood). 50.
Candy for food. 42.
—— (medicinal). 3.
Cane bills. 12.
— fibre (Bagasse) for use in manufactures). 4.

Cane travelling trunks. 50.
Canned fish, fruits, meats, and vegetables. 42.
Cannon. 19.
Canoes. 21.
Can openers. 12.
Cans (metal). 13.
Canvas, Artists'. 39.
—— covers for ricks and vehicles. 50.
Canvas in the piece (cotton). 24.
—— —— (linen or hemp). 27.
—— (jute). 29.
Capers. 42.
Capes. 38.
Capoc, raw or partly prepared, for use in manufacture. 4.
Caps, Chimney (metal). 13.
——, Detonating. 20.
— for wear. 38.
——, Knee. 11.
Capstans (steam). 6.
Capsules (medicated) for human use. 3.
—— —— veterinary use. 2.
—— (metal). 13.
—— of gelatine or wafer for containing medicine. 50.
—— (paper). 39.
Caramel, being an ingredient in food. 42.
Carbide of calcium. 1.
—— silicon, being an abrasive. 50.
Carbolic acid prepared for sanitary purposes. 2.
—— use in medicine and pharmacy. 3.
— soap being a disinfectant. 2.
Carbon paper. 39.
Carbons for electrical purposes. 4.
Carburettors being parts of machinery. 6.
Card-board. 39.
—— boxes. 50.
—— roofing material. 50.
Card cases (leather). 37.
— games. 49.
Cards, Christmas, Sentiment, Menu, Programme, Pattern, Photographic and Playing. 39.
——, Machine. 6.
Cargo gins. 6.
Carpet bags. 50.
— bindings (woollen). 35.
— soap. 47.
— sweepers (mechanical). 6.
Carpets. 36.
Carriage aprons (wholly or principally of india-rubber). 40.
—— bodies, principally of wood. 50.
—— metal work. 13.
—— rugs. 50.

Carriages. 22.
————, Gun. 19.
Carriers, Luggage and Parcel (being metal goods not included in other classes). 13.
Carrying apparatus, Pneumatic, for cash and goods. 18.
Cars. 22.
——, Side. 22.
Cart covers. 50.
Cartons (cardboard). 50.
Cartridge belts, cases, dies, fillers, and pouches. 19.
Cartridges. 20.
Carts. 22.
——, Hoods for. 50.
Carving tools. 12.
Casement fasteners (metal). 13.
Casements (metal). 13.
Cases, Bookbinding. 39.
——, Packing and Store (wood). 50.
——, Blotting. 39.
——, Pencil (not of precious metal). 39.
———————(precious metal). 14.
——, Stationery. 39.
Cash boxes (metal). 13.
—— carrying apparatus, Pneumatic. 18.
—— checking apparatus for detecting false coins. 8.
—— register tills. 6.
Casks (glass). 15.
—— (metal). 13.
—— (pottery ware). 16.
—— (wood). 50.
——, Wax composition for lining. 50.
Cask-stands (metal). 13.
———————— (wood). 50.
Cassada plates (cooking, heating, and baking apparatus). 18.
Cassia being an ingredient in food. 42.
Castings (metal) in the rough. 5.
Castor oil prepared for use in medicine and pharmacy. 3.
Castors (metal). 13.
Catamenial pads and bandages (not medicated). 11.
Caterpillars, Preparations for destroying. 2.
Catheters. 11.
Cattle Ear markers for. 13.
—— food. 42.
—— medicines. 2.
—— troughs and pans (metal). 13.
Caulking irons. 13.
Caustic soda. 1.
Ceiling coverings, being tiles or sheets of metal. 13.
———————————— in the nature of paper hangings. 41.
Celery salt. 42.
Cells, Dry (electrical). 8.
Celluloid collars, cuffs, and cuff protectors. 38.
Celluloid films (sensitized). 1.
———— records for talking machines. 8.
———— transparencies for cinematograph apparatus. 8.
———— yarn, gearcases, mudguards. 50.
Cement for preventing the radiation of heat; for filling holes in castings. 1.
———— for tipping billiard cues; for mending china and other articles; for celluloid; for fixing india-rubber tyres; for floor-cloth. 50.
————, Portland, and other calcareous. 17.
Cerates prepared for use in pharmacy. 3.
Cereals for use as food. 42.
———————— seed. 46.
Ceresine. 4.
Chaff cutters. 7.
—— knives (parts of machines). 7.
Chain cables. 21.
—— rollers. 13.
Chains, Dog, Cycle, and Motor. 13.
————, Measuring. 8.
———— of precious metal. 14.
Chairs, Bath. 22.
————, Dentists' and Invalids'; along with furniture in Class 41.
———— (furniture). 41.
——————, Garden (metal). 13.
———————————— or Deck (wood). 50.
Chalk, Camphorated, for toilet purposes. 48.
———— (for drawing). 39.
————, Tailors'; Billiard. 50.
Chamois leather. 37.
Champagne. 43.
Chapels (iron). 18.
Charcoal. 4.
Chasing machines. 6.
———— tools (being edge tools). 12.
Chassis of motor cars. 22.
Cheese. 42.
———— colouring. 42.
———— making apparatus. 7.
———— tasters. 12.
———— tubs. 50.
Chemical apparatus (experimental). 8.
———————— substances prepared for agricultural, horticultural, veterinary, and sanitary purposes. 2.
———————————————————— use in manufactures, photography, or philosophical research. 1.
———————————————————————— use in medicine and pharmacy. 3.
———————— test paper. 39.
Chemises. 38.
Cheroots. 45.
Cherry brandy. 43.
Chess boards. 49.
Chest-expanding apparatus. 49.
———————————— braces. 38.

Chest protectors. 11.
Chests (metal). 13.
—— (wood). 50.
Chewing gum. 42.
Chicory. 42.
Chiguons. 50.
Chillies. 42.
Chimney caps, cowls, and tops (earthenware). 16.
—— —— —— (metal). 13.
—— cleaners (chemical). 2.
Chimneys, Lamp (glass). 15.
—— —— (mica). 50.
China articles. 16.
—— clay. 4.
—— crape (wool or worsted piece goods). 34.
—— grass (ramie) braids and belting. 28.
—— —— used in manufactures. 4.
—— —— yarn. 26.
Chip braid. 50.
Chisels. 12.
Chloride of calcium. 1.
—— gold. 1.
—— lime for disinfecting purposes. 2.
—— zinc. 1.
Chlorodyne. 3.
Chloroform for surgical and medical purposes. 3.
Chocolate. 42.
Cholera belts. 11.
Choppers. 12.
Chopping machines, Meat. 6.
Chrome leather. 37.
—— ores. 4.
—— salts. 1.
Chronometers. 10.
Chucks (parts of machines). 6.
Churches (iron). 18.
Churns for butter making. 7.
Chutney. 42.
Cider. 43.
—— machines and presses. 7.
Cigar and cigarette cases (leather). 37.
—— —— holders (not of precious metal). 50.
—— cutting machines. 6.
—— wrappers (paper) sold separately. 39.
Cigarette making machines. 6.
—— paper tubes (sold empty). 39.
—— —— papers. 39.
Cigarettes. 45.
——, Anti-asthmatic (not containing tobacco). 3.
Cigars. 45.
Cinder sifters (metal) for household use. 13.
—— (machines). 6.
Cinematographs. 8.
Cinematograph transparencies for exhibition. 8.
Cinnamon. 42.
Circular saws. 6.
Cisterns (metal). 13.
——, Syphon flushing. 18.
Citrate of magnesia. 3.
Clamps (metal). 13.
Claret. 43.
Clarifiers for articles of food and drink. 42.
Clarionets. 9.
Clasps (jet, horn or celluloid). 50.
—— (metal). 13.
—— (precious metal). 14.
Clay, China. 4.
——, Fire (articles of). 16.
——, Modelling. 17.
——, Pipe. 50.
—— pipes (tobacco). 50.
Cleaning and polishing preparations, cleaning preparations for leather articles. 50.
—— cloths (cotton). 25.
—— preparations for fabrics and for other articles (being detergents). 47.
Cleansing preparations (medicated) for children's heads. 3.
Cleavers. 12.
Cleeks, Golf. 49.
Clinical thermometers. 11.
Clips, Letter. 39.
Clippers, Horse. 12.
Cloaks. 38.
Clock and watch springs and dials. 10.
—— gongs and weights. 13.
Clocks. 10.
Clod crushers (agricultural). 7.
Clogs. 38.
Closets, Water; Hot; Steam. 18.
Cloth, Brattice; Corundum; Crocus; Emery; Glass; Ruby; Sand. 50.
—— (carbolized), for destroying insects. 2.
——, Cotton (in the piece). 24.
—— for bookbinding. 39.
——, India-rubber. 40.
——, Silk (in the piece). 31.
——, Wool, Worsted, or Hair (in the piece). 34.
Clothes horses (wood). 50.
—— lines (juto or hemp). 50.
—— —— (metal). 13.
—— props (wood). 50.
—— wringers. 6.
Clothing, Articles of. 38.
——, Horse. 37.
Cloths, Rick. 50.
——, Saddle. 37.
Clouts, Waggon and Cart (metal). 13.
Cloves. 42.
Clubs (sporting articles). 49.
Coach ironmongery. 13.

Conches. 22.
Coal. 4.
—— cutting machines. 6.
—— saving compounds (chemical) for mixing with coal to economise consumption. 1.
—— scuttles (metal). 13.
—— tar. 4.
Coatings (woollen and worsted). 34.
Coats. 38.
Cobblers' wax. 50.
Cochineal used in manufactures. 4.
Cocks (earthenware). 16.
—— (metal, not being parts of machinery). 13.
—— (wood). 50.
Cocktails. 43.
Cocoa. 42.
——— mills. 6.
——— nut (desiccated). 42.
——— fat and oil (edible). 42.
——— fibre. 4.
——— oil for illuminating purposes. 47.
Cod-liver oil and cod-liver oil compounds for use in medicine and pharmacy. 3.
Coffee. 42.
——— (aerated). 44.
——— mills. 6.
——— roasting machines. 6.
——— percolaters (glass). 15.
——— pots (earthenware and porcelain). 16.
——— (metal). 13.
——— (precious metal). 14.
Coffins. 50.
Cogs for horseshoes. 13.
Coil clutches (parts of machinery). 6.
Coils, Electrical induction (for medical purposes). 11.
——— (not for medical purposes). 8.
——, Steam (apparatus for heating). 18.
Coin-freed machines for delivering goods. 6.
Coke. 4.
Cold cream. 3.
—— sates. 13.
Collar studs (ivory, wood, bone, jet, or mother of pearl). 50.
——— (metal). 13.
——— (precious metal). 14.
—— supports, Dress (metal). 13.
——— ——— (celluloid). 50.
Collars for wear. 38.
——, Horse and Dog (leather). 37.
Collodion. 1.
——— fancy wares not included in other classes. 50.
——— prepared for use in medicine and pharmacy. 3.
Collodionized fibre, Threads manufactured from. 50.
Colouring matters for laundry use. 47.
——— the hair and toilet use. 48.
——— use as ingredients in food. 42.
——— in making liqueurs (containing alcohol). 43.
manufactures (mineral). 1.
(other than mineral). 4.
Colours, Artists'. 1.
Comb foundations for beehives. 50.
Combs for the hair. 50.
——, Currying (metal); Graining (metal). 13.
—— (parts of machines). 6.
Comforters (articles of clothing). 38.
Commutators (parts of machinery). 6.
Compasses (cutting). 12.
——— (drawing). 8.
——— (needle). 8.
——— (workmen's metal). 13.
Compo-board. 50.
Composing frames and sticks (wood). 50.
Concertinas. 9.
Concrete articles for building or decoration. 17.
Condensed milk. 42.
Condensers (parts of machinery). 6.
Condensing machines. 6.
Condiments. 42.
Condition powder. 2.
Conduits (earthenware). 16.
——— (metal). 13.
Cones for use in bread-making. 42.
Confectionery. 42.
Confetti. 49.
Conjuring apparatus. 49.
Conservatories. 18.
Contacts, Electrical (metal). 13.
——— (precious metal). 14.
Contrivances, Building and Engineering. 18.
——— (not medicated) for surgical or curative purposes. 11.
Cooking stoves and ranges. 18.
——— utensils (metal). 13.
——— ——— (aluminium). 14.
Coolers for wine, water, &c. (glass). 15.
——— (metal). 13.
——— (pottery-ware). 16.
——— (precious metal). 14.
Cooper. 43.
Coops, Poultry (metal). 13.
——— (wood). 50.
Copal. 4.
Copper. 5.
——— gauze. 13.
——— sulphate for agricultural and horticultural use. 2.
——— wire. 5.

Copperas. 1.
Coppers, Portable washing. 18.
Copying baths, trays, books, composition, ink, machines (rotary), paper and presses. 39.
Cord, Blind and Sash (not of metal). 50.
——, Elastic (india-rubber). 40.
—— for trimming (cotton). 25.
———— (linen). 28.
———— (silk). 32.
———— (woollen, worsted, and mohair). 35.
Cordage (metal). 13.
—— (not of metal). 50.
Cordials (alcoholic). 43.
—— (non-alcoholic). 42.
Corduroys in the piece (cotton). 24.
Cork. 4.
—— drawing machines. 6.
—— gripes (wood). 50.
—— socks for boots. 38.
Corking machines. 6.
Corks. 50.
Corkscrews. 13.
Corn-bins (metal). 13.
—— drills. 7.
—— flour. 42.
—— meters. 8.
—— plasters. 3.
—— rubbers. 11.
Corned beef. 42.
Cornets. 9.
Cornices (concrete). 17.
—— (metal). 13.
—— (wood). 50.
Corrosion, Compositions, Oils and Paints for preventing. 1.
Corrugated iron or steel sheets. 5.
———— paper. 39.
Corset busks (metal). 13.
—— covers (articles of clothing). 38.
—— shields and stiffeners (metal). 13.
Corsets. 38.
—— for curative purposes. 11.
Corundum cloth and paper. 50.
———, Raw. 4.
———— wheels. 50.
Cosaques. 42.
Cosmetics. 48.
Cosmetique. 48.
Costume stands (wood or papier mâché). 50.
Costumes. 38.
Cots. 41.
Cotter-pins. 13.
Cotton, Gun. 20.
—— piece goods of all kinds. 24.
—— (raw or partly prepared). 4.
——, Sewing. 23.
—— smallwares (not included in other classes), trimmings, cords, bindings, galloons, lace. 25.
Cotton, Silicate, prepared for use as a covering to prevent the radiation of heat. 1.
———— (raw). 4.
—— thread. 23.
—— wool (medicated). 3.
———— not medicated and not prepared for surgical or curative purposes. 25.
———— prepared for surgical or curative use. 11.
—— yarn. 23.
Cotton-seed cake. 42.
———— oil, raw or partly prepared for use in manufactures. 4.
————, refined for edible purposes. 42.
Couches. 41.
Cough mixtures (for human use). 3.
Counterfeit coins, Automatic instruments for detecting. 8.
Counters for games. 49.
———— shops. 41.
———, Mechanical. 8.
Counterweight fittings (metal). 13.
Couplings (railway). 13.
Covering walls and ceilings, Metal sheets for. 13.
Coverings, Anti-corrosive. 1.
———, Boiler (to prevent radiation of heat). 1.
———, Wall (in the nature of paper hangings). 41.
Coverlets, Bed (textile), as smallwares according to the class of the material.
Covers (asbestos, mica), for lamps. 50.
——, Bassinette; Cushion; Table; Tea-cosy; Toilet (all of cotton). 25.
—— (cardboard, paper). 39.
——, Dish (precious metal). 14.
—— (india-rubber or gutta-percha). 40.
—— (metal). 13.
——, Tyre (linen). 28.
——, Van, Rick and Boat. 50.
Cowls, Chimney (metal). 13.
Crabs (machinery). 6.
Crackers (being cosaques or bon-bons). 42.
———, Nut (metal). 13.
Cramps (metal). 13.
Cranes. 6.
Crank braces. 13.
Cranks, cycle. 13.
Crape, China (wool or worsted). 34.
—— (cotton). 24.
—— (silk). 31.
Crates (metal). 13.
—— (wood). 50.
Cravats. 38.
Crayon holders (not of precious metal). 39.
———— ———— (precious metal). 14.
Crayons. 39.

Cream. 42.
———, Cold. 3.
——— for toilet use. 48.
———, Furniture. 50.
———, Salad. 42.
——— separators. 7.
Creamometers. 8.
Creosote for use in manufactures. 4.
——— preparations for disinfecting purposes. 2.
——— prepared for use in medicine and pharmacy. 3.
Cresylic acid, prepared for use in medicine and pharmacy. 3.
Cribs (furniture). 41.
Cricketing articles not included in other classes. 49.
——— shoes. 38.
Crimped paper. 39.
Crinkled paper. 39.
Crocus cloth and paper. 56.
Croquet sets. 49.
Crosses (celluloid). 50.
——— (precious metal). 14.
Crossings, Railway. 5.
Crowbars. 13.
Crucibles (clay). 16.
——— (graphite or plumbago). 50.
——— (precious metal). 14.
Cruets (electro-plated). 14.
Crumb cloths (cotton), not in the piece. 25.
——— (linen), not in the piece. 28.
Crushing machines (agricultural). 7.
Crutches. 11.
Cues, Billiard. 49.
Cuff protectors (celluloid). 38.
Cuffs. 38.
——, Preparation for taking the roughness from the edges of. 50.
Culinary utensils (metal). 13.
Cultivators. 7.
Cupels (fire-clay). 16.
Curaçoa. 43.
Curative corsets. 11.
——— purposes, contrivances for. 11.
Curl papers. 39.
Curlers, Hair (metal). 13.
Curric powder and paste. 42.
Curry combs. 13.
Currying and tanning oils. 4.
Curtain hooks, rings and rods (metal). 13.
——— rings and rods (wood). 50.
Curtains, as smallwares, according to the class of the material or predominating material.
Cushions (india-rubber and gutta-percha). 40.
——— (leather). 37.
Custard powder. 42.
Cut flowers. 46.
———, Preservative for. 2.
Cutch. 4.
Cutlasses. 19.
Cutlery. 12.
——— (electro-plated). 14.
——— (surgical). 11.
Cut-outs (metal). 13.
Cutting-out presses. 6.
Cyanide of Potash. 1.
Cycle component parts (metal) not included in other classes. 13.
Cycles. 22.
——, geared hubs for. 6.
Cyclometers. 8.
Cylinders for compressed gas (not being parts of machines). 13.
———, Lime, for lighting purposes. 4.
———, Record, for talking machines. 8.
Cymbals. 9.

Dairy implements of the larger kind. 7.
Damask in the piece (cotton). 24.
——— (linen). 27.
——— (silk). 31.
——— (woollen or worsted). 34.
Dampers for stamps and envelopes. 39.
Damping trays for press copying. 39.
Damp-proof felt for lining walls. 50.
Damp resisting preparations for walls. 1.
Dandriff eradicator. 48.
Darning lasts (wood). 50.
——— machines. 6.
Dashpot plungers (parts of machinery). 6.
Dates. 42.
Daylight reflectors of silvered glass. 15.
Deals. 50.
Decanters (glass). 15.
Deck chairs (principally of wood). 50.
Decorations (celluloid), Floral and other. 50.
——— (gelatine transparencies) for windows. 50.
——— (metal) for walls and ceilings. 13.
Deed boxes (metal). 13.
Dental cement (medicated). 3.
——— composition, india-rubber, instruments, mirrors, plates, stopping (containing no precious metal), wax. 11.
Dentifrices. 48.
Deodorisers. 2.
Depilatories (being chemical substances for use in manufactures). 1.
Depilatory paste for toilet purposes. 48.
Derricks. 6.
Desiccated cocoanut. 42.
Desks, Office; Reading. 41.
———, School. 8.

Despatch boxes. 39.
Destroying insects, vermin and weeds, Preparations for. 2.
——— nits, Medicated preparations for. 3.
Detecting counterfeit coins, Automatic instrument for. 8.
Detergents. 47.
Detonating caps. 20.
Developers, Photographic (chemical). 1.
Dials, Sun. 8.
— Watch and Clock. 10.
Diamonds. 14.
——— for glass cutting. 50.
Diapers (linen) in the piece. 27.
——————— not in the piece. 28.
Diaphragms for talking machines. 8.
Diaries. 39.
Diatomite (raw). 4.
Dies (metal), without a cutting edge. 12.
—, Screw-cutting. 12.
Differential pulleys. 6.
Digesters (metal hollow-ware). 13.
Dill water. 3.
Dips, Sheep. 2.
Discs, Record, for talking machines. 8.
Dishclouts not in the piece (cotton). 25.
——— (esparto). 50.
Dish covers (metal). 13.
——————— (precious metal). 14.
Disincrustant boiler composition. 1.
Disinfectant limewash and disinfectant soap. 2.
Disinfectants. 2.
Distance measuring and recording apparatus. 8.
Distemper paint. 1.
Distilled water for table use. 42.
——————— prepared for use in medicine and pharmacy. 3.
Dividers (drawing). 8.
Diving apparatus. 18.
——— dresses. 18.
Dog biscuits. 42.
— calls (metal), whistles (metal), chains, collars (metal). 13.
— grates (fireplaces). 18.
— leads (leather), collars (leather). 37.
— soap and washes. 2.
Dolls and dolls' dresses. 49.
Domestic labour-saving machinery. 6.
Door checks and springs (metal). 13.
— fittings of metal. 13.
— mats (india-rubber). 40.
——— (metal). 13.
——— (textile). 36.
— scrapers (metal). 13.
— springs made wholly or principally of india-rubber. 40.
— straps (leather). 37.
Doors (iron). 13.
——————— (asbestos-lined). 13.
——— (wood). 50.
Douches (medicated) for human use. 3.
——————— (not medicated). 11.
Down. 4.
——— quilts, as smallwares according to the class of the material of the cover.
Doyleys (cotton) 25.
Drain pipes (concrete). 17.
——————— (earthenware). 16.
——————— (metal). 13.
— testing rocket apparatus. 8.
Draught excluders (india-rubber). 40.
Draw bars for railway couplings. 13.
Draw-pulls (metal). 13.
Drawers for wear. 38.
Drawing boards, pencils and crayons. 39.
——— instruments. 8.
Drawings. 39.
Drenches for cattle. 2.
Drenching horns for animals. 11.
Dress fasteners (metal), not being buttons. 13.
— preservers (articles for wear). 38.
— shields (cotton). 25.
——————— (india-rubber). 40.
— stiffeners (metal). 13.
——————— (whalebone, featherbone, or celluloid). 50.
Dresses. 38.
Dressing-cases (principally or wholly of leather). 37.
——————— (wood). 50.
Dressing for leather goods, for belting, for floorcloth, for india-rubber tyres. 50.
——— machines, Grain. 7.
Dressings (medicated) for human use. 3.
———, Seed. 2.
———, Veterinary. 2.
Driers (preparation for mixing with paint and varnish). 1.
Drill braces. 13.
Drilling machines (agricultural). 7.
——————— (other than agricultural). 6.
Drills not being machine drills. 12.
——— (linen) in the piece. 27.
Drinking flasks and horns (not of precious metal nor mounted in precious metal). 50.
——————— (precious metal or mounted in precious metal). 14.
Drinks (alcoholic). 43.
Drops (medicated). 3.
Drugget. 36.
Drugs prepared for human use. 3.
Drums (metal) for holding oil and pigments. 13.
——— (musical). 9.
——— (parts of machines). 6.
——— (porcelain or earthenware). 16.

Dry cells (electrical). 8.
—— plates (chemically prepared, for use in photography). 1.
—— soap, being a form of common soap. 47.
Drying kilns. 18.
——— machines. 6.
Dubbin. 50.
Dumb-bells. 49.
Duplicating apparatus (for office use) for writings and drawings. 39.
——————— inks. 39.
Dust extracting machines. 6.
—— laying and absorbing compounds for floors. 50.
——————————————— disinfectants. 2.
Dusters (cotton), not in the piece. 25.
——— (silk), not in the piece. 32.
Dusting powders (for toilet use). 48.
Dyes for the hair. 48.
——, Mineral. 1.
——, not mineral, and not for toilet purposes. 4.
Dyewood extracts. 4.
Dynamite. 20.
Dynamos. 6.

Ear cleaners (surgical). 11.
—— markers (metal). 13.
—— rings (precious metal). 14.
—— trumpets. 11.
Earthenware. 16.
Easels. 39.
Eau de Cologne. 48.
Ebonite goods not included in other classes. 40.
Edge tools. 12.
Educational appliances. 8.
Egg beating machines. 6.
—— boxes (wood). 50.
—— carriers (metal). 13.
—— powder and egg flour. 42.
—— preservatives (not being ingredients in food). 2.
Eggs. 42.
Elastic bands (stationery). 39.
——— hosiery for surgical or curative purposes. 11.
—— sandallings, webs and cords (india-rubber). 40.
——————————————————————
(not of india-rubber) in the class of the material.
Electric accumulators and batteries (medical). 11.
——————————————————————
(not medical). 8.
—— alarms (as systems in buildings). 18.
——— appliances for surgical or curative use. 11.

Electric cables. 8.
——— carbons. 4.
——— clocks. 10.
——— detonators and fuses. 20.
——— dynamos, fans and blowers. 6.
——— fittings (metal goods not included in other classes). 13.
——— fusible cut-outs (principally of ordinary metal). 13.
——— ignition sparking plugs. 13.
——— induction coils (not for medical purposes). 8.
——— insulating materials (not included in other classes). 50.
——— insulators (india-rubber). 40.
——————— (porcelain). 16.
——— lamps (ordinary). 13.
——————— (philosophical). 8.
——— pianofortes. 9.
——— switchboards (complete). 8.
——— switches (ordinary) of metal. 13.
——— wire (covered) in the class of the covering material.
Electricity meters. 8.
Electromotors. 6.
Electroplate. 14.
Electrotypes for printing (metal). 13.
Elevators, Grain or Straw. 7.
Embossing machines. 6.
——————— stamps (hand) for stationery. 39.
Embrocation for horses and cattle. 2.
——————————— human use. 3.
Embroidery (cotton). 25.
——————— (linen). 28.
——————— (silk). 32.
——————————— (woollen or worsted). 35.
Emery cloth, paper, powder and wheels. 50.
Emulsions (medicinal) for human use. 3.
Enamel (being in the nature of paint). 1.
——— for coating metal. 1.
——————— stopping teeth. 11.
Enamelled articles of metal hollowware. 13.
——————— leather. 37.
——————— leather cloth. 36.
Enemas. 11.
Engineering contrivances. 18.
Engines for agricultural purposes, as Watering, Hop-washing, &c. 7.
——— of all kinds other than agricultural. 6.
Engravers' plates (metal). 13.
Engravings. 39.
Ensilage presses. 7.
Envelopes. 39.
Epsom salts for use in medicine and pharmacy. 3.
Eraser, Ink and Pencil. 39.
——— (liquid) for removing stains from paper and fabrics. 47.
Escapes, Fire. 50.
Esparto grass, Cloths of. 50.

Essences (alcoholic). 43.
——— and essential oils (medical). 3.
———. (non-alcoholic) for use as food. 42.
Essential oils for use in manufactures, not included in other classes. 4.
Etching mordants. 1.
Etchings. 39.
Ethers, prepared for use in pharmacy. 3.
Eucalyptus extracts prepared for use in medicine and pharmacy. 3.
Excluders, Draught (india-rubber). 40.
Exercisers for use in physical culture. 49.
Exhausters, Breast. 11.
Expanded metal in sheets. 5.
Expanders, Tube (metal). 13.
Expanding apparatus, Chest. 49.
Explosion engines. 6.
Explosive substances. 20.
Extinguishing compounds, Fire. 50.
——————— machines, Fire (extincteurs). 6.
——————— systems, Fire (for erection in buildings). 18.
Extractor, Ink (for fabrics and paper). 47.
Eye-glass cases (papier mâché). 50.
Eye glasses. 8.
—— salve. 3.
Eyelets (metal). 13.
Eyeletting machines. 6.
Eyes, Artificial. 11.
——, Hooks and. 13.

Face powder and cream (not medicated). 48.
Facing, Founders'. 4.
Facings, as smallwares, according to the class of the material or predominating material.
Faience. 16.
Fake ball. 50.
Fancy smallwares (not included in other classes) of wood, bone, ivory, celluloid, jet or mother of pearl. 50.
Fans for personal use. 50.
—— (parts of machinery). 6.
Fare indicators. 8
Farina (preparation for stiffening calico or thread). 4.
Farls. 42.
Fasteners, Belt (metal). 13.
———, Dress (metal, not being buttons). 13.
——— ——— (precious metal). 14.
——— ——— (celluloid). 50.
———, Paper. 39.
———, Window (metal). 13.

Fat for culinary purposes. 42.
——— illuminating, heating and lubricating. 47.
——— manufacturing purposes. 4.
Feather beds and pillows. 41.
——— trimmings (made up), feather brushes. 50.
Feathers (raw). 4.
Feed pumps. 6.
—— water heaters (parts of machines). 6.
Feeding bottles. 50.
Fellies or rims (wood). 50.
Felt in the piece (woollen). 34.
—— for laying under carpets. 36.
——, Roofing; Sarking; Waterproofing. 50.
Felts for paper makers, not in the piece (cotton). 25.
Fencing foils and gauntlets. 49.
——— (metal). 13.
Fenders (metal). 13.
Fermented liquors and spirits. 43.
——————— milk for use as food. 42.
Ferments (not medicinal). 42.
Ferns and grasses (preserved). 50.
Fertilisers. 2.
Fibre, Potting. 2.
Fibrous substances, raw or partly prepared, for use in manufactures, as cotton, hemp, flax, jute. 4.
Fichus. 38.
Field glasses. 8.
Figures and busts of wood or papier mâché. 50.
Filaments for lamps (not metallic). 50.
Files. 12.
——, Stationery. 39.
Filing cabinets being office furniture. 41.
Fillers, Cartridge. 19.
Filletings (cotton). 25.
Filling cement for metal castings. 1.
——— for bedding and cushions (textile) as small wares according to the class of the material.
——————— teeth (precious metal). 14.
——————— (not precious metal). 11.
——— machines. 6.
Films, Cinematograph (being transparencies for exhibition). 8.
———, Sensitized, for photography. 1.
Filter cloths (cotton). 25.
Filtering materials, being chemical substances for sanitary purposes. 2.
——————— ——————— raw or partly prepared vegetable and mineral substances. 4.
Filter paper. 39.
Filters and filtering apparatus. 18.
Finger stalls for curative purposes. 11.
Finings (for coffee, beer, or wine). 42.
Fire alarms (as systems in buildings). 18.
—— arms. 19.

Fire bricks and clay, fireclay articles. 16.
—— engines. 6.
—— escapes. 50.
—— extinguishing compounds. 50.
—— —— machines (extinc-
teurs). 6.
—— systems for erection
in buildings. 18.
—— indicating instruments. 8.
—— irons and screens (metal). 13.
—— lighters and wood. 50.
—— places. 18.
—— proofing solution. 50.
Fireworks. 20.
Fish. 42.
Fishing bait (wheaten). 42.
—— boots. 38.
—— hooks. 13.
—— tackle, except fishing hooks. 49.
Fittings, Bath; Door; Lavatory; Gas;
Stable; &c. (of metal). 13.
——, Electric (metal). 13.
——, Furnace (silica and clay). 16.
——, Shop (wood). 50.
Fives balls. 49.
—— shoes. 38.
Flags (cotton). 25.
—— (linen or hemp). 28.
—— (silk). 32.
—— (wool). 35.
Flannel (in the piece). 34.
——, medicated. 3.
Flannelette (cotton). 24.
Flashlight signalling apparatus. 8.
Flasks, Drinking (not precious metal nor
mounted in precious metal). 50.
—— (precious metal, or
mounted in precious metal). 14.
——, Powder. 19.
Flat irons. 13.
Flavourings for foods and beverages
(not alcoholic). 42.
Flax (raw or partly prepared). 4.
—— yarn and thread. 26.
Fleams. 11.
Flesh gloves and rubbers. 11.
Flint paper and cloth. 50.
Floggers (wood). 50.
Flongs. 39.
Floor cloth. 36.
—— polish. 50.
Flooring composition (sawdust). 50.
—— (wood). 50.
Flounces, Skirt (sold separately) as
smallwares according to the class of
the material.
Flour. 42.
—— milling machines. 6.
Flowers, Artificial. 50.
——, Cut. 46.
——, Preservatives for. 2.
Flushing cisterns, Syphon (being build-
ing contrivances). 18.
Flutes. 9.

Fluxes for soldering and brazing. 1.
Fly gum and paper. 2.
—— powder for sheep. 2.
—— traps (metal). 13.
Flying machines. 6.
Fog signals (explosive). 20.
Foil (metallic). 5.
Foils (fencing). 49.
Food for man and animals. 42.
—— preservatives (being ingredients in
food). 42.
—— —— (not being ingredients
in food. 2.
Football bladders (india-rubber). 40.
—— cases (leather). 37.
Footballs. 49.
Footsacks for carriage use. 50.
Foot warmers (metal). 13.
—— —— (wholly or principally of
india-rubber). 40.
Forges (portable). 6.
Forgings, Rough. 5.
Forks (agricultural and horticultural).
13.
—— (brass). 13.
—— (cycle). 13.
—— for table use (steel). 12.
—— (wholly or partly of
precious metal). 14.
——, Tuning. 8.
Foundations, Comb, for beehives. 50.
Founders' powder and blacking. 4.
Fountain pens (not of precious metal).
39.
—— (precious metal). 14.
Fowling pieces. 19.
Frames (metal). 13.
—— (precious metal). 14.
—— (wood or composition). 50.
Free wheel clutches for cycles. 13.
Freezing machines. 6.
—— mixtures (chemical). 1.
—— pots (metal). 13.
French chalk (prepared). 50.
—— polish and varnish. 50.
Fret shelves (metal). 13.
Friction composition for violin pegs and
for handles of golf clubs. 50.
—— gloves. 11.
—— paste for driving belts. 50.
Friezes, Irish, being woollen piece goods.
34.
Frillings (cambric). 28.
—— (cotton). 25.
—— (silk). 32.
Frills for wear. 38.
Fringe (gold and silver bullion). 14.
Fringes (cotton). 25.
—— (linen or hemp). 28.
—— (silk). 32.
—— (worsted or woollen). 35.
Fronts, Blocked shoe leather. 37.
——, Shirt. 38.
Frost cogs for horseshoes. 13.

Frothing preparations. 42.
Fruit essences (alcoholic). 43.
——— (not alcoholic). 42.
——— prepared for human use as medicine. 3.
— juices, syrups, and drinks (not alcoholic). 42.
Fruits. 42.
Fuel, Artificial. 50.
— economising composition (chemical). 1.
——— plant. 18.
— (liquid) for internal combustion engines. 47.
Fullers. 13.
Fullers' earth for toilet purposes. 48.
——— use in manufactures. 4.
Fumigating apparatus (not medicated), for hygienic purposes. 11.
——— paper. 2.
Fungus destroying or preventing preparations. 2.
Funnels (glass). 15.
——- (gutta-percha). 40.
——- (metal). 13.
——- (porcelain or earthenware). 16.
——- (wood). 50.
Furnace bars. 13.
——- blocks and fittings of silica or clay. 16.
——- grates. 18.
Furnaces (experimental). 8.
Furniture. 41.
——— cream and polish. 50.
Fur waste and cut fur for use in manufactures. 4.
Furs not made up. 37.
— made up for wear. 38.
Fused silica. 15.
Fuses. 47.
Fuses (explosive). 20.
Fusible metal cut-outs (electrical). 13.

Gaiters. 38.
Galley racks (wood) for printers. 50.
—— ranges. 18.
Galvanized iron and steel. 5.
Gambier. 4.
Game food. 42.
Games of all kinds. 49.
Garden chairs, seats and tables (metal). 13.
——— ——— ——— (wood). 50.
—— implements of the larger kind. 7.
——— ——— smaller kind, with a cutting edge. 12.
———, without a cutting edge (metal). 13.
—— tents. 50.

Garlands (celluloid). 50.
Garment suspenders, not being articles of clothing (metal). 13.
——— (wood). 50.
Garments. 38.
———-, Life-saving (for use on water). 21.
Garters. 38.
Gas, Acetylene. 1.
—— brackets, burners, cylinders, standards, and fittings (metal). 13.
—— engines. 6.
—— enriching and purifying material. 1.
—— generating plant. 18.
—— holders (scientific). 8.
——, Instruments for testing. 8.
—— lighting and regulating apparatus (automatic), regulators and gauges. 8.
—— stoves. 18.
—— tubing (india-rubber). 40.
——— (metal). 13.
Gasogenes. 8.
Gates (metal). 13.
——- (wood). 50.
Gauge glass tubes. 15.
Gauges. 8.
Gauntlets, Fencing. 49.
Gauze (metal). 13.
——— (silk). 31.
Gear cases (celluloid). 50.
——— (leather). 37.
——, Winding. 6.
Gears, Variable, for cycles and cars. 6.
Gelatine capsules for containing medicine. 50.
——— for use as food. 42.
——— glues. 1.
——— window decorations. 50.
Gems, Natural and Artificial. 14.
Generating plant for gas production. 18.
Geneva. 43.
German silver in sheets, bars, ingots, and wire. 5.
Geysers. 18.
Gilders' brushes. 50.
Gills (machine). 6.
Gilt thread. 14.
Gimlets. 13.
Gimps, as small wares, according to the class of the material or the predominating material.
Gin. 43.
Ginger. 42.
——— ale (an aërated water). 14.
——— beer. 44.
———. Preparations for making. 42.
——— brandy. 43.
——- bread. 42.
——— gin. 43.
Gins, Cargo. 6.
Girths (leather). 37.

Glass. 15.
—— cloths not in the piece (cotton). 25.
———————— (linen). 28.
—— lustres, no part of metal. 15.
—— paper and cloth. 50.
——, Preparations for cleaning and polishing; for preventing condensation on. 50.
Glasses, Blending (graduated); Eye; Opera; Field; Magnifying. 8.
Glaze for food. 42.
——, Laundry. 47.
Glaziers' diamonds. 50.
Globes (glass). 15.
——, Terrestrial and celestial. 8.
Glove stretchers (wood). 50.
Gloves. 38.
——, Bath, Flesh, and Friction. 11.
——, Batting; Boxing. 49.
——, Bottling. 38.
—— for use by X-ray operators. 11.
——, Insulation (india-rubber). 40.
Glucose. 42.
Glue. 1.
Glycerine for use in manufactures. 4.
———— prepared for toilet purposes. 48.
———————— use in medicine and pharmacy. 3.
Goffering irons. 13.
Goggles. 8.
Gold, gold alloys, and gold leaf. 5.
—— beaters' moulds and skin. 50.
—— thread and lace. 14.
Golf balls, bags, clubs, irons, and tees. 49.
Goloshes. 38.
Gongs. 13.
Gouges. 12.
Governors (parts of machinery). 6.
Grafting tools with a cutting edge. 12.
———— (metal) without a cutting edge. 13.
Grain crushers. 7.
—— dressing machines. 7.
—— elevators. 7.
Graining combs (metal). 13.
Grains (for food). 42.
Granite (rough or partly prepared). 4.
——— setts for paving. 4.
——— tar macadam. 17.
Grape ferment for human use (medicinal). 3.
——— sugar. 42.
Graphite crucibles. 50.
——— lubricants. 47.
——— polishes. 50.
——— raw or partly prepared for use in manufactures. 4.
Grapnels (for use on board ship only). 21.
Grass cutting machines. 7.
—— hooks. 12.
—— pulp, Yarns and textile piece goods made from. 50.
Grass seeds. 46.
Grasses, Preserved. 50.
Grates (being fireplaces). 18.
——, Furnace. 18.
Gratings (metal). 13.
Grease for lubricating, heating and illuminating purposes. 47.
———— use in manufactures. 4.
———————— pharmacy. 3.
Greenhouses. 18.
Gridirons. 13.
Grindstones. 50.
Gripes, Cork (wood). 50.
Grit for poultry. 42.
Groats. 42.
Ground sheets (india-rubber). 40.
Grubbers. 7.
Guano. 2.
Guards, Fire (metal). 13.
——, Leg (cricketing). 49.
Guidebooks. 39.
Guitars. 9.
Gulleys (earthenware). 16.
——— (metal). 13.
Gum, Chewing. 42.
——, Fly. 2.
—— prepared as an article of stationery. 39.
Gums for use in manufactures. 4.
—— prepared for use in pharmacy. 3.
Gun barrels and locks, gun carriages. 19.
—— cotton and gunpowder. 20.
Guns. 19.
——, Harpoon. 19.
Gut casts or traces. 49.
Gutta-percha goods not included in other classes. 40.
———— —— tissue for tailors' use. 40.
———————— tooth stopping. 11.
Gutters (metal). 13.
Gymnastic apparatus. 49.

Hack saw blades. 12.
Hacking knives. 12.
Hackles (machine). 6.
Hair brushes, combs, plaits, pads, and transformations. 50.
—— cloths and fabrics (in the piece). 34.
—— for use in manufactures. 4.
—— nets (of real hair). 35.
———— (silk). 32.
—— pins, curlers and wavers (metal). 13.
—— stuffing for furniture. 35.
—— washes and preparations for the hair. 48.
——, Yarns of. 33.
Halter balls (metal). 13.
Halters. 37.

Hames, Harness (metal). 13.
——————— (wood). 50.
Hammers. 13.
———, Steam. 6.
Hammocks. 50.
Hampers. 50.
Hams. 42.
Hand-barrows (metal). 13.
——————— (wood). 50.
——— carts and trucks. 22.
Handkerchiefs (cotton), in the piece. 24.
——————————— not in the piece. 25.
——————— (linen) in the piece. 27.
——————————— not in the piece. 28.
——————— (silk) in the piece. 31.
——————————— not in the piece. 32.
Handles (metal). 13.
——— (precious metal). 14.
——— (vulcanite). 40.
——— (wood, ivory, bone, mother of pearl). 50.
Hangers (parts of machinery). 6.
——— (textile) for garments, as smallwares according to the class of the material.
Hangings, Paper. 41.
Hardening fluid for metal. 1.
Harmoniums. 9.
Harness. 37.
——— liquid. 50.
Harpoon guns. 19.
Harps. 9.
Harrows. 7.
Harvesting machines. 7.
Hatchets. 12.
Hatching apparatus. 50.
Hat and coat hooks (metal). 13.
—— bands, as smallwares, according to the class of the material.
—— gloss and reviver (for silk hats). 47.
—— pins (metal). 13.
—— stands and rails (furniture). 41.
—— varnish (for straw hats). 1.
Hats. 38.
Hay forks and racks (metal). 13.
—— knives. 12.
—— making machines, hay presses. 7.
Headsquares (for children). 38.
Head-stalls. 37.
Healds. 6.
Hearth brick and hearth stone. 50.
Hearths of porcelain or earthenware. 16.
Heat, Composition for preventing the radiation of. 1.
—— indicators and gauges. 8.
Heater irons. 13.
Heaters, Feed-water (parts of machines). 6.
Heating apparatus for buildings. 18.
Heel-ball. 50.
—— tips (metal). 13.
——— or pads (india-rubber). 40.
Heels for boots (leather). 37.
——————— (wood). 50.
Helmets. 38.
Hemp lace. 28.
——— machine belting. 28.
——— piece goods. 27.
——— (raw and partly prepared). 4.
——— yarn and thread. 26.
Hempseed cake. 42.
Herbs for food. 42.
——— used in medicine and pharmacy. 3.
Hessians (jute). 29.
——————(tow). 27.
Hides. 37.
High-pressure packing. 50.
Hinges (metal). 13.
Hockey sticks. 49.
Hoes. 13.
——, Horse. 7.
Hog products used as food. 42.
Hoists (machinery). 6.
Holdfasts (metal). 13.
Hollands, in the piece (linen). 27.
——————— (spirits). 43.
Hollowware (metal). 13.
Home trainers. 49.
Hominy. 42.
Hones. 50.
Honey. 42.
Hoods for carts and motor cars (textile). 50.
Hooks and eyes. 13.
———, Boat. 21.
———, Crochet (metal). 13.
———, Fish. 13.
———— for cutting, as billhooks. 12.
———— hanging or holding, as ship-hooks, curtain-hooks. 13.
Hoop iron. 5.
Hop presses. 7.
Hops. 42.
Horizons, Artificial. 8.
Horizontal bars. 49.
Horns, Cycle. 13.
———, Drenching. 11.
———, Drinking (not mounted in precious metal). 50.
——— (musical). 9.
———, Shoe (bone, ivory, wood). 50.
——————— (metal). 13.
Horological instruments. 10.
Horse and cattle food. 42.
—— blisters and medicines. 2.
—— clippers. 12.
—— clothing. 37.
—— collars. 37.
—— hair. 4.
—— singers. 13.
Horses, Slaters'. 12.
Horseshoe cogs. 13.
Horseshoes (metal). 13.
——————— (vulcanised indiarubber). 40.

Horticultural implements of the larger kind. 7.
——————————— smaller kind, with a cutting edge. 12.
——————————— without a cutting edge (metal). 13.
Hose (tubular). 50.
—— suspenders (for wear). 38.
Hosiery being wearing apparel. 38.
———— for curative purposes. 11.
Hot-air engines for agricultural purposes. 7.
——————— not for agricultural purposes. 6.
Hot closets, being building contrivances. 18.
—— plates for cooking. 18.
—— water apparatus. 18.
Houses (iron). 18.
Hubs (metal) not being geared hubs. 13.
—— (wood). 50.
Huckaback towellings. 27.
Hurdles (metal). 13.
Hydrants, not being machinery. 13.
Hydraulic packing. 50.
———— rams for rising water. 6.
———— scrubber for cleaning ships' bottoms when afloat. 21.
Hydrochloric acid. 1.
Hydrogen, Compressed. 1.
Hydrometers. 8.
Hypodermic injections (medicinal) for human use. 3.
———— injectors. 11.

Ice. 42.
—— houses, Portable. 50.
—— making machines. 6.
—— pails (glass). 15.
———— (wood). 50.
—— safes. 50.
—— skates. 12.
Illuminating gas. 1.
———————— oils and greases. 47.
———————— power of oil and gas, Chemical preparations for increasing. 1.
Illustrated books, papers and cards. 39.
Imitation jewellery. 14.
Implements, agricultural and horticultural, of the larger kind. 7.
——————————————— smaller kind, with a cutting edge. 12.
——————————————— without a cutting edge (metal). 13.
———————— Drainage (of the larger kind). 7.

Incandescent electric lamps (ordinary). 13.
——————————— (philosophical). 8.
———————— gas and lamp burners and fittings (metal). 13.
——————————— mantles (not of metal). 50.
Incrustations in steam boilers, Composition for the prevention and removal of. 1.
Incubators. 50.
Index cabinets (furniture). 41.
———— cards and sheets. 39.
India-rubber bands (stationery) and stamps. 39.
———————— for erasing. 39.
———————— goods, not included in other classes. 40.
———————— (raw, waste, or reclaimed) for use in manufactures. 4.
———————— shoes and clothing. 38.
———————— solution. 40.
———————— surgical appliances. 11.
Indicators, Pressure, Speed and Distance. 8.
Indigo dye. 4.
Induction coils for medical purposes. 11.
———————— not for medical purposes. 8.
Infants' and invalids' food. 42.
Inflators, Tyre. 6.
Infusers, Tea (metal). 13.
Infusions used in pharmacy. 3.
Infusorial earth. 4.
Ingots, Metal in. 5.
Inhalers (medicated). 3.
———— (not medicated). 11.
Injections, Hypodermic (medicinal), for human use. 3.
Injectors, Hypodermic. 11.
Ink, Burnishing, for boots and shoes. 50.
—— (writing, copying, printing, duplicating), inkstands, ink ribbons, ink powders, ink pads, ink and pencil erasers. 39.
—— extractor for fabric and paper. 47.
Inner tubes for tyres. 40.
Inoculation of soil, Bacterial products for. 2.
Insect destroying preparations. 2.
———— repelling preparations for personal use. 3.
Insulating compositions for preventing the radiation of heat. 1.
———— preparations (electrical) of asbestos, mica, resin, oils or bitumen. 50.
Insulators, Electric (porcelain and earthenware). 16.
———————— (india-rubber). 40.
Internal combustion engines. 6.
Invalids' furniture. 41.
Ipecacuanha wine. 3.

Irish friezes, being woollen piece goods. 31.
Iron (angle, galvanized, pig, cast, rough, bar, rail, bolt. rod, sheet, or hoop). 5.
Ironmongery, Coach. 13.
Isinglass (for food). 42.
Italian paste. 42.
Ivory. 4.
—— fancy smallwares not included in other classes. 50.

Jackets (wearing apparel). 38.
——, Swimming. 21.
Jacks, Lifting. 6.
——, Roasting. 6.
Jacquards (parts of machinery). 6.
Jam. 42.
Japanese lanterns (no part being of metal). 49.
Japans. 1.
Jars (glass). 15.
—— (pottery ware). 16.
Jellies for food. 42.
Jerseys. 38.
Jet or imitation jet, Fancy smallwares of. 50.
Jets (metal). 13.
Jewellers' rouge. 50.
Jewels and imitation jewels. 14.
—— for wire drawing, and for horological, telegraphic and other instruments. 50.
Jews' harps. 9.
Joints, Union (metal). 13.
Jointing, Steam (in the nature of a packing). 50.
Jugs (glass). 15.
—— (pottery ware). 16.
Juices, Fruit (alcoholic). 43.
———— (non-alcoholic). 42.
Jujubes (medicated). 3.
Junction boxes (earthenware). 16.
Jute bags and sacks. 50.
—— carpets and mats. 36.
—— piece goods (except carpets, mats and wall coverings). 29.
—— (raw or partly prepared). 4.
—— small wares, not included in other classes. 29.
—— wall coverings. 11.
—— yarns. 29.

Kainit. 2.
Kamptulicon. 36.
Kali, Lemon (in powder). 42.
Kapok, raw or partly prepared for use in manufacture. 4.
Kegs (metal). 13.
—— (wood). 50.
Kennels (structures of iron). 18.
Kerosine oil for illuminating and heating. 47.
Ketchup. 42.
Kettles. 13.
——, Bronchitis. 11.
Keys, key rings and blanks. 13.
Kid gloves. 38.
—— reviver. 50.
Kieselguhr. 4.
Kilns. 18.
Kinematograph apparatus. 8.
Kit tools (with a cutting edge). 12.
———— (without a cutting edge). 13.
Kitchen ranges. 18.
Kites made of paper. 49.
Kitool. 4.
Knapsacks. 50.
Knee caps for curative purposes. 11.
Knife-boards, knife polishing powder. 50.
—— cleaning and sharpening machines. 6.
Knitting machines. 6.
———— pins of bone or wood. 50.
———————— (metal). 13.
Knives (table, pocket, and hand). 12.
———— of precious metal. 14.
——, Paper. 39.
—— (parts of agricultural machinery). 7.
—— (parts of machinery). 6.
—— (surgical). 11.
Knobs (metal). 13.
—— (porcelain). 16.
Knockers, Door. 13.
Knotter plates. 6.

Labelling adhesives. 39.
———— machines. 6.
Labels (leather). 37.
—— (metal). 13.
—— (paper). 39.
—— (pottery ware). 16.
—— (wood). 50.
Lace and laces as smallwares, according to the class of the material or the predominating material.
Laces (leather). 37.
Lacquered leather. 37.
Lacquers. 1.
Lactometers. 8.
Ladder tapes for blinds, as smallwares according to the class of the material.
Ladders (wood or rope). 50.
Ladles (metal). 13.
—— (precious metal). 14.
Lager beer. 43.
Lametta. 5.

Lamp black (a pigment). 1.
——— burners (metal). 13.
——— chimneys (glass). 15.
——— ——— (mica). 50.
——— shades (celluloid). 50.
——— ——— (glass). 15.
——— ——— (paper). 39.
——— ——— (silk). 32.
——— stoves and blow lamps. 18.
——— wicks. 47.
Lamps (ordinary). 13.
——— (philosophical). 8.
———, Electric (ordinary). 13.
——— ——— (philosophical). 8.
Lancets. 11.
Land rollers. 7.
Lantern slides. 8.
Lanterns, metal or partly metal. 13.
———, Optical. 8.
——— (paper), no part being of metal. 19.
Lard, for food. 12.
——— used for lubricating purposes. 17.
——— in manufactures. 1.
Lardine, a food substance. 42.
Lastings (wool, worsted, or hair). 34.
Lasts (wood). 50.
Latches (metal). 13.
Lathes. 6.
Laths (metal). 13.
——— (wood). 50.
Launches. 21.
Laundry purposes, Preparations for. 47.
Lavatories. 18.
Lavatory basins (china, stoneware, and earthenware). 16.
——— fittings (metal). 13.
Lavender water. 18.
Lawn mowers. 7.
——— tennis sets. 49.
——— ——— shoes. 38.
Lead, Black (for polishing). 50.
——— pencils. 39.
——— (pig, rolled, or sheet). 5.
———, Red, Orange and White. 1.
——— wool packing. 50.
Leaf, Gold. 5.
——— turning apparatus. 8.
Leakage indicators, Electrical. 8.
Leather. 37.
———, Artificial. 37.
———, Cement, Stains and Inks for. 50.
——— cloth. 36.
——— dressing. 50.
Leaven. 42.
Leeches. 11.
Legee twist. 30.
Leggings. 38.
Leg guards (cricketing). 49.
Lemon juice and syrup. 42.
——— kali (in powder). 42.
Lemonade (an aerated beverage). 44.
Lenses 8.
Lentils. 42.
Letter balances. 39.
——— clips and files. 39.
——— filing cabinets. 41.
Letters (metal). 13.
——— (wood). 50.
Levels, Spirit. 8.
———, Workmen's (wood). 50.
Levers (metal). 13.
——— (wood). 50.
Life belts and buoys. 21.
Life-saving garments for use on water. 21.
Lifting jacks. 6.
Lifts. 6.
Lighters, Fire. 50.
Lighting apparatus for surgical use. 11.
——— installations. 18.
Lights, Night. 47.
——— of glass, with metal frames. 13.
——— ——— without metal frames. 15.
Limbs, Artificial. 11.
Lime. 17.
——, Chloride of (for disinfecting purposes). 2.
——— cylinders. 4.
——— juice (aerated). 44.
——— ——— cordial and syrup (free from spirit). 42.
——— ——— for medicinal purposes. 3.
Limestone. 4.
Limewash disinfectant. 2.
Linchpins. 13.
Linen bindings, braids, and other linen small wares not included in other classes. 28.
——— buttons. 50.
——— cords for trimming. 28.
——— fire hose. 50.
——— piece goods. 27.
——— stretchers (bone, wood, or ivory). 50.
———, Tracing. 39.
——— yarn and thread. 26.
Liners of clay. 16.
Lines, Fishing. 49.
——— for sounding and measuring. 8.
——— Sash, Blind, Picture and Clothes (not of metal). 50.
Liniments for human use. 3.
Lining felt for walls. 50.
Linings (cut or traced) for dressmaking. 50.
——— in the piece (cotton). 24.
——— ——— ——— (linen or hemp). 27.
——— ——— ——— (wool, worsted or hair). 34.
———, Furnace. 16.
Links, Sleeve (metal). 13.
——— ——— (precious metal). 14.
Linseed-oil cake. 42.
——— oils (used in manufactures). 4.
Lint. 11.

Lintels (iron). 13.
Liqueur colourings and essences (alcoholic). 43.
Liqueurs. 43.
Liquorice confectionery. 42.
——— prepared for use in pharmacy. 3.
Liquors prepared for use in medicine and pharmacy. 3.
Lithia water. 44.
Lithographic stones, Preparations for cleaning. 47.
Lithographs. 39.
Litter, Peat Moss. 50.
Liver pads (not medicated). 11.
Liveries. 38.
Locks. 13.
——, Rifle and pistol. 19.
Locomotives. 6.
Logs and log lines. 8.
Logwood, Extract of (a vegetable dye). 4.
Looking glasses (furniture). 11.
Looms for weaving. 6.
Lorries. 22.
Lotions for toilet use. 48.
——— (medicated). 3.
——— (veterinary). 2.
Lozenges (medicated). 3.
——— (not medicated). 12.
Lubricating preparations. 47.
Lubricators. 13.
——, parts of agricultural and horticultural machinery. 7.
———, parts of machinery. 6.
Luggage carriers for attachment to cycles (metal). 13.
——— labels and straps (leather). 37.
Lumps, Furnace. 16.
Lung protectors. 11.
Lustres (glass), no part of metal. 15.
Lymph for vaccination. 11.

Maccaroni. 42.
Mace. 42.
Machine guns. 19.
——— irons (plane, moulding and grooving). 6.
——— tools. 6.
Machinery, Agricultural and horticultural, and parts of such machinery. 7.
——— of all kinds, and parts of machinery (except agricultural and horticultural machines and their parts included in class 7). 6.
Magnesia, prepared for use in medicine and pharmacy. 3.
——— water. 44.
Magnetic apparatus for medical purposes. 11.
Magneto-electric machines. 6.
——— for surgical or curative purposes. 11.
Magnifying glasses. 8.
Majolica ware. 16.
Mallets. 50.
Malt. 42.
—— extract, an ingredient in food. 42.
—— liquors (fermented). 43.
Mandolines. 9.
Mandrels (parts of machinery). 6.
Manganese bronze. 5.
Mangles and mangling machines. 6.
Manhole covers (metal). 13.
Manifold copying paper. 39.
Manilla ropes. 50.
Mantle cloth (woollen or worsted). 31.
Mantles. 38.
——— for incandescent lighting (not of metal). 50.
Manumotive vehicles. 22.
Manure. 2.
——— pumps. 7.
Maps. 39.
Marble, Imitation. 17.
——— rough or partly worked. 1.
Marbles, Playing. 49.
Margarine. 42.
Marine engines. 6.
——— glasses. 8.
——— or ships' chronometers. 10.
Markers, Billiard, Whist and Bezique. 49.
———, Ear (metal). 13.
Marking gauges. 8.
——— ink. 39.
——— presses or stamps for linen. 39.
Marline spikes. 13.
Marmalade. 42.
Marquees. 50.
Marrow. 42.
Massage instruments. 11.
Match-boxes (metal). 13.
——— striking compositions or surfaces. 50.
Matches. 17.
Matchets. 12.
Mathematical instruments. 8.
Mats, Door (india-rubber). 40.
——— (textile). 36.
——— (wire). 13.
Mattocks. 13.
Mattresses. 41.
Mauds. 35.
Mayonnaise. 42.
Meal. 42.
Measures, not being workmen's ordinary measures. 8.
———, Workmen's (metal). 13.
——— (wood). 50.
Measuring instruments and apparatus. 8.
——— tapes (for workmen's use). 50.

Meat, Extract of. 42.
——, Fresh and preserved. 42.
—— safes (chiefly of wood). 50.
—— screens and safes (metal). 13.
Medical batteries. 11.
Medicated articles for human use, as wool, paper, soap, &c. in class. 3.
—— beverages. 3.
Medicines for horses, cattle, or birds. 2.
—— man. 3.
Mediums, Artists'. 1.
——, Bronzing. 1.
Memorandum books. 39.
Memorial brasses. 13.
—— stones (finished). 17.
—— wreaths of cut-flowers. 16.
Menu cards. 39.
Merino piece goods. 34.
—— yarns. 33.
Mesh pins (metal). 13.
—— (wood). 50.
Metallic cement for filling holes in castings. 1.
—— oxides. 1.
Metals of all kinds used in manufactures (unwrought and partly wrought). 5.
Meteorological instruments. 8.
Meters. 8.
Methylated spirit for burning. 47.
Metronomes. 8.
Mica insulators, lamp chimneys and covers. 50.
— (raw or partly prepared for use in manufacture). 4.
Microscopes. 8.
Milk. 42.
— cans. 13.
——, Condensed. 42.
—— fermented (for use as food). 42.
—— separators. 7.
Millboard. 39.
Millinery. 38.
—— stands (wholly or chiefly of wood). 50.
Milling cutters (parts of machines). 6.
—— machines. 6.
Mills, Coffee; Pottery. 6.
Mincing machines. 6.
Mineral dyes. 1.
—— oils for lighting, heating, and lubricating. 47.
—— not included in other classes. 4.
—— substances used in manufactures (raw or partly prepared), not included in other classes. 4.
— waters, natural and artificial. 44.
Minnows, Artificial. 49.
Mirrors (dental). 11.
—— (furniture). 41.
— (pocket). 50.
Mitres (metal). 13.
Modelling, Prepared clay for. 17.
Models (educational). 8.
Mohair cloth. 34.
—— smallwares (not included in other classes), including laces, braids and bindings. 35.
Molasses. 42.
Moleskins (cotton pile). 24.
—— (japanned). 36.
—— (woollen). 34.
Moneyboxes (metal). 13.
Monumental masonry (finished). 17.
Mops. 50.
Mordants. 1.
Mortar mills. 6.
Mortars (earthenware or china). 16.
—— (glass). 15.
—— (metal). 13.
Mortising machines. 6.
Mosaic (glass). 15.
Mosquito nets. 11.
—— destroying pastilles. 2.
—— repelling preparations (for human use). 3.
—— (veterinary). 2.
Moss destroying preparations. 2.
Moth repelling and destroying preparations. 2.
Mother-of-pearl ornaments. 50.
Motor car bodies (wood). 50.
—— engines. 6.
—— frames (metal). 13.
— carriages. 22.
— chassis. 22.
— cycles. 22.
— spirit. 17.
Motors, Traction, 6.
Moulding irons (machine). 6.
—— wax composition, Dentists'. 11.
Mouldings, Picture frame and cornice (wood or composition). 50.
Moulds, Bullet. 19.
——, Gold-beaters'. 50.
—— (metal), not for bullets. 13.
Moustache protectors (linen). 28.
—— wash. 48.
Mouth protectors. 11.
—— wash (medicated, for human use). 3.
—— (not medicated). 48.
Movements, Watch and Clock. 10.
Mowing machines. 7.
Mudguards for cycles and other vehicles (celluloid or wood). 50.
(metal). 13.
Muffs. 33.
Mullions (concrete). 17
Mungo piece goods. 34
—— yarns. 33.
Mushroom spawn. 46.
Music cases. 39.

Music sheets, Perforated, for mechanical players. 9.
—— turning apparatus. 8.
Musical boxes, instruments, and strings. 9.
—— publications. 39.
Muslin (cotton). 24.
—— (wool). 34.
Mustard as an ingredient in food. 42.
—— oil, leaves and plasters (for human use). 3.
—— prepared for use in medicine and pharmacy. 3.
—— —— —— veterinary use. 2.
Mutes for violins (precious metal). 14.
Muzzles (leather). 37.
—— (wire). 13.
Myrobalans. 4.

Nail brushes. 50.
—— rods. 5.
Nails. 13.
Name plates (metal). 13.
Naphtha for illuminating and heating. 47.
Napkin rings (bone, ivory, celluloid, papier mâché, wood). 50.
—— —— (metal). 13.
—— —— (precious metal). 14.
Napkins (cotton), in the piece. 24.
—— —— not in the piece. 25.
—— (linen), in the piece. 27.
—— —— not in the piece. 28.
Nautical instruments. 8.
—— thimbles. 13.
Necklets of precious metal. 14.
Neckties. 38.
Needles. 13.
—— for talking machines. 8.
Nets, Fishing. 49.
——, Hair, as smallwares according to the class of the material.
——, Mosquito. 11.
——, Tennis, 49.
Netting pins and meshes of wood, bone, or ivory. 50.
——, Silk (in the piece). 31.
——, Wire. 13.
Neutralizers for fermented liquors. 42.
Newspapers. 39.
Nickel silver. 5.
—— wares. 14.
Nicotine preparations for horticultural purposes. 2.
Night lights. 47.
Nippers with a cutting edge. 12.
—— without a cutting edge. 13.
Nipple shields. 11.
Nit destroying preparations (medicated) for children's heads. 3.
Nitrate of soda for agricultural purposes. 2.
Nose bags (textile). 50.
Note books and paper. 39.
Numerals (metal). 13.
Nursing aprons. 38.
Nut-crackers (metal). 13.
Nutmegs. 42.
Nut-oil for food. 42.
Nuts and bolts. 13.

Oakum. 4.
Oars. 21.
Oat bruising machines (agricultural). 7.
Oat cakes and meal. 42.
Ochre. 1.
Office desks. 41.
Oil cake. 42.
— cans. 13.
— cloth. 36.
— enriching substances for illuminating purposes. 1.
— feeders (metal) not parts of machinery. 13.
— paintings. 39.
— separating machines. 6.
— skin garments. 38.
— stones. 50.
— tanks (metal). 13.
Oiled silk for curative purposes. 11.
Oils, Anti-corrosive. 1.
—— for heating, lighting, and lubricating. 17.
—— tanning and currying. 4.
—— use as food. 42.
—— prepared for toilet purposes. 48.
—— —— use in medicine and pharmacy. 3.
—— —— veterinary purposes. 2.
——, Preservative, for leather articles. 50.
—— —— for wood and stone work. 1.
—— used in manufactures, not included in other classes. 4.
Ointment for human use. 3.
——, Veterinary. 2.
Oleographs. 39.
Olive oil for use as food. 42.
Olives. 42.
Omnibuses. 22.
Openers, Can. 12.
Opera glasses. 8.
Opium. 3.
Opodeldoes. 3.
Optical instruments. 8.
—— lanterns and slides. 8.
Orange lead. 1.
—— quinine wine. 3.
—— wine. 43.
Orchestrions. 9.

Ores. 1.
Organs. 9.
Ormolu wares. 14.
Ornaments (bronze). 14.
———— (china) not being jewellery. 16.
———— (ivory, wood, bone, horn, vegetable ivory, mother-of-pearl, jet, and imitation jet), not being jewellery. 50.
—— —— (paper). 39.
———— (precious metal. 14.
Orsedew. 5.
Ostrich feathers (made up). 50.
———————— (not made up). 4.
Ovens. 18.
Overcoats, overalls and overshoes. 38.
Overlays, Printers' (paper or cardboard). 39.
Oxidation of metal surfaces, Preparations for preventing. 1.
Oxides, Metallic. 1.
Oxygen. 1.
Ozokerite. 4.
Oysters. 42.

Packing, Steam and Hydraulic. 50.
Packs, Wool (canvas). 50.
Pads (not medicated), Ague, Catamenial, Liver, Teething and Vaccination. 11.
- - (stamp inking). 39.
Pails (glass). 15.
—— (metal). 13.
—— (wood). 50.
Paint driers. 1.
- - - mills. 6.
—— removing compositions. 17.
Paints. 1.
Paintings, Oil and Water-colour. 39.
Palette knives with a cutting edge. 12.
———————— without a cutting edge. 13.
Palettes. 39.
Palisading (metal). 13.
Palliasses. 41.
Palmetto fibre. 4.
Palms, Sailmakers'. 13.
Pannellings (wood or composition). 50.
Pans (glass). 15.
— — (metal). 13.
—— (potteryware). 16.
Paper bed-coverlets. 41.
——, Chemical test. 39.
—— collars. 38.
——, Emery, Sand, Corundum, and Glass. 50.
—— (except paper hangings). 39.
—— fasteners and files. 39.
- - for destroying insects. 2.
- - -, Filter. 39.
——, Fumigating. 2.

Paper hangings. 11.
—— knives, being stationery. 39.
—— (perforated) for musical instruments. 9.
—— prepared for medical and pharmaceutical purposes. 3.
——, Toilet (medicated). 3.
- - ———— (not medicated). 39.
—— weights. 39.
Paraffin oil (for illuminating, heating and lubricating purposes). 47.
———— wax for use in manufactures. 4.
Parasol frames, ribs and stretchers (metal). 13.
Parasols. 50.
Parcel carriers for attachment to cycles (metal). 13.
Parchment. 39.
Paring machines. 6.
Parquetry of wood. 50.
Paste, being an article of stationery. 39.
—— for destroying insects. 2.
———— food. 42.
———— lubricating. 47.
———— toilet use. 48.
——, Printers'. 39.
——, Razor; Friction; Polishing. 50.
Pasteboard. 39.
———— roofing material. 50.
Pastilles (medicated). 3.
———— for destroying insects. 2.
———————— toilet purposes. 48.
Pastry and pastry powder. 42.
Patching material (india-rubber). 40.
Pattern cards. 39.
———— linings (textile) for dresses. 50.
Patterns for embroidery (textile) as smallwares according to the class of the material.
————. Paper. 39.
Pavement lights of glass, with metallic frames. 13.
———————————, without metallic frames. 15.
Paving blocks (metal). 13.
———————— (wood). 50.
———— material (manufactures from mineral and other substances). 17.
———————— (raw or partly prepared mineral substances). 4.
———— setts (stone). 4.
Pearls, natural and artificial. 14.
Peas (for food). 42.
Peat fire-lighters and fuel. 50.
—— moss litter. 50.
Pedals for cycles. 13.
Pedometers. 8.
Peel plates (metal). 13.
Pelisses. 38.
Pencil cases (not of precious metal). 39.
———————— (precious metal). 14.
———— protectors. 39.
———— sharpeners. 12.
———— sharpening machines. 6.

Pencils. 39.
Penholders (not of precious metal). 39.
——— (precious metal). 14.
Penknives. 12.
Pens (not of precious metal). 39.
—— (precious metal). 14.
Pepper. 42.
Pepsine preparations (medicinal) for human use. 3.
Peptone preparations (medicinal) for human use. 3.
Perambulator covers. 50.
Perambulators. 22.
Percolators, Coffee (metal). 13.
Percussion caps. 20.
Perforated music sheets for mechanical players. 9.
Perforating presses, being articles of stationery. 39.
Perfumed soap. 48.
Perfumery. 48.
Perry. 43.
Pessaries. 11.
——— (medicated). 3.
Pestles (metal). 13.
Petrifying liquids. 1.
Petrol for motor engines. 47.
Petroleum for illuminating, heating, or lubricating purposes. 47.
——— jelly for use in medicine and pharmacy. 3.
Pewter. 5.
———, Wares of. 13.
Phonograph records. 8.
Phonographs. 8.
Phosphor-bronze. 5.
Phosphorus for use in manufactures, photography or philosophical research. 1.
——— prepared for use in medicine and pharmacy. 3.
Photographic cameras. 8.
——— chemicals, plates, and films. 1.
——— paper. 39.
Photographs. 39.
Photometers. 8.
Pianoforte actions. 9.
Pianofortes. 9.
Piano players. 9.
—— wire. 5.
Piassava fibre. 4.
Pickaxes. 13.
Pickers, being parts of looms. 6.
Picking bands (leather). 37.
Pickles. 42.
Picks. 13.
Picture frames and mouldings (wood or composition). 50.
—— lines (metal). 13.
——— (not of metal). 50.
—— reviver for oil paintings. 50.
—— rods and hooks (metal). 13.
Pictures. 39.
Pieces, Fowling. 19.
———, Trunnion (ordnance). 19.
Pig houses. 18.
— medicines. 2.
— rings and pliers. 13.
Pigments. 1.
Pigs' bristles. 4.
Pillars, Gas (metal). 13.
Pillowcases (cotton). 25.
——— (linen). 28.
Pillows, Feather. 41.
——— (india-rubber and gutta-percha). 10.
———, Soporific (not medicated) for use in cases of insomnia. 11.
Pills for man. 3.
—— veterinary purposes. 2.
Pimento. 42.
Pinafores. 38.
Pincers with a cutting edge. 12.
——— without a cutting edge. 13.
Pins, Cotter and Linch. 13.
—— (bone, ivory, or wood). 50.
—— (metal). 13.
—— (precious metal). 14.
Pipeclay. 50.
Pipe cleaners (wire). 13.
—— clips (metal). 13.
—— cutters. 12.
—— organs. 9.
Pipes (glass). 15.
——— (metal). 13.
———, Pitch. 8.
——— (pottery ware). 16.
———, Tobacco. 50.
Pistols and parts thereof. 19.
Pitch. 4.
—— pipes. 8.
Plaids (woollen) in the piece. 34.
——— (not in the piece). 35.
Plaits, Hair and Straw. 50.
Planes and plane irons. 12.
Planing machines. 6.
Planks (wood). 50.
Plans. 39.
Plants for horticultural purposes. 46.
Plaster. 17.
—— of Paris. 17.
Plasters for human use (surgical and medical). 3.
Plate. 14.
—— glass. 15.
—— powder. 50.
—— racks (wood). 50.
Plates, Axle (Grinders'). 13.
———, Black. 5.
———, Boiler and Armour. 5.
———, Canada. 5.
———, Dental. 11.
———, Dry (chemically prepared, for use in photography). 1.
———, Engravers' steel and copper. 13.
———, Hot, for cooking. 18.
———, Knotter and strainer. 6.

Plates, Name (metal). 13.
——, Stencil. 39.
Plates and dishes (china and earthenware). 16.
—— —— (metal). 13.
—— —— (precious metal). 14.
Plating apparatus, Electro-. 8.
Platinum. 5.
—— articles. 14.
Platters, Bread (wood). 50.
Player pianos. 9.
Players, Piano. 9.
Playing cards. 39.
Pliers with a cutting edge. 12.
—— without a cutting edge. 13.
Plough irons, for planing and grooving. 12.
—— breasts. 7.
Ploughs and parts of ploughs (agricultural). 7.
—— for woodworkers and bookbinders. 12.
——, Steam. 7.
Plugs (ivory, bone or wood). 50.
——, Sparking. 13.
Plumb bobs. 8.
—— levels, Workmen's (wood). 50.
Plumbago crucibles. 50.
—— for lubricating. 47.
—— polishing. 50.
——, Founders'. 4.
Plumbers' knives, with a cutting edge. 12.
—— —— without a cutting edge. 13.
Pneumatic alarms and bells (as systems in buildings). 18.
—— apparatus for carrying cash and goods. 18.
—— machinery. 6.
—— tyres (india-rubber). 40.
Pocket books. 39.
Pockets, Dress, of textile material, as smallwares, according to the class of the material.
Points, Black-lead, for pencil cases. 39.
——, Railway. 6.
Poison, Insect and Vermin. 2.
Poleaxes. 12.
Poles, Lawn Tennis. 49.
—— (wood). 50.
Polishing cloths (cotton). 25.
—— —— (emery, glass). 50.
—— —— (linen). 28.
—— —— (silk). 32.
—— —— preparations and materials. 50.
Pomade for medical purposes. 3.
—— —— toilet purposes. 48.
Ponchos. 38.
Poplins. 34.
Porcelain. 16.
Porous cells (earthenware). 16.
Porter. 43.
Portfolios. 39.
Portland cement. 17.
Portmanteaus (canvas or cane). 50.
—— —— (leather). 37.
Portraits. 39.
Postcards. 39.
Postal tubes (paper or cardboard). 39.
Posters. 39.
Postiches. 50.
Pot stretchers (wood). 50.
Potash for use in manufactures. 1.
—— water. 44.
Potassium, Iodide of, prepared for use in pharmacy. 3.
Potato flour for use in manufactures. 4.
—— peeling machines. 6.
Potatoes (for food). 42.
Pots (earthenware and china). 16.
—— (metal). 13.
Potted fish and meats. 42.
Pottery mills. 6.
Potting fibre. 2.
Pouches, Cartridge or shot. 19.
—— —— other than cartridge or shot pouches, in the class of the material, as leather pouches in. 37.
Poultry coops (wood). 50.
—— food and grit. 42.
—— houses. 18.
—— medicines. 2.
Powder and shot measures and flasks. 19.
—— puffs. 48.
Powders for destroying insects, vermin and weeds. 2.
—— —— veterinary purposes. 2.
——, Medicinal (for human use). 3.
Power meters and indicators. 8.
Precious metal and imitations thereof, Wares of. 14.
—— stones. 14.
Prepayment gas meters. 8.
Preservative dressings for leather goods. 50.
—— —— —— wood, stonework, brickwork and metal. 1.
Preservatives for food (being ingredients in food). 42.
—— —— (not becoming ingredients in the food). 2.
—— —— plants. 2.
Preserves for food. 42.
Press studs (metal). 13.
Presses, Copying. 39.
——, Hand (for marking linen and paper). 39.
—— Mechanical, for trousers. 6.
——, Perforating (articles of stationery). 39.
Pressure gauges and indicators. 8.
Preventing condensation on glass, Compositions for. 50.
—— —— corrosion on metals, Compositions for. 1.

Preventing incrustation in steam boilers, Compositions for. 1.
Printed publications. 39.
Printers' blankets and p[illegible]otton). 25.
——— overlays and underlays (paper or cardboard). 39.
——— paste. 39.
——— roller composition. 50.
——— rollers (parts of machines). 6.
——— type-cleaning preparations. 17.
Printing inks. 39.
——— presses. 6.
——— type, blocks and plates (metal). 13.
——— ——— ——— (wood). 50.
Prints and engravings. 39.
Prismatic glass for pavement lights. 15.
Programmes (paper or card). 39.
Projectiles (explosive). 20.
——— (non-explosive). 19.
Propellers, Ships'. 6.
Props (wood). 50.
Protector glasses for gauges. 15.
Protectors, Back, Mouth and Chest. 11.
———, Boot (india-rubber). 40.
——— ——— (leather). 37.
——— ——— (metal). 13.
———, Cuff (celluloid). 38.
———, Moustache (linen). 28.
———, Sight (for guns). 19.
———, Watch (celluloid). 50.
——— ——— ——— (metal). 13.
Protractors. 8.
Pruners, Tree. 12.
Pruning hooks. 12.
Publications, Printed. 39.
Puddling machinery. 6.
Puffs, Powder. 48.
Pug mills. 6.
Pulley blocks (metal). 13.
——— ——— (wood). 50.
Pulleys, Differential and Machine. 6.
Pullna water. 44.
Pulls, Drawer and Door (metal). 13.
Pulp, Wood. 50.
Pulping machines (agricultural). 7.
Pulses (for food). 42.
Pumice soap (being a form of common soap). 47.
——— (raw). 4.
——— blocks (prepared). 50.
Pumping engines. 6.
Pumps. 6.
———, Air (philosophical). 8.
——— ——— (steam engine, and for supplying air). 6.
———, Garden and Manure. 7.
———, Running. 38.
———, Stomach and Breast. 11.
Punches (metal), with a cutting edge. 12.
———, without a cutting edge. 13.
Punching machines. 6.
Puncture closing compositions. 50.
——— proof bands (leather) for tyres. 37.
——— repair outfits for tyres. 50.
Punt guns. 19.
Purses in the class of the material.
Putty. 50.
——— knives without a cutting edge. 13.
Pyrometers. 8.
Pyroxylin, Yarn or Fabric made of. 50.

Quarries (tiles). 16.
Quarrying tools without a cutting edge. 13.
Quassia extract for horticultural purposes. 2.
Quicksilver. 5.
Quill pens. 39.
Quilts (textile) as small wares in the class of the material or predominating material of the covering.
Quinine. 3.
——— wine. 3.
Quoits. 49.

Rackets. 49.
Racks, Hay (metal). 13.
———, Plate and Clothes (wood). 50.
Radiation of Heat, Compositions to prevent. 1.
Radiators for heating. 18.
Rag books. 39.
—— knives, not parts of machinery. 12.
———, parts of machinery. 6.
—— toys. 49.
Railings (metal). 13.
Rails for railways. 5.
Railway carriages and trucks. 22.
——— couplings (sold separately). 13.
——— crossings, with rails in Class 5.
——— points and signals. 6.
——— wraps and rugs. 50.
Rakes (garden). 13.
—— (horse). 7.
Ramie braids and laces. 28.
——— piece goods. 27.
———, raw or partly prepared for use in manufactures. 4.
——— yarn and thread. 26.

Rammers (metal). 13.
Ramps (metal). 13.
Rams, Hydraulic. 6.
Ranges, Cooking. 18.
Rape cake and meal (for food). 42.
—— oil, for use in manufactures. 4.
Raspberry vinegar. 42.
Rasps. 12.
Ratchet-braces. 13.
Ratchets. 13.
Rattans. 50.
Razor paste and strops. 50.
—— stropping machines. 6.
Razors. 12.
Reading desks. 11.
Reamers (hand tools). 12.
—— (machine tools). 6.
Reaping hooks. 12.
—— machines. 7.
Reclaimed india-rubber. 4.
Reconstructed stone. 17.
Recorders, Time. 8.
Recording gauges. 8.
Records for piano players. 9.
—— talking machines. 8.
Rectum tubes. 11.
Red lead. 1.
—— ochre. 1.
Reed musical instruments. 9.
Reeds (parts of looms). 6.
Reels, Fishing. 49.
Refills for pencil cases. 39.
Reflectors (glass). 15.
—— (metal). 13.
Refractory clay for furnaces. 16.
Refrigerating chambers. 18.
—— chests. 50.
—— machines. 6.
Register stoves. 18.
—— tills, Cash. 6.
Regulating apparatus for gas. 8.
Reins, Driving (cotton). 25.
—— (leather). 37.
Remedies for animals. 2.
—— man. 3.
Removing ink and stains from fabrics, Preparations for. 47.
—— paint and varnish, Preparations for. 47.
Rennet. 42.
Renovating preparations for clothes and silk hats. 47.
Repair bands and patching material (india-rubber) for tyres. 40.
—— outfits for tyres. 50.
Repairing composition for tyres (not being india-rubber solution). 50.
Resin. 4.
—— oil for use in manufactures. 4.
Resistances, Electrical. 8.
Respirators. 11.
Retorts (earthenware). 16.
—— (plumbago). 50.
Reviver, Kid; Leather; Floor-cloth; Picture. 50.
Revolvers. 19.
Rheostats. 8.
Rheumatism, Rings, Bracelets and Anklets for the cure of (not of precious metal). 11.
—— —— —— —— —— (of precious metal). 14.
Ribbons for typewriting machines. 39.
—— (cotton). 25.
—— (silk and silk velvet). 32.
—— (wool, worsted, or mohair). 35.
Ribs, Umbrella (cane). 50.
—— (metal). 13.
Rice. 42.
—— bowls (metal). 13.
Rick covers. 50.
Riddles (wire). 13.
—— (wood). 50.
Rifles. 19.
Rimers (hand tools). 12.
—— (machine tools). 6.
Rims or fellies (metal). 13.
—— —— (wood). 50.
Ringflyers. 6.
Rings, Curtain (metal). 13.
—— (wood). 50.
—— Finger, for the cure of rheumatism (not of precious metal). 11.
—— —— —— —— —— —— (precious metal). 14.
—— (metal). 13.
—— . Napkin (bone, ivory, celluloid, papier mâché, wood). 50.
—— —— (metal). 13.
—— —— —— (precious metal). 14.
Rippers, Slaters'. 12.
Rivet iron. 5.
Rivets. 13.
Riveting machines. 6.
Road making, Granite for. 1.
——, Manufactures from mineral and other substances for. 17.
Roasting jacks. 6.
—— machines, Coffee. 6.
Rock drills. 6.
Rod iron and steel. 5.
Rods, Fishing. 49.
——, Gauge. 8.
——, Stair and Picture (metal). 13.
Roller bandages. 11.
—— composition, Printers'. 50.
—— skates. 49.
—— skins. 37.
Rollers for sashes and chains (metal). 13.
——, Land and Garden. 7.
——, Printers' (parts of machinery). 6.
Rolling pins (wood). 50.

Roofing felts. 50.
—— material (pasteboard). 50.
Root-cutting machines. 7.
Roots for food. 42.
———— use in medicine and pharmacy. 3.
Rope (jute or hemp). 50.
—— (leather). 37.
—— (wire or metal). 13.
—— for driving machinery (cotton). 25.
———————————— (wool or hair). 35.
—— ladders. 50.
—— ways, Overhead (engineering contrivances). 18.
Rosettes, Paper. 39.
————, Silk. 32.
Rosettes, Wood. 50.
Rotten stone. 50.
Rouge for polishing. 50.
———— toilet purposes. 18.
Roughing cogs. 13.
Rowing exercisers. 19.
Rowlocks. 21.
Rubbers, Corn and Flesh. 11.
————, Sharpening. 50.
Ruby cloth and paper for polishing. 50.
—— fabric for photography, in the piece (cotton). 24.
———————————————————
—— (silk). 31.
—— paper for photography. 39.
Rugs for personal use. 50.
—— in the nature of carpets. 36.
Rulers. 39.
Rules, Slide (for calculating). 8.
——, Workmen's (metal). 13.
———————— (wood). 50.
Rum. 43.
——, Bay. 48.
Running pumps. 38.
Rust on metal. Compounds to prevent. 1.
Rye meal. 42.

Sabots (bathing). 38.
Saccharin as an ingredient in food. 42.
Saccharometers. 8.
Sachets, Perfumed. 48.
Sacking (jute). 24.
Sacks. 50.
Saddle cloths. 37.
— — — frames (metal). 13.
—— paste and soap. 50.
—— trees (metal). 13.
———— (wood). 50.
Saddlers' ironmongery. 13.
Saddlery. 37.
Sad-irons. 13.
Safes, Ice. 50.
——, Meat (wire). 13.
———— (wood predominating). 50.
—— (metal) for money and valuables. 13.
Saffron prepared for use in medicine and pharmacy. 3.
Sago (for food). 42.
Sailcloth (flax and hemp). 27.
Sailmakers' palms (metal). 13.
Salad cream and oil. 42.
Saline, Medicinal, for human use. 3.
Salinometers. 8.
Salt for food. 42.
—, Sea (for bathing). 3.
Salts, Bath (medicated). 3.
———— (perfumed toilet). 48.
—— prepared for use in medicine and pharmacy. 3.
——, Smelling. 3.
—— used for agricultural, horticultural, veterinary and sanitary purposes. 2.
———— in manufactures, photography, or philosophical research. 1.
Salve (medicated) for human use. 3.
Sand paper and cloth. 50.
——, Silver. 50.
Sandallings, Elastic (india-rubber). 49.
Sanitary paper (medicated). 3.
———————— (not medicated). 39.
———— towels. 11.
Sardines. 42.
Sarsaparilla. 3.
Sash cord (not of metal). 50.
— fasteners, pulleys and weights (metal). 13.
—— iron. 5.
Sashes for wear. 38.
Satchels (textile). 50.
Sateens (cotton piece goods). 24.
Sates, Cold. 13.
Satins (silk piece goods). 31.
Sauce. 42.
Saucepans (metal). 13.
Sausage machines. 6.
———— skins. 37.
Sausages. 42.
Saw benches and tables. 6.
—— blades. 12.
—— sets. 13.
Sawdust. 50.
———— flooring compositions. 50.
Sawing machines. 6.
Saws. 12.
—— (surgical). 11.
Saxes, Slaters'. 12.
Scale, Fluid for the prevention and removal of boiler. 1.
Scales. 6.
Scantling (wood). 50.
Scarves. 38.
Scents. 48.
Schiedam. 43.
School desks. 8.

Scissors. 12.
——— (*surgical*). 11.
Scoops (metal). 13.
Scorifiers (refractory earth). 16.
Scoring books, cards and sheets. 39.
Scouring cloths (cotton). 25.
——— liquids for fabrics. 47.
Scrap-books. 39.
Scrapers, Door (metal). 13.
———, Tongue. 11.
——— with a cutting edge. 12.
——— without a cutting edge (metal). 13.
Screens, Fire (metal). 13.
——— (furniture). 41.
——— for motor cars (wood and glass). 50.
——— (wire). 13.
Screw-drivers. 13.
——— *cutting tackle (not being parts of machines).* 12.
——— jacks. 6.
——— machines. 6.
Screws (metal). 13.
Scrubbers, Hydraulic (for cleaning ships' *bottoms when afloat*). 21.
Scuttles, Coal (metal). 13.
Scythe snaths (wood). 50.
——— stones and strickles. 50.
Scythes. 12.
Sea salt for bathing. 3.
— water for bathing and other purposes. 50.
Sealing wax. 39.
Searchlight apparatus. 8.
Seats, Garden (metal). 13.
— (wood). 50.
Seed dressing. 2.
——— machines. 7.
— drills. 7.
Seeds for agricultural and horticultural purposes. 46.
— used as food. 42.
——— in manufactures. 4.
——— — medicine and pharmacy. 3.
Seidlitz powders. 3.
Seltzer water. 44.
Seltzogenes. 8.
Semolina. 42.
Sensitive compositions, Photographic. 1.
——— paper for detecting sewer gas. 39.
———, Light-. 39.
——— plates and films, Light-. 1.
Separating machines (agricultural). 7.
——— (other than agricultural and horticultural machines). 6.
Separators, Cream. 7.
Serges (cotton). 24.
——— (woollen). 34.
Serum for inoculation. 11.
Serviettes, Paper, 39.
——— not in the piece (cotton). 25.
——— (linen). 28.
Set-off liquid for printing and lithography. 39.
Setsquares for workmen's use (metal). 13.
——— (wood). 50.
Setts, Granite paving. 4.
Sewing machine needles. 13.
——— machines and parts of sewing machines. 6.
——— needles. 13.
——— silk. 30.
— thread (cotton). 23.
——— (linen). 26.
Sextants. 8.
Shackles (metal). 13.
Shades for lamps (asbestos, mica, or celluloid). 50.
——— (glass). 15.
——— (metal). 13.
Shafts (parts of machines). 6.
——— (wood). 50.
Shaping machines. 6.
Sharpening machines. 6.
——— sticks (metal). 13.
——— stones and powder. 50.
Shave hooks, Plumbers' (without a cutting edge). 13.
Shaving brushes. 50.
———paste and soap. 48.
Shawls in the piece (cotton). 24.
——— (linen). 27.
——— (silk). 31.
——— (wool or worsted). 34.
——— *not in the piece* (cotton). 25.
——— (linen). 28.
——— (silk). 32.
——— (wool or worsted). 35.
Sheaf binders. 7.
Shear steel. 5.
Shearing machines (for sheep). 7.
——— (not for agricultural purposes). 6.
Shears. 12.
Sheathing and roofing felt. 50.
——— *metal.* 5.
Sheep, Medicines and Dressings for. 2.
——— shearing and washing machines. 7.
——— shears. 12.
——— skins. 37.
——— *washes.* 2.
Sheet-metal. 5.
Sheeting (india-rubber). 40.
Sheetings (cotton) in the piece. 24.
——— (linen and hemp) in the piece. 27.
Sheets (cotton) not in the piece. 25.
——— (linen) not in the piece. 28.
Sheffield and other plated goods. 14.

Shellac. 4.
Shell gravel for birds. 42.
Shells (explosive). 20.
Shelves, Fret (metal). 13.
—— (wood) 50.
Sherbet. 42.
Sherry. 43.
Shields for blasting (metal). 13.
——, Nipple. 11.
Ships' berths (metallic). 41.
—, Compositions for the bottoms of. 1.
— logs. 8.
Shirt fronts. 38.
— studs (ivory, bone, or mother of pearl). 50.
—— (metal). 13.
—— (precious metal). 14.
Shirtings (cotton). 24.
—— (linen). 27.
—— (woollen). 31.
Shirts. 38.
Shives and spiles (wood). 50.
Shoddy piece goods. 31.
Shoe and boot leather. 37.
— —— linings (linen) in the piece. 27.
—— protectors (metal). 13.
—— socks. 38.
—— varnish and polish; stretchers (wood); heels (wood). 50.
— horns (bone, ivory, wood). 50.
—— (metal). 13.
— thread (linen). 26.
Shoes. 38.
Shop counters. 41.
— fittings (wood). 50.
Shot. 19.
— belts and pouches. 19.
Shoulder straps for wear. 38.
Shovels (metal). 13.
—— (wood). 50.
Show cards. 39.
— cases (wood). 50.
Shumac. 4.
Shutters (revolving). 18.
—— (wood). 50.
Shuttlecocks. 49.
Shuttles of bone, ivory, and wood. 50.
—— metal. 13.
—— (parts of machines). 6.
Sickles. 12.
Side-cars. 22.
— plates for ploughs. 7.
Sieves (wire). 13.
——(wood). 50.
Sifters, Cinder (being machines). 6.
—— (metal) for household use. 13.
Sights and sight protectors for guns. 19.
Signal boxes, Railway. 18.
Signalling apparatus, Flashlight. 8.
— machinery, Fog. 6.
Signals, Fog (explosive). 20.
——, Railway. 6.
Signs, Mechanical, for advertising purposes. 6.
—— (metal). 13.
Silica furnace fittings. 16.
—, Fused. 15.
Silicate cotton prepared for covering steam boilers. 1.
—— (raw). 4.
Silk braids, bindings, galloons, ribbons, webbing, and other silk smallwares (not included in other classes). 32.
—, Oiled, for curative purposes. 11.
— piece goods. 31.
— (raw and partly prepared). 4.
— (spun, thrown, sewing, or knitting: twist, yarn, and thread). 30.
Sills of concrete. 17.
Silver and silver alloys. 5.
— ——, Wares of. 14.
—, German (in sheets, bars, ingots and wire). 5.
— leaf and wire. 5.
—, Nitrate of. 1.
— sand. 50.
— thread. 14.
Silvered glass. 15.
Silvering solutions. 50.
Silversmiths' soap. 50.
Singeing lamps. 13.
Singers, Horse. 13.
Sinks (earthenware or fire-clay). 16.
— (metal). 13.
— (slate and stone). 50.
Sirens, Steam. 6.
Size. 1.
Sizing machines. 6.
Skates. 12.
——, Roller. 49.
Sketch books. 39.
Ski. 49.
Skin emollients, being toilet articles. 48.
— preparations, Medicated (for human use). 3.
Skins, Wrought and unwrought. 37.
Skirt flounces (textile) as small wares according to the class of the material.
Skirts. 38.
Skylights (metal). 13.
Slag wool prepared as a covering for steam boilers. 1.
—— (raw). 4.
Slate, Artificial. 17.
— pencils. 39.
Slaters' rippers, saxes, and horses. 12.
Slates (roofing). 17.
— (writing). 39.
Sleep-inducing pillows (not medicated). 11.
Sleeve links (metal). 13.
—— (precious metal). 14.
Slide rests (parts of machinery). 6.
— rules. 8.

Slides for optical lanterns and microscopes. 8,
Slippers for wear. 38.
Slotting machines. 6.
Slug exterminators. 2.
Small-arms. 19.
Small wares, Fancy, not included in other classes (textile) according to the material or the predominating material.
——————————————
———— (wood, ivory, celluloid, mother of pearl, bone and jet). 50.
Smelling bottles mounted in precious metals. 14.
——— salts. 3.
Smoke stoppers (glass). 15.
———— (metal). 13.
———— (mica). 50.
———— (porcelain). 16.
Snaths, Scythe (wood). 50.
Snow boots. 38.
Snuff. 45.
——. Medicinal (containing no tobacco). 3.
Soap, Common. 47.
——, Extract of (common). 47.
———— (perfumed). 48.
—— for veterinary and horticultural purposes. 2.
——, Medicated, for human use. 3.
——, Perfumed. 48.
——, Polishing. 50.
——, Shaving. 48.
——, Silversmiths'. 50.
Soapstone (prepared). 50.
———— (raw). 4.
Socks for boots. 38.
—— —— curative purposes (medicated). 3.
———————————— (not medicated). 11.
———— wear. 38.
Soda and its preparations (for use in manufactures). 1.
—— water. 44.
———— machines. 6.
Sofas (furniture). 41.
Solder. 5.
Soldering fluxes. 1.
———— stoves and lamps. 18.
Sole plates for ploughs. 7.
Soles (leather). 37.
Solitaires (metal). 13.
———— (precious metal). 14.
Soluble oils for lubricating. 47.
Solution, Fireproofing. 50.
———, India-rubber. 40.
———, Silvering. 50.
———, Waterproofing (for fabrics). 50.
Soot used in manufactures, not included in other classes. 4.
Soothers, Baby. 11.
Sound boxes for talking machines. 8.
Sounding machines and apparatus. 8.
Soups. 42.
Spades. 13.
Spangles (precious metal). 14.
Spanners. 13.
Sparking plugs. 13.
Spars for ships. 21.
Spats. 38.
Spawn, Mushroom. 46.
Spectacle frames (metal). 13.
———— (precious metal). 14.
Spectacles. 8.
Specula (surgical). 11.
Speed gears for cycles and cars. 6.
—— indicators and gauges. 8.
Spelter. 5.
Spherometers. 8.
Spice extracts (alcoholic). 43.
Spices. 42.
Spikes (metal). 13.
Spills (wood). 50.
Spinning oils. 4.
Spiral wire for power transmission. 13.
Spirit levels. 8.
—— stands (wood). 50.
Spirits (beverages). 43.
———— (medicinal, for human use). 3.
———, Motor; Lighting: Heating. 47.
———— (perfumed). 48.
———— used in manufactures. 4.
Spittoons (metal). 13.
———— (porcelain or earthenware). 16.
Splints. 11.
Spokeshaves. 12.
Spokes (metal). 13.
———— (wood). 50.
Sponges. 4.
Sponge substitutes (india-rubber). 40.
Spoons (earthenware). 16.
———— (metal). 13.
———— (precious metal). 14.
Spouting (metal). 13.
Spraying apparatus (medical and surgical). 11.
———— machines. 6.
———— ———— (agricultural and horticultural). 7.
Spreaders (wood). 50.
Spring balances. 6.
———— mattresses. 41.
———— steel. 5.
Springs (bell, door, railway waggon and carriage, bufling or buffer). 13.
———— for watches and clocks. 10.
———— (machine). 6.
Sprinkler systems for fire extinction. 18.
Sprinklers (metal). 13.
Spuds. 13.
Spurs (iron or steel). 13.
Squares, Workmen's (metal). 13.
———————— (wood). 50.
Squeegees (india-rubber). 40.

Stained glass. 15.
Stains for leather. 50.
—— from fabrics, Preparations for removing 47.
——, Wood. 1.
Stair cases. 18.
—— rods and treads (metal). 13.
Stakes (metal). 13.
Stamps, Hand (for marking linen and paper). 39.
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INSTRUCTIONS TO PERSONS WHO WISH TO REGISTER TRADE MARKS.

1909.

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1. General.

It is advisable in the first instance for a person who desires to register a trade mark to buy a copy of the Trade Marks Rules, 1906, and of the Trade Marks Act of 1905 now governing the registration of trade marks. For information as to obtaining copies of the rules and Act, *see* paragraph 26.

2. Who may Apply for Registration of a Trade Mark.

Any person claiming to be the proprietor of a trade mark, whether a British subject or not, may make an application for the registration of a trade mark in the United Kingdom.

The term "person" includes firm, partnership, and body corporate.

Any person who has made a previous application for registration of a trade mark, which is registrable under the Trade Marks Act, 1905, either in any of the Foreign States or in any of the British Possessions (*see* paragraph 24) with which certain arrangements for mutual pro-

tection of trade marks have been made, may obtain priority of date in the United Kingdom, provided that the application is made within four months from the date of the application in such Foreign State or British Possession.

3. What may be Registered as a Trade Mark.

(This paragraph is a reprint of Section 9 of the Trade Marks Act, 1905.)

4. Manner of Applying for Registration of a Trade Mark.

All applications and communications must be made in the English language.

Applications relating to marks not being cotton marks or Sheffield marks must be left at the Patent Office by hand or sent by post addressed to the Registrar, The Patent Office, Trade Marks Branch, 25, Southampton Buildings, London, W.C.

In the case of cotton marks, applications should be addressed to the Keeper of Cotton Marks, Manchester Branch of the Trade Marks Registry, 48, Royal Exchange, Manchester. (*See* paragraph 19.)

In the case of Sheffield marks, applications should be addressed to the Law Clerk to the Cutlers' Company, The Cutlers' Hall, Sheffield. (*See* paragraph 18.)

Fees must be paid by means of the appropriate stamped forms, which can be obtained as directed in paragraph 5. Stamped forms cannot be sent by post from the Patent Office.

5. Trade Mark Forms and Fees.

The following is a list of the forms under the Trade Marks Act, 1905, and of the principal fees :—

Number of Form.	Title of Form.	Fee.
		£ s. d.
TM No. 1	Form of authorisation of agent	—
TM No. 2	Application for registration of trade mark	0 10 0
TM No. 3	Additional representation of trade mark	No stamp.
TM No. 4	Request for statement of grounds of decision under sect. 12 (3)	0 10 0
TM No. 5	Application for registration of special trade mark under sect. 9 (5)	0 10 0
TM No. 6	Application for registration of special trade mark under sect. 62	0 10 0
TM No. 7	Notice of opposition to application for registration	1 0 0
TM No. 8	Counter-statement to opposition to application for registration	0 10 0
TM No. 9	Application for hearing in cases of opposition	1 0 0
TM No. 10	Application to the Board of Trade for hearing under Rule 38	1 0 0

Number of Form.	Title of Form.	Fee. £ s. d.
TM No. 11	Fee for registration of a trade mark	1 0 0
TM No. 12	Renewal of registration before notice has been given by registrar	1 0 0
TM No. 13	Renewal of registration after notice has been given by registrar	1 0 0
TM No. 14	Additional fee to accompany renewal fee within one month after advertisement of non-payment of renewal fee	0 10 0
TM No. 15	Restoration of trade mark where removed for non-payment of fee	1 0 0
TM No. 16	Joint request by registered proprietor and assignee to register assignee as subsequent proprietor.....	1 0 0
TM No. 17	Form of declaration (only to be furnished when requested by registrar) by assignee in support of Form TM No. 16	—
TM No. 18	Request to enter name of subsequent proprietor upon register	1 0 0
TM No. 19	Form of declaration (only to be furnished when requested by registrar) in support of statement of case accompanying Form TM No. 18	—
TM No. 20	Application for alteration of address on register	0 5 0
TM No. 21	Application to permit an apportionment of trade marks	5 0 0
TM No. 22	Request for correction of clerical error or amendment of application	0 5 0
TM No. 23	Request to enter change of name of registered proprietor	0 5 0
TM No. 24	Application to cancel entry on register	0 5 0
TM No. 25	Request to strike out goods from those for which a mark is registered	0 5 0
TM No. 26	Request to enter disclaimer or memorandum	0 5 0
TM No. 27	Application to add to or alter a trade mark	1 0 0
TM No. 28	Request for search under Rule 95	0 10 0
TM No. 29	Appeal from registrar to Board of Trade	1 0 0
TM No. 30	Notice of Order of Court for alteration of register	0 10 0
TM No. 31	Request for general certificate	1 0 0
TM No. 32	Request for certificate of refusal to register	1 0 0
TM No. 33	Request for certificate of registration for use in obtaining registration abroad.....	0 5 0
TM No. 34	Request for certificate of registration for use in legal proceedings	1 0 0
	For office copies every 100 words, but never less than one shilling	0 0 4
	For certifying office copies MS. or printed matter	0 10 0
	An additional stamp duty of one shilling is also charged under the Stamp Act upon certified copies of certain documents.	

The stamped forms can be obtained, *on personal attendance only*, at the Inland Revenue Office (Room No. 32), in the Patent Office, 25, Southampton Buildings, Chancery Lane, London, W.C., or, at a few days' notice and upon pre-payment of the value of the stamp, at any money order office in the United Kingdom.

If it should not be convenient to apply in either of the ways above specified, the stamped forms can be ordered by post from the Controller of Stamps (Room No. 5), Inland Revenue Office, Somerset House, London, W.C. In this case a bankers' draft or a money or postal order payable to the Commissioners of Inland Revenue and crossed Bank of England, to cover the value of the stamp and the cost of transmitting the form in a registered envelope by post, must be forwarded to Somerset House with the application for the form. Cheques will not be accepted.

Forms bearing the numbers TM No. 2, TM No. 3, and TM No. 11 are kept in stock at the following post offices in London :—

The London Chief Office.

Lombard Street Branch Office, E.C.

Eastern District Office, 206, Whitechapel Road, E.

South-Eastern District Office, 239, Borough High Street, S.E.

Charing Cross Branch Office, W.C.

North-Western District Office, 28, Eversholt Street, Camden Town, N.W.

Post Office, 44, Parliament Street, S.W., and

The chief post office of the undermentioned cities and towns :—

In England and Wales.

Accrington.
Altrincham.
Ashton-under-Lyne.
Bacup.
Barnsley.
Bath.
Belford.
Birkenhead.
Birmingham.
Blackburn.
Bolton.
Bournemouth.
Bradford.
Brighton.
Bristol.
Burnley.
Burslem.
Bury.
Cambridge.
Cardiff.
Carlisle.
Chatham.
Cheltenham.
Chester.
Coventry.
Croydon.
Darwen.
Derby.
Devizes.
Dewsbury.
Doncaster.
Dorchester.
Driffield.
Droitwich.
Dudley.
Durham.
Exeter.
Gloucester.
Goole.
Greenwich.
Halifax.
Hanley.
Hartlepool.
Huddersfield.
Hull.
Ipswich.
Keighley.
Kidderminster.
Leamington.
Leeds.
Leicester.
Lichfield.
Lincoln.
Liverpool.
Macclesfield.
Manchester.
Middlesbrough.
Newcastle.
Newport (Mon.).
Northallerton.
Northampton.
Norwich.
Nottingham.
Nuneaton.
Oldbury.
Oldham.
Plymouth.
Pontypridd.
Portsmouth.
Preston.
Reading.
Redditch.
Rochdale.
Rotherham.
Rugby.
St. Helen's.
Salford.
Scarborough.
Sheffield.
Southampton.
Stafford.
Stalybridge.
Stockport.
Stockton-on-Tees.
Stoke-on-Trent.
Stourbridge.
Stroud.
Sunderland.
Swansea.
Tamworth.
Truro.
Tunstall.
Wakefield.
Walsall.
Warrington.
West Bromwich.
Widnes.
Wigan.
Wolverhampton.
Woolwich.
Worcester.
York.

In Scotland.		In Ireland.	
Aberdeen.	Greenock.	Belfast.	Limerick.
Dundee.	Inverness.	Dublin.	Waterford.
Edinburgh.	Leith.	Galway.	Wexford.
Glasgow.	Perth.		

6. Documents, &c. Required on Application for Registration of a Trade Mark.

An application for the registration of a trade mark, under Section 9 (*see* paragraph 3), must be made on an application form (Form TM No. 2) bearing an impressed stamp of 10*s*. (*see* paragraph 5), but in the case of a special application under the provisions of Section 9 (5), when an order of the Board of Trade or the Court is necessary, Form TM No. 5 must be used.

(The applicant should, before filling up the form, carefully read the marginal notes.)

Four additional representations of the trade mark, each mounted on Form TM No. 3, should accompany every application on TM No. 2 or TM No. 5. (*See* paragraph 5.)

A *separate* application form is required for *each* class in cases where the same trade mark is claimed in more than one class of goods.

If the mark be the property of a firm or partnership, the Form TM No. 2 should be signed by some one or more members of such firm or partnership, who should add, after his or their signature, "A member of the firm" or "Members of the firm" (as the case may be); if a body corporate, by a director or by the secretary or other principal officer, who should add, after his signature and designation, "For the Company."

Applications may be made by agents in the names of and on behalf of the owners of trade marks. The agent must be duly authorised in writing, in the Form TM No. 1, by the owner or owners; the authority to an agent should be signed by the owner or owners; in the case of a firm, partnership, or body corporate, the authority should be signed in the same manner as indicated in the paragraph next above.

Each application made by an agent should have, after the signature of the agent, the description "agent."

When an applicant, or his authorised agent, for the registration of a trade mark resides out of the United Kingdom at the time of making the application, an address for service in the United Kingdom must be given in the application.

When the mark consists of or includes words printed in other than Roman characters, there should be given upon the forms a translation and a transliteration of such words, signed by the applicant or his agent.

In the case of marks claimed in the cotton classes and Class 34, the applicant should state by what name the particular mark claimed would be referred to in the invoices of his house.

The representations of the mark on the Form TM No. 3 must agree *in every respect* with each other, and with that on the Form TM No. 2.

Representations of a mark of a large size may be folded. In that case they must, however, be backed with linen, tracing cloth, or other

suitable material, and firmly affixed to the forms. Representations must in no case be executed *in pencil*. They should be not only of a durable nature, but of such a kind as will admit of their being preserved and bound together in volumes as records of the property of the owners. Photographs are not, as a rule, therefore, acceptable.

7. Word Marks.

In most of the classes, except the cotton classes, word marks are very popular. Speaking broadly, the Act debars from registration three kinds of words: (1) Geographical names; (2) surnames; (3) descriptive words; and it is frequently difficult to decide whether any given word falls under any of these heads. Cases often happen in which a person thinks he has invented a word, and yet on investigation it is found that such a word already exists, and falls under one of the heads above mentioned.

Again, though a given word may, after argument, be decided not to fall under one of the forbidden heads, yet the matter is so much on the border-line that much discussion can be raised before a final decision is reached.

It is very greatly to the advantage of a person adopting a new word mark—it being immaterial to him what word he adopts—to choose a word open to little or no discussion, and which clearly falls within paragraphs 3 or 4 of the ninth section of the Act. The registrar will give what assistance he can on this subject, and it is suggested that an applicant desirous of adopting a new word mark should, before doing so, submit by letter a word, such as he thinks will suit his purpose, for the registrar's consideration. The registrar will of course only express an opinion as to how far a word submitted is within the section, and will make no search for the purpose of ascertaining whether any other person has a similar registered mark, unless a search fee is paid.

8. Search.

A person wishing to adopt a trade mark may make application to the registrar in writing upon a Form TM No. 28, to cause a search to be made to ascertain whether any marks are on record at the date of such search which may resemble the proposed mark, and the applicant will be informed of the result of such search. The request on Form TM No. 28 should be accompanied by two representations of the proposed mark, each mounted on a half-sheet of foolscap.

A person may, however, search amongst the classified representations of trade marks at the Trade Marks Branch of the Patent Office, if he so desire. The index includes a general collection of marks, a divisional index of devices, and an alphabetically arranged index of words appearing as parts of trade marks or alone. It must not be assumed, however, that all words contained in this index are protected by registration.

The fee payable by a person making a search is 1*s.* for every quarter of an hour.

Complete searches amongst classified collections of marks in the *cotton classes* (Classes 23, 24 and 25) can only be made at the Manchester Branch Office, 48, Royal Exchange, Manchester. (*See* paragraph 19.)

9. Series of Trade Marks.

By sect. 26 of the Act, when a person claiming to be the proprietor of several trade marks for the same description of goods which, while resembling each other in the material particulars thereof, yet differ in respect of—

(a) statements of the goods for which they are respectively used or proposed to be used; or
(b) statements of number, price, quality, or names of places; or
(c) other matter of a non-distinctive character which does not substantially affect the identity of the trade mark; or
(d) colour;

seeks to register such trade marks, they may be registered as a series in one registration.

When an application is made for a series, a representation of each of the marks of the series must be affixed to Form TM No. 2, and also to each of the Forms TM No. 3.

10. Old Marks.

In order that an application for an "old mark" may be treated as such, there must have been continuous user, since before the date mentioned in paragraph 3, in the United Kingdom and in connexion with the goods stated in the application. An applicant for such a mark should state how, *i.e.*, whether as a label, by branding or embossing or in any other manner, the mark has been so used. The registrar may require a declaration verifying the statements made in such an application.

11. Procedure on Receipt of Application.

As soon as may be, following the receipt of an application and after due consideration and search, the registrar will communicate the result to the applicant in writing.

12. Non-completion of Registration of a Trade Mark.

When registration is not completed within twelve months from the date of the application by reason of default on the part of the applicant, the application may, after notice duly given, be treated as abandoned, unless it be completed within the time specified in such notice.

13. Duration of Registration and Payment of Renewal Fees.

Registration of a trade mark is for a period of fourteen years from the date of the original application, but may be renewed from time to time on payment of the prescribed fee.

Each renewal is for fourteen years.

The fee for renewal should be paid in due time by lodging the proper form as directed by the rules.

If the renewal fee is not paid in due time, extra cost is incurred, and, possibly, the registration may entirely lapse.

14. Classification of Goods.

A guide (*a*) to the classification of goods under the Trade Marks Rules can be obtained on application at the Patent Office, Trade Marks Branch, and should be asked for if the applicant feels any difficulty in determining to which of the classes set out in the third schedule to the Rules the goods for which he uses his mark belong.

(*a*) See p. 463, *ante*.

15. Advertisement in the "Trade Marks Journal."

A trade mark cannot in any case be entered upon the register until after the expiration of one month from the date of its advertisement in the *Journal*.

A wood-block or electrotype must be furnished for each mark (even though the mark consists only of a word or words) in each class claimed, except in the case of the cotton classes, for which no blocks are required, unless the mark be claimed in Class 23 in respect of goods other than cotton yarn.

No block or electrotype should be forwarded until a formal demand for it is sent by the registrar.

In the case of a "series" of trade marks differing only in respect of the particulars mentioned in sect. 26 of the Act, a wood-block or electrotype must, if the registrar so require, be furnished for each mark in the series.

The wood-blocks or electrotypes furnished must correspond *exactly* with the representations, must afford *perfectly distinct* impressions of the marks, and must be upon a scale sufficiently large to reproduce the marks faithfully. Worn or mutilated blocks or electrotypes cannot be accepted. It is found in practice that zincotypes or process blocks do not, as a rule, yield impressions distinct enough for the purposes of this *Journal*, and a great number of such blocks have to be returned as unsuitable. It is generally found that the most suitable blocks are wood-blocks or electrotypes.

In the case of word marks the words on the block should be in plain block type.

The largest space available for the insertion of any single block or electrotype is five and a half inches broad by seven and a half inches deep.

When a block or electrotype *exceeds two inches in breadth or depth, or in breadth and depth*, a charge for additional space is made, at the rate of two shillings for every inch or part of an inch over two inches

in breadth, and for every inch or part of an inch over two inches in depth.

The official number given by the registrar to a mark should *not* be cut on the face of the block or electrotype, but should be *marked upon the side* in such a manner as to secure identification.

All blocks or electrotypes should be sent to the Patent Office, Trade Marks Branch, together with the paper marked "Form R. Adv. 3," and with the representation of the mark sent for the guidance of the applicant in preparing the block or electrotype.

After the advertisement of a trade mark the block or electrotype supplied for such advertisement cannot in any case be returned to applicants, even for temporary use.

16. Restrictions on Registration.

Ornamental or coloured groundwork, such as tartans or checks, cannot be claimed as part of a mark unless such groundwork be included within the mark by some border or lines.

Applications for the registration of trade marks consisting of or embodying the emblem of a red cross, the words "Red Cross," or "Geneva Cross" will be refused.

Applications may be refused in cases where the following appear upon the representations of trade marks forming part of an application:—

(a) The words "Patent," "Patented," "By Royal Letters Patent," "Registered," "Registered Design," "Copyright," "Entered at Stationers' Hall," "To counterfeit this is Forgery," or words to like effect.
(b) Representations of their Majesties or of any member of the Royal Family.

The following also may not appear on trade marks, the registration of which is applied for, unless the marks have been used since before 13th August, 1875:—

(a) The Royal arms or Royal crests, or arms or crests so nearly resembling them as to lead to mistake.
(b) British Royal crowns.
(c) British national flags.
(d) The word "Royal" or any other words, letters or devices calculated to lead persons to think that the applicant has Royal patronage or authorisation.

In cases where the following appear on a mark, the registrar may call for such justification as he may deem necessary for their use:—

Representation of the arms of a foreign state or place.

In cases where the following appear on a mark, the registrar may require to be furnished with consents from such officials, persons, or their legal representatives as he may consider necessary:—

(a) Representations of the arms or emblems of any city, borough, town, place, society, body corporate, or institution.
(b) Names or representations of living persons or persons recently dead.

Where there appears on the face of a trade mark the name or a description of the goods to which the mark is applied, the registrar may refuse to register such mark in respect of any goods other than the goods so named or described. Where the name or description of any goods appears on a trade mark, which name or description in use varies, the applicant should state in his application that the name or description varies.

17. Oppositions.

Notice of opposition to the registration of a trade mark (*see* Rules, Form TM No. 7) must be filed within one month from the date of advertisement of the mark in the *Journal*, accompanied by an unstamped duplicate.

The applicant's counter-statement, Form TM No. 8, accompanied by an unstamped duplicate, must be filed within one month from the date of receipt by him of the duplicate notice of opposition.

The opponent's evidence, in support of the opposition, must be filed within one month from the date of receipt by him of the duplicate counter-statement, and copy of such evidence must be forthwith sent to the applicant.

The applicant's evidence must be filed within one month from the receipt of the copies of the opponent's evidence, and a copy of such evidence must be forthwith sent to the opponent.

The opponent's evidence in reply must be filed within fourteen days from the receipt of the copies of the applicant's evidence, and a copy of such evidence must be forthwith sent to the applicant.

On the completion of the evidence, a hearing is appointed by the registrar. Each party attending the hearing must lodge the hearing fee form Form TM No. 9, with £1 stamp).

18. Cutlers' Company.

By section 63 of the Act, application for the registration of trade marks used on metal goods shall, if made by a person carrying on business in Hallamshire or within six miles thereof, be made to the Cutlers' Company of Sheffield. (*See* Rul[illegible]7 to 112.)

Applications made to the Cutle[illegible]ompany in pursuance of section 63 of the Act should be made on Form TM No. 2, the address in the left-hand corner to be "To the Cutlers' Company, Sheffield," instead of "To the Registrar," and should be left at, or sent by post to, the Cutlers' Hall, Sheffield.

Each application should be accompanied by an unstamped copy on an application Form TM No. 2. (*See* rule 107.)

Requests to enter old corporate marks on the Sheffield register, under section 63 (2), should be made on Form Sheffield No. 1.

Applications sent by post should be addressed—

The Law Clerk to the Cutlers' Company,
The Cutlers' Hall,
Sheffield.

19. Manchester Branch.

By section 64 of the Act, application for the registration of cotton marks should be made to the Manchester Branch on Form Cotton No. 1. Each application should be accompanied by an unstamped duplicate of the form, and also by four additional representations on Form Cotton No. 2.

These forms can be obtained at the Chief Post Office, Manchester, and on personal application at the Inland Revenue Office (Room No. 32), in the Patent Office, 25, Southampton Buildings, Chancery Lane, London, W.C.

Applications sent by post should be addressed—

The Keeper of Cotton Marks,
Manchester Branch of the Trade Marks Registry,
48, Royal Exchange, Manchester.

Searches can be made at the Manchester Branch on payment of 1s. for each quarter of an hour for marks in the cotton classes.

20. Certificates.

The registrar's certificate in relation to a trade mark is of four kinds, viz.:—

(i.) Of registration fo. use in legal proceedings.
(ii.) Of registration for use in obtaining registration abroad.
(iii.) Of any application made and of proceedings thereon.
(iv.) Of refusal to register a mark in use since before 13th August, 1875, and not registrable.

A person desirous of obtaining any of the above certificates should forward Form TM No. 34, Form TM No. 33, Form TM No. 31, or Form TM No. 32 (*see* paragraph 5), as the case may be, to the registrar, giving the registrar's official number of the mark and the class, and stating whether the certificate is required for use in legal proceedings, or for use in applying for the registration of the mark abroad, or for what other purpose.

In every case where a certificate is required in respect of a cotton mark, or in respect of any trade mark of which the representations or specimens forming part of the application for registration are *coloured*, or in respect of an application made, or in respect of an application refused, two unmounted copies of the mark should be supplied, agreeing *in every respect* with the representations forming part of the application for registration. Special attention should be paid to this requirement, as otherwise considerable delay may be caused before the certificate can be issued.

21. Inspection of Register and Copies of Entries.

The fee payable by a person inspecting the register in connection with any particular trade mark is 1*s.* for every quarter of an hour.

Copies of any entry in the register can be supplied at the rate of 4*d.* for every 100 words, with a minimum charge of 1*s.*

22. Registration of Subsequent Proprietors of Registered Trade Marks.

The request to be made by a subsequent proprietor on application for the registration in his name of a registered trade mark must be made on Form TM No. 16 or Form TM No. 18 (*see* paragraph 5), as the case may be. In the case of a firm or partnership, the declaration may be made by one member of the firm or partnership. In the case of a body corporate, the declaration should be made by a director or by the secretary or a principal officer of such body corporate.

If the registrar considers it necessary, he may require a declaration on Form TM No. 17 or Form TM No. 19 to be furnished in support of the request.

Where a person becomes entitled to the goodwill of a business, he should forthwith ascertain what registered marks have been in use in that business, and at the earliest possible moment get those marks transferred into his name on the register. The mere possession of the certificates of registration is quite insufficient.

23. Miscellaneous Matters relating to Trade Marks and the Patent Office.

(a.) *Advice on Trade Mark Matters, &c.*—The Patent Office does not undertake to give legal advice or opinions on questions of infringement or on any subject connected with trade mark law which, like other laws, is left to the interpretation of professional men.

(b.) *Agency.*—The registrar cannot recommend any particular agent for employment by applicants. A list of registered patent agents who, as a rule, also transact trade mark business, may be obtained from Wyman & Sons, Limited, Fetter Lane, London, E.C., or through any bookseller. Price (including postage), 1*s.* 1*d.*

(c.) *Application for Reduction of Fees.*—It is not within the power of the registrar to comply with any request for the reduction or remission of any of the fees required by the trade mark law.

(d.) *Use of the word "Registered."*—Any person who represents that a trade mark is registered which is not so is liable for every offence on summary conviction to a fine not exceeding five pounds.

A person is deemed, for the purposes of the Trade Marks Act, 1905, to represent that a trade mark is registered if he uses in connection with the trade mark the word "registered" or any words expressing or implying that registration has been obtained for the trade mark. (*See* section 67 of the Trade Marks Act, 1905.)

(e.) *Patent Medicines.*—Communications with respect to the preparation and supply of medicine stamps appropriated to a particular medicine, or as to the liability to stamp duty of so-called "patent medicines," should be addressed to the Secretary (Stamps and Taxes), Inland Revenue, Somerset House, London, W.C.

(f.) *Mere Trading Names.*—Mere trading names or names given to business premises cannot be registered at the Patent Office.

24. International and Colonial Arrangements.

An international convention for the protection of industrial property exists between the following states :—

Austria.
Belgium.
Brazil.
Cuba.
Denmark, with the Faröe Islands.
Franco, with Algeria and colonies.
Germany.
Great Britain, with Australia, Coylon, Now Zealand, and Trinidad and Tobago.
Hungary.
Italy.
Japan.
Mexico.
Netherlands, with the Dutch East Indios, Surinam, and Curaçon.
Norway.
Portugal, with the Azores and Madeira.
Santo Domingo.
Servia.
Spain.
Sweden.
Switzerland.
Tunis.
United States of America.

Copies of the text of the Convention (*a*), and of the additional Act modifying the Convention (*b*), may be purchased for 2*d.* and 1*d.*, respectively, from Wyman and Sons, Limited, Fetter Lane, London, E.C., or through any bookseller.

Under this Convention, an applicant for a trade mark in any one of the contracting states may obtain priority of date in any of the other states.

Similar arrangements, for the mutual protection of trade marks, have been made between Great Britain on the one side, and each of the following states and colonies on the other :—

Ecuador.
Greece.
Honduras.
Paraguay.
Roumania.
Uruguay.

The above list may of course be varied from time to time.

(*a*) See p. 565, *infra*.
(*b*) See p. 574, *infra*.

25. Applications for the Registration of Trade Marks in the British Colonies and Foreign States.

Applications for the registration of trade marks in the colonies and foreign states must be made to the Government of the colony or foreign state in which protection is desired. A collection of colonial and foreign trade mark laws and rules may be seen in the free library of the Patent Office.

26. Sale of Official Publications.

Copies of the Act and of the Rules can be purchased at the Sale Branch of the Patent Office. The price of the Act and Rules together is 8*d.*, postage 2½*d.*; of the Act alone, 3*d.*, postage, 1*d.*; and of the

Rules alone, 5*d.*, postage, 1½*d.* Sums exceeding 5*d.* should be remitted by postal order or post office order.

Copies of the *Trade Marks Journal* may also be obtained from the Sale Branch of the Patent Office.

The price of the *Trade Marks Journal* is :—

	Per No. s.	d.
Nos. 1 to 509 (years 1876 to 1887)	1	0
Nos. 510 to 561 (year 1888)	1	6
No 562 and following numbers from 1st January, 1889 ..	0	6

27. Patent Office Library.

The free public library of the Patent Office, 25, Southampton Buildings, Chancery Lane, London, W.C., is open daily, from 10 a.m. to 10 p.m., except on Sundays, Christmas Day, Good Friday, and Bank Holidays. On the day observed as His Majesty's birthday, Christmas Eve, Easter Eve, and Whitsun Eve, the library is closed at 4 p.m.

APPENDIX B.

THE PATENTS AND DESIGNS ACT, 1907.

7 Edw. VII. c. 29.

An Act to consolidate the enactments relating to Patents for Inventions and the Registration of Designs and certain enactments relating to Trade Marks.

[28th August 1907.]

BE it enacted by the King'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:—

PART I. (Sects. 1—18.)

Patents.

PART II. (Sects. 49—61.)

Designs.

Part III. (Sects. 62-99.)

General.

Patent Office and Proceedings thereat.

Patent Office. 5 Edw. 7, c. 15.

62.—(1) The Treasury may continue to provide for the purposes of this Act and the Trade Marks Act, 1905, an office with all requisite buildings and conveniences, which shall be called, and is in this Act referred to as, the Patent Office (*a*).

See Pat. Acts.

S. 82.

(2) The Patent Office shall be under the immediate control of the comptroller, who shall act under the superintendence and direction of the Board of Trade.

(3) Any act or thing directed to be done by or to the comptroller may be done by or to any officer authorised by the Board of Trade.

(4) Rules under this Act may provide for the establishment of branch offices for designs at Manchester or elsewhere, and for any document or thing required by this Act to be sent to or done at the Patent Office being sent to or done at any branch office which may be established.

(*a*) This section comes from sect. 82 of the P. D. & T. M. Act, 1883.

Officers and clerks.

See Pat. Acts. S. 83.

63.—(1) There shall continue to be a comptroller-general of patents, designs, and trade marks, and the Board of Trade may, subject to the approval of the Treasury, appoint the comptroller, and so many examiners and other officers and clerks, with such designations and duties as the Board of Trade think fit, and may remove any of those officers and clerks (*a*).

(2) The salaries of those officers and clerks shall be appointed by the Board of Trade, with the concurrence of the Treasury, and those salaries and the other expenses of the execution of this Act and the Trade Marks Act, 1905, shall continue to be paid out of money provided by Parliament.

(*a*) This section comes from sect. 83 of the P. D. & T. M. Act, 1883.

Seal of Patent Office.

See Pat. Acts. S. 84.

64. Impressions of the seal of the Patent Office shall be judicially noticed and admitted in evidence (*a*).

(*a*) This section comes from sect. 84 of the P. D. & T. M. Act, 1883.

* * * * * *

Annual reports of comptroller.

See Pat. Acts. S. 102. Also T.M.A. 1905, s. 57.

76. The comptroller shall, before the first day of June in every year, cause a report respecting the execution by or under him of this Act to be laid before both Houses of Parliament, and therein shall include for the year to which the report relates all general rules made in that year under or for the purposes of this Act, and an account of all fees, salaries, and allowances, and other money received and paid under this Act (*a*).

(*a*) This section comes from sect. 102 of the P. D. & T. M. Act, 1883. See T. M. Act, 1905, s. 57.

* * * * * *

Provision as to Order in Council.

See Pat. Acts. S. 104 (2).

88. An Order in Council under this Act shall, from a date to be mentioned for the purpose in the Order, take effect as if it had been contained in this Act; but may be revoked or varied by a subsequent Order (*a*).

(*a*) This section comes from sect. 104 (2) of the P. D. & T. M. Act, 1883.

Offences.

Offences.

See Pat. Acts. Ss. 93, 105.

89.—(1) If any person makes or causes to be made a false entry in any register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanor (*a*).

(2) If any person falsely represents that any article sold by him is a patented article, or falsely describes any design applied to any article sold by him as registered he shall be liable for every offence, on conviction under the Summary Jurisdiction Acts, to a fine not exceeding five pounds (*b*).

(3) If any person sells an article having stamped, engraved, or impressed thereon or otherwise applied thereto the word "patent," "patented," "registered," or any other word expressing or implying that the article is patented or that the design applied thereto is registered, he shall be deemed for the purposes of this section to represent that the article is a patented article or that the design applied thereto is a registered design (*c*).

(4) Any person who, after the copyright in a design has expired, puts or causes to be put on any article to which the design has been applied the word "registered," or any word or words implying that there is a subsisting copyright in the design, shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding five pounds (*d*).

(5) If any person uses on his place of business, or on any document issued by him, or otherwise, the words "Patent Office," or any other words suggesting that his place of business is officially connected with, or is, the Patent Office, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding twenty pounds (*d*).

(*a*) This sub-section comes from sect. 93 of the P. D. & T. M. Act, 1883.

(*b*) This sub-section comes from sect. 105 (1) of the P. D. & T. M. Act, 1883. Note that the words in the old Act, which apparently distinguished the case where there had once been a patent, have now disappeared.

(*c*) This sub-section comes from sect. 105 (2) of the P. D. & T. M. Act, 1883.

(*d*) This sub-section is new.

Unauthorised assumption of Royal Arms.

See Pat. Acts. S. 106.

Also T.M.A. 1905, s. 68.

90. (1) The grant of a patent under this Act shall not be deemed to authorise the patentee to use the Royal Arms or to place the Royal Arms on any patented article.

(2) If any person, without the authority of His Majesty, uses in connection with any business, trade, calling, or profession the Royal Arms (or arms so nearly resembling them as to be calculated to deceive) in such manner as to be calculated to lead to the belief that he is duly authorised to use the Royal Arms, he shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding twenty pounds (*a*).

Provided that nothing in this section shall be construed as affecting the right, if any, of the proprietor of a trade mark containing such arms to continue to use such trade mark (*b*).

(*a*) This sub-section comes from sect. 106 of the P. D. & T. M. Act, 1883. Note that the authority of His Majesty is now alone mentioned.

(*b*) This sub-section comes from sect. 68 of the T. M. Act, 1905.

International and Colonial Arrangements.

International and Colonial arrangements.

See Pat. Acts. Ss. 103. 104. Also T.M.A. 1905, s. 65.

91.—(1) If His Majesty is pleased to make any arrangement with the government of any foreign state for mutual protection of inventions, or designs, or trade marks, then any person who has applied for protection for any invention, design, or trade mark in that state shall be entitled to a patent for his invention or to registration of his design or trade mark under this Act or the Trade Marks Act, 1905, in priority to other applicants; and the patent or registration shall have the same date as the date of the application in the foreign state (*a*).

Provided that—

(a) The application is made, in the case of a patent within twelve months, and in the case of a design or trade mark within four months, from the application for protection in the foreign state; and

(b) Nothing in this section shall entitle the patentee or proprietor of the design or trade mark to recover damages for infringements happening prior to the actual date on which his complete specification is accepted, or his design or trade mark is registered, in this country.

(2) The patent granted for the invention or the registration of a design or trade mark shall not be invalidated—

(a) in the case of a patent, by reason only of the publication of a description of, or use of, the invention; or

(b) in the case of a design, by reason only of the exhibition or use of, or the publication of a description or representation of, the design; or

(c) in the case of a trade mark, by reason only of the use of the trade mark,

in the United Kingdom or the Isle of Man during the period specified in this section as that within which the application may be made.

(3) The application for the grant of a patent, or the registration of a design, or the registration of a trade mark under this section, must be made in the same manner as an ordinary application under this Act or the Trade Marks Act, 1905: Provided that—

(a) In the case of patents the application shall be accompanied by a complete specification, which, if it is not accepted within the twelve months from the application for protection in the foreign state, shall with the drawings (if any) be open to public inspection at the expiration of that period; and

(b) In the case of trade marks, any trade mark the registration of which has been duly applied for in the country of origin may be registered under the Trade Marks Act, 1905.

(4) The provisions of this section shall apply only in the case of those foreign states with respect to which His Majesty by Order in Council declares them to be applicable, and so long only in the case

of each state as the Order in Council continues in force with respect to that state.

(5) Where it is made to appear to His Majesty that the legislature of any British possession has made satisfactory provision for the protection of inventions, designs, and trade marks, patented or registered in this country, it shall be lawful for His Majesty, by Order in Council, to apply the provisions of this section to that possession, with such variations or additions, if any, as may be stated in the Order (*b*).

(*a*) This section, down to sub-section (4), comes from sect. 103 of the P. D. & T. M. Act, 1883.

(*b*) This sub-section comes from sect. 104 (4) of the P. D. & T. M. Act, 1883.

* * * * * *

Repeal, Savings, and Short Title.

Repeal and savings.

98. (1) The enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule—

(a) As respects the enactments mentioned in Part I. of that Schedule, as from the commencement of this Act;

(b) As respects the enactments mentioned in Part II. of that Schedule, as from the date when rules of the Supreme Court regulating the matters dealt with in those enactments come into operation;

(c) As respects the enactments mentioned in Part III. of that schedule, as from the date when rules under this Act regulating the matters dealt with in those enactments come into operation;

and the enactments mentioned in Part II. and Part III. of that Schedule shall, until so repealed, have effect as if they formed part of this Act:

Provided that this repeal shall not affect any convention, Order in Council, rule, or table of fees having effect under any enactment so repealed, but any such convention, Order in Council, rule, or table of fees in force at the commencement of this Act shall continue in force, and may be repealed, altered or amended, as if it had been made under this Act.

(2) Except where otherwise expressly provided, this Act shall extend to all patents granted and all designs registered before the commencement of this Act, and to applications then pending, in substitution for such enactments as would have applied thereto if this Act had not been passed (*a*).

(*a*) Note that this Act is made retrospective.

Short title and commencement.

99. This Act may be cited as the Patents and Designs Act, 1907, and shall, save as otherwise expressly provided, come into operation on the first day of January one thousand nine hundred and eight.

SCHEDULES.

FIRST SCHEDULE.

Fees.

* * * * * *

SECOND SCHEDULE.

Enactments Repealed.

Part I.

Session and Chapter.	Short Title.	Extent of Repeal.
16 & 17 Vict. c. 57.	The Patents, Designs, and Trade Marks Act, 1853.	The whole Act, except sub-sections (5), (6), and (7) of section twenty-six, section twenty-nine, sub-sections (2) and (3) of section forty-seven, and section forty-eight.
18 & 19 Vict. c. 63.	The Patents, Designs, and Trade Marks (Amendment) Act, 1855.	The whole Act.
19 & 20 Vict. c. 37.	The Patents Act, 1856	The whole Act.
31 & 32 Vict. c. 50.	The Patents, Designs, and Trade Marks Act, 1868.	The whole Act.
1 Edw. 7, c. 18.	The Patents Act, 1901	The whole Act.
2 Edw. 7, c. 34.	The Patents Act, 1902	The whole Act.
7 Edw. 7, c. 28.	The Patents and Designs (Amendment) Act, 1907.	The whole Act.

Part II.

Session and Chapter.	Short Title.	Extent of Repeal.
46 & 47 Vict. c. 57.	The Patents, Designs, and Trade Marks Act, 1883.	Sub-sections (5), (6), and (7) of section twenty-six, and section twenty-nine.

Part III.

Session and Chapter.	Short Title.	Extent of Repeal.
46 & 47 Vict. c. 57.	The Patents, Designs, and Trade Marks Act, 1883.	Sub-sections (2) and (3) of section forty-seven and section forty-eight.

APPENDIX C.

FORMS AND PRECEDENTS.

Part I.

FORMS FOR USE IN REGISTRATION PROCEEDINGS.

1. Grounds of Opposition (*a*).

(i.) That the alleged trade mark to which the above-mentioned application relates is not a registrable trade mark within the Trade Marks Act, 1905.

(ii.) The alleged [as in (i.) to relates] does not consist of or contain any essential particular as defined by § 9 of the Trade Marks Act, 1905.

(iii.) The alleged [as in (i.) to relates] is a mere word in ordinary use in the English language descriptive of quality, and the applicant is not entitled to acquire an exclusive right therein by registration.

(iv.) The alleged [as in (i.) to relates] is not distinctive of the above-named applicant's goods, but is merely descriptive of the character and quality of the goods to which it is applied.

(v.) The alleged [as in (i.) to relates] consists of a name which has throughout the continuance of an expired patent been applied by the applicant as patentee, and by the trade and the public, to articles manufactured in accordance with the said patent. Upon the expiration of the said patent the trade became entitled to manufacture in accordance with the said patent, and to describe articles so manufactured by the name which was generally understood to be descriptive of them, and the applicant is not now entitled to exclude the trade from the use of the said name.

(*a*) See Form T. M. No. 7. p. 437, *supra*, for the formal parts of the notice of opposition. These forms are intended to be varied and combined as may be necessary, or they may suggest others more suitable to particular cases.

(vi.) The alleged [as in (i.) to relates] is identical with the opponent's trade mark No. , advertised in Trade Marks Journal No. , and registered with respect to the same goods or description of goods as those for which the applicant is now applying to register the same. If the applicant is allowed to register or use the said alleged trade mark, the trade and the public will be deceived and the opponent injured.

(vii.) The alleged [as in (i.) to —relates] has such a resemblance to the opponent's [as in (vi.) to —register the same] as to be calculated to deceive. An action is now pending in the Chancery Division of the High Court of Justice in which the opponent is seeking to restrain the applicant from using the said alleged trade mark.

(viii.) The trade mark [as in (i.) to relates] is the trade mark of the opponent, and has been used by him in his business for years last past, and an application by the opponent for the registration of the same is now pending. The applicant is a discharged servant of the opponent, in fraud of whose rights the present application is made.

(ix.) The trade mark [as in (i.) to relates] was months since adopted by the opponent and used upon his [describe the goods], and the applicant was employed by the opponent to obtain the registration of the same on his behalf, and he is not now entitled to obtain the registration of the same in his own name.

(x.) The trade mark [as in (i.) to —relates] has for many years past been the exclusive property in [France] of the opponent, and it has for the same period been exclusively used in the United Kingdom upon goods of the opponent imported into this country. [The opponent has not hitherto registered the said trade mark in the United Kingdom from ignorance of the requirements of British law, but he is now about to apply for the registration of the same.]

(xi.) The alleged [as in (i.) to —relates] contains several material misstatements with respect to the nature and composition of the article to which it is applied by the applicant, and the said alleged trade mark is therefore calculated to deceive, and ought not to be registered.

(xii.) By articles of partnership, dated , under which the opponent and the applicant carried on business until recently in partnership, it was agreed that on the dissolution of the partnership the goodwill of the partnership business and the trade marks used therein (of which the trade mark [as in (i.) to relates] was one) should belong solely to the opponent. The said partnership is now dissolved, and the applicant is not entitled to use or register the said trade mark.

(xiii.) By articles [as in (xii.) to dissolution of the partnership] neither of the partners should in any business carried on by him use the name or trade marks used by the said

partnership. The trade mark [as in (i.) to—relates] is one of the trade marks which were used by the said partnership, and since the dissolution of the said partnership the applicant is not entitled to use or register the said trade mark.

(xiv.) The device of a ["lion"] is in common use in the trade, and the applicant is therefore not entitled to obtain registration of the words ["Lion Brand"] as part of his alleged trade mark No. , except and unless he first disclaims any right to the exclusive use of the said words.

(xv.) Goods of the opponent's manufacture [*or*, merchandise] of the same description as the goods for which the applicant is now applying to register his alleged trade mark, are constantly ordered and sold as ["*Lion*"] goods, and if the applicant is allowed to obtain registration of the device of a [lion] as [*or* as part of] his trade mark, it will cause his goods to be passed off as and for the opponent's goods.

(xvi.) The alleged [as in (i.) to—relates] has such a resemblance to the opponent's registered trade mark No. , advertised in Trade Marks Journal No. , as to be calculated to deceive. The class of goods for the whole of which the above-mentioned applicant is now applying to register the said trade mark includes the goods in respect of which the opponent's said trade mark is registered, and the applicant is therefore not entitled to obtain registration of the said alleged trade mark except and unless the goods in respect of which registration is granted to him are so limited and defined as not to include the goods or description of goods for which the opponent's said trade mark is registered as aforesaid.

2. GROUNDS OF COUNTER-STATEMENT (*a*).

(i.) The trade mark to which the above-mentioned application relates has been exclusively used for years last past by the applicant, and is a good, valid, and registrable trade mark.

(ii.) The trade mark [as in (i.) to—relates] consists of *or* contains] an essential particular as defined by the Trade Marks Act, 1905, viz., [a distinctive device, mark, or label], and is therefore registrable.

(iii.) The trade mark [as in (i.) to—relates] consists of a special and distinctive word used by the applicant as a trade mark before the 13th day of August, 1875, and is there-

(*a*) See Form T. M. No. 8, p. 137, *supra*, for the formal parts of the counter-statement.

fore a good and valid trade mark and is registrable as an old mark.

(iv.) The applicant's trade mark is not a mere word in ordinary use in the English language descriptive of quality, but is a special and distinctive word by which his goods are generally recognized by the trade and the public, and he is entitled to register the same.

(v.) The applicant's above-mentioned trade mark is not merely descriptive of the character and quality of the goods to which it is applied, but it was first adopted and has since been exclusively used by the applicant for the purpose of distinguishing goods of his manufacture [or merchandise], and it is generally recognized as being distinctive of such goods.

(vi.) It is not the fact that the applicant's above-mentioned trade mark has for many years past, or at all, been in common use in the trade. In instances the applicant has obtained injunctions to restrain infringements thereof, and if there has been any user by persons not so restrained it has been without his knowledge, or he would have taken proceedings against them.

(vii.) It is not the fact that the applicant's above-mentioned trade mark is generally understood by the trade or the public to denote a particular quality of goods; on the contrary it is generally understood to denote goods of the applicant's manufacture [or merchandise], and the trade and the public would be deceived and the applicant would be injured if any other manufacturer or trader were to use it.

(viii.) It is not the fact that the opponent, or the trade, or the public, have used or understood the applicant's above-mentioned trade mark as describing articles made in accordance with any expired patent. On the contrary, the applicant adopted it before the grant to him of the said patent, and it has always been used and understood as distinguishing goods of his make, and not goods of any particular pattern.

(ix.) The opponent's trade mark No. is not a good or valid trade mark, but was registered by mistake and wrongfully, and the applicant is now applying for the rectification of the register by the removal therefrom of the said mark.

(x.) Whether the trade mark which the applicant is now applying to register is or is not the property of the opponent in a foreign country, as to which the applicant has no knowledge, the said trade mark has not up to the present time been known in the United Kingdom in connection with [describe the goods], but the same is a new mark adopted for the first time by the applicant.

(xi.) The statements contained in the above-mentioned trade mark are true, and the said trade mark is not calculated to deceive. If any such statements are exaggerated, such exaggerations are trifling and immaterial and not calculated to deceive.

(xii.) The articles of partnership mentioned in the notice of opposition provided that the goodwill and trade marks of the partnership business should belong to the opponent only in the event of the partnership being dissolved by effluxion of time. The said partnership was dissolved at an earlier date by common consent, and the provisions of the said articles were varied in such manner that the goodwill and trade marks devolved upon the opponent and the applicant equally.

(xiii.) The trade mark to which the above-mentioned application relates was used by the applicant in his business concurrently with the opponent before the 13th day of August, 1875, and is an old trade mark, and was not used by any other person in the same trade, and the applicant is therefore entitled to registration notwithstanding the opponent's registration.

(xiv.) The opponent uses his trade mark No. only by stamping it on his goods. The applicant only uses his by placing it on the wrappers in which the goods are placed; and the concurrent use of the two trade marks in such different ways is not calculated to deceive. The applicant has used his trade mark for years, and is willing to undertake to use it in the future only as he has hitherto used it.

(xv.) The opponent uses his trade mark No. only on goods exported by him to [*the Colonies and the United States*]. The applicant only uses his in [*the United Kingdom*]; and the concurrent user of the two trade marks in such different parts of the world cannot deceive. The applicant is willing [as in (xiv.)].

(xvi.) The word , which forms part of the above-mentioned trade mark No. , and also of the opponent's registered mark No. , is a mere word of description, and is not an essential particular of the opponent's said registered mark, nor has he any exclusive rights therein by reason of his registration.

3. Form of Statutory Declaration in Support of Application or Opposition.

Trade Marks Act, 1905.

In the matter of an opposition No. , by , to application by .

I of , a member of the firm of , the above-named applicants [*or* opponents], do hereby solemnly and sincerely declare as follows:—

1.

2.

3.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

Signed

Declared at this day of before me .

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4. Form of Letter written by Registrar to Applicant for Registration of an Old Mark.

Sir,

Adverting to your application No. [and to your agent's letter of the], I have to say that you should supply a statutory declaration, with exhibit, setting out and verifying the fact that the mark (either in its original form or with additions or alterations not substantially affecting the identity of the same) has been used within the United Kingdom of Great Britain and Ireland by you and your predecessors in business absolutely by itself as a trade mark in respect of [state the goods] continuously since years before 13th August, 1875, and that, save the said mark, there did not appear upon the bottles containing [or as the case may be] the said goods any devices, words, figures, letters, or any other particulars whatsoever. If, however, such particulars did appear, they should be set out in the declaration so that a judgment can be formed whether they are in the nature of trade mark matter.

I am, &c.,

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5. Form of Case on Appeal to the Board of Trade.

[Formal parts.]

Case on appeal to the Board of Trade (*a*).

1. [*Set out the material facts of the case in numbered paragraphs.*]
2.
3.
4.

The appellants submit that, under the circumstances hereinbefore stated, the decision of the Registrar should be reversed, and the appellants' trade mark No. above mentioned should be admitted to registration [*or* as the case may be] on the following grounds:

1. Because, &c.
2. Because, &c.

Signed

(*a*) To accompany Form TM No. 29, see p. 452.

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6. Form of Reference to the Court by the Board of Trade of Appeal under §§ 12, 59, with Directions thereon.

Trade Marks Act, 1905.

In the matter of an application No. of for the registration of a trade mark under section 12 of the above-mentioned Act,

and

In the matter of a decision of the Registrar, dated the day of , 19 ,

and

In the matter of an appeal dated the day of , 19 , to the Board of Trade from the above decision.

Reference of Appeal to the Court.

Whereas an appeal has been made to the Board of Trade against the decision above referred to. And whereas the Board of Trade think fit to refer the said appeal to the Court, now therefore the Board of Trade by virtue of the provisions of section 59 of the above-mentioned Act of 1905 do hereby refer such appeal to the Court accordingly.

Dated this day of , 19 .

Secretary to the Board of Trade.

Directions on Reference of the above Appeal to the Court.

For the purpose of the above reference, the Board of Trade, pursuant to Rule 125 of the Trade Marks Rules, 1906, hereby direct that the appellants make application by motion to the Chancery Division of the High Court of Justice to hear and determine the said appeal, and that notice of such application be served upon the Registrar of Trade Marks, and upon (*a*) such other parties, if any, as may be advised, and that upon the hearing and determination of the said appeal the appellants and the Registrar and such other parties, if any, be respectively at liberty to adduce such evidence by affidavit, examination or cross-examination of witnesses, and otherwise, as the Court may see fit to direct or permit.

Dated this day of , 19 .

Secretary to the Board of Trade.

(*a*) When the Board of Trade considers that specified parties—*e.g.*, the proprietors of an earlier mark which may conflict—ought to be served, the names of such parties are introduced here.

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7. Form of Requirement by the Board of Trade that a Special Application for Registration under § 9 (5) shall be brought before the Court.

In the matter of the Trade Marks Act, 1905.
and
In the matter of an application by , of for the registration of a trade mark in Class .

Requisition for Application to the Court.

Whereas the above-named applicants in pursuance of the provisions of sub-s. 5 of § 9 of the Trade Marks Act, 1905, and Rule 35 of the Trade Marks Rules, 1906, have applied for the registration of the word in Class , in respect of , and have, in accordance with Rule 38 of the said Rules, sent to the Registrar in writing a case in duplicate stating at length the grounds upon which they rely in support of their application, and that they desire to be heard by the Board of Trade:

And whereas by Rule 39 of the said Rules it is provided that the Board may require the applicant to apply to the Court and limit a time for that purpose:

Now therefore the Board of Trade by virtue of the power hereinbefore recited do hereby require the above-named applicant to apply by motion to the Chancery Division of the High Court of

Justice within two months from this date to hear and determine the said application, and that notice of proceedings be served upon the Registrar of Trade Marks pursuant to Rule 129 of the said Rules.

Dated this day of , 19 .

Secretary to the Board of Trade.

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8. FORM OF ACCEPTANCE BY THE BOARD OF TRADE OF A SPECIAL APPLICATION UNDER § 9 (5).

In the matter of the Trade Marks Act. 1905,
and
In the matter of an application No. by . for the registration of a trade mark consisting of the word in Class in respect of under sub-s. 5 of § 9 of the above-mentioned Act.

The Board of Trade having considered the above-named application, the case stating at length the grounds upon which the applicants rely and the statutory declarations of , and having heard the applicants by their , and the Registrar, direct that the application be accepted and that the Registrar proceed with the said application.

Dated this day of , 19 .

An Assistant Secretary to the Board of Trade.

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9. FORM OF LETTER USUALLY WRITTEN BY THE BOARD OF TRADE TO AN APPLICANT FOR RECTIFICATION OF THE REGISTER.

Solicitor. Board of Trade.

7. WHITEHALL GARDENS,
LONDON. S.W.
. 19 .

DEAR SIR,

Re Trade Mark No. .

Referring to the pending application by motion that the Register of Trade Marks may be rectified by removing therefrom the above-mentioned mark. I beg to inform you that, having had an opportunity of considering the evidence in support of the motion, I do not propose to put the parties to the expense of briefing counsel to appear on behalf of the Registrar, if you will undertake that in the case of each mark no order shall be made in any way affecting

the Register except a simple order for the removal of the mark, or, if any settlement is proposed between the parties, that you will serve me with a copy of the terms proposed, giving me a reasonable opportunity, if so advised, of objecting thereto on behalf of the Registrar before an order is taken. This undertaking will, should you have the carriage, also bind you to supply me with draft minutes whatever order be made and to give me due notice of all appointments before the Registrar to settle the same.

In the event of your agreeing to this course, I shall be glad to receive the undertaking at your early convenience.

I return the copy evidence which you sent me, and for the loan of which I am obliged.

I am, Dear Sir,
Yours truly,

Solicitor, Board of Trade.

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10. SUMMONS FOR LEAVE TO REGISTER.

In the High Court of Justice,
Chancery Division.
Mr. Justice .

In the matter of an application by *A. B.* for the registration of a trade mark No. ,
and
[In the matter of the opposition thereto, No. of *C. D.*,
and]
In the matter of the Trade Marks Act, 1905.

Let *C. D.*, of , in the county of , and the Registrar of Trade Marks, within eight days after service of this summons on them respectively, inclusive of the day of such service, cause appearances to be entered for them respectively to this summons which is issued upon the application of the above-named *A. B.*, of . in the county of , that the appeal of the said applicant *A. B.*, from the decision dated of the Registrar of Trade Marks in the above-mentioned matters may be heard and determined by the Court and that the said decision of the Registrar whereby he refused registration of the applicant's trade mark No. , above-mentioned. may be reversed, and that he may be directed to proceed with the above-mentioned application of the said *A. B.* [notwithstanding the above-mentioned opposition thereto of *C. D.*] *or* [notwithstanding the registration of *C. D.'s* trade mark No.], *or* [notwithstanding the registration of *C. D.'s* trade mark No. in the Sheffield Register]. And that the said *C. D.* may be ordered to pay the costs of this application.

Dated the day of 19 .

(Seal)

This summons was taken out by *E. F.*, of , Solicitor for the above-named *A. B.*

The respondents may appear hereto by entering appearance either personally or by Solicitor at the Central Office, Royal Courts of Justice.

Note.—If the defendant does not enter appearance within the time and at the place above mentioned such order will be made and proceedings taken as the judge may think just and expedient.

11. NOTICE OF MOTION FOR LEAVE TO REGISTER.

[*Heading as in No.* 10.]

Take notice that the Court will be moved before the Hon. Mr. Justice on the day of 19 . or so soon thereafter as counsel can be heard, by [Mr. . of] counsel on behalf of the above-named *A. B.*, that as in No. 10].

Dated the day of , 18 .

(Signed) *E. F.*, of . Solicitor for the above-named *A. B.*

To the Registrar of Trade Marks, *and, if there is an opposition*, To *Mr. C. D.*

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12. NOTICE OF MOTION FOR THE RECTIFICATION OF THE REGISTER.

In the High Court of Justice,
Chancery Division.
Mr. Justice

In the matter of the registered trade mark No. of *A. B.*,
and
In the matter of the Trade Marks Act, 1905.

Take notice as in No. 11 to behalf of *C. D.*, of . that the Register of Trade Marks kept under the authority of the above-mentioned Act may be rectified [by removing therefrom the above-mentioned trade mark No.], *or* [by adding to the registration of the above-mentioned trade mark No. a note disclaiming any exclusive right in the above-named *A. B.* to the use of the word], *or* [by limiting the registration of the above-mentioned trade mark No. to [describe the goods], and not allowing it to remain in respect of all the goods in Class , of the said register as to the Court shall seem just. And that the said *A. B.* may be ordered to pay the costs of this application.

[Dated and signed as in No. 11.]

To Mr *A. B.* and the Registrar of Trade Marks.

Part II.

FORMS FOR USE IN ACTIONS FOR INFRINGEMENT (a).

I. Writ of Summons with Endorsement.

In the High Court of Justice, 19 . B. No. .
Chancery Division.
Mr. Justice .

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

GEORGE THE FIFTH, *by the Grace of God, &c.*

To *C. D.* of , in the county of .

We command you that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of *A. B.*; and take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, Robert Baron Loreburn, Lord High Chancellor of Great Britain, the day of , in the year of our Lord one thousand nine hundred and .

Memorandum to be subscribed on the writ.

N.B. This writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

The defendant [*or* defendants] may appear hereto by entering an appearance [*or* appearances] either personally or by solicitor at the Central Office, Royal Courts of Justice, London.

Indorsement to be made on the writ before issue thereof.

The plaintiff's claim is for an injunction to restrain the defendant from [*see forms of Injunction in Part III. of this Appendix*], and for an account or damages;

or, The plaintiff's claim is for damages for wrongfully using [*or* imitating] the plaintiff's trade mark, and for an injunction to restrain, &c.

And for an order for delivery up on oath or (at the plaintiff's option) destruction of all documents, articles and things in the possession or power of the defendant or under his control which offend against any of the foregoing injunctions.

(a) See Schedules to Rules of Supreme Court.

This writ was issued by the said plaintiff, who resides at ;
or. This writ was issued by *E. F.*, of , whose address for service is , solicitor for the said plaintiff, who resides at ;
or. This writ was issued by *G. H.*, of . whose address for service is . agent for *E. F.*, of . solicitor for the said plaintiff, who resides at *mention the city, town, or parish, and also the name of the street and number of the house of the plaintiff's residence, if any*].

Indorsement to be made on the writ after service thereof.

This writ was served by me at on the defendant on the day of 19 .
Indorsed the day of 19 .
(Signed)
(Address)

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2. Notice of Motion for Injunction.

[*Heading as in No.* 1.]

Take notice that the Court will be moved before the Hon. Mr. Justice on the day of 19 . or so soon thereafter as counsel can be heard, by [Mr. of] counsel for the above-named plaintiff, that an injunction may be granted to restrain the defendant, &c., until judgment in this action or further order, from [*see Part III. of this Appendix*] [and take also notice that special leave to serve you with this [short] notice for the day aforesaid [with the writ of summons] has been obtained from the said Mr. Justice].

Dated the day of 19 .

(Signed) *E. F.*, of
Solicitor for the above-named Plaintiff.

To the Defendant *C. D.*

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3. Statement of Claim.

[*Heading as in No.* 1. *inserting above the title of the action* – "Writ issued the day of , 19 ."]

Statement of Claim (*a*).

1. The defendant has infringed the plaintiff's trade mark.
2. The trade mark is [*describe it*].

(*If the plaintiff is not the original proprietor of the trade mark, show shortly how his title is derived.*)

(*a*) The above is the form appended to the Rules of Court, 1883, but fuller particulars will usually be required. Forms 3 (i.), 3 (ii.), and 3 (iii.) are therefore suggested.

3. The following are the acts complained of, viz.:—
(*Set them out.*)

The plaintiff claims an injunction to restrain the defendant, his servants and agents, from infringing the plaintiff's said trade mark, and in particular from [*see forms of Injunction in Part III. of this Appendix*].

The plaintiff also claims an account or damages.

(Signed)

(Delivered)

3. (i.) [*Heading as above.*]

Statement of Claim.

1. The plaintiff is the registered proprietor of a trade mark [consisting of] (*a*), which was advertised in the Trade Marks Journal of the day of . 19 . and is registered for in Class .

2. The defendant has infringed the plaintiff's said trade mark in manner following; that is to say [he has].

[3. The plaintiff has applied to the defendant to desist from his wrongful acts aforesaid, but he has refused (*or* neglected) so to do] (*b*).

4. The defendant has made considerable profits by selling goods not being the plaintiff's goods under the trade mark of which the plaintiff complains [*or* in manner aforesaid].

5. The plaintiff has sustained considerable damage from the defendant's wrongful acts aforesaid.

The plaintiff claims—

1. An injunction [as above].
2. An order for delivery up to the plaintiff on oath of all [*describe goods*] which are in the possession or power or under the control of the defendant, and offend against any injunction to be granted herein.
3. Damages or an account of profits.
4. Costs.

(*a*) The trade mark need not be described unless the nature of the infringement renders it necessary.

(*b*) Though previous application is not necessary, if it has been made it should be mentioned.

3. (ii.) [*Heading as above.*]

Statement of Claim.

1. [As in 3 (i.), omitting the description of the plaintiff's trade mark.]

2. The said trade mark consists of [*or* contains] the device of a [lion], and the plaintiff's goods bearing such trade mark are extensively known in the [Indian] markets as ["Lion"] goods, and are frequently ordered and invoiced under that name.

3. No other goods of the same kind are or ever have been known in the [Indian] markets as ["Lion"] goods.

4. The defendant is using on goods intended for export to the [Indian] markets a trade mark [*or* label, *or* wrapper] on which he places the device of a [lion], and such user is calculated to deceive by inducing purchasers to buy the defendant's goods in the belief that they are buying those of the plaintiff.

5. [As in 3 (i.), par. 4.]

6. [As in 3 (i.), par. 5.]

The plaintiff claims [as in 3 (i.). For form of injunction, see that in *Orr-Ewing & Co.* v. *Johnston & Co.*, Part III., No. 5, *infra*.]

3. (iii.) [*Heading as above.*]

Statement of Claim (*a*).

1. The plaintiff has for years last past and upwards offered for sale and sold [a preparation for the human hair] of his manufacture under the title of [Robinson's Hair Stimulant], and previously to the defendant commencing his wrongful acts hereinafter stated no other person except the plaintiff offered for sale or sold under that title any similar preparation.

2. The plaintiff offers for sale and sells and always has offered for sale and sold [his said preparation] in bottles of a peculiar and distinctive shape packed in cases which are also of a peculiar and distinctive shape; and previously to the defendant commencing his wrongful acts hereinafter stated no other person except the plaintiff used for the purposes of trade in any [preparation for the human hair] bottles or cases similar in shape to the plaintiff's bottles and cases.

3. The plaintiff has recently ascertained as the fact is that the defendant for the purpose of passing off his goods as and for the plaintiff's goods is offering for sale and selling [a preparation] not of the plaintiff's manufacture under the title of [Robinson's Hair Stimulant], and in bottles similar in shape to the plaintiff's bottles and packed in cases similar in shape to the plaintiff's cases, whereby

(*a*) This is intended for a case in which no trade mark has been registered.

divers persons have been induced to purchase the defendant's [preparation] as and for the goods of the plaintiff [*or* and such acts are calculated to induce, &c.]

4. The defendant has made considerable profits by selling his goods as and for the goods of the plaintiff.

5. [As in 3 (i.), par. 5.]

The plaintiff claims—

1. An injunction to restrain the defendant, his servants and agents, from passing or attempting to pass off the defendant's goods as and for the plaintiff's goods, and in particular from offering for sale or selling any [preparation for the human hair] not of the plaintiff's manufacture by means of the use of the title [Robinson's Hair Stimulant], and by means of the use of bottles similar in shape to the plaintiff's bottles, and by means of the use of cases similar in shape to the plaintiff's cases, or by any of such means [*or* as may be].
2. Delivery up [as in 3 (i.)].
3. An account of profits or damages.
4. Costs.

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4. Defence.

[*Heading as in No.* 1.]

Defence (*a*).

The defendant says that:—

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

(Signed)
(Delivered)

(*a*) The above is the form appended to the Rules of Court, 1883, but a fuller form varying with the nature of the case will generally be required.

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5. Reply.

[*Heading as in No.* 1.]

Reply.

The plaintiff as to the defence says that:—

1.
2.

(Signed)
(Delivered)

6. Summons to Stay Proceedings by Consent, the Defendant submitting to an Injunction.

[*Heading as in No.* 1.]

Let all parties concerned attend at the chambers of Mr. Justice at the Royal Courts of Justice on the day of , 19 , at o'clock in the noon, on the hearing of an application on the part of the above-named defendant that the defendant submitting to a perpetual injunction restraining [*see forms of Injunction in Part III. of this Appendix, infra*] and submitting to pay the plaintiff £ in respect of [damages and] his taxed costs of this action, all further proceedings in this action may be stayed, or that such further or other order may be made as to the judge shall seem just.

Dated the day of , 19 .

This summons was taken out by *G. H.* of , Solicitor for the above-named Defendant.

To the above-named Plaintiff.

Part III.

PRECEDENTS OF INJUNCTIONS, &c.

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1. Croft *v.* Day, 7 Beav. 81, 90.

Label on Blacking Bottles Trade Cards Injunction.

Injunction to restrain the defendant, his servants, &c., "from selling, or exposing for sale, or procuring to be sold, any composition or blacking described as, or purporting to be, blacking manufactured by Day and Martin, in bottles having affixed thereto such labels as in the complainant's bill mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by John Weston (the manager), for the benefit of the estate of Charles Day, the testator; and from using trade cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by John Weston" (*a*).

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2. Seixo *v.* Provezende. L. R. 1 Ch. 192, 194.

Brand on Casks of Wine Injunction.

Injunction to restrain the defendants, &c., "from affixing or causing to be affixed to any casks of wine shipped to their orders the brand or marks of a crown and the word *Seixo*, or any other combination of marks or words so contrived as, by colourable imitation or otherwise, to represent the marks or brands of the plaintiff, and from employing any marks or words which shall be so contrived as to represent, or induce the belief, that such wines are Crown Seixo, or the produce of the *Quinta do Seixo*, or otherwise using the word *Seixo* without clearly distinguishing the same from the wine produced by the *Quinta do Seixo*" &c.

(*a*) Lord Langdale, M. R.

(*b*) Wood, V.-C.: approved by Lords Watson and Macnaghten in *Montgomery v. Thompson*, 1891 A. C. 217, 221, 224. And see *Thompson v. Bent's Brewery Co.*, 8 P. R. 479; *Grazier v. Anbon*, 13 P. R. 1; *Pinet v. Maison Pinet* (1), 4 P. R. 903, and many other cases.

3. MAGNOLIA METAL CO. *v.* ATLAS METAL CO., 14 P. R. 389.

Magnolia Metal—Injunction.

Injunction restraining the defendants, &c., "from casting, packing, describing, advertising, offering for sale, selling, or dealing with any anti-friction metal made up in such a way as not to be readily and clearly distinguishable from the 'Magnolia Metal' manufactured by the plaintiffs, and from using the word 'Magnolia' as descriptive of, or in connection with, any anti-friction metal manufactured by them or either of them, without clearly distinguishing such anti-friction metal from the anti-friction metal of the plaintiffs" (*a*).

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4. STEPHENS *v.* PEEL, 16 L. T. N. S. 145.

Labels on Bottles of Ink—Injunction.

Injunction restraining the defendant, &c., "from selling, or exposing, or advertising for sale, or procuring to be sold, any ink or writing fluid in bottles bearing thereon such labels as after mentioned, and from using any labels, or stamps, or advertisements so contrived or expressed as by colourable imitation or otherwise to represent or lead to the belief that the ink sold by the defendant is the ink or writing fluid manufactured by the plaintiffs, and sold by them under the name of 'Stephens' Blue Black Writing Fluid'" (*b*).

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5. ORR-EWING & Co. *v.* JOHNSTON & Co., 7 App. Cas. 219. 233.

"Two Elephant" Yarn—Injunction.

Injunction restraining the defendants, &c., "from affixing or causing to be affixed to any Turkey red yarn not dyed by the plaintiffs the ticket marked 'B.' and from using two elephants on any ticket used on Turkey red yarn, without clearly distinguishing such ticket from the plaintiffs' ticket mentioned in the pleadings, being the exhibit marked 'A' referred to in the depositions, or so as to represent or induce the belief that any of the said yarn was dyed by the plaintiffs" (*c*).

(*a*) Collins, J., approved by the Court of Appeal.

(*b*) Wood, V.-C.

(*c*) House of Lords. See *Reddaway* v. *Banham*, 1896) A. C. 199, 221; and *Magnolia Metal Co* v. *Atlas Metal Co.*, 14 P. R. 389, 404.

6. READ BROTHERS *v.* RICHARDSON & Co., 45 L. T. N. S. 54, 60.

"Dog's Head" Beer for Exportation—Undertaking on Motion—Injunction—Costs.

"The plaintiffs by their counsel undertaking to abide by any order this Court may make as to damages in case this Court shall hereafter be of opinion that the defendants have sustained any by reason of this order which the plaintiffs ought to pay, this Court doth order that the defendants, &c., be restrained from using the figure of a dog's head upon any labels, tickets, or wrappers affixed or applied to bottles of beer or stout sold for exportation or exported by the defendants to any of the Australian Colonies or New Zealand, and from selling for exportation or exporting to any of the said colonies any bottles of beer or stout having affixed or applied thereto any such label, ticket, or wrapper, until judgment in this action or further order; and it is ordered that the plaintiffs' costs of this motion be their costs in the action" (*a*).

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7. BROADHURST *v.* BARLOW, L. J. N. of C., 1872, p. 183.

Stamps on Shirtings Injunction.

Injunction restraining the defendants, &c., "from stamping, impressing, or affixing, or causing to be stamped, impressed, or affixed on or to any Spanish shirtings or pieces of white calico manufactured or sold by them, any mark consisting of words in the Turkish, Armenian, and Greek languages, meaning 'exactly 12 yards,' and placed between a figure or crest and the words 'Spanish Shirtings' enclosed in a scroll in the same manner as those are respectively placed in the plaintiff's trade mark, or in any manner only colourably differing therefrom" (*b*).

8. WOTHERSPOON *v.* CURRIE, L. R. 5 H. L. 508, 523.

"Glenfield Starch" Injunction.

Injunction restraining the respondent, &c., "from using the word 'Glenfield' in or upon any labels affixed to packets of starch manufactured by or for him, and from in any other way representing the starch manufactured by or for him to be 'Glenfield Starch,' and from selling or causing the same to be sold as 'Glenfield Starch,' and from doing any act or thing to induce the belief that starch manufactured by or for him, the respondent, is 'Glenfield Starch,' or starch manufactured by the appellant" (*c*).

(*a*) Court of Appeal. (*b*) Wickens, V.-C. (*c*) House of Lords.

9. FORD *v.* FOSTER, L. R. 7 Ch. 611, 634.

"Eureka" Shirts—Injunction.

Injunction restraining the defendants, &c., "from applying the mark or title 'Eureka' to any shirts manufactured by them, or to any shirts sold by them, unless manufactured by the plaintiffs, and from selling any shirts already marked with the mark or 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 '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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10. WEINGARTEN BROTHERS *v.* CHARLES BAYER & Co., 22 P. R. 341, 351.

"Erect Form" Corsets—Descriptive Words written in Special Type.

Injunction restraining the defendants, &c., "from selling or offering for sale corsets in boxes bearing the scroll or an imitation of the scroll used by the plaintiffs in connection with their corsets or any corsets designated by show cards or labels bearing such scroll or imitation or otherwise distinguished by such scroll or imitation" (*b*).

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11. REY *v.* LECOUTURIER, 25 P. R. 265 (292); 27 P. R. 268.

"Chartreuse" Liqueur—Passing off—Injunction.

Injunction restraining the defendants, &c., "from using the word 'Chartreuse' in connection with the sale of liqueurs other than those manufactured by the plaintiffs as the name of or as descriptive of the liqueur, or without clearly distinguishing the liqueur so sold from the liqueur manufactured by the plaintiffs, and from selling or offering for sale in this country any liqueurs or other liquors not so manufactured in such a manner as to represent or lead to the belief that the liqueurs or other liquors manufactured or imported or sold by the defendants are the manufacture of the plaintiffs" (*c*).

(*a*) James, L. J.
(*b*) House of Lords.
(*c*) Court of Appeal and House of Lords.

12. MURALO CO. *v.* TAYLOR & CO., 27 P. R. 261.

"Muralo" Distemper—Passing off—Injunction.

Injunction restraining the defendants, &c., "from in any manner passing off or enabling or assisting others to pass off any distemper not of the plaintiff's manufacture as or for the plaintiff's goods, and from selling or offering or exposing or advertising for sale or procuring to be sold any such distemper as aforesaid under the name 'Murrilo' or under any other name which, by reason of colourable imitation of the plaintiff's name and trade mark 'Muralo,' or otherwise, is calculated to represent or lead to the belief that such distemper is 'Muralo' distemper or a distemper of the plaintiff's manufacture" (*a*).

13. 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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14. CARUNCHO *v.* STEPHENSON, 25 SOL. J. 929.

"La Intimidad" Cigars—Injunction.

Injunction restraining the defendant, &c., "from selling or causing or allowing to be sold, and from in any manner representing, or causing or procuring to be represented, any cigars manufactured, sold, or dealt in by the defendant as 'La Intimidad' cigars, or as cigars manufactured, imported, or sold by the plaintiffs or either of them; and also from affixing, or procuring or causing or allowing to be affixed, to any boxes of cigars manufactured, or bought, or procured, or sold, or attempted to be sold by the defendant, or other-

(*a*) Eady, J.

(*b*) Bacon, V.-C. And see also forms of injunctions in *Apollinaris Co.* v. *Edwards*, Seton, 6th ed. 626; *Millington* v. *Fox*, 3 My. & Cr. 338; and Pemberton, 4th ed. 490; *Edelsten* v. *Vick*, 11 Hare, 78; *Collins Co.* v. *Walker*, 7 W. R. 222; and Seton, 6th ed. 623; *Harrison* v. *Taylor*, 11 Jur. N. S. 408; and Pemberton, 4th ed. 490; *Breham* v. *Bustard*, 1 H. & M. 447; *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; and Pemberton, 4th ed. 490; *Mickle* v. *Emery*, Seton, 6th ed. 623; *Siegert* v. *Findlater*, 7 Ch. D. 801, 814; *McLean* v. *Fleming*, 96 U. S. 245; 13 U. S. Pat. Gaz. 913, 914.

wise using, or employing, or permitting to be used or employed, any labels, wrappers, brands, or marks used by the plaintiffs or either of them, or so contrived or prepared as to represent or lead to the belief that the cigars manufactured or sold by the defendant are cigars manufactured or sold by the plaintiffs or either of them, and from using the words 'La Intimidad' on any cigars, or boxes or wrappers containing cigars, so as to induce the belief that such cigars are manufactured or imported by the plaintiffs or either of them, pending the trial of this action" (*a*).

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15. BEWLAY & CO., LD. *v.* HUGHES, 15 P. R. 290, 293.

"Flor de Dindigul" Cigars—Injunction.

Restrain defendant, &c., "from using the names 'Flor de Dindigul' or 'Cigarro de Dindigul' as the brand or title of any cigars not being the plaintiffs' cigars, and from supplying cigars, not being the plaintiffs' cigars, in response to orders for 'Flor de Dindigul' cigars; and from using the name 'Dindigul' in connection with the sale of cigars, not being the plaintiffs' cigars, without clearly distinguishing such cigars from the plaintiffs' cigars. This injunction is not to prevent the defendant from describing any cigars sold by him which are, in fact, made of 'Dindigul' tobacco, as being so made" (*b*).

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16. VALENTINE MEAT JUICE CO. *v.* VALENTINE EXTRACT CO.. 17 P. R. 673, 688.

Valentine's Extract of Meat—Name of Firm—Passing off—Injunction.

"Order that the defendants, the Valentine Extract Company and Herbert Hughes and each of them, their servants and agents, be perpetually restrained from carrying on business as manufacturers or vendors of any preparation of extract of meat or meat juice under any name or title of which the word 'Valentine' or 'Valentine's' forms part, and from selling, or offering, or exposing, or advertising for sale, or procuring to be sold any such preparation as aforesaid, not being of the plaintiffs' manufacture, under any name or description of which the name 'Valentine' or 'Valentine's' or 'Valtine' forms part. And order that the defendant, Charles Richard Valentine, his servants and agents, be perpetually restrained from carrying

(*a*) Cave, J. (*b*) North, J.

on any such business as aforesaid under any such name or title as aforesaid without clearly distinguishing such business from the business of the plaintiffs, and from selling, or offering, or exposing, or advertising for sale, or procuring to be sold, any such preparation as aforesaid, under any such name or description as aforesaid without clearly distinguishing such preparation from the goods of the plaintiffs. And order that the defendants, the Valentine Extract Co., Ld., Charles Richard Valentine, and Herbert Hughes, and each of them. their servants and agents, be perpetually restrained from in any manner representing or acting so as to be calculated to lead to the belief that the defendant, Charles Richard Valentine, is or ever has been interested in or connected with the business of the plaintiffs, and from passing off, or enabling or assisting others to pass off, any such preparation as aforesaid, not being of the plaintiffs' manufacture, as or for the plaintiffs' goods" (*a*).

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17. WARWICK TYRE CO., LD. *v.* NEW MOTOR AND GENERAL RUBBER CO., LD., 17 P. R. 161.

"Warwick" Tyres—Injunction.

Injunction restraining the defendants, &c., "from selling or offering for sale motor tyres as 'Warwick' tyres, or using the word 'Warwick' in connection with the sale or offering for sale of motor tyres in such a way as to lead to the belief that the defendants' motor tyres are motor tyres of the plaintiff company" (*b*).

18. KERFOOT *v.* R. A. COOPER, LD., 25 P. R. 508.

"Sweet Lips" Cachous—Trade Mark—Passing off—Sale over Counter—Injunction.

Injunction restraining the defendants, &c., "from selling any cachous, not being the plaintiff's cachous, under the name 'Sweet Lips' or 'Sweet Two Lips,' and from selling or supplying any such cachous as or for 'Sweet Lips' or 'Sweet Two Lips' cachous, or in response to orders for 'Sweet Lips' or 'Sweet Two Lips' cachous" (*c*).

(*a*) Court of Appeal. This was followed in *International Plasmon, Ltd.* v. *Plasmonade, Ltd.*, 22 P. R. 543. See also form of injunction in *Rigden* v. *Jones*, 22 P. R. 417, 430.

(*b*) Neville, J.

(*c*) Eve, J.

19. EDELSTEN *v.* EDELSTEN, 1 De G. J. & S. 185, 189.

"Anchor Brand Wire"—Prayer of Bill—Injunction—Account —Delivery up.

Prayer of Bill: "That an account may be taken of the gains and profits made and obtained by the defendants by the sale of wire having tallies or labels attached thereto with the plaintiff's trade mark, or a trade mark in imitation of, or only colourably differing from that of the plaintiff, stamped or impressed thereon; and that the defendants may be ordered to pay to the plaintiff the amount of such gains and profits. That the defendants may be restrained by injunction from attaching to wire, not the manufacture of the plaintiff, any tally or label with the plaintiff's trade mark, or any mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, and from otherwise using the plaintiff's trade mark, or any mark in imitation thereof, so as to denote or represent that the said wire is the 'Anchor Brand Wire,' or is the manufacture of the plaintiff; and from selling, or offering for sale, or procuring to be sold, any wire not being of the plaintiff's manufacture, having a tally or label attached thereto with the plaintiff's trade mark, or a mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, or otherwise in any manner having the said trade mark, or a mark in imitation thereof, or only colourably differing therefrom, attached thereto. That the defendants may deliver up to be cancelled all tallies, labels, and papers in their possession, or in the possession of their servants or agents, having the said trade mark so in colourable imitation of the plaintiff's as hereinbefore mentioned; and also all tallies, labels, and papers in their possession, or in the possession of their servants or agents, having the plaintiff's trade mark, or any mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, and also all dies for stamping or impressing the same; and that the defendants may pay all the costs of the suit" (*a*).

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20. HAVANA CIGAR AND TOBACCO FACTORIES, LD. *v.* TIFFIN (1905), LD., 26 P. R. 473; 27 P. R. 602.

"La Corona" Cigars—Passing off—No Infringement of Trade Marks—Costs—Set-off.

Injunction restraining the defendants, &c., "from selling, or offering, or exposing, or advertising for sale, or procuring to be

(*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, 4th ed. 492; and the full decree in *Ford* v. *Foster*, Seton, 6th ed. 625. As to order restraining exportation of goods with forged trade marks, see *Henderson* v. *Jorss*, Seton, 6th ed. 625. 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, 6th ed. 625; *Del Valle* v. *Mayer*, *ib.*; *Moet* v. *Pickering*, 6 Ch. D. 770, 771; 8 *ib.* 372.

sold or passing off, or inducing or enabling others to pass off, cigars not of the plaintiffs' manufacture as or for the plaintiffs' 'La Corona' brand of cigars by the use of any words consisting of or containing the word 'Corona' as a brand name. And it is ordered that the defendants do pay to the plaintiffs the sum of 40*s.* by way of damages. And it is ordered that it be referred to the taxing master to tax the costs of the plaintiffs of this action and of and occasioned by the said appeal, except so far as such costs have been increased by the claim set up by them in respect of infringement of trade mark, and to tax the costs of the defendants of so much of this action and of and occasioned by the said appeal so far as they have been increased by the said claim in respect of infringement, and the taxing master is to set off the said costs of the plaintiffs and of the defendants and certify to which of them the balance after such set off is due. And it is ordered that such balance be paid by the party from whom to the party to whom the same shall be certified to be due. And it is ordered that the defendants do repay to the plaintiffs the costs of this action paid by them pursuant to the said judgment" (*a*).

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21. GUINNESS *v.* ULLMER, 10 L. T. O. S. 127.

Engraving Blocks for Printing Forged Labels—Injunction.

Injunction restraining the defendant, &c., "from cutting, engraving, casting, or making, and from causing to be cut, engraved, cast, or made, and also from using or permitting to be used, and from selling or otherwise disposing of or parting with any blocks or plates adapted for printing labels or sheets of labels in imitation of the label furnished by Sparkes Moline to and used by the agents appointed by him for sale of the plaintiffs' stout, as in the plaintiffs' bill mentioned, or any of them, or differing only colourably therefrom. And also from selling or otherwise disposing of, and from delivering over or parting with any of such blocks or plates as are now in their possession, custody, or power, to any person other than the plaintiffs or such person as they shall appoint to receive the same" (*b*).

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22. FARINA *v.* SILVERLOCK, 1 K. & J. 509.

Printing Forged Labels—Injunction.

Injunction restraining the defendant, &c., "from printing or selling, or exposing for sale, or procuring to be printed or sold, any labels similar to those in use by the plaintiff, as in the bill in this

(*a*) Court of Appeal (correcting their previous order as drawn up with respect to costs).

(*b*) Shadwell, V.-C. of Eng.

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*).

23. LEVER *v.* GOODWIN, 4 P. R. 503.

Order—Action dismissed as to Trade Mark—Injunction as to passing off Goods—Account—Costs.

Order "that this action so far as the same claims protection in respect of the trade mark No. , stand dismissed out of Court. Order that the defendants, Goodwin Bros., their agents and servants, be restrained from selling, offering for sale, or disposing of any soap not being manufactured for or by the plaintiffs in the wrapper or of the form of any one of the three exhibits admitted in this action to have been issued by the defendants, and marked A, B, and C, or in any wrapper or in any form calculated or intended to pass off, or to enable others to pass off, such soap as or for the goods of the plaintiffs. Order that the following account be taken: that is to say, an account of the profits made by the defendants in selling or disposing of soap made by or for the defendants in any wrapper such as that contained in the exhibits marked A, B, and C, and in the form of those exhibits. Order that the defendants Goodwin Bros. do, within fourteen days after the date of the chief clerk's certificate to be made pursuant to this order, pay to the plaintiffs Lever & Co. the amount which upon taking such account shall be certified to be payable by the defendants to the plaintiffs. Order that it be referred to the taxing master to tax the costs of the plaintiffs of this action up to and including the trial, except so far as the same have been incurred by their claim for protection in respect of the trade mark aforesaid. Order that it be referred to the taxing master to tax the costs of the defendants of this action so far as the same have been incurred by the plaintiffs setting up the said claim for protection in respect of the said trade mark, and the costs of the plaintiffs when so taxed are to be set off against the said costs of the defendants when taxed, and the taxing master is to certify to whom, after such set off, the balance is due. Order that the party from whom such balance shall be certified to be due do pay the amount thereof to the other party. And the question of the costs of this action incurred subsequent to the trial are reserved, and either of the parties are to be at liberty to apply as they may be advised" (*b*).

(*a*) Wood. V.-C. (*b*) Chitty, J., affirmed by C. A.

24. 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" (*a*).

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25. 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'" (*b*).

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26. WALTER *v.* HEAD, 25 Sol. J. 757.

Name of Newspaper—Injunction.

Injunction restraining the defendant, &c., "from printing or publishing any newspaper or other publication in the form of a newspaper with or under the name or title of 'The Times,' and from doing any other act in invasion or infringement of the plaintiff's right or interest in the name or title of 'The Times'" (*c*).

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27. PROWETT *v.* MORTIMER, 2 Jur. N. S. 414.

Name of Newspaper—Soliciting Customers—Injunction.

Injunction restraining the defendant, &c., "from printing, or publishing, or exposing for sale, or procuring to be printed or sold, the newspaper publication called 'The True Britannia,' or any other newspaper or publication, as a continuation of the plaintiff's news-

(*a*) Stuart, V.-C. And see *Edmonds v. Benbow*, Seton, 6th ed. 629; *Corns v. Griffiths*, Pemberton, 4th ed. 489; *Mack v. Petter*, 41 L. J. Ch. 782.
(*b*) Wood, V.-C.
(*c*) Court of Appeal.

paper '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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28. HOGG *v.* KIRBY, 8 Ves. 215, 226.

Publication of a Magazine as a Continuation of Plaintiff's Magazine—Injunction.

Injunction restraining the defendant, &c., "from publishing or exposing for sale any copy or copies of the defendant's said work, and from printing, publishing, or exposing for sale, any other work or publication as or being a continuation of the plaintiff's work, or of the defendant's work which has been so published as such continuation as aforesaid; and from printing all or any part or parts of the plaintiff's said work"; and Ordered "that the injunction shall be continued as to any letters, &c., admitted by the Answer to have been received from correspondents by the defendant, while publishing for the plaintiff" (*b*).

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29. 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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30. PRINCE ALBERT *v.* STRANGE, 2 De G. & Sm. 652, 717.

Etchings Improperly Obtained and Published—Catalogues Improperly Published—Decree—Delivery up—Injunction.

Decree, by which—"Declared that the plaintiff is entitled to have delivered to him the impressions (by the Answer of defendant J. admitted to be in his possession) of such of the several etchings in

(*a*) Stuart, V.-C. (*b*) Lord Eldon, C. (*c*) Wood, V.-C.

the pleadings mentioned as in the catalogue and in the pleadings are stated to have been etched by the plaintiff; that is to say (description by reference to Nos. in the catalogue); Ordered, that J. shall, within four days after the service of the decree, deliver up the impressions above specified on oath, and leave them with the Clerk of Records and Writs at the Record Office. Ordered, that the defendant S. shall, within four days after the service of the decree, deliver to the Clerk of Records and Writs, at the said Office, the twenty-five copies of the catalogue, being the same as are mentioned in the decree in the other suit of even date. Similar directions as to six copies of the catalogue admitted by J. to be in his possession. Ordered, that the Clerk of Records and Writs shall destroy those copies of the catalogue, giving notice to the solicitors of the several parties of the time and place at which he intends to do so. Injunction restraining the defendants, &c., from making or permitting to be made any engraving or copy of such etchings, or any of them, and from publishing the same; and from parting with or disposing of them or any of them, except in obedience to the decree; and from selling or in any manner publishing the catalogue, or any work being or purporting to be a catalogue of the etchings made by the plaintiff. Provision made for costs. Liberty to apply reserved" (*a*).

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31. 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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32. 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, 6th ed. 624: *Weston* v. *Hemmons*, 2 V. L. R. Eq. 121.

33. ESTCOURT *v.* ESTCOURT HOP ESSENCE CO., 31 L. T. N. S. 567.

Hop Essence—Secret Recipe—Trade Name—Representation of Succession in Business—Manufacturing Contrary to Agreement—Injunction.

Injunction restraining the defendants C. Estcourt and the Estcourt Hop Essence Co., &c., "from manufacturing, or selling, or advertising for sale, an article called 'Hop Essence,' or any other substance identical with or only colourably differing from the 'Hop Supplement' manufactured and sold by the plaintiffs, and from using or disclosing to any persons the secret of compounding the said 'Hop Supplement'; and also restraining the defendant company from trading under the name of 'The Estcourt Hop Essence Co., Limited,' and from using any designation, either of the vendors or of the substance offered for sale, calculated to lead purchasers into the belief that such substance is the 'Hop Supplement' manufactured by the plaintiffs, or equivalent or substantially equivalent thereto, or that they, such defendants, or any of them, are the successors in business of the plaintiff's firm, or the original firm who manufactured and sold the said article; and also restraining the defendant C. Estcourt from carrying on or being connected with the business of manufacturing or selling any substance intended to be used as a substitute for hops in brewing" (*a*).

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34. FRANKS *v.* WEAVER, 8 L. T. O. S. 510.

Fraudulently using Another's Testimonials—Injunction.

Injunction restraining the defendant, &c., "from making, vending, or offering for sale, or in any manner disposing of any preparation, mixture, compound, or nostrum, having around, or upon, or in connection with the same, or the bottles or other vessels containing the same, any cover, wrapper, envelope, label, bill, circular, notice, advertisement, or other formula, in the terms or to the purport or effect of the cover, wrapper, envelope, label, bill, circular, notice, advertisement, or other formula, in the plaintiff's bill stated to have been used by the said defendant, or any other cover, &c., containing any testimonial in favour of the plaintiff's medicine or medical preparation in the said bill described as 'Franks' Specific Solution of Copaiba,' or in which any statement or representation is made or contained indicating, or implying, or tending to induce the public or purchasers to suppose that such preparation, mixture, compound, or nostrum is the same as 'Franks' Specific Solution of Copaiba,' or referred to in connection with any preparation, mixture, com-

(*a*) **Malins, V.-C.** The injunction was afterwards rescinded, but on grounds independent of the form of it: L. R. 10 Ch. 276.

pound, 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*).

35. WALTER *v.* ASHTON, (1902) 2 Ch. 282, 295.

Unauthorised use of name of Newspaper—"The Times" Cycle —Injunction.

Injunction restraining the defendant, &c., until the trial or further order, "from representing that the cycles offered by him for sale are in fact offered for sale by the proprietors of 'The Times' newspaper, or representing that he is carrying on business as a department of, or in connection with, 'The Times' newspaper, or in any way holding out 'The Times' newspaper, or the proprietors thereof, to be the owners of the business" (*b*).

36. KNOTT *v.* MORGAN, 2 Keen, 213, 219.

Imitating a Rival Line of Omnibuses—Injunction.

Injunction restraining the defendant, &c., "from running, or in any manner using, or causing to be used, for the conveyance of passengers, his omnibus in the bill mentioned, or any other omnibus, having painted, stamped, printed, or written thereon the words or names 'London Conveyance' or 'Original Conveyance Company,' or any other names, words, or devices painted, stamped, printed, or written thereon, in such manner as to form or to be a colourable imitation of the names, words, and devices painted, stamped, printed, or written on the omnibuses of the plaintiff" (*c*).

37. GLENNY *v.* SMITH, 2 De. & Sm. 476.

Trade Name -Injunction.

Injunction restraining the defendant, &c., "from continuing to use, or from exhibiting or using the words 'Thresher and Glenny,' or the name of the plaintiffs' said firm in any form in or about his

(*a*) Lord Langdale, M. R.
(*b*) Byrne, J.
(*c*) Lord Langdale, M. R. The M. R. altered the form so as not to restrain all use of the words "London Conveyance Company."

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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38. WOLMERSHAUSEN *v.* G. S. WOLMERSHAUSEN & CO., LD., W. N. 1892, p. 87.

Trade Name—Misleading Advertisement—Injunction.

Injunction restraining the defendant company "from carrying on their business of 'G. S. Wolmershausen & Co., Limited,' without clearly distinguishing such business from the business of the plaintiff, and from publishing advertisements or issuing circulars in their name of 'G. S. Wolmershausen & Co., Limited,' without clearly distinguishing therein their business from the business of the plaintiff, and from otherwise representing in any way that their business is the business or a branch business of the plaintiff" (*b*).

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39. BRINSMEAD *v.* BRINSMEAD, 13 T. L. R. 3.

Trade Name—Use of Defendant's own Name.

Injunction restraining the defendant company "from using the name of 'Thomas Edward Brinsmead & Sons, Limited,' or the name of 'Brinsmead,' without adding thereto an express statement that the defendant company are distinct from and have no connection with the old firm of 'John Brinsmead & Sons'" (*c*).

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40. J. & J. CASH, LD. *v.* CASH, 19 P. R. 181, 183, 186.

Trade Name—Cash's Frillings—Use of Defendant's own Name—Injunction.

Injunction restraining the defendant, Joseph Cash, "from selling any frillings or woven names or initials not manufactured by the plaintiffs as 'Cash's frillings' or 'Cash's Woven Names or Initials,' and from carrying on the business of a manufacturer or seller of frillings or woven names or initials under the name of 'Joseph Cash & Co.' while not in partnership with any other person, and

(*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, 6th ed. 629; *Montague* v. *Moore*, *ib.*: *Cave* v. *Myers*, *ib.*; *Fullwood* v. *Fullwood*, 38 L. T. N. S. 381.

(*b*) Chitty, J.

(*c*) Court of Appeal.

from carrying on any such business either in the name of 'Cash' or under any style in which the name 'Cash' appears without taking reasonable precautions to clearly distinguish the business carried on, and the frillings, woven names and initials manufactured or sold by the defendant from the business carried on, and the frillings and woven names and initials manufactured by the plaintiffs, and from carrying on any such business under any name or in any manner so as to mislead or deceive the public into the belief that the business of the defendant or the frillings or woven names or initials manufactured or sold by him are the business of or goods manufactured by the plaintiffs, or that the defendant is carrying on the business formerly carried on at Coventry by Messrs. J. & J. Cash, the vendors to and predecessors in business of the plaintiffs. And it is ordered that the defendant be also restrained from making over his business in frillings or woven names or initials to or acting as managing director of any limited or other company formed to carry on business in frillings or woven names or initials, and having a name which is calculated or likely to mislead or deceive the public into the belief that the business, frillings or woven names or initials of such company are the business, frillings or woven names or initials of the plaintiffs, or that such company is carrying on the business formerly carried on at Coventry by the said Messrs. J. & J. Cash, and from otherwise assisting any such company to so mislead or deceive the public." (Then followed an injunction restraining the defendant from soliciting the customers of the firm of J. & J. Cash (*a*).)

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41. PINET *v.* MAISON PINET (1), 14 P. R. 933.

Trade Name—Boots and Shoes—Injunction on the assumption that Name was Defendant's also.

Injunction "To restrain the defendants from carrying on their business as manufacturers of boots or shoes under any name or description of which the name of 'Pinet' forms part, without clearly distinguishing the boots or shoes made or sold by the defendants from those made or sold by the plaintiffs" (*b*).

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42. PINET *v.* MAISON PINET (2), (1898) 1 Ch. 179; 15 P. R. 65.

Trade Name—Boots and Shoes—Injunction where Name fraudulently adopted by the Defendant.

Injunction restraining the defendants "from using the name 'Pinet' or any title or description including that name in connection

(*a*) Court of Appeal. This was followed in *Joseph Rodgers & Sons, Ltd.* v. *Simpson*, 23 P. R. 348.

(*b*) Court of Appeal.

with the manufacture or sale of boots or shoes, and from doing any other act or thing conferring, or purporting to confer, either directly or indirectly, upon any other person or persons any right to use the said name or other such title or description as aforesaid in such connection as aforesaid, and from selling or offering for sale any boots or shoes not of the plaintiffs' manufacture under the name of 'Pinet's Special Boots and Shoes,' or 'Pinet's Boots and Shoes'" (*a*).

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43. ABEL MORRALL, LD. *v.* T. HESSIN & Co., 19 P. R. 557, 565.

Trade Name—Colourable Purchase of Business—Injunction.

Injunction restraining the defendant "from carrying on any business as a needle manufacturer under the name or style of 'J. Y. Morrall' and 'W. Mogg & Co.,' or either of them, or under any other name or style so arranged or combined as by colourable imitation or otherwise to be calculated to represent or lead to the belief that the defendant is carrying on the plaintiffs' business. And an injunction to restrain the defendant, his servants, workmen, and agents, from in any manner passing off or enabling or assisting others to pass off the defendant's goods as or for the plaintiffs' goods" (*b*).

44. M. MELACHRINO & Co. *v.* R. MELACHRINO & Co., May 29th, 1888.

Name of Firm—"Original"—Injunction.

Injunction restraining the defendants, &c., "from carrying on business as dealers in cigarettes under the name of 'R. Melachrino & Co.,' or under any other name containing the name 'Melachrino' so arranged or contrived as to represent or lead to the belief that the business so carried on is the business carried on by the plaintiffs, or is in any way connected with the business of the plaintiffs, and from using the name 'Melachrino' in any other manner calculated to represent or lead to such belief; and from selling or offering or exposing for sale, or procuring to be sold, any cigarettes not of the manufacture or merchandise of the plaintiffs, with statements that such cigarettes are 'Original Melachrino Cigarettes,' and from in any other manner selling or passing off their cigarettes as or for 'Original Melachrino Cigarettes,' or cigarettes of the manufacture or merchandise of the plaintiffs" (*c*).

(*a*) North, J. (*b*) Eady, J., and C. A. (*c*) Chitty, J.

45. ARMY AND NAVY CO-OPERATIVE SOCIETY, LD. *v.* ARMY AND NAVY AND CIVIL SERVICE CO-OPERATIVE SOCIETY OF INDIA, LD., 91 L. T. (Journal) 228.

Name of Company—User on Goods—Injunction.

Injunction restraining the defendants "from using on or in connection with any goods sold, exported, or supplied by them, the stamp or name of 'Army and Navy Co-operative Society, Limited,' either with or without the words 'of India,' or any other stamp or name so closely resembling the name of the plaintiff as would be calculated to lead the public in India and elsewhere to suppose that the goods sold, exported, or supplied by the defendants were goods sold, exported, or supplied by the plaintiffs" (*a*).

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46. HENDRIKS *v.* MONTAGU, 17 Ch. D. 638.

Name of Company—Registration—User—Advertisement, &c.—Injunction.

Injunction restraining the defendants "from applying to the Registrar of Joint Stock Companies in England for registration under the Companies Acts of any company to be incorporated under the name of 'The Universe Life Assurance Association,' or any other name likely to mislead or deceive the public into the belief that the company being incorporated as aforesaid is the same as 'The Universal Life Assurance Society'; from issuing or publishing advertisements, circulars, or prospectuses representing that a company is to be incorporated pursuant to the Companies Act, 1862, under the name of 'The Universe Life Assurance Association, Limited,' or any such other name as aforesaid; and from carrying on or commencing any business under the name of 'The Universe Life Assurance Association, Limited,' or any such other name as aforesaid" (*a*).

47. LEE *v.* HALEY, L. R. 5 Ch. 155.

Name of Company—Injunction against User in certain Locality.

Injunction restraining the defendant, &c., "from continuing to use and from exhibiting or causing the words 'The Pall Mall Guinea Coal Company,' in Pall Mall, or any other name or style so framed as to be a colourable imitation of the name or style in which the plaintiffs' branch business mentioned in the bill is carried on, or so as to deceive the public, or to lead to the belief that the business carried on by the defendant is the same as the business carried on by the plaintiffs under the name or style of 'The Guinea Coal Company,' or is in any way connected therewith" (*b*).

(*a*) Court of Appeal. (*b*) Malins, V.-C.

48. WHEELER *v.* JOHNSTON, 3 L. R. Ir. 284.

Name of Mineral Springs—Injunction.

Injunction restraining the defendant, &c., "from using the words 'Cromac Springs' in connection with his trade or business as a manufacturer or seller of mineral waters, so as to represent that his said waters are so manufactured or sold by the plaintiffs at their works in the bill mentioned, called 'The Cromac Springs,' and from using the words 'Cromac Springs' as the name of the defendant's place of business so as to represent as aforesaid" (*a*).

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49. BRAHAM *v.* BEACHIM, 7 Ch. D. 848, 857.

Name of Collieries—Injunction until certain events.

Injunction restraining the defendants, "unless and until they shall acquire a colliery or coal mine within the parish of Radstock, from trading under or using the name or style of 'The Radstock Colliery Proprietors,' or any other name or style signifying that the defendants, or either of them, are proprietors of any colliery or collieries at Radstock"; and restraining the defendants, "unless and until they shall become authorised to sell or supply any coals raised or gotten from any colliery or coal mine within the parish of Radstock, from using any style or name signifying or implying that the defendants are selling or supplying, or are authorised to sell or supply, any coal raised or gotten from any colliery or coal mine within the parish of Radstock" (*b*).

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50. 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*).

(*a*) Chatterton, V.-C. of I. *Duncan*, Seton, 6th ed. 693; *Will* v. *Corcoran*, *ib.* 695; *Graveley* v. *Winchester*, *ib.* 695; *England* v. *Curling*, 8 Beav. 129.
(*b*) Fry, J.
(*c*) Wood, V.-C. And see *Hoffman* v.

51. BURROWS *v.* FOSTER, 1 N. R. 156.

False Representation of Continuation of Business—Soliciting former Customers—Injunction.

Injunction restraining the defendant, &c., "from issuing or sending, and from causing or procuring to be issued or sent, to any person or persons any further copies or copy of the circular or letter bearing date the , in the plaintiffs' bill mentioned, or any other circular or letter signifying or importing that the business carried on by him the said defendant is, and from in any manner representing such business to be a continuation of the business formerly carried on by the firms of Foster, Lacy & Co., and Bashall, Lacy & Co., in the plaintiffs' bill mentioned, or by either of such firms, and from in any manner soliciting or inviting any person or persons who, at the date of the indenture of the , in the plaintiffs' bill mentioned, was or were a customer or correspondent, customers or correspondents, of the firms of Foster, Lacy & Co., and Bashall, Lacy & Co., or of either of such firms, and from causing or procuring any such person or persons to be solicited or invited to become or be a customer or correspondent or customers or correspondents of, or to employ him the said defendant in the business carried on by him, or to cease from employing or not to employ the said plaintiffs in the business formerly carried on by the said firms of Foster, Lacy & Co., and Bashall, Lacy & Co., or either of them" (*a*).

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52. MASSAM *v.* THORLEY'S CATTLE FOOD CO., 14 Ch. D. 748, 762.

False Representation of Continuation of Business—Trade Name—Labels—Advertisements—Circulars—Injunction.

Injunction restraining the defendants, &c., "from selling, shipping, or exporting, or causing or procuring or allowing to be sold, shipped, or exported, and from in any manner representing, or causing or procuring to be represented, any goods manufactured by the defendant company as the manufacture or goods of the late Joseph Thorley, or of the plaintiffs, his trustees and successors in business; and also from in any manner representing, or causing or procuring to be represented, or doing anything which shall lead to the belief that the defendant company have been or are carrying on the business of the late Joseph Thorley; and also from affixing, or permitting or causing to be affixed to any goods or articles manufactured, or bought, or procured, or sold, or shipped, or exported by the defendant company, or otherwise using or employing, or permitting to be used or employed, any labels, wrappers, or marks used by the late Joseph Thorley and the plaintiffs, his trustees and suc-

(*a*) Turner, L. J.

cessors in business, or so contrived and prepared as to represent or lead to the belief that the goods or articles manufactured, or sold, or shipped, or exported by the defendant company, are the goods or manufacture of the late Joseph Thorley or of the plaintiffs; and also from employing, using, or circulating, or causing to be employed, used, or circulated, any circulars, pamphlets, notices, or advertisements of the late Joseph Thorley or of the plaintiffs, or which shall in any manner represent or lead to the belief that the defendant company have been or are carrying on the business of the late Joseph Thorley, or that they are his successors in business" (*a*).

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53. LABOUCHERE *v.* DAWSON, L. R. 13 Eq. 322, 327.

Soliciting former Customers after Sale of Business—Injunction.

Injunction restraining the defendant, &c., "from applying to any person who was a customer of the firm of B. Dawson & Co. prior to the , privately by letter, personally, or by a traveller, asking such customer to continue to deal with the defendant, or not to deal with the plaintiffs, the Kirkstall Brewery Co., Limited" (*b*).

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54. WHEELER & WILSON MANUFACTURING CO. *v.* SHAKESPEAR, 39 L. J. Ch. 36, 38, 41.

False Representation of Agency—Injunction.

Injunction restraining the defendant, &c., "from, in manner aforesaid, or in any other manner, calling, or describing, or representing, his said shop or place of business, No. 32, Union Street, Birmingham, or any other shop, warehouse, or place, not belonging to the plaintiffs, as 'The Original Wheeler & Wilson Sewing Machine Depôt,' or 'Wheeler & Wilson Sewing Machine Depôt, established in 1860,' or as a place of business of the plaintiffs, or of 'Wheeler & Wilson,' manufacturers of sewing machines; and from in manner aforesaid, or in any other manner, calling, or describing, or representing, himself or his said firm of T. Shakespear & Co., as the agent or agents for the American 'Wheeler & Wilson' sewing machines, in the same manner in which he has been since 1860, or as the agent of the 'Wheeler & Wilson' sewing machines; and from in any other manner

(*a*) James, L. J.

(*b*) Lord Romilly, M. R. Repeated by the House of Lords in *Trego* v. *Hunt*, (1895) App. Cas. 7, 30. See also *Leggott* v. *Barrett*, 15 Ch. D. 306; and *Selby* v. *Anchor Tube Co.*, W. N. 1877, p. 191. As to opening letters containing orders intended for another firm, see *Scheile* v. *Brakell*, 11 W. R. 796; and Seton, 6th ed. 686, 687: *Witt* v. *Corcoran*, Seton, 6th ed. 695; *England* v. *Curling*, 8 Beav. 129.

representing himself as the agent of the plaintiffs, and from permitting the names 'Wheeler and Wilson' to remain over the door of his shop or business premises, at 32, Union Street, Birmingham, or on the brass plate under the window, or on the brass plate on the door jamb, or on any other part of his said shop or place of business, or on any placard in his said shop, or on the door, or in the window thereof; and from causing the names 'Wheeler & Wilson' to be inserted in any railway time-table, or directory, or other book or publication, under the head of, or described as, sewing machine manufacturers, as residing or carrying on business at No. 32, Union Street, Birmingham, or as in any other manner connected with that or any other shop or place of business of the said defendant, and from doing any other act, matter, or thing representing, or whereby the trade or the public may be led to believe that the defendant has any connection whatever in business with the plaintiffs" (*a*).

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55. JAMES *v.* JAMES, 41 L. J. Ch. 358.

Fraudulent Disuse of Christian Name—Claim to be the "Only Genuine"—Injunction.

Injunction restraining the defendant, &c., "from using the name of 'Robert James' singly, instead of 'Robert Joseph James,' or 'R. J. James'; also from stating or inserting in his advertisement or circular any words or expressions asserting or suggesting that the ointment manufactured and sold by the plaintiffs is spurious and not genuine" (*b*).

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56. LIEBIG'S EXTRACT OF MEAT CO. *v.* ANDERSON, 55 L. T. N. S. 206, 209.

Claim to be the only Genuine—Injunction.

Injunction restraining the defendant, &c., "from using the wrappers or making the advertisements complained of containing the words 'This is the only genuine' with reference to the Liebig's Extract of Meat sold or offered for sale by the defendant, and from using any other wrapper or making any other advertisement with reference to such extract sold or offered for sale by the defendant, representing that such extract or the defendant's brand of such extract is the only genuine" (*c*).

(*a*) James, V.-C. (*b*) Lord Romilly, M. R. (*c*) Chitty, J.

57. THORLEY'S CATTLE FOOD CO. *v.* MASSAM, 14 Ch. D. 763, 781.

Trade Libel—Representation that the Plaintiffs' Goods are Spurious—Injunction.

Injunction restraining the defendants, &c., "from advertising, or representing, or suggesting in their advertisements or circulars that they are alone possessed of the secret for compounding the condiment known as 'Thorley's Food for Cattle,' and from representing, or suggesting, or doing anything calculated to represent or suggest, that the cattle food manufactured and sold by the plaintiffs is spurious or not genuine" (*a*).

58. THOMAS *v.* WILLIAMS, 14 Ch. D. 864, 875.

Trade Libel—Representation that the Plaintiff's Goods are Spurious—Injunction.

Injunction restraining the defendants, &c., "from issuing or permitting the issue of the circular dated the , and from in any manner representing or suggesting that the goods now made or sold by the plaintiff are imitations of the goods made or sold by J. Thomas & Sons, or Edmund Holyoake" (*b*).

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59. ROUTH *v.* WEBSTER, 10 Beav. 561, 563.

Unauthorised and Injurious Use of a Person's Name—Injunction.

Injunction restraining the defendants, &c., "from printing, publishing, or circulating, any prospectus or other document of, or relating to a certain company called 'The Economic Conveyance Company,' mentioned and referred to in the plaintiff's bill in this cause, with the plaintiff's name thereto, and from in any manner using the name of the plaintiff so as to identify him as a party interested in, or associated with, the said company" (c).

(*a*) Malins, V.-C., affirmed by C. A. (*b*) Fry, J.
(*c*) Lord Langdale, M. R.

APPENDIX D.

INTERNATIONAL ARRANGEMENTS.

(*See Patents and Designs Act*, 1907, § 91, *replacing Patents, &c. Acts*, 1883—1902, §§ 103, 104.)

I.

International Convention for the Protection of Industrial Property.

Signed at Paris, March 20th, 1883.

[*Ratifications exchanged at Paris, June 6th*, 1884.]

Official Translation.

His Majesty the King of the Belgians, His Majesty the Emperor of Brazil, His Majesty the King of Spain, the President of the French Republic, the President of the Republic of Guatemala, His Majesty the King of Italy, His Majesty the King of the Netherlands, His Majesty the King of Portugal and the Algarves, the President of the Republic of Salvador, His Majesty the King of Servia, and the Federal Council of the Swiss Confederation,

Being equally animated with the desire to secure by mutual agreement, complete and effectual protection for the industry and commerce of their respective subjects and citizens, and to provide a guarantee for the rights of inventors, and for the loyalty of commercial transactions, have resolved to conclude a convention to that effect, and have named as their plenipotentiaries, that is to say:—

(*Here follow the appointments of the plenipotentiaries.*)

Who, having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles:—

Article I.

The Governments of Belgium, Brazil, Spain, France, Guatemala, Italy, Holland, Portugal, Salvador, Servia, and Switzerland constitute themselves into a union for the protection of industrial property.

ARTICLE II.

The subjects or citizens of each of the contracting states shall, in all the other states of the union, as regards patents, industrial designs or models, trade marks and trade names, enjoy the advantages that their respective laws now grant, or shall hereafter grant, to their own subjects or citizens.

Consequently they shall have the same protection as the latter, and the same legal remedy against any infriugement of their rights, provided they observe the formalities and conditions imposed on subjects or citizens by the internal legislation of each state.

ARTICLE III.

Subjects or citizens of states not forming part of the union, who are domiciled, or have industrial or commercial establishments in the territory of any of the states of the union, shall be assimilated to the subjects or citizens of the contracting states (*a*).

(*a*) New Art. III. substituted for this in 1900. See *post*, p. 574.

ARTICLE IV.

Any person who has duly applied for a patent, industrial design or model, or trade mark in one of the contracting states, shall enjoy, as regards registration in the other states, and reserving the rights of third parties, a right of priority during the periods hereinafter stated.

Consequently, subsequent registration in any of the other states of the union before expiry of these periods shall not be invalidated through any acts accomplished in the interval: either, for instance, by another registration, by publication of the invention, or by the working of it by a third party, by the sale of copies of the design or model, or by use of the trade mark.

The above-mentioned terms of priority shall be six months for patents, and three months for industrial designs and models and trade marks. A month longer is allowed for countries beyond sea (*a*).

(*a*) New Art. IV. substituted for this in 1900, and Art. IV. *bis* added. See *post*, p. 574.

ARTICLE V.

(Relates only to patents.)

ARTICLE VI.

Every trade mark duly registered in the country of origin shall be admitted for registration, and protected in the form originally registered, in all the other countries of the union (*a*).

That country shall be deemed the country of origin where the applicant has his chief seat of business.

If this chief seat of business is not situated in one of the countries of the union, the country to which the applicant belongs shall be deemed the country of origin.

Registration may be refused if the object for which it is solicited is considered contrary to morality or public order.

(*a*) No effect can be given to this or any other article of the convention by the Courts of the United Kingdom, except so far as it is embodied in sect. 103 of the Patents Act, 1883 (now sect. 91 of the P. & D. Act, 1907): *In re Californian Fig Syrup Co.*, 40 Ch. D. 620. And it seems that, to entitle a foreign mark to protection in the United Kingdom, it must comply with the requirements of the Act in force: *In re Carter Medicine Co.*, (1892) 3 Ch. 472. And similarly in the United States legislation is necessary to enable effect to be given to it. See opinion of the Attorney-General of the United States, 47 U. S. Pat. Gaz. 397; and *Ex parte Zucck & Co.*, 76 U. S. Pat. Gaz. 1855.

Article VII.

The nature of the goods on which the trade mark is to be used can, in no case, be an obstacle to the registration of the trade mark.

Article VIII.

A trade name shall be protected in all the countries of the union, without necessity of registration, whether it form part or not of a trade mark.

Article IX.

All goods illegally bearing a trade mark or trade name may be seized on importation into those states of the union where this mark or name has a right to legal protection.

The seizure shall be effected at the request of either the proper public department or of the interested party, pursuant to the internal legislation of each country (*a*).

(*a*) See additions made to this article in 1900, *post*, p. 575.

Article X.

The provisions of the preceding article shall apply to all goods falsely bearing the name of any locality as indication of the place of origin, when such indication is associated with a trade name of a fictitious character or assumed with a fraudulent intention.

Any manufacturer of, or trader in, such goods, established in the locality falsely designated as the place of origin, shall be deemed an interested party (a).

(*a*) New Art. X. substituted for this in 1900, and Art. X. *bis* added. See *post*, p. 575.

Article XI.

The high contracting parties agree to grant temporary protection to patentable inventions, to industrial designs or models, and trade marks, for articles exhibited at official or officially recognised international exhibitions (a).

(*a*) New Art. XI. substituted for this in 1900. See *post*, p. 575.

Article XII.

Each of the high contracting parties agrees to establish a special government department for industrial property, and a central office for communication to the public of patents, industrial designs or models, and trade marks.

Article XIII.

An international office shall be organised under the name of "Bureau International de l'Union pour la Protection de la Propriété Industrielle" (International Office of the Union for the Protection of Industrial Property).

This office, the expense of which shall be defrayed by the Governments of all the contracting states, shall be placed under the high authority of the Central Administration of the Swiss Confederation, and shall work under its supervision. Its functions shall be determined by agreement between the states of the union.

Article XIV.

The present convention shall be submitted to periodical revisions, with a view to introducing improvements calculated to perfect the system of the union.

To this end conferences shall be successively held in one of the contracting states by delegates of the said states. The next meeting shall take place in 1885 *at Rome* (*a*).

(*a*) New Art. XIV. substituted for this in 1900. See *post*, p. 575.

Article XV.

It is agreed that the high contracting parties respectively reserve to themselves the right to make separately, as between themselves, special arrangements for the protection of industrial property, in so far as such arrangements do not contravene the provisions of the present convention.

Article XVI.

States which have not taken part in the present convention shall be permitted to adhere to it at their request.

Such adhesion shall be notified officially through the diplomatic channel to the Government of the Swiss Confederation, and by the latter to all the others. It shall imply complete accession to all the clauses and admission to all the advantages stipulated by the present convention (*a*).

(*a*) New Art. XVI. substituted for this in 1900. See *post*, p. 575.

Article XVII.

The execution of the reciprocal engagements contained in the present convention is subordinated, in so far as necessary, to the observance of the formalities and rules established by the constitutional laws of those of the high contracting parties who are bound to procure the application of the same, which they engage to do with as little delay as possible.

Article XVIII.

The present convention shall come into operation one month after the exchange of ratifications, and shall remain in force for an unlimited

time, till the expiry of one year from the date of its denunciation. This denunciation shall be addressed to the Government commissioned to receive adhesions. It shall only affect the denouncing state, the convention remaining in operation as regards the other contracting parties.

Article XIX.

The present convention shall be ratified, and the ratifications exchanged in Paris, within one year at the latest.

In witness whereof the respective plenipotentiaries have signed the same, and have affixed thereto their seals.

Dated at Paris the 20th March, 1883.

(*Signed by the Plenipotentiaries.*)

II.

Final Protocol.

(*Official Translation.*)

On proceeding to the signature of the convention concluded this day between the Governments of Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Servia, and Switzerland, for the protection of industrial property the undersigned plenipotentiaries have agreed as follows:

1. The words "industrial property" are to be understood in their broadest sense; they are not to apply simply to industrial products properly so called, but also to agricultural products (wines, corn, fruits, cattle, &c.), and to mineral products employed in commerce (mineral waters, &c.).

2. (Relates only to patents.)

3. The last paragraph of Article II. does not affect the legislation of each of the contracting states as regards the procedure to be followed before the tribunals, and the competence of those tribunals (*a*).

(*a*) See par. 3 *bis* introduced here in 1900, *post*, p. 576.

4. Paragraph 1 of Article VI. is to be understood as meaning that no trade mark shall be excluded from protection in any state of the union, from the fact alone that it does not satisfy, in regard to the signs composing it, the conditions of the legislation of that state; provided that on this point it comply with the legislation of the country of origin, and that it had been properly registered in said country of origin. With this exception, which relates only to the form of the mark, and under reserve of the provisions of the other articles of the convention, the internal legislation of each state remains in force.

To avoid misconstruction, it is agreed that the use of public armorial bearings and decorations may be considered as being contrary to public order in the sense of the last paragraph of Article VI.

5. The organisation of the special department for industrial property mentioned in Article XII. shall comprise, so far as possible, the publication in each state of a periodical official paper.

6. (After providing for the common expenses of the international office, continues:—)

The Swiss Government will superintend the expenses of the international office, advance the necessary funds, and render an annual account, which will be communicated to all the other administrations.

The international office will centralise information of every kind relating to the protection of industrial property, and will bring it together in the form of a general statistical statement which will be distributed to all the administrations. It will interest itself in all matters of common utility to the union, and will edit, with the help of the documents supplied to it by the various administrations, a periodical paper in the French language dealing with questions regarding the object of the union.

The numbers of this paper, as well as all the documents published by the international office, will be circulated among the administrations of the states of the union in the proportion of the number of contributing units as mentioned above. Such further copies as may be desired either by the said administrations, or by societies or private persons, will be paid for separately.

The international office shall at all times hold itself at the service of members of the union, in order to supply them with any special information they may need on questions relating to the international system of industrial property.

The administration of the country in which the next conference is to be held will make preparation for the transactions of that conference, with the assistance of the international office.

The director of the international office will be present at the meetings of the conferences, and will take part in the discussions, but without the privilege of voting.

He will furnish an annual report upon his administration of the office, which shall be communicated to all the members of the union.

The official language of the international office will be French.

7. The present final protocol, which shall be ratified together with the convention concluded this day, shall be considered as forming an integral part of, and shall have the same force, validity, and duration as the said convention.

In witness whereof the undersigned plenipotentiaries have drawn up the present protocol.

(*Signed by the Plenipotentiaries.*)

III.

Accession of Her Majesty's Government to the Convention.

The undersigned, ambassador extraordinary and plenipotentiary of her Majesty the Queen of the United Kingdom of Great Britain and Ireland to the French Republic, declares that her Britannic Majesty, having had the International Convention for the Protection of Indus-

trial Property, concluded at Paris on the 20th March, 1883, and the protocol relating thereto, signed on the same date, laid before her, and availing herself of the right reserved by Article XVI. of that convention to states not parties to the original convention, accedes, on behalf of the United Kingdom of Great Britain and Ireland, to the said international convention for the protection of industrial property, and to the said protocol, which are to be considered as inserted word for word in the present declaration, and formally engages, as far as regards the President of the French Republic and the other high contracting parties, to co-operate on her part in the execution of the stipulations contained in the convention and protocol aforesaid.

The undersigned makes this declaration on the part of her Britannic Majesty, with the express understanding that power is reserved to her Britannic Majesty to accede to the Convention on behalf of the Isle of Man and the Channel Islands, and any of her Majesty's possessions, on due notice to that effect being given through her Majesty's Government.

In witness whereof the undersigned, duly authorised, has signed the present declaration of accession, and has affixed thereto the seal of his arms.

Done at Paris, on the 17th day of March, 1884.

(L.S.) (Signed) LYONS.

IV.

DECLARATION OF ACCEPTANCE OF ACCESSION.

(*Official Translation.*)

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland having acceded to the International Convention relative to the protection of industrial property, concluded at Paris, March 20th, 1883, together with a protocol dated the same day, by the declaration of accession delivered by her Ambassador Extraordinary and Plenipotentiary to the Government of the French Republic; the text of which declaration is word for word as follows:—

(*Here is inserted the text of No. III. in English.*)

The President of the French Republic has authorised the undersigned, President of the Council, Minister for Foreign Affairs, to formally accept the said accession, together with the reserves which are contained in it concerning the Isle of Man, the Channel Islands, and all other possessions of her Britannic Majesty, engaging as well in his own name as in that of the other high contracting parties to assist in the accomplishment of the obligations stipulated in the convention and the protocol thereto annexed, which may concern the United Kingdom of Great Britain and Ireland.

In witness whereof the undersigned, duly authorised, has drawn up the present Declaration of Acceptance and has affixed thereto his seal.

Done at Paris, the 2nd April, 1884.

(L.S.) (Signed) JULES FERRY.

V.

ORDER IN COUNCIL.

(*The Patents Act*, 1883.)

At the Court at Windsor, the 26th of June, 1884. Present, the Queen's Most Excellent Majesty in Council.

Whereas by the provisions of the Patents, Designs, and Trade Marks Act, 1883, it is, amongst other things, provided:—

That if her Majesty is pleased to make any arrangement with the Government or Governments of any foreign State or States for mutual protection of inventions, designs, and trade marks, or any of them, then any person who has applied for protection for any invention, design or trade mark in any such State shall, subject to the conditions further provided and set forth in the said Act, be entitled to a patent for his invention, or to registration of his design or trade mark (as the case may be) under the said Act in priority to other applicants, and such patent or registration shall have the same date as the date of the protection obtained in such foreign State:

And whereas it has pleased her Majesty to make an arrangement of the nature contemplated by the said Act by and in virtue of a declaration signed and sealed by her Majesty's Ambassador at Paris on the 17th of March, 1884, duly conveying the accession of Great Britain to the International Convention and Protocol for the Protection of Industrial Property, signed by representatives of certain powers on the 20th of March, 1883, and duly ratified on the 6th of June, 1884, power being reserved to her Majesty to hereafter accede to the provisions of the said convention and protocol on behalf of the Isle of Man, the Channel Islands, and any of her Majesty's possessions, which declaration of accession was duly accepted by the French Government on behalf of the signatory powers by and in virtue of a declaration dated the 2nd of April, 1884:

Now, therefore, her Majesty, by and with the advice and consent of her Privy Council, and by virtue of the authority committed to her by the said Act, doth declare, and it is hereby declared, that the provisions of the said Act hereinbefore specified shall apply to the following countries, viz.:—Belgium, Brazil, France, Guatemala, Italy, Netherlands, Portugal, Salvador, Servia, Spain, Switzerland, Ecuador,* and Tunis.*

And it is hereby further ordered and declared that this order shall take effect from the 7th of July, 1884.

C. L. PEEL.

* These States had acceded to the Convention and Protocol.

VI.

Subsequent Orders in Council (*a*).

Orders in Council admitting Foreign Countries.

	Date of Order.	To take effect from—	"London Gazette."
Santo Domingo.....	Jan. 27th, 1885 ..	Jan. 27th, 1885 ..	1885, p. 418.
Sweden and Norway.....	July 9th, 1885 ..	July 1st, 1885 ..	1885, p. 3173.
Paraguay and Uruguay* ..	Sept. 24th, 1886 ..	Sept. 24th, 1886 ..	1886, p. 4725.
United States of America...	July 12th, 1887 ..	July 12th, 1887 ..	1887, p. 3827.
Netherlands East Indies....	Nov. 17th, 1888 ..	Mar. 17th, 1889 ..	1888, p. 6412.
Mexico	May 28th, 1889 ..	Sept. 28th, 1889 ..	1889, p. 2954.
Curaçao and Surinam.....	May 17th, 1890 ..	Sept. 17th, 1890 ..	1890, p. 2891.
Santo Domingo.....	Oct. 21st, 1890 ..	Feb. 21st, 1891 ..	1890, p. 5661.
Roumania*	Aug. 5th, 1892 ..	Dec. 5th, 1892 ..	1892, p. 4554.
Ecuador*	May 16th, 1893 ..	Sept. 16th, 1893 ..	1893, p. 2899.
Greece*	Oct. 15th, 1894 ..	Feb. 15th, 1895 ..	1894, p. 5918.
Denmark	Nov. 20th, 1894 ..	Mar. 20th, 1895 ..	1894, p. 6879.
Japan	Oct. 7th, 1899 ..	Oct. 7th, 1899 ..	1899, p. 6241.
Honduras*	Sept. 26th, 1901 ..	Sept. 25th, 1901 ..	1901, p. 6383.
Germany	Oct. 9th, 1903 ..	May 1st, 1903 ..	1903, p. 6220.
Cuba.....	Jan. 12th, 1905 ..	Nov. 17th, 1904 ..	1905, p. 321.
Austria and Hungary.....	May 17th, 1909 ..	Jan. 1st, 1909 ..	1909, p. 3863.

Orders in Council admitting British Possessions.

Queensland	Sept. 17th, 1885 ..	Sept. 17th, 1885 ..	1885, p. 4429.
New Zealand.....	Feb. 8th, 1890 ..	June 8th, 1890 ..	1890, p. 727.
Tasmania.....	April 30th, 1894 ..	Aug. 30th, 1894 ..	1894, p. 2578.
Western Australia.....	May 11th, 1895 ..	Sept. 11th, 1895 ..	1895, p. 2848.
Ceylon	Aug. 7th, 1905 ..	June 10th, 1905 ..	1905, p. 5459.
Australia, Commonwealth of	Mar. 26th, 1907 ..	Feb. 1st, 1907 ..	1907, p. 2178.
Trinidad and Tobago	Aug. 12th, 1907 ..	Aug. 12th, 1907 ..	1907, p. 5603.

Orders in Council revoking Orders of Admission.

Ecuador	April 16th, 1886 ..	Dec. 26th, 1886 ..	1886, p. 1894.
Salvador.....	Sept. 24th, 1886 ..	Aug. 17th, 1887 ..	1886, p. 4726.
Santo Domingo.....	May 28th, 1889 ..	May 28th, 1889 ..	1889, p. 3035.
Guatemala.....	Feb. 2nd, 1895 ..	Nov. 8th, 1895 ..	1895, p. 754.
Queensland	Mar. 26th, 1907 ..	Feb. 1st, 1907 ..	1907, p. 2178.
Western Australia	Mar. 26th, 1907 ..	Feb. 1st, 1907 ..	1907, p. 2178.
Tasmania	Aug. 12th, 1907 ..	Aug. 12th, 1907 ..	1907, p. 5603.

(*a*) The Orders in Council down to Jan. 1st, 1908, were made under the Patents Acts, 1883-1902—as to foreign countries, under § 103; as to British possessions, under § 104. The Patents Acts, 1883-1902, were repealed by the Patents and Designs Act, 1907, but the existing Orders in Council were saved by § 98 of that Act. Since Jan. 1st, 1908, the Orders are made under § 91 of the Act of 1907.

* These countries, without acceding to the Convention, entered into corresponding arrangements with this country.

VII.

Additional Act modifying the Industrial Property Convention of March 20, 1883.

Signed at Brussels, December 14th, 1900.

Official Translation.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India; His Majesty the King of the Belgians; the President of the United States of Brazil; His Majesty the King of Denmark; the President of the Dominican Republic; Her Majesty the Queen-Regent of Spain, in the name of His Majesty the King of Spain; the President of the United States of America; the President of the French Republic; His Majesty the King of Italy; His Majesty the Emperor of Japan; Her Majesty the Queen of the Netherlands; His Majesty the King of Portugal and the Algarves; His Majesty the King of Servia; His Majesty the King of Sweden and Norway; the Federal Council of the Swiss Confederation; and the Tunisian Government, having deemed it expedient to make certain modifications in, and additions to, the International Convention of the 20th March, 1883, and also as regards the Final Protocol annexed to the said convention, have named as their plenipotentiaries, that is to say:

(*Here follow the appointments of the plenipotentiaries.*)

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following Articles:—

Article I.

The International Convention of the 20th March, 1883, shall be modified as follows:—

1. Article III. of the convention shall run as follows:—

"Art. III. The subjects or citizens of states which are not parties to the union shall be assimilated to the subjects or citizens of the contracting states, provided that they are domiciled in, or have industrial or commercial establishments, real and effective, in the territory of one of the states of the union."

2. Article IV. shall run as follows:—

"Art. IV. Any person who shall have duly applied for a patent, industrial design, or model or trade mark in one of the contracting states, shall enjoy, in order to admit of such request being lodged in the other states, during the periods of time mentioned below, a right of priority, the rights of third parties being reserved.

"Consequently, subsequent registration in one of the other states of the union, before the expiration of such periods of time, shall not be invalidated by any acts accomplished in the interval—either, for instance, by another registration, by the publication of the invention,

or by the working of it, by the sale of patterns of the design or model, or by the use of the trade mark.

"The above-mentioned periods of time during which priority is guaranteed shall be twelve months for patents with respect to inventions, and four months for patents for industrial designs or models, as well as for trade or merchandize marks."

3. There shall be inserted in the convention an Article IV.*bis* in the following terms:—

"Art. IV.*bis*." (Relates only to patents.)

4. The two following paragraphs shall be added to Article IX.:—

"In states the laws of which do not admit of seizure upon importation, prohibition of importation may take the place of such seizure.

"The authorities shall not be compelled to effect the seizure in the case of goods in transit."

5. Article X. shall run as follows:—

"Art. X. The stipulations of the preceding Article shall be applicable to every production which may falsely bear as indication of origin the name of a specified locality, when such indication shall be joined to a trade name of a fictitious character or used with intent to defraud.

"Any producer, manufacturer, or trader engaged in the production, manufacture, or trade of such goods, and established either in the locality falsely designated as the place of origin, or in the district where the locality is situated, is to be deemed a party concerned."

6. There shall be inserted in the convention an Article X.*bis* in the terms following:—

"Art. X.*bis*. Persons resorting to the countries referred to in the convention (Articles II. and III.) shall enjoy in all the states of the union the protection accorded to nationals against dishonest competition."

7. Article XI. shall run as follows:—

"Art. XI. The high contracting parties shall, in conformity with the legislation of each country, accord temporary protection to inventions susceptible of being patented, and to industrial designs or models, as well as to trade marks or merchandize marks, in respect of products which shall be exhibited at official or officially recognized international exhibitions held in the territory of one of them."

8. Article XIV. shall run as follows:—

"Art. XIV. The present convention shall be submitted to periodical revisions with a view to the introduction of amendments calculated to improve the system of the union.

"For this purpose, conferences shall be held successively, in one of the contracting states, between the delegates of the said states."

9. Article XVI. shall run as follows:—

"Art. XVI. States which are not parties to the present convention shall be allowed to accede to it upon their request.

"The accession shall be notified through the diplomatic channel to the Government of the Swiss Confederation, and by the latter to all the other states.

"It shall entail, as a matter of right, accession to all the clauses, as well as admission to all the advantages stipulated in the present

convention, and shall take effect one month after the dispatch of the notification by the Swiss Government to the other states of the union, unless a subsequent date have been indicated by the acceding state."

Article II.

The final protocol annexed to the International Convention of the 20th March, 1883, shall be completed by the addition of No. 3*bis* in the following terms :—

"3*bis*." (Relates only to patents.)

Article III.

The present additional Act shall have the same value and duration as the convention of the 20th March, 1883.

It shall be ratified, and the ratifications shall be deposited at the Ministry for Foreign Affairs, Brussels, as soon as possible, and at the latest within a period of eighteen months from the date of signature.

It shall come into force three months after the protocol of deposit shall have been closed.

In witness whereof the respective plenipotentiaries have signed the present additional Act.

Done at Brussels, in a single copy, the 14th December, 1900.

(*Signed by the Plenipotentiaries.*)

Procès-Verbal.

The contracting parties having unanimously agreed that the exchange of the ratifications of the additional Act to the Convention of the 20th March, 1883, signed at Brussels on the 14th December, 1900, shall be effected by means of the deposit of the respective instruments in the archives of the Belgian Ministry for Foreign Affairs, the present protocol recording the deposit has been, for this purpose, drawn up at the Ministry for Foreign Affairs this 3rd day of May, 1901.

(*Then follow the dates of ratification, as follows :—*

United States of America, May 3rd, 1901.
Switzerland, August 5th, 1901.
Denmark, October 10th, 1901.
Portugal, November 5th, 1901.
United Kingdom, December 6th, 1901.
Belgium, December 10th, 1901.
Italy, December 12th, 1901.
Japan, April 21st, 1902.
France, May 23rd, 1902.
Tunis, May 23rd, 1902.
Sweden, June 5th, 1902.
Norway, June 5th, 1902.
Netherlands, June 10th, 1902.)

In conformity with Article 3 of the additional Act of the 14th December, 1900, the present protocol has been closed on this date.

The Belgian Minister for Foreign Affairs,

(Signed) P. DE FAVEREAU.

Brussels, June 14, 1902.

It not having been possible to deposit the ratifications of the President of the United States of Brazil, the President of the Dominican Republic, His Majesty the King of Spain, and His Majesty the King of Servia, within the stipulated period, the Governments of Belgium, Denmark, the United States of America, France, Great Britain, Italy, Japan, Norway, the Netherlands, Portugal, Sweden, Switzerland, and Tunis have unanimously agreed that the additional Act of the 14th December, 1900, shall, from the 14th September, 1902, take effect as regards themselves, and also as regards those of the other four signatory States whose ratifications may in the interval have been deposited.

Certified copy :

The Secretary-General of
the Belgian Ministry for Foreign Affairs,

(Signed) BARON LAMBERMONT.

APPENDIX E.

THE TRADE MARKS REGISTRATION ACTS, 1875—1877, WITH THE ORDERS IN COUNCIL THEREUNDER, AND THE COTTON MARKS RULES.

[*All repealed.*]

THE TRADE MARKS REGISTRATION ACT, 1875.

38 & 39 VICT. c. 91 (*a*).

An Act to establish a Register of Trade Marks.

[13*th August*, 1875.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Registration of trade marks.

1. A register of trade marks as defined by this Act, and of the proprietors thereof, shall be established under the superintendence of the Commissioners of Patents, and from and after the first day of July one thousand eight hundred and seventy-six a person shall not be entitled to institute any proceeding to prevent the infringement of any trade mark as defined by this Act until and unless such trade mark is registered in pursuance of this Act.

Characteristics of registered trade mark.

2 A trade mark must be registered as belonging to particular goods, or classes of goods; and when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in such particular goods or classes of goods, and shall be determinable with such goodwill; but subject as aforesaid, registration of a trade mark shall be deemed to be equivalent to public use of such mark.

Title of first proprietor of a trade mark.

3. The registration of a person as first proprietor of a trade mark shall be *primâ facie* evidence of his right to the exclusive use of such trade mark, and shall, after the expiration of five years from the date of such registration, be conclusive evidence of his right to the exclusive use of such trade mark, subject to the provisions of this Act as to its connection with the goodwill of a business.

(*a*) It is frequently necessary to refer to these Acts, though repealed, and they are consequently printed here, for facility of reference.

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. Title of proprietor claiming by transmitted proprietorship.

5. If the name of any person who is not for the time being entitled to the exclusive use of a trade mark in accordance with this Act, or otherwise in accordance with law, is entered on the register of trade marks as a proprietor of such trade mark, or if the registrar refuses to enter on the register as proprietor of a trade mark the name of any person who is for the time being entitled to the exclusive use of such trade mark in accordance with this Act, or otherwise in accordance with law, or if any mark is registered as a trade mark which is not authorised to be so registered under this Act, any person aggrieved may apply in the prescribed manner for an order of the Court that the register may be rectified: and the Court may either refuse such application, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may award damages to the party aggrieved. Rectification of register.

Where each of several persons claims to be registered as proprietor of the same trade mark, the registrar may refuse to comply with the claims of any of such persons until their rights have been determined by the Court, and the registrar may himself submit or require the claimants to submit in the prescribed manner their rights to the Court.

The Court may, in any proceeding under this section, decide any question as to whether a mark is or is not such a trade mark as is authorised to be registered under this Act, also any question relating to the right of any person who is party to such proceeding to have his name entered on the register of trade marks, or to have the name of some other person removed from such register, also any other question that it may be necessary or expedient to decide for the rectification of the register.

The Court may direct an issue to be tried for the decision of any question of fact which may require to be decided for the purposes of this section.

Whenever any order has been made rectifying the register the Court shall by its order direct that due notice of such rectification be given to the registrar.

6. The registrar shall not, without the special leave of the Court, to be given in the prescribed manner, register in respect of the same goods or classes of goods a trade mark identical with one which is already registered with respect to such goods or classes of goods, and the registrar shall not register with respect to the same goods or classes of goods a trade mark so nearly resembling a trade mark already on the register with respect to such goods or classes of goods as to be calculated to deceive. Restrictions on registry of trade marks.

It shall not be lawful to register as part of or in combination with a trade mark any words the exclusive use of which would not, by reason of their being calculated to deceive or otherwise, be deemed entitled to protection in a court of equity; or any scandalous designs.

7. Subject as aforesaid, a register office shall be established from and after such time (not being later than the first day of January one thousand eight hundred and seventy-six), in such manner, and with Establishment of registry and general rules.

such officers, and at such salaries, to be paid out of moneys provided by Parliament, as the Lord Chancellor may, with the consent of the Treasury, direct; and the Lord Chancellor may, from time to time, with the assent of the Treasury as to fees, make, and when made, alter, annul, or vary, such general rules as to the registry of trade marks, and as to notices to be given by advertisement before the registration of trade marks, and as to the classification of goods for the purposes of this Act, and as to the registration of first and subsequent proprietors of trade marks, and as to the fees to be charged for registration, and also for the continuance of a trade mark on the register or otherwise, and as to the removal from the register of any trade mark, as to notices, and as to the persons entitled to inspect the register, and as to any proceedings to be taken to obtain the judgment or leave of the Court in any matter in which the judgment or leave of the Court is required to be obtained under this Act, and generally for the purpose of carrying into effect this Act, as he may deem expedient.

Any rules made in pursuance of this section shall be laid before both Houses of Parliament if Parliament be then sitting, or if not then sitting, then within ten days from the then next assembling of Parliament, and shall be of the same validity as if they had been enacted by Parliament; provided that if either House of Parliament resolve, within one month after such rules have been laid before such House, that any of such rules ought not to continue in force, any rule in respect of which such resolution has been passed shall, after the date of such resolution, cease to be of any force, without prejudice, nevertheless, to the making of any other rule in its place, or to anything done in pursuance of any such rules before the date of such resolution.

Certificate of registrar to be evidence.

8. The certificate of the registrar as to any entry, matter, or thing which he is authorised by this Act, or any general rules made thereunder, to make or do, shall be evidence of such entry having been made, and of the contents thereof, and of such matters and things having been done or left undone.

Provision as to Cutlers' Company and Sheffield corporate marks.

9. With respect to the master, wardens, searchers, assistants, and commonalty of the Company of Cutlers in Hallamshire, in the County of York (in this Act called "the Cutlers' Company"), and the marks or devices (in this Act called "Sheffield corporate marks") assigned or to be assigned by the master, wardens, searchers, and assistants of that company, be it enacted as follows:—

(1.) Within the prescribed time and in the prescribed manner the Cutlers' Company shall at their own expense deliver to the registrar under this Act copies of all Sheffield corporate marks in force at the time of such delivery:

(2.) When any person, after the passing of this Act, applies to the said master, wardens, searchers, and assistants to assign to him any mark or device, notice of such application, with a copy of such mark or device, shall, within the prescribed time and in the prescribed manner, be delivered to the registrar under this Act; and such mark or device shall not be assigned until after the expiration of the prescribed period from the giving of such notice. In like manner, when any person applies for the registration under this Act of a trade

mark as belonging to any goods or class of goods specified in § 2 of the Cutlers' Company's Act of 1860, notice of such application, with a copy of such trade mark, shall, within the prescribed time and in the prescribed manner, be delivered to the Cutlers' Company; and such trade mark shall not be registered until after the expiration of the prescribed period from the giving of the last-mentioned notice:

(3.) Upon the assigning of any such mark or device, or the registration of any such trade mark as aforesaid, notice of the assignment or registration shall, within the prescribed time and in the prescribed manner, be given to the registrar under this Act, or to the Cutlers' Company, as the case may be:

(4.) The registrar under this Act, without the special leave of the Court, to be given only in cases where the applicant proves his right, shall not in respect of any goods or classes of goods with respect to which a Sheffield corporate mark shall have been assigned and actually used, and of which mark a copy or description or notice of the assigning thereof shall have been delivered or given to the registrar as aforesaid, register a trade mark identical with such Sheffield corporate mark, or so nearly resembling the same as to be calculated to deceive:

(5.) The master, wardens, searchers, and assistants of the Cutlers' Company shall not assign to any person a mark or device identical with any trade mark registered under this Act, and notice of the registration whereof shall have been given to the Cutlers' Company as aforesaid, or so nearly resembling the same as to be calculated to deceive:

(6.) Any person to whom a Sheffield corporate mark legally belongs shall be entitled to have the same mark registered also as a trade mark under this Act, in respect of any particular goods or classes of goods, in the same manner and upon the same terms and conditions in and upon which he might have registered the same if it were not a Sheffield corporate mark:

(7.) Nothing in this Act shall prejudice or affect the rights and privileges of the Cutlers' Company, nor, save as is otherwise in this Act expressly provided, shall any of the provisions of this Act apply to or in the case of any Sheffield corporate mark.

10. For the purposes of this Act: Definitions.

A trade mark consists of one or more of the following essential particulars; that is to say:

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

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

A distinctive device, mark, heading, label, or ticket;

and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures; also

Any special and distinctive word or words or combination of figures

or letters used as a trade mark before the passing of this Act may be registered as such under this Act.

"Prescribed" means prescribed by general rules made in pursuance of this Act; and

"Court" means any of her Majesty's superior courts of law or equity at Westminster, or any court to which the jurisdiction of such courts may be transferred, or any one or more of such courts which may be declared to be the court for the purposes of this Act by such general rules as aforesaid; but the provisions of this Act conferring a special jurisdiction on the court as above defined shall not, excepting so far as such jurisdiction extends, affect the jurisdiction of any court in Scotland or Ireland in causes, actions, suits, or proceedings relating to trade marks; and if the register requires to be rectified in consequence of any proceedings in any such court in Scotland or Ireland, due notice of such requirements shall be given to the registrar, and he shall rectify the register accordingly.

Short title of Act.

11. This Act may be cited for all purposes as the Trade Marks Registration Act, 1875.

THE TRADE MARKS REGISTRATION AMENDMENT ACT, 1876.

39 & 40 Vict. c. 33.

An Act for the Amendment of the Trade Marks Registration Act, 1875. [*24th July*, 1876.]

Whereas by the Trade Marks Registration Act, 1875, in this Act referred to as the principal Act, it is provided that from and after the first day of July one thousand eight hundred and seventy-six, a person shall not be entitled to prevent the infringement of any trade mark as defined by the principal Act until and unless such trade mark is registered in pursuance of that Act:

And whereas by reason of the number of trade marks, and especially by reason of the difficulties attending the registration of trade marks in relation to textile fabrics, it has been found impossible to complete the registration of existing trade marks within the time specified by the said section; and it is therefore expedient to prolong the time for the 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 sect. 1 of

1. There shall be repealed so much of § 1 of the principal Act as provides that from and after the first day of July one thousand eight

hundred and seventy-six, a person shall not be entitled to institute any proceeding to prevent the infringement of any trade mark as defined by that Act until and unless such trade mark is registered in pursuance of that Act; and in place thereof be it enacted that—

the principal Act.

From and after the first day of July one thousand eight hundred and seventy-seven, a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of any trade mark as defined by the principal Act, until and unless such trade mark is registered in pursuance of that Act, or until and unless, with respect to any device, mark, name, combination of words, or other matter or thing in use as a trade mark before the passing of the principal Act, registration thereof as a trade mark under the principal Act shall have been refused as hereinafter is mentioned.

Saving of marks and devices not capable of being registered under Act.

2. When an application by any person to register as a trade mark a device, mark, name, word, combination of words, or other matter or thing proposed for registration as a trade mark, which has been in use as a trade mark before the passing of the recited Act, has been refused, it shall be the duty of the registrar, on request, and on payment of the prescribed fee, to give to the applicant a certificate of such refusal, and a certificate so granted shall be conclusive evidence of such refusal.

Short title.

3. This Act may be cited for all purposes as the Trade Marks Registration Amendment Act, 1876.

THE TRADE MARKS REGISTRATION EXTENSION ACT, 1877.

40 & 41 Vict. c. 37.

An Act for extending the Time for the Registration of Trade Marks, in so far as relates to Trade Marks used in Textile Industries.

[*6th August*, 1877.]

39 & 40 Vict. c. 33.

38 & 39 Vict. c. 91.

Whereas by § 1 of the Trade Marks Registration Amendment Act, 1876, it is provided that from and after the first day of July one thousand eight hundred and seventy-seven, a person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of any trade mark as defined by the Trade Marks Registration Act, 1875 (referred to in such Amendment Act and in this Act as the principal Act), until and unless such trade mark is registered in pursuance of the principal Act, or until and unless, with respect to any device, mark, name, combination of words, or other matter or thing in use as a trade mark before the passing of the principal Act, registration thereof as a trade mark under the principal Act shall have been refused, as is in the said Act thereafter mentioned:

And whereas by reason of the difficulties attending the registration of trade marks used in the textile industries it has been found impossible to complete the registration of such trade marks within the time specified by the said section, and it is therefore expedient to prolong such time as aforesaid:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Extension of time for registration of trade marks used in textile industries.

1. In so far as relates to the registration of trade marks used in the textile industries, but not further or otherwise, § 1 of the Trade Marks Registration Amendment Act, 1876, shall be construed as if for the words "from and after the first day of July one thousand eight hundred and seventy-seven" there were substituted the words "from and after the first day of January one thousand eight hundred and seventy-eight, or such further time as her Majesty may by Order in Council determine."

Definition of "trade marks used in the textile industries."

2. The expression in this Act "Trade marks used in the textile industries" means the trade marks relating to goods comprised in Classes 23 to 35, both inclusive, of the First Schedule to the Rules under the Trade Marks Registration Acts, 1875, 1876, dated September, 1876.

Short title of Act.

3. This Act may be cited for all purposes as the Trade Marks Registration Extension Act, 1877; and this Act and the Trade Marks Registration Amendment Act, 1876, and the Trade Marks Registration Act, 1875, may be cited together as the Trade Marks Registration Acts, 1875—1877.

ORDERS IN COUNCIL

EXTENDING THE TIME FOR REGISTRATION.

Dec. 12th, 1877, extension till June 30th, 1878 (*a*).
June 29th, 1878, ,, ,, Dec. 31st, 1878 (*a*).
Nov. 27th, 1878, ,, ,, May 31st, 1879 (*b*).
May 17th, 1879, ,, ,, July 31st, 1879 (*b*).

(*a*) These orders related only to trade marks used in the textile industries.
(*b*) These orders related only to trade marks used for cotton piece goods.

RULES OF AUGUST, 1876, WITH RESPECT TO COTTON MARKS.*

Cotton Goods.

Establishment of office for exhibition of cotton trade marks at Manchester.

57. For the purpose of facilitating the granting of trade marks in respect of cotton goods in Classes 23, 24 and 25, there shall be established by the Commissioners of Patents (*a*), and subject to their control, an office at Manchester (*b*) for the exhibition of all devices, marks, headings, labels, tickets, letters, words, or figures, or combinations of letters, words, or figures used in the cotton trade, and in these Rules included under the expression "cotton marks" (*c*).

(*a*) Previous to the coming into operation of the Patents Act, 1883, on January 1st, 1884, the registration of trade marks was under the control of the Commissioners of Patents, now no longer in existence.

(*b*) This was opened and is still maintained at No. 48, Royal Exchange, Manchester. See T. M. A. 1905, § 64, and Instructions, par. 19.

(*c*) All cotton marks are treated as exceptional, and advertised and registered by deposit. See *In re Robinson*, 29 W. R. 31.

Representations of cotton marks to be sent by owners resident in the United Kingdom on or before Jan. 1, 1877; by owners resident abroad on or before Mar. 1, 1877.

58 (*a*). Every person who at the date of the passing of the Act used any cotton mark shall, if resident in the United Kingdom, on or before the first day of January one thousand eight hundred and seventy-seven, and if resident elsewhere, on or before the first day of March, one thousand eight hundred and seventy-seven, send to the Manchester office three representations of such cotton mark, in such form and with such a description as may be from time to time required by the Commissioners of Patents.

(*a*) This Rule was made on Dec. 1st, 1876, in substitution for the previous Rule 58, by which representations of old cotton marks were to be sent in at Manchester on or before Dec. 1st, 1876.

Extended time for sending representations of combination stamps for cotton piece goods.

58a (*a*). Every person who at the date of the passing of the Trade Marks Registration Act, 1875, used any "combination stamp" (*b*) for cotton piece goods, shall on or before the first day of February, one thousand eight hundred and seventy-nine, send to the Manchester Branch of the Trade Marks Registry Office four

* These Rules, though repealed, are given here in order that the position of cotton marks dealt with by the late Manchester Committee of Experts may be comprehended. Where it is not otherwise stated, the Rules were included in the set of Rules issued in August, 1876. Various additions were made from time to time, and in March, 1883, after the Committee of Experts had completed their labours, an entirely new set was substituted (see p. 589, *infra*). Those Rules were, in their turn, repealed, and the Rules now in force place cotton marks on the same footing as other trade marks, and this would seem to be the case even with B list marks, subject, however, to the provisions of sect. 64 of T. M. A. 1905.

representations of such "combination stamp," in such form and with such a description as may be from time to time required by the Commissioners of Patents.

(*a*) This Rule was made on Dec. 28th, 1878.

(*b*) Combination stamps are combinations of several different trade marks which dealers in cotton goods habitually use on such goods, treating the combination as equivalent to a single trade mark. See *Robinson* v. *Finlay*, 9 Ch. D. 487, for an example of such a combination.

Committee of experts to be appointed, and to divide cotton marks into two classes.

59. A committee (*a*) of persons versed in the usages of the cotton trade shall be appointed by the Commissioners of Patents, consisting of such number of persons as may from time to time be determined by them; and it shall be the duty of such committee, on or before a time to be named by the Commissioners of Patents, to divide the cotton marks, representations of which have been so sent in to the Manchester office, into two classes, the first class consisting of such of the said cotton marks as are, in the opinion of the committee, trade marks within the meaning of the Act, and the second class consisting of such of the said cotton marks as are not, in the opinion of the committee, trade marks within the meaning of the Act (*b*).

(*a*) A list of the Committee of Experts appointed under this Rule will be found in the Instructions issued during the existence of the committee.

(*b*) The committee were instructed by the Commissioners of Patents in a letter, dated April 4th, 1877, to act on the following principles in dividing the cotton marks into two classes, viz.: (i) To decide only from the evidence before them whether, in their opinion, a mark belonged to the first or second class of cotton marks; (ii) in case of further information being required, the keeper of the Manchester office was authorised to obtain such information for the use of the committee; (iii) in case of a difference of opinion among the committee as to the nature of marks applied for, their decision should be given according to the opinion of the majority, the chairman presiding at each meeting having a casting vote; (iv) single letters were not trade marks within the meaning of the Act: (v) in all cases where more than three persons applied for registration of the same mark for the same description of goods, such mark must be considered as a trade mark not within the meaning of the Act, and must consequently be placed in the second class. By supplementary directions, the committee were instructed that Rule (v) extended to marks so similar, or so nearly resembling each other, as to be substantially the same marks, or calculated to deceive, and was not to be confined to identical marks. And they were also instructed that, in dealing with individual cases, they should bring to bear upon them the knowledge which the members of the committee might have of the state of things in the trade, and to decide with reference to that knowledge, and not merely upon such evidence as might be formally brought before them in the individual cases. Also that borders of marks should not be treated as parts of the marks. See *In re Brook*, 26 W. R. 791.

Acting on the principles thus laid down, the committee divided the marks submitted to them into two classes, known as the A list and the B list, of which the former contained registrable, and the latter non-registrable, cotton marks.

By Rule 62, *infra*, the marks placed in the B list were not to be registered except in pursuance of an order of the Court; and in *In re Orr-Ewing & Co.*, 8 Ch. D. 794, the question was raised how far the decision of the committee was a binding decision. Hall, V.-C., decided that the marks there in question, which had been placed in the B list, were good and valid trade marks, and that they ought to be registered; but the Court of Appeal reversed his decision, holding that the decision of the committee should not be interfered with except under special circumstances, James, L. J., saying that the Court should not interfere, unless satisfied that the committee had proceeded upon some wrong principle or in some improper manner. When, however, the case was brought before the House of Lords (4 App. Cas. 479), the decision of Hall, V.-C., was restored, with the modification that only the

essential particulars of the marks were admitted to registration, and the Lord Chancellor (Lord Cairns) said that "the Rules appear to provide a rough but useful way of separating, by means of the technical knowledge and judgment of the committee, the cotton trade marks into two classes. The first class is to consist of those marks which the committee is of opinion are trade marks within the Act; and proprietors in this class are to have the benefit, arising from this opinion, of being able at once to apply to be registered in respect of those marks. But in doing this they must satisfy the registrar that they are the proprietors, and comply with the conditions of registration as any other applicants would do. With regard to the second class, there is no decision pronounced against them, but the proprietors cannot apply for registration as a matter of course. They must come to the Court, and it must be for the Court to say whether the registrar shall proceed on their application to register, or not. In deciding this the Court will have before it the circumstance that the opinion of the committee was adverse to the claim of a trade mark; but this would be an opinion only, and not a decision arrived at after hearing both sides, or rendered in any judicial proceeding": *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 483; and see *per* Lords O'Hagan and Blackburn. See also *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434; 7 App. Cas. 219; and the cases noted under Rule 62, *infra*.

The function of the committee was solely to decide on the question of registrability or non-registrability, and where they had assumed to decide a question of title, it was held by Jessel, M. R., that the registrar must proceed with the application, leaving it to the owners of other marks to oppose the registration: *Ex parte Ede Brothers & Co.*, 28 W. R. 436.

Committee to form list of marks sent in to Manchester office.

60. The said committee shall form a list of the cotton marks sent to the Manchester office in each of the aforesaid classes, and shall transmit such lists (*a*) to the Commissioners of Patents, accompanied by two representations of each of the marks specified in the second class in such list.

The third representation of each of the marks in the second class in such list shall be retained for reference in the Manchester office.

(*a*) *I.e.*, the A list and the B list.

Marks may be added to list.

61. The Commissioners of Patents may from time to time add to the aforesaid list any cotton marks as they may think just, and such addition shall be deemed to be part of the original list.

Any person claiming to be the proprietor of a cotton mark in Class 1 may apply to be registered.

62. Any proprietor of a cotton mark not specified in the second class in such list may apply to be registered as proprietor of such cotton mark in manner and subject to the conditions in which he may apply to be registered as proprietor of any other trade mark (*a*), but it shall not be lawful for the registrar to register (*b*) any person as proprietor of any cotton mark in the second class of the aforesaid list except in pursuance of an order of the Court (*c*).

(*a*) After being passed by the committee, the marks in the A list had to be advertised, so that an opportunity for opposition might be afforded. In *In re Robinson*, 29 W. R. 31, an A list cotton mark was opposed, but without success.

(*b*) But he might grant a certificate of refusal to register, thus preserving any previous rights.

(*c*) For an order of the Court to be obtained for the registration of a B list mark, such a case had to be made out as, in the opinion of the Court, was sufficient to outweigh the opinion of the Committee of Experts: *per* Lord Blackburn in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 501. It is, however, believed that an application to the Court by an owner of a B list mark was never unsuccessful. Such applications were granted in *Ex parte Ede Bros. & Co.*, 28 W. R. 436; *In re Dugdale*, 49 L. J. Ch. 303; *In re J. Hoyle & Sons, Ld.* (1), Hull, V.-C., May 8th, 1880:

S. C. (2), Chitty, J., Nov. 30th, 1883; *In re Dickinson, Ackroyd & Co.*, Hall, V.-C., July 8th, 1880; *In re Jones Bros. & Co.*, Hall, V.-C., July 10th, 1880; *In re Ward, Sturt & Sharp*, 50 L. J. Ch. 347; *In re Sykes*, 43 L. T. N. S. 626; *In re T. Ashton & Sons*, Hall, V.-C., Feb. 26th, 1881; *In re Framjee, Sands & Co.*, Bacon, V.-C., Nov. 30th, 1883. In *In re Brook*, 26 W. R. 791, which was decided against the applicants on the authority of the decision of the Court of Appeal in *In re Orr-Ewing*, 8 Ch. D. 794, an arrangement satisfactory to the applicants was afterwards arrived at.

"The Court" being the Chancery Division (now the High Court of Justice), the order of the House of Lords was made an order of the Chancery Division in *In re Orr-Ewing* (2), 28 W. R. 412. The registrar will now register a B. list mark in a proper case, without requiring the applicant to go to the Court.

Advertisement of cotton marks.

62a (*a*). As soon as may be after the receipt of an application, made as provided by the Trade Marks Rules, for the registration of a mark in Classes 23, 24, 25 aforesaid, or in any one or more of such classes, the registrar shall insert in the official paper an advertisement of such application, showing the name and address of the applicant, the class in which he applies, the number given to the mark by the registrar, the places in London and Manchester respectively where a specimen of such mark is deposited for exhibition, and distinguishing whether the mark has or has not been used prior to the thirteenth day of August one thousand eight hundred and seventy-five.

(*a*) This and the following Rule were made on Feb. 26th, 1877, in substitution, so far as related to cotton marks, for Rules 13, 15 and 17 of the General Rules of August, 1876, as to advertisement.

Time of registration of cotton marks.

62b (*a*). On the expiration of three weeks from the date of the first appearance of the advertisement of a mark in Classes 23, 24, 25, or in any one or more of such classes, in the official paper, the registrar may, if he is satisfied that the applicant is entitled to registration, register such mark in respect of the description of goods for which he may be entitled to be registered, and the applicant as the proprietor thereof, on payment of the prescribed fee.

(*a*) See note to previous Rule.

Cotton mark not to be registered except in manner herein prescribed.

63. A cotton mark shall not be registered except in manner and subject to the conditions prescribed by these Rules with respect to the registry of cotton marks.

Applications for registration of *new* trade marks for cotton goods (Classes 23, 24, and 25) to be made in the same manner as for all other classes of goods.

63a (*a*). The Rules numbered 57 to 63 as aforesaid do not apply to such trade marks in respect of cotton goods in Classes 23, 24 and 25 as are not cotton marks which were in use at the date of the passing of the Trade Marks Registration Act, 1875; and applications for the registration of trade marks in respect of goods in Classes 23, 24 or 25, and which marks were not cotton marks in use at the date of the passing of the Trade Marks Registration Act, 1875, shall be made in manner and subject to the conditions in and subject to which applications for trade marks other than cotton marks may be made in conformity with the rules in that behalf for the time being in force.

Provided that where application is made for the registration as a

trade mark in respect of any goods in Classes 23, 24 or 25 of any mark being a cotton mark contained in the second class of the list mentioned in Rule 59 aforesaid, such registration shall not take place except in pursuance of an order of the Court.

(*a*) This Rule was made on Oct. 21st, 1879.

RULES OF MARCH, 1883, WITH RESPECT TO COTTON MARKS.*

57. [This Rule is identical with Rule 57, *supra*.]

Establishment of office for exhibition of cotton trade marks at Manchester.

58 (*a*). The Commissioners of Patents may from time to time add to the first and second class lists of cotton marks formed by the late Manchester Committee of experts any cotton marks as they may think just, and such addition shall be deemed to be part of the original lists.

Marks may be added to the first and second class lists of cotton marks.

(*a*) This is taken from the old Rule 61.

Any person claiming to be the proprietor of a cotton mark in first class may apply to be registered.

59 (*a*). Any proprietor of a cotton mark in the first class may apply to be registered as proprietor of such cotton mark in manner and subject to the conditions in which he may apply to be registered as proprietor of any other trade mark, but it shall not be lawful for the registrar to register any person as proprietor of any cotton mark in the second class aforesaid, except in pursuance of an order of the Court.

(*a*) This is taken from the old Rule 62.

Advertisement of cotton marks.

60. [This Rule is identical with Rule 62a, *supra*.]

Time of registration of cotton marks.

61. [This Rule is identical with Rule 62b, *supra*.]

* See note, p. 585, *supra*.

APPENDIX F.

THE PATENTS, DESIGNS, AND TRADE MARKS ACTS, 1883—1902 (SO FAR AS RELATES TO TRADE MARKS), CONSOLIDATED.

(*All repealed by T. M. A.* 1905, *and P. and D. A.* 1907.)

THE PATENTS, DESIGNS, AND TRADE MARKS ACT, 1883 (*a*).

46 & 47 Vict. c. 57.

An Act to amend and consolidate the Law relating to Patents for Inventions, Registration of Designs, and of Trade Marks.

[25th August, 1883.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

(*a*) The amending Acts are as follows:—
The Patents, Designs, and Trade Marks (Amendment) Act, 1885 (48 & 49 Vict. c. 63).
The Patents Act, 1886 (49 & 50 Vict. c. 37).
The Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50).
The Patents Act, 1901 (1 Edw. VII. c. 18).
The Patents Act, 1902 (2 Edw. VII. c. 34).
Of such Acts those passed in 1886 and 1901 do not affect trade marks at all, and those of 1885 and 1902 only do so in one or two small details. The Patents and Designs (Amendment) Act, 1907 (7 Edw. VII. c. 28), seems never to have become effective, as it was repealed by the Patents and Designs Act, 1907 (7 Edw. VII. c. 29), which came into operation on the same day, *i.e.*, January 1st, 1908.
The parts of the principal Act which were expunged by the later Acts are printed in italics, and the provisions which were introduced are printed in brackets.

Part I.

Preliminary.

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Preliminary.

Short title.

1. This Act may be cited as the Patents, Designs, and Trade Marks Act, 1883.

Division of Act into parts.

2. This Act is divided into parts, as follows:—
Part I.—Preliminary.
Part II.—Patents.
Part III.—Designs.
Part IV.—Trade Marks.
Part V.—General.

3. This Act, except where it is otherwise expressed, shall commence from and immediately after the thirty-first day of December, one thousand eight hundred and eighty-three (*a*). Commencement of Act.

(*a*) The Act of 1888, except where otherwise provided, commenced on the 1st January, 1889 (§ 28).

PART II. (Sects. 4—46.)

Patents.

PART III. (Sects. 47—61.)

Designs.

PART IV.

Trade Marks.

Registration of Trade Marks.

62.—(1.) The comptroller (*a*) may, on application by or on behalf of any person (*b*) claiming to be the proprietor (*c*) of a trade mark (*d*), register the trade mark. Application for registration.

(2.) The application (*e*) must be made in the form set forth in the first schedule to this Act, or in such other form as may be from time to time prescribed (*f*), and must be left at, or sent by post to *the Patent Office in the prescribed manner* [such place and in such manner as may be prescribed]. See T. M. A. 1905, ss. 12, 59.

(3.) The application must be accompanied by the prescribed number of representations of the trade mark, and must state the particular goods or classes of goods (*g*) in connection with which the applicant desires the trade mark to be registered.

(4.) The comptroller may, if he thinks fit (*h*), refuse to register a trade mark (*i*); but any such refusal shall be subject to appeal to the Board of Trade, who shall, if required, hear the applicant and the comptroller, and may make an order determining whether, and subject to what conditions (*k*), if any, registration is to be permitted.

(5.) The Board of Trade may, however, if it appears expedient, refer the appeal to the Court; and in that event the Court shall have jurisdiction to hear and determine the appeal, and may make such order as aforesaid (*l*).

[(6.) Where an applicant for the registration of a trade mark otherwise than under an International Convention is out of the United Kingdom at the time of making the application, he shall give the comptroller an address for service in the United Kingdom, and if he

fails to do so the application shall not be proceeded with until the address has been given (*m*)].

The amendments in this section were made by § 8 of the Act of 1888.

(*a*) The Comptroller General of Patents, Designs, and Trade Marks: § 117.

(*b*) "Person" includes a body corporate: § 117, Rule 41. There was no limitation to British subjects, and the practice was to grant registration to aliens. See, however, *In re Riviere & Co.*, 26 Ch. D. 48. By § 103, a certain priority was given to foreign applicants who had applied for registration in their own countries.

(*c*) By "claiming to be the proprietor" nothing more was meant than "claiming to be the first to adopt," whether there had been any user or not. The doubt expressed in *In re Anderson*, 54 L. J. Ch. 1084; *Edwards* v. *Dennis*, 30 Ch. D. 454; and *In re Lyndon*, 32 Ch. D. 109, was removed by *In re Hudson*, 32 Ch. D. 311. And see *In re Hicks*, 22 V. L. R. 636, a decision upon a similar provision in the Trade Marks Act of Victoria. But "a person who puts another's trade mark on the register cannot be a person entitled within the Act": *per* Fry, L. J., *In re Apollinaris Co.*, (1891) 2 Ch. 186, 226; and an importer could not register as his own a trade mark of the foreign producer, at all events, unless he had the control of the entire output: *Ib.* Again, a person cannot register a trade mark without any intention of using it in his business: *In re Apollinaris Co.*, (1891) 2 Ch. 186, 234, 235; *In re Batt*, (1898) 2 Ch. 432. For registration to be good a title had to be shown which is good according to the law of England, so that a mark which had been assigned in gross abroad ought not to be registered: *Pinto* v. *Badman*, 8 P. R. 181—192, 193; nor a mark which, though registered abroad, did not contain any of the essential particulars required by this Act: *In re Carter Medicine Co.*, (1892) 3 Ch. 472.

(*d*) As to what was a trade mark under this Act, see § 64, *infra*.

(*e*) By § 81 (3), applications for registration of Hallamshire cutlery marks had to be made to the Cutlers' Company.

(*f*) "Prescribed," *i.e.*, by the Rules. See § 117.

(*g*) The application might have been for any goods in a class. But it should have been only for the particular goods for which the applicant had used or was about to use the mark: *Edwards* v. *Dennis*, 30 Ch. D. 454; *Hargreave* v. *Freeman*, (1891) 3 Ch. 39; *In re Suter, Hartmann and Rahtjen's Composition Co., Ld.*, 19 P. R. 42; *In re Hart*, 19 P. R. 569; *Anglo-Swiss Condensed Milk Co.* v. *Pearks, Gunston and Tee*, 20 P. R. 509; 21 P. R. 261. Similarly, an application for the whole of a class by a person who did not deal or intend to deal in goods in that class was improper: *In re Batt & Co.*, (1898) 2 Ch. 432; (1899) A. C. 428.

(*h*) The comptroller's discretion to allow the registration of a trade mark was limited by §§ 69, 72, 73. See *per* Cotton, L. J., in *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278, and *per* Pearson, J., in *In re Price's Patent Candle Co.*, 27 Ch. D. 681. And, further, "the question whether the comptroller shall, in the exercise of the discretion which the Act gives to him, register a trade mark, is a very different question from any of the questions upon a trade mark that can be raised. He is quite within his duty, and he is quite entitled, if he thinks that—either because there are words in it, the exclusive use of which would be calculated to deceive, or otherwise—there is a sufficient reason, to say 'No; I do not think it is proper to register this trade mark'": *per* Kay, J., in *In re Dunn*, 41 Ch. D. 439. And see the same case in the House of Lords, 15 App. Cas. 252; *In re Marks and Tellefsen*, 63 L. T. N. S. 234; *In re Speer*, 55 L. T. N. S. 880; *In re Farrow*, 7 P. R. 260; *In re Turney*, 11 P. R. 37; *In re Pomril*, 18 P. R. 181; and *In re Booth's Distillery, Ld.*, 21 P. R. 18. It is to be observed that in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 497, Lord Blackburn, referring to § 5 of the Act of 1875, by which it was provided that the Court "may" direct registration of a trade mark to which a claimant is entitled, said: "I cannot construe this section as meaning anything else than that, where the Court of Chancery is satisfied that the applicant is a person who is for the time being entitled to the exclusive use of a trade mark in accordance with law, and that the trade mark is one within the definition in the Act, the Court is, *ex debito justitiæ*, to rectify the register, just as it would, before the Act of 1875, have been bound *ex debito justitiæ*, on similar proof, to prevent any one infringing the trade mark shown to be his property." And his lordship went on to say that, though the burden of proof lay upon the person making the application, yet if he did produce such proof as would, in the opinion of the Court,

entitle him to an injunction, he did not think that the Court had any discretion to consider whether the registration would be inconvenient. If the comptroller had an absolute discretion to reject any mark he thought fit, the result might be, in the case of an old mark, to destroy a very valuable property without redress. These statements must, however, be taken in connection with the dicta in the House of Lords in *Eno* v. *Dunn*, 15 App. Cas. 252, *e.g.*, *per* Lord Herschell, at p. 261, where he said: "Those sections" (*i.e.*, §§ 72 and 73) "prohibit the registration of a trade mark in certain specified cases; but there is no duty cast upon the comptroller of registering every other trade mark that may be applied for. On the contrary, whilst he is in certain cases prohibited from registering, a discretion whether to register or not appears to me to be in all cases plainly conferred. Of course, this discretion must be reasonably and not capriciously exercised." It is to be observed that Lord Blackburn was primarily referring to an old mark, and Lord Herschell to a new one. In any event the comptroller was forbidden to refuse registration without giving the applicant an opportunity of being heard: § 91. Whether the comptroller was justified in registering oriental words as a trade mark, *quære*: *In re Deichurst & Sons, Ld.*, (1896) 2 Ch. 137.

(*i*) Before refusing to register a mark, the comptroller was to give the applicant ten days' notice of a time when he might be heard personally or by his agent: § 94.

(*k*) As to limited registration, see note (*e*) to § 72, p. 612, *infra*.

(*l*) The Court was the High Court of Justice in England: § 117. The Court had no jurisdiction to deal with an application which the comptroller had refused, except upon an appeal to the Board of Trade and a reference of the matter by the Board to the Court: *In re Normal Co., Ld.*, 35 Ch. D. 231. But the Board should have referred the matter to the Court: *ib.* On the matter coming before the Court all objections could be taken, whether originally raised by the comptroller or not: *In re Sanitas Co., Ld.*, 4 P. R. 533. When the comptroller refused an application, and the matter was taken to the Court, the usual rule was to make the applicant pay the comptroller's costs, whether successful or unsuccessful: *In re Van Dazer*, 34 Ch. D. 623. Where the Court was moved to direct the comptroller to proceed with an application to register notwithstanding the existence on the register of a mark belonging to a foreign company, and notice was sent to the company, but was not acknowledged, the Court directed the comptroller to proceed in the company's absence without prejudice to any opposition, the applicant undertaking to give due notice to the company of the advertisement: *In re Stringer*, 8 P. R. 445. In referring an appeal to the Court, the Board of Trade might direct notice of appeal to be served on parties who were not before the comptroller, and might allow further evidence to be adduced, and the Court would not hear the appeal until the directions of the Board of Trade were complied with: *In re Extract of Meat (Baron Liebig) Photograph Brand, Ld.*, 17 P. R. 161; and see *In re Royal Worcester Corset Co.*, 26 P. R. 185, and other cases at pp. 373, 374.

(*m*) As to the address for service, see *per* Lindley, L. J., in *In re King & Co.*, (1892) 2 Ch. 462, 378; also *In re Robertson, Sanderson & Co.*, 9 P. R. 213.

Limit of time for proceeding with application. **See T. M. A. 1905, s. 18.**

63. Where registration of a trade mark has not been or shall not be completed within twelve months from the date of the application, by reason of default on the part of the applicant, *the application shall be deemed to be abandoned* (*a*) [the comptroller shall give notice of the non-completion to the agent employed on behalf of the applicant, and if at the expiration of fourteen days from that notice the registration is not completed, shall give the like notice to the applicant, and if at the expiration of the latter fourteen days, or such further time as the comptroller may in special cases permit, the registration is not completed, the application shall be deemed to be abandoned].

(*a*) This provision was first made by the edition of March, 1883, of the Rules under the old Acts. The amendments in this section were made by § 9 of the Act of 1888. By the combined operation of this section and § 113 all applications not completed within the prescribed time by the applicant's default lapsed, whether they were pending at the date of this Act or had been made subsequently: *In re Hayward & Co.*, 54 L. J. Ch. 1003. And this was so, though the default was occa-

sioned by the neglect of the applicant's agent, and not of the applicant himself: *Jackson & Co.* v. *Napper*, 35 Ch. D. 162. But a trade mark registered in 1885, in pursuance of an application made in 1879, was allowed to remain on the register, subject to certain disclaimers, and to the entry of a note on the register making the five years for the purposes of § 76 run from 1885 and not from 1879: *In re Hayward & Co.*, 54 L. J. Ch. 1003. An application which had been abandoned might afterwards be renewed, at all events where the applicants were not personally in default: *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *In re Bancroft & Co.*, 5 P. R. 205. In *In re United Vineyards Proprietors' Co.*, Stirling, J., Nov. 8th, 1889, an application made in 1876 had lapsed in consequence of the applicants having failed to comply with a request from the registrar for the payment of the final fee, the letter containing such request having miscarried. The applicants supposed that the mark had been registered, and took no further step. In 1882 a somewhat similar new mark was registered for the same goods by another firm. In 1889 the mistake was discovered by the original applicants, and they at once made a fresh application. The matter was referred to the Court, and it was held that, the mark having been used long before 1875, the registration should proceed, notwithstanding that the firm registered in 1882 refused to consent, while not appearing to actively oppose. So, also, in *In re Loftus*, (1894) 1 Ch. 193, a renewed application was allowed to proceed.

Conditions of registration of trade mark.

See T. M. A. 1905, ss. 9, 15.

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

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

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

(c.) *A distinctive (d) device, mark, brand (e), heading (f), label (g), ticket, or fancy word or words not in common use (h).*

(2.) *There may be added to any one or more of these particulars any letters, words or figures, or combination of letters, words or figures, or of any of them.*

(3.) *Provided that any special and distinctive word or words, letter, figure, or combination of letters or figures or of letters and figures used as a trade mark before the thirteenth day of August, one thousand eight hundred and seventy-five, may be registered as a trade mark under this part of this Act.*

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

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

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

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

(d.) An invented word or invented words (*i*); or

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

(2.) There may be added to any one or more of the essential particulars mentioned in this section any letters, words, or figures, or combination of letters, words, or figures, or of any of them (*l*); but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade mark, and must

disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register (*m*).

(3.) Provided as follows:

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

(ii.) Any special and distinctive word or words, letter, figure, or combination of letters or figures, or of letters and figures, used as a trade mark before the thirteenth day of August, one thousand eight hundred and seventy-five, may be registered as a trade mark under this part of this Act (*q*).]

The amendments in this section were made by § 10 of the Act of 1888.

(*a*) This section is enlarged from § 10 of the Act of 1875. The essential particular is that which causes a mark which, without it, would not be a registrable trade mark, to be a registrable trade mark; it is that by virtue of which registration is granted to a mark; and when the validity of an alleged trade mark is being considered by the Court, "the first duty cast upon the Court is to ascertain whether some one or more than one of the essential particulars of a trade mark, as defined by the Act, is found to exist, so that the mark may be described with one or more than one essential particular or particulars which distinguish it": *per* Earl Cairns, C., in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479. This being so, it was provided by § 92 that, though non-essential particulars of registered trade marks might be altered with the leave of the Court, essential particulars might not be. Where, therefore, two trade marks had been registered, one of which contained the name of the firm in ordinary type, and the other contained it printed in the form of a signature, Jessel, M. R., allowed a firm who had acquired the trade mark by assignment to substitute their own name for the name printed in ordinary type, but refused to allow any alteration of the signature in the second mark: *In re Deuhurst*, M. R., June 11th, 1880. See also *In re Murphy & Co.*, 7 P. R. 163. A trade mark which did not contain any essential particular, and was therefore not registrable, did not become a good trade mark by remaining five years on the register: *In re Palmer* (1), 21 Ch. D. 47; (3), 24 Ch. D. 504; *In re Ralph*, 25 Ch. D. 194; *In re Leonard & Ellis*, 26 Ch. D. 288; *In re Lloyd & Sons*, 27 Ch. D. 646; *In re Wragg*, 29 Ch. D. 551; *Edwards* v. *Dennis*, 30 Ch. D. 454; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Spencer*, 54 L. T. N. S. 659; *In re Apollinaris Co.*, (1891) 2 Ch. 186. So in Victoria: *Lewis* v. *Klapproth*, 11 V. L. R. (E.) 214; *Wolfe* v. *Alsop* (2), 12 V. L. R. 421; *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752. The definition section in the Canadian statute is wider, so that cases on this section must be applied with caution in Canada: *Smith* v. *Fair*, 14 Ont. Rep. 729.

(*b*) See *ante*, p. 39. The words "individual or firm" in clause (a) as in clause (b) meant a real human being and a real firm, the names of fictitious persons falling under clause (c), and if the name fell under clause (a) it was excluded from clause (c), and *vice versâ*: *per* Smith, L. J., *In re Holt*, (1896) 1 Ch. 711, 724, 725. The name of a living public character unconnected with the business fell under this clause and could not be registered if printed in ordinary type: *In re Carroll*, 16 P. R. 82. The name of an individual in ordinary type was not made distinctive by having the descriptive name of the goods added: *In re Gianaclis*, 6 P. R. 467; *In re Hannay*, 7 P. R. 46; *In re Edge*, 8 P. R. 207. And see *Pirie* v. *Goodall*, (1892) 1 Ch. 35, where Lindley, L. J., stated that "Pirie's" in the genitive was not the name of an individual or firm for the purposes of this clause.

(*c*) See *ante*, p. 46; and *In re Deuhurst*, M. R., June 11th, 1880. Registration of a signature, together with a descriptive word, gave no exclusive right in the descriptive word: *Watt* v. *O'Hanlon*, 4 P. R. 1.

(*d*) See *ante*, pp. 48, 64. The word "distinctive" applied to all the varieties of marks mentioned in this sub-section: *per* Cotton, L. J., in *Waterman* v. *Ayres*, 39 Ch. D. 29; and *per* Chitty, J., in *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274;

and see *Pirie* v. *Goodall*, (1892) 1 Ch. 35. The distinctiveness which was required could not consist solely in colour: *In re Hanson*, 37 Ch. D. 112. To entitle a mark to registration it must at the date of registration distinguish the goods of the person registering it from all others: *In re Apollinaris Co.*, (1891) 2 Ch. 186, 226, 230; and an importer could not register as his own the trade mark of the foreign producer, at all events, unless he had the control of the entire output: *Ib.*

(*e*) To be registrable, a brand could not consist of words unless they were capable of registration as such: *Pirie* v. *Goodall*, (1892) 1 Ch. 35; nor did the addition of the word "brand," as part of a trade mark, to words which were not capable of registration, validate the trade mark: *In re Paine*, 9 P. R. 130. *Semble*, a water-mark woven into the texture of paper might be a brand: *per* Williams, J., in *Pirie* v. *Goodall*, (1892) 1 Ch. 35.

(*f*) A word used alone was not a heading: *per* Earl of Selborne, C., in *In re Leonard & Ellis*, 26 Ch. D. 288, 295.

(*g*) The label itself must have been distinctive, so that a label with the name of the proprietors in ordinary type and words descriptive of the goods was not a distinctive label: *In re Price's Patent Candle Co.*, 27 Ch. D. 681; *In re Bradley*, 9 P. R. 205; *In re Birmingham Vinegar Brewery Co.*, 11 P. R. 195; nor could words which were descriptive or common to the trade be such a label: *Great Tower St. Tea Co.* v. *Smith*, 6 P. R. 165. It was thought that a distinctive label must contain elements capable of themselves of constituting essential particulars within the Act, and that a novel combination of old elements, none of which fell within this description, would not do: *In re Bryant & May, Ld.*, 8 P. R. 69: but in *In re Bradley*, 9 P. R. 205, Chitty, J., while holding that a mark when looked at as a whole must contain at least one of the essential particulars, thought that a novel combination of devices not in themselves distinctive, because in common use, would be capable of registration: cf. *In re Birmingham Vinegar Brewery Co.*, 11 P. R. 195. The label was the entire combination: *Pinto* v. *Badman*, 8 P. R. 181, 191, *per* Lord Esher, M. R.: see *In re Apollinaris Co.*, (1891) 2 Ch. 186; *In re Smokeless Powder Co.*, (1892) 1 Ch. 590. A label was held to be distinctive in *In re Bryant & May, Ld.*, 4 Times L. R. 675; and see *Bryant & May* v. *Heyde*, 7 N. S. W. Rep. (E.) 72. The registration of a distinctive label did not give an exclusive right to descriptive words appearing on it: *In re Hudson*, 32 Ch. D. 311; *In re Atkins Filter & Engineering Co., Ld.*, 3 P. R. 164; *Symington & Co.* v. *Footman, Pretty & Co.*, 56 L. T. N. S. 696; *Watt* v. *O'Hanlon*, 4 P. R. 1; *Lewis's* v. *Goodbody*, 67 L. T. N. S. 194; *Rugby Portland Cement Co.* v. *Rugby & Newbold Cement Co.*, 8 P. R. 241; 9 P. R. 46; cf. *In re Paine* (2), (1893) 2 Ch. 567; nor to words common to the trade registered in connection with it: *British Tea & Trading Association, Ld.* v. *Cooke*, Bacon, V.-C., June 8th, 1886. And where applicants applied for registration of a label containing descriptive words, and contended that their registration would give them a right to the descriptive words, the opinion of the Court of Appeal negativing the claim was stated in the order of the Court allowing the registration to proceed: *In re Hudson*, 32 Ch. D. 311. Words not constituting a proper trade mark did not become entitled to registration by the addition of flourishes placed round them with a view to making up a distinctive label: *In re Clement & Cie.*, *per* Romer, L. J., (1900) 1 Ch. 114: and see *In re Weingarten Bros.*, 29 V. L. R. 965.

(*h*) See *ante*, pp. 53, 56. Fancy words were not registrable under the Act of 1875: *Ex parte Stephens*, 3 Ch. D. 659: and see *Rose* v. *Evans*, 48 L. J. Ch. 618. A fancy word could not be made out of that which was not one by prefixing the word "the": *In re Stapley & Smith*, 29 Ch. D. 877: nor could words which, used separately, were not fancy words, become so by being used in combination: *Pirie* v. *Goodall*, (1892) 1 Ch. 35. In determining whether a word was a fancy word the time to be looked at was the date of registration, and the word was not to be criticised by the light of subsequent events: *In re Borrel T. M.*, (1896) 2 Ch. 600, 605, 607, *per* Lindley and Lopes, L. JJ.: *In re Burroughs, Wellcome & Co.*, (1904) 1 Ch. 736. An old mark was not considered to be in common use unless it had been used by more than three firms, but the leave of the Court was necessary for the second or third registration of the same, or substantially the same, old mark. See note (*e*) to § 72, and note (*f*) to § 74.

(*i*) See *ante*, p. 56. The new clauses (d) and (e) were inserted on the recommendation of a select committee appointed to inquire into the working of the Act of 1883 for the purpose of obviating the difficulty which had been experienced in

construing the term "fancy word." Nevertheless, for some years the Courts showed a disposition to construe the new term "invented word" by the light of the decisions upon fancy words. It was accordingly held that the term "invented word" was impliedly subject to the qualification expressly imposed by the legislature in clause (c) in the case of known words, viz., that it should have no reference to the character or quality of the goods, and great ingenuity was exercised in discovering some covert reference to character or quality in words which, to the ordinary purchaser, would convey no meaning. Thus, registration was refused by Kay, J., to "Satinine" for starch (*In re Meyerstein*, 43 Ch. D. 604), by North, J., and the C. A. to "Somatose" for an extract of meat (*In re Farbenfabriken*, (1894) 1 Ch. 645), and by Kekewich, J., and the C. A. to "Solio" for photographic paper: *In re Eastman Photographic Materials Co.*, 14 P. R. 487. This last decision, however, was reversed by the House of Lords ((1898) A. C. 571), whose decision finally established, first, that it was not essential that an invented word should have no reference to the character or quality of the goods; secondly, that the decisions upon "fancy words" were no guide in construing the substituted clauses (d) and (e). But, as was said by Lord Shand, "there must be invention and not the appearance of invention only. It is not possible to define the extent of the invention required; but the words should be clearly and substantially different from any word in ordinary and common use. The employment of a word in such use, with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words, would not be an invented word; and a word would not be 'invented' which, with some trifling addition or very trifling variation, still leaves the word one which is well-known or in ordinary use, and which would be quite understood as intended to convey the meaning of such a word." Registration was also refused by Kekewich, J., to the word "Electrozone" (*In re British Electrozone Co.*, 13 P. R. 447) on the ground that it was a word known in the United States, and by the same learned judge and the C. A. to "Pirle" (*In re Ripley*, 15 P. R. 154) on the ground that it was the equivalent of "pearl": and these cases appear to be unaffected by the decision of the House of Lords. So "Uneeda" was refused registration as being a mis-spelling of "you need a": *In re Uneeda T. M.*, (1901) 1 Ch. 550: (1902) 1 Ch. 783. So in Canada "Shur-on" has been held not to be an invented word for pince-nez, as being equivalent to "Sure on": *Kirstein, Sons & Co.* v. *Cohen Bros.*, 39 Can. Sup. Ct. 286. But "Vezet," though said to be the Dutch equivalent to V Z, was allowed, subject to a disclaimer by the applicants of the exclusive right to the letters V Z: *In re Verschure & Zoon*, 22 P. R. 568. Again, the word "Eboline" (*In re Salt*, (1894) 3 Ch. 166) was held incapable of registration by Chitty, J., as being a geographical name owing to the existence in Italy of a town called "Eboli": cf. *In re Magnolia Metal Co.*, (1897) 2 Ch. 385. The following words were also held bad for various reasons:—"Absorbine" *Christy* v. *Tipper*, (1904) 1 Ch. 696: (1905) 1 Ch. 1); "Bioscope" (*Warwick Trading Co.* v. *Urban*, 21 P. R. 240); "Haematogen" (*Hommel* v. *Gebrüder Bauer & Co.*, 21 P. R. 576; 22 P. R. 43); "Diabolo" *In re Philippart*, 25 P. R. 565), and in the Cape Colony "Rooibosch" (*Heatie Bros.* v. *Hartley*, Cape Good Hope, 26 S. C. R. 586). On the other hand, the word "Mazawattee," which was compounded of two words of different foreign languages, viz., Hindustani and Cingalese, was held to have been properly registered for tea: *In re Densham*, (1895) 2 Ch. 176. So "Savonol" *J. C. & J. Field & Co., Ld.* v. *Wagel Syndicate, Ld.*, 17 P. R. 266); "Tachytype" (*In re Linotype Co.*, (1900) 2 Ch. 238); "Kodak" (*Kodak, Ld.* v. *London Stereoscopic and Photographic Co., Ld.*, 20 P. R. 337), were held to be admissible as invented words. With regard to the admissibility of foreign words Lord Herschell said, in *In re Eastman Photographic Materials Co.*, (1898) A. C. 571, 581, "I do not think that a foreign word is an invented word simply because it has not been current in our language. At the same time I am not prepared to go so far as to say that a combination of words from foreign languages so little known in this country that it would suggest no meaning, except to a few scholars, might not be regarded as an invented word."

(*k*) See *ante*, p. 59. The reason for inserting in clause (e) the condition that the word shall have no reference to the character or quality of the goods is explained by Lord Herschell in *In re Eastman Photographic Materials Co.*, (1898) A. C. 571, to be that "the vocabulary of the English language is common property; it belongs alike to all, and none ought to be permitted to prevent the other members of the

community from using for purposes of description a word which has reference to the character or quality of the goods," and upon this point there was no difference between the policy of the Act of 1883 and the Act of 1888. Thus, in *In re Dunn*, 41 Ch. D. 439, where an application under the Act of 1883 to register the words "Fruit Salt" for baking powder was opposed by Eno, who had used the name for a medicine, Fry, L. J., said, "I cannot help regarding Mr. Eno's attempt as an instance of that perpetual struggle which it seems to me is going on, to enclose and appropriate as private property certain little strips of the great open common of the English language." But, as was subsequently pointed out by Lord Herschell, this reason does not apply to an invented word—a word which is newly coined. Names of imaginary persons, such as the characters in a romance, were included under this clause, and did not fall under clause (a): *In re Holt*, (1896) 1 Ch. 711. Now any word can be registered with the sanction of the Board of Trade or the Court under § 9 (5) of the Act of 1905.

In *In re Magnolia Metal Co.*, (1897) 2 Ch. 371, objection was taken that "Magnolia" was a geographical name by reason of the existence of certain places of that name in the United States. The Court of Appeal in affirming the decision of Kekewich, J., overruling this objection, interpreted the term "geographical name" as follows:—"It must, we think, in the absence of special circumstances, be interpreted so as to be in accordance in some degree with the general and popular meaning of the words, and a word does not become a geographical name simply because some place upon the earth's surface has been called by it For example, we agree with Kekewich, J., that the word 'Monkey' is not proved to be a geographical name by showing merely that a small and by no means generally known island has been called by that name. If, indeed, in its primary and obvious meaning the word has reference to locality, as the word 'Melrose' in *Van Duzer's Case* (34 Ch. D. 623), or the word 'Eboli' in *Sir Titus Salt & Co.'s Case* ((1894) 3 Ch. 166) (from which Chitty, J., declined to distinguish the derivative 'Eboline'), it may well be a geographical name within the meaning of the sub-section. Even where the primary signification is not geographical, if the name is really a local name (however little known the locality may be), and the name is given because of the connection of the article with the locality, whether that be real or imputed only by those who give the name, it may well be a geographical name within the meaning of the sub-section. An instance of this is to be found in the case of the word 'Apollinaris,' given to the water from a spring known as the Apollinaris Spring. So, if 'Magnolia' had been the name of a place where the metal was manufactured, we should have been by no means inclined to say that it would not be a geographical name when applied to the article manufactured in the place having the name." See also *per* Kekewich, J., in *In re Apollinaris Co.*, (1891) 2 Ch. 186, and *In re Clement & Cie.*, (1900) 1 Ch. 114. Under this head the word "Quaker" as applied to spirituous liquors was held to be a good trade mark (*In re Ellis & Co.*, 21 P. R. 617): but the word "Century" was held to be inadmissible as referring to quality or character: *In re Printing Machinery Co*, 23 P. R. 38.

(*l*) "Figures" meant numerals. See *Ex parte Stephens*, 3 Ch. D. 659. In the Act of 1905 the word "numerals" is substituted. When it was wished to register the same essential (or "material," by which nearly the same thing appears to have been meant) particular, with a number of varying additions, the proper course was to register the marks as a series, under § 66, *q.v.* See also note (*e*) to § 72, *infra*. Inasmuch as the parts of a combination mark which were not within the definition of "essential particulars" were not entitled to registration or protection when standing alone, there could not be infringement of a combination mark unless the essential particular was taken. See *In re Hudson*, 32 Ch. D. 311; *In re Atkins' Filter & Engineering Co., Ld.*, 3 P. R. 164; *Burland & Co. v. Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274; *Watt v. O'Hanlon*, 4 P. R. 1. In *In re Horsburgh*, 53 L. J. Ch. 237, where a registered trade mark consisted of a distinctive device and a descriptive word, it was held that substantially the same descriptive word might be registered by another firm with a different device, from which it follows that the use of the second trade mark would be no infringement of the first.

The Instructions under this Act prohibited the registration of the following as new marks or prominent parts of new marks:—

The Royal Arms, or arms so nearly resembling them as to be calculated to deceive.

Representations of the Queen, or of any member of the Royal Family.

Representations of the Royal Crown.
The National Arms or Flags of Great Britain. (See *Ex parte Davids & Co.*, 16 U. S Pat. Gaz. 94, as to the American practice.)
Prize or exhibition medals were also formerly excluded, but are now admitted. (As to these, see *Batty* v. *Hill*, 1 H. & M. 264; *Taylor* v. *Gillies*, 59 N. Y. 331; *In re Bush & Co.*, 10 U. S. Pat. Gaz. 164; *In re Brook*, 26 W. R. 791; *In re Farina* (2), 27 W. R. 456. But they could not be treated as constituting an essential particular: *In re Bryant & May, Ld.*, 8 P. R. 69.)

(*m*) If the essential particular claimed was a distinctive label, it seems very doubtful whether the applicant could be called on to disclaim anything contained in it. "The truth is that the label does not consist of each particular part of it, but consists in the combination of them all": *per* Lord Esher, M. R., *Pinto* v. *Badman*, (1891) 2 Ch. 186, 191. And see *per* Fry, L. J., at p. 188; also in *In re Apollinaris Co.*, (1891) 2 Ch. 186, 233; and *per* Chitty, J., in *In re Smokeless Powder Co.*, (1892) 1 Ch. 590; also *In re Clement & Cie.*, (1900) 1 Ch. 114. See also *In re Albert Baker & Co.*, (1908) 2 Ch. 86, a decision under the Act of 1905; and *In re Weingarten Bros.*, 29 V. L. R. 965, a decision under the Victorian Act of 1890.

Where an application was made for registration as an old mark of a composite mark which did not fall within the definition in § 64 (3) (ii) so that the application could only be made under (1) and (2), it was held that for the purposes of disclaimer it was immaterial whether the application was in respect of a new or an old mark: *In re Wright, Crossley & Co.*, (1900) 2 Ch. 218. Where a label was composed of two parts, one part consisting merely of directions for use and descriptive matter, it was held that that was added matter which ought to be disclaimed: *In re Royal Baking Powder Co.*, 19 P. R. 261. Where the essential particular consisted in the combination of devices, it was held sufficient so to describe it in the application without stating the nature of the combination; it was held further that, provided that a mark complied with the requisites of § 64, the whole mark need not appear on any one ticket, label, stamp or impression, but that a combination of several marks might be treated as equivalent to a single mark, and that the component parts of such combination mark need not all be visible at the same time. Accordingly, a registration of a mark consisting of three separate labels was held good: *In re A. & J. Crompton & Co., Ld.*, 19 P. R. 265. A disclaimer under the Act was held to be an answer to an interlocutory application for an injunction by the registered proprietor founded on his common law right to restrain the use of the disclaimed matter in a manner calculated to deceive: *Rosenthal* v. *Reynolds*, (1892) 2 Ch. 301; but this case was questioned in Scotland, and an interdict has been granted under similar circumstances: *Bayer* v. *Baird*, 15 P. R. 615. And see *Packham & Co.* v. *Sturgess & Co.*, 15 P. R. 652, a passing-off action in which North, J., himself recognized that the defendants were not entitled to use a name, the exclusive right to which the plaintiffs had disclaimed as being descriptive, so as to represent that the defendant's goods were the plaintiffs'; and the fact that the application in *Rosenthal* v. *Reynolds*, (1892) 2 Ch. 301, was interlocutory must be borne in mind. Cf. *In re Loftus*, (1894) 1 Ch. 193. Under the Act of 1905 the effect of disclaiming is limited, see § 15.

(*n*) "Person" includes "company," and under this section, as amended, added words which, if used alone, might require to be disclaimed, need not be disclaimed if used as part of the name of the company owning the trade mark: *In re Smokeless Powder Co.*, (1892) 1 Ch. 590. And see *In re Clement & Cie.*, 16 P. R. 173.

(*o*) It was not necessary that the full name, either in the case of a single trader, or in the case of a firm, should be placed upon the trade mark, if it was used fairly and *bonâ fide* in such a way that it could not be mistaken for anything else than the name of the manufacturer of the goods to which the mark related; nor was it necessary that the name should be the private name of the owner if he traded under another name; and it was also no objection that the name should be used in the possessive case. Accordingly it was held by Stirling, J., explaining *Pirie* v. *Goodall*, (1892) 1 Ch. 35, that the firm of J. & J. Colman were not bound to disclaim the word "Colman's": *In re Colman*, (1894) 2 Ch. 115. But a firm describing themselves as successors to another firm had to disclaim the name of their predecessors: *In re Birmingham Vinegar Brewery Co.*, 11 P. R. 195.

(*p*) "The names of foreign springs, when added to a trade mark tendered for registration by a limited company with a registered office in England, are [were] not protected against the requirement of a disclaimer by the exception in favour of a

'place of business'": *In re Apollinaris Co.* (1891) 2 Ch. 186, 211, *per* Kekewich, J.

Old marks.

(*q*) See *ante*, p. 61. The wording of this subsection was wider than that of the corresponding provision in § 10 of the Act of 1875. *E.g.*, a single letter might be registered as an old mark, though it was formerly excluded from registration: *In re Mitchell* (1), 7 Ch. D. 36. An old mark had to be registered as a whole, and in the exact form in which it had been actually used. Thus, in *In re Royal Baking Powder Co.*, W. N. 1880, p. 49, the applicants were not allowed to register the word "Royal," or the words "Royal Baking Powder," apart from the rest of the label with which they had been used. And see *Wright, Crossley & Co.* v. *Royal Baking Powder Co.*, Cape Good Hope, 15 S. C. R. 9. So in *In re Simpson, Davies & Sons*, Jessel, M. R., January 12th, 1881, the registration of a trade mark consisting of a cross would have been held to be wrongful, by reason of the points of the cross registered being differently shaped from the points of the cross used, had it not been proved that there had been user in both forms. So in *Russell & Sons, Ld.* v *Smith*, Jessel, M. R., June 18th, 1880, it was held that registration was wrongful because the user had been of a rough outline of a crown, and the registration was of an elaborate crown, with all the shading filled in. And see cases at pp. 62, 63. On the other hand, in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479, the House of Lords directed registration of the essential particular, omitting the immaterial additions. However, by §§ 64, 74, the entire mark would be registered, with a disclaimer of the additions See *Baker* v. *Rawson*, 45 Ch. D. 519; *In re Meens*, (1891) 1 Ch. 41; *In re Fuente*, (1891) 2 Ch. 166; *In re Phillips*, (1891) 3 Ch. 139. A mark must not be registered as an old mark if it was only used before 1875 as part of a mark: *Baker* v. *Rawson*, 45 Ch. D. 519; *In re Fuente*, (1891) 2 Ch. 166; *Richards* v. *Butcher* (2), (1891) 2 Ch. 522; *In re Kinahan*, 10 P. R. 393; *In re Heddle*, 20 P. R. 599; nor if used only on packing cases to identify the contents: *In re Powell*, (1893) 2 Ch. 388; (1894) A. C. 8. And see *Richards* v. *Butcher*, (1891) 2 Ch. 522. And if a device had been registered as an old mark, but was never used *per se*, the registration was bad and would be rectified upon the application of a party aggrieved: *Baker* v. *Rawson*, 45 Ch. D. 519, 528. See also *In re Fuente*, (1891) 2 Ch. 166.

Where it was sought to register as a new trade mark a mark which, though not used before 1875, had yet been used for some years with fraudulent misstatements contained in it, registration would be refused, even though the misstatements were corrected in the mark as tendered for registration: *In re Fuente*, (1891) 2 Ch. 166. So also where the word "registered" had been wrongly applied to the mark, unless this was due to a *bonâ fide* mistake: *In re Altman*, 21 P. R. 753. Compare *In re Lyle and Kinahan, Ld.*, 24 P. R. 249, where the misrepresentation being not in the mark itself but in the price lists, and being due to a mistake, the registration was allowed to proceed.

Where blanks were left in the marks as registered, there was nothing to prevent the proprietor from filling them up in actual use: *Neeman* v. *Pinto*, 4 P. R. 508, *per* Kekewich, J.: *Melachrino* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215: *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888.

Registration under this Act was, by the Instructions, refused to the words "Registered," "Registered Design," "Copyright," "Entered at Stationers' Hall," "To Counterfeit this is Forgery," also to pictorial representations of goods to which the marks were to be applied, or names of persons in the possessive case in combination with the names of goods.

Connection of trade mark with goods.

See T. M. A. 1905, s. 8.

65. A trade mark must be registered for particular goods or classes of goods (*a*).

(*a*) This came from § 2 of the Trade Marks Registration Act, 1875. The appropriation of a trade mark to particular goods or classes of goods was not new. See *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Ainsworth* v. *Walmsley*, L. R. 1 Eq. 518; *Somerville* v. *Schembri*, 12 App. Cas. 453. See also *per* Pearson, J., in *In re Lyndon*, 32 Ch. D. 109: and *per* North, J., in *Hart* v. *Colley*, 44 Ch. D. 193. By the Rules under the Act of 1875, it was provided that where a trade mark was registered, a similar trade mark should not be registered in the name of another proprietor for any goods in the same class without the leave of the Court: but this requirement

of the leave of the Court was afterwards limited to cases in which the second application was in respect of the same goods or description of goods. See § 72. The fact that a trade mark had been registered for goods in one class would not prevent another from obtaining registration for the same mark for different goods in another class: *In re Lake and Elliott*, 20 P. R. 605. Under the Act of 1875, registration for part of a class was granted to old marks: in *Ex parte Barrows*, W. N. 1877, p. 119; L. J. N. of C. 1877, p. 110; *In re Lysaght*, Dig. 623; *In re Rabone*, Dig. 643; *In re Ashton & Sons*, Hall, V.-C., February 26th, 1881; and to new marks in *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Braby & Co.*, 21 Ch. D. 223; and *In re Clark & Co.*, 27 Sol. J. 396, though in this case the mark was common for other goods in the class; and refused to a new mark in *In re Hargreaves*, 11 Ch. D. 669. And see *In re De Otaduy*, W. N. 1885, p. 177; *In re Metcalf*, 31 Ch. D. 454. Registration ought to be applied for only in respect of goods for which the mark was used or intended to be used: *Edwards* v. *Dennis*, 30 Ch. D. 454; *Hargreave* v. *Freeman*, (1891) 1 Ch 39; *In re Batt & Co.*, (1898) 2 Ch. 432; (1899) A. C. 428; *In re Suter, Hartmann & Kahtjen's Composition Co., Ld.*, 19 P. R. 42; *In re Hart*, 19 P. R. 569; *Anglo-Swiss Condensed Milk Co.* v. *Pearks, Gunston & Tee*, 20 P. R. 509; 21 P. R. 261. In cases of Sheffield marks within § 81 (2), the Cutlers' Co. were to register old marks for all the metal goods in § 81, though they might have been used for some only of such goods: *per* North, J., in *In re Lambert*, 5 P. R. 542. If a mark was used for other goods than those in respect of which it was registered, even though in the same class, such user might be restrained if a similar mark had been used and registered by another firm in respect of those other goods: *Upper Assam Tea Co.* v. *Herbert & Co.*, 7 P. R. 182.

Registration of a series of marks.
See T. M. A. 1905, s. 26.

66. When a person claiming to be the proprietor of several trade marks which, while resembling each other in the material particulars thereof, yet differ in respect of (a) the statement of the goods for which they are respectively used or proposed to be used, or (b) statements of numbers, or (c) statements of price, or (d) statements of quality, or (e) statements of names of places, seeks to register such trade marks, they may be registered as a series in one registration. A series of trade marks shall be assignable and transmissible only as a whole, but for all other purposes each of the trade marks composing a series shall be deemed and treated as registered separately (*a*).

a. This section was entirely new, but a mode of registration bearing a resemblance to that for which provision is here made was suggested by the Court of Appeal as the right one in *In re Barrows*, 5 Ch. D. 353, and was occasionally adopted. See note *c* to § 72, *infra*, and cases there cited. In some cases, however, this form of registration was not considered satisfactory by the applicant, usually because, the different combinations not being individually registered, the registered proprietor was unable to get such a certificate of registration as would enable him to obtain registration in foreign countries. In *In re Fox & Co.*, Hall, V.-C., May 7th, 1881, the V.-C. allowed a person who had registered a device together with a word (which, under the Act of 1875, could not be an essential particular in a new trade mark) to obtain a separate registration of the same device with a different word, so that the same one essential particular was separately registered twice over, with additions which, for the purposes of the Act, were immaterial. After this decision, separate registration was generally granted by the registrar to marks which would more properly have been registered in a series, or, as it was more generally called, by representation. The concluding words of this section rendered separate registration unnecessary, but there was nothing to prevent it. It should, however, be noted that in *Baker* v. *Rawson*, 45 Ch. D. 519, 530, North, J., appears to have considered that a mark already registered should not be allowed to be registered over again with a mere addition common to the trade and consequently disclaimed. This decision was followed by Cozens-Hardy, J., in *In re Player*, (1901) 1 Ch. 382, but under the present Act the same proprietor is not debarred from registering two similar marks (§ 19), and under the former Acts the fact that

a mark had been registered superfluously was not necessarily a ground for taking it off the register at the instance of a rival trader:—*In re A. & A. Crompton & Co.*, 19 P. R. 265. See *In re Phillips*, (1891) 3 Ch. 139.

Trade marks may be registered in any colour.

67. A trade mark may be registered in any colour [or colours], and such registration shall (subject to the provisions of this Act) confer on the registered owner the exclusive right to use the same in that or any other colour [or colours] (*a*).

See T. M. A. 1905, s. 10.

The amendments in this section were made by § 11 of the Act of 1888.

(*a*) In the early Acts and Rules no mention was made of colour, on account of the difficulty of properly advertising marks applied for in colour. See *per* Jessel, M. R., in *In re Robinson*, 29 W. R. 31. A trade mark registered in black and white consisted of the device registered, whatever might be the colour in which it was used, and it was therefore regarded as entitled to protection in whatever colour it might be used, and against rival marks in whatever colour: *Nuthall* v. *Vining*, C. A., Jan. 21st, 1880. There it was said that, in cases of alleged infringement, the true test of comparison was to compare the designs of the two trade marks in the same size and free from colour, and that similarities in respect of colour would only be regarded in order either to prove fraud, or to turn the scale when the question of infringement, leaving colour out of sight, was very difficult to decide. In *Hanson* v. *British Tea and Trading Association, Ld.*, Bacon, V.-C., April 9th, 1884; C. A., June 19th, 1884, a label had been used, which, as registered under the Act of 1875, was divided into three parallel stripes of equal width, of which the outer ones were shaded and the middle one was left white, and which had the words "'Red, white, and blue' label" printed across it, and the name of the plaintiffs at the foot, and which, in actual use, was coloured with the French tricolour: and though it was registered without colour, an injunction was granted to restrain the use of a label similarly coloured and containing the same words. But where a fresh application was made to register the same label for other goods under this Act, registration was refused by the comptroller, and his refusal was upheld by the Court, on the ground that the distinctiveness required in a mark tendered for registration could not consist solely in colour: *In re Hanson*, 37 Ch. D. 112. When the question was whether a trade mark sent in for registration was too similar to one already registered for registration to be permitted, and the trade mark already on the register was in practice used in colour, the question was taken into consideration whether the subsequent trade mark, if similarly coloured, would be likely to cause deception: *In re Worthington*, 14 Ch. D. 8; and in *In re Bass, Ratcliff & Gretton, Ld.*, 19 P. R. 529, Romer, L. J., doubted whether in determining whether an old mark, which was always used in a particular colour, was distinctive, all consideration of colour ought to be omitted. In *In re Jeffrey & Co.*, Stirling, J., May 18th, 1888, the applicants for registration were allowed to bind themselves by a note on the register not to use the trade mark in black colour, nor in so dark a hue as to resemble black; and in *In re Johnson, Philpott & Co.*, North, J., Feb. 21st, 1888, the register was rectified by consent by adding a note that the registered proprietor was only to use his mark in blue and white. By § 10 of the Trade Marks Act, 1905, a trade mark may be limited to one or more specified colours.

In Canada, the same effect as that provided by this section is given to registration in colour: *Smith* v. *Fair*, 14 Ont. Rep. 729; and in the United States also a trade mark cannot consist in colour alone: *Ex parte Landreth*, 31 U. S. Pat. Gaz. 1441; *Fleischmann* v. *Starkey*, 25 Fed. Rep. 127.

In some exceptional cases, under the Act of 1875, trade marks were found to be incapable of advertisement or registration in black and white, the only peculiarity being the combination of colours, *e.g.*, where coloured threads were twisted in the wick of a candle, or combined in the selvage of a piece of stuff. In such cases the marks were registered by deposit, actual specimens of the marked article being sent in to the registrar and deposited by him at the Patent Museum. For instance, there were so deposited specimens of certain marks for worsted stuffs in Class 34, numbered 5844 to 5850, and consisting of selvages containing distinctive coloured threads. See "Trade Marks Journal," Vol. II., No. 51. p. 88. The use of colour being very frequently of importance in the cotton trade, it was decided that all

marks for goods in the cotton classes 23—25) should be registered by deposit. When a trade mark was thus registered by deposit, the actual thing deposited, colour included, constituted the trade mark, so that in questions of infringement the point was whether the device, plus colour, was imitated in the offending mark with sufficient exactness to deceive. And the same rule was applied in registration cases, colour being taken into consideration in estimating the degree of resemblance. Thus, in *In re Robinson*, 29 W. R. 31, a device of a silver rupee being already registered, another applicant sought to obtain registration of a device of a gold mohur, and this was granted, on the ground that all that was registered was a silver coin, notwithstanding that, if the second mark were to be coloured silver, deception would be probable. In such cases it was held that the proper manner of regarding the colour was a question for the trade, and that if, in the opinion of the trade, deception might arise, the Court would act on that opinion: *Mitchell* v. *Henry*, 15 Ch. D. 181. See also *In re Christiansen*, 3 P. R. 54, as to the opinion of the trade. Besides the cases above referred to, see *In re Orr-Ewing*, 8 Ch. D. 798; 1 App. Cas. 479; *In re Brook*, 26 W. R. 791; and *In re Jones Bros. & Co.*, Hall, V.-C., July 10th, 1880.

This section 67 appears to have had the effect of giving trade marks registered by deposit at the Patent Office Library, or registered in pursuance of an application accompanied by coloured representations, the same advantages as registration in black and white, so that the colour of a trade mark registered in colour would not, except in very exceptional cases, such as that of the coloured selvage, be a part of the mark, but after one trade mark was so registered, another would not be entitled to be used or registered, if it would be likely to be mistaken for the first, on the supposition that the first mark was used in any different colour from that in which it was registered.

68. Every application for registration of a trade mark under this part of this Act shall as soon as may be after its receipt be advertised by the comptroller (*a*), [unless the comptroller refuse to entertain the application] (*b*).

Advertisement of application.
See T. M. A. 1905. s. 13.

The amendments in this section were made by § 12 of the Act of 1888.

(*a*) "The object of the advertisement is to give to persons who might be claimants of the trade mark proposed to be registered the opportunity of coming forward and objecting": *per* Hall, V.-C., *In re Meikle*, 24 W. R. 1067. Consequently, as was there held, when a refusal of the comptroller to register a trade mark was overruled, the only order that could be made was an order for him to proceed with the application, so that the usual course of advertisement, &c., might be followed. This course was adopted by Hall, V.-C., in *In re Orr-Ewing*, 8 Ch. D. 794, and subsequent cases. For a similar reason a mark which had been wrongfully registered would be removed from the register, even though a new application might be successfully made to register it: *In re Apollinaris Co.*, (1891) 2 Ch. 186, 231. It was not, however, incumbent on persons to see the advertisement, so that if a common mark had been registered, in consequence of the firms interested in opposing it having failed to see the advertisement of the application, they were able to obtain the removal of the mark from the register, with costs, on application within a reasonable time after the registration was brought to their knowledge: *In re Hyde & Co.*, 7 Ch. D. 724. See *In re Palmer* (3), 24 Ch. D. 504; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Lloyd & Sons*, 27 Ch. D. 646; *In re Wragg*, 29 Ch. D. 551; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Spencer*, 54 L. T. N. S. 659; *In re Apollinaris Co.*, (1891) 2 Ch. 186.

(*b*) This exception was no doubt inserted in consequence of the case of *Ex parte Saxlehner*, Q. B. D., July 7th, 1887, in which the comptroller refused to advertise applications by Saxlehner for the registration of certain trade marks, on the ground that similar marks were already registered in the name of the Apollinaris Co., so that registration could not be granted and advertisement was useless; but on application by Saxlehner the Q. B. Div. granted a rule to show cause why a mandamus to advertise should not issue. The matter does not appear to have been further contested, and the marks were advertised in the "Trade Marks Journal" for July 27th, 1887.

Opposition to registration.
See T. M. A. 1905, ss. 14, 59.

69.—(1.) Any person (*a*) may within *two months* [one month or such further time, not exceeding three months, as the comptroller may allow (*b*)] of the *first* advertisement of the application, give notice in duplicate at the Patent Office of opposition (*c*) to registration of the trade mark, and the comptroller shall send one copy of such notice to the applicant.

(2.) Within *two months* [one month] after receipt of such notice or such further time as the comptroller may allow, the applicant may send to the comptroller a counter-statement in duplicate of the grounds on which he relies for his application, and if he does not do so, shall be deemed to have abandoned his application.

(3.) *If the applicant sends such counter-statement, the comptroller shall furnish a copy thereof to the person who gave notice of opposition, and shall require him to give security in such manner and to such amount as the comptroller may require for such costs as may be awarded in respect of such opposition; and if such security is not given within fourteen days after such requirement was made or such further time as the comptroller may allow, the opposition shall be deemed to be withdrawn.*

(4.) *If the person who gave notice of opposition duly gives such security as aforesaid, the comptroller shall inform the applicant thereof in writing, and thereupon the case shall be deemed to stand for the determination of the Court* (*d*).

[(3.) If the applicant sends such counter-statement, the comptroller shall furnish a copy thereof to the person who gave notice of opposition, and shall, after hearing (*e*) the applicant and the opponent, if so required, decide whether the trade mark is to be registered (*f*); but his decision shall be subject to appeal to the Board of Trade, who shall, if required, hear (*e*) the applicant and the opponent and the comptroller, and may make an order determining whether, and subject to what conditions (if any), registration is to be permitted.

(4.) The Board of Trade may, however, if it appears expedient, refer the appeal to the Court, and in that event the Court shall have jurisdiction to hear and determine the appeal, and may make such order as aforesaid (*g*).

(5.) If the applicant abandons his application after notice of opposition in pursuance of this section, he shall be liable to pay to the opponent such costs in respect of the opposition as the comptroller may determine to be reasonable.

(6.) Where the opponent is out of the United Kingdom he shall give the comptroller an address for service in the United Kingdom.]

(*a*) This section came from the old rules. The amendments were made by § 13 of the Act of 1888.

There was no limitation of the right of opposing to persons who could themselves claim registration: *In re Riviere & Co.*, 26 Ch. D. 48; and "the statute allows any person to oppose an application for registration, whether he has or has not a personal interest in the result": *per* Lord Macnaghten, in *Eno* v. *Dunn*, 15 App. Cas. 252, 262; nor was there any limitation of the right of opposing on the ground of similarity to proprietors of trade marks registered for the same goods, or even for goods in the same class, as the goods for which the applicant was seeking to register. But an opposition on this ground would, of course, not succeed unless the two marks would come into collision in some way when being used. Thus, in *In re Simpson, Davies & Sons*, Jessel, M. R., Jan. 12th, 1881, the application was for registration in class 22 for railway waggons, and the successful opposition was by a firm registered in class 4 for coal, whose trade mark was used by placing it on the waggons in which the coal

was conveyed and sold. In *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278, a mark applied for in respect of wines was not allowed to be registered on account of its similarity to a mark already registered for spirits; and in the similar case of *In re Turney*, 11 P. R. 37, beer and rum were for this purpose held to be the same description of goods. So in *In re La Union Agricola Sociedad Anonima*, 25 P. R. 295 (beer and liqueur). So also in Victoria, *In re Webendorfer Bros.*, 23 V. L. R. 34 (gunpowder and cartridge cases). And see *In re Gutta Percha and Rubber Manufacturing Co. of Toronto, Ld.*, 26 P. R. 84, 428, a decision under the Trade Marks Act, 1905, where it was held that confusion might arise between goods falling within different classes for the purposes of registration. See also *Boord and Son* v. *Huddart*, 21 P. R. 149; *Finlay* v. *Shamrock Co.*, 22 P. R. 301; *Blogg* v. *Anderson*, N. S. W., 21 L. R. Eq. 238, where a similar question arose in an action for infringement. In *Lever* v. *Abrams*, 8 C. L. R. 609, the Supreme Court of Australia held that a word registered and used for soaps could not be registered by another applicant for boot polish. In *In Re Dunn*, 41 Ch. D. 439; 15 App. Cas. 252, the opposition failed in the Court of Appeal, because a mark used for baking-powder was thought not to be capable of being mistaken for a mark used for powder for an effervescing drink, but in the House of Lords the opposition succeeded. Registration was also refused on the ground of fraudulent misstatements contained in the mark as previously used for several years, though corrected in the mark as tendered for registration: *In re Fuente*, (1891) 2 Ch. 166. The opposition might be by a person with whom the applicant had covenanted not to use the mark. See the Victorian case of *Ex parte Grist & Bowring*, 11 V. L. R. 630.

It was thought that if what was desired was not to have the registration altogether refused, but to have it limited by the addition of a note stating, *e.g.*, that the mark was only to be used in trade with a particular country, and the applicant was willing to consent to such limitation, it was not necessary to go through the process of entering a notice of opposition, but that an order directing that the mark, if registered, was to be registered with the addition of a note to the desired effect, might be obtained by the applicant on an *ex parte* application: *In re Keep Brothers*, 25 Ch. D. 187. The entry of such notes was, however, objected to by the comptroller, and was not allowed in later cases.

(*b*) The period allowed seems to have been at most three months from the date of the advertisement, not three months after one month, *i.e.*, four months. See *In re Moet*, 7 P. R. 226, 230.

(*c*) The notice of opposition might be amended, even after the counter-statement had been put in: *In re Moet*, 7 P. R. 226.

(*d*) This being the time at which the case stood for the determination of the Court, it was held that the costs of the previous proceedings in the office could not be given to a successful opponent: *In re Brandreth*, 9 Ch. D. 618: *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278. Where a claim had been wrongfully set up to use a certain trade mark, the claimants were ordered to pay the costs of cross adjourned summonses, as well as of an action which had been brought to enforce the right, even though they had not actually used the mark in question: *Davis* v. *Tylor*, Jessel, M. R., April 24th, 1879. In *In re Hudson*, 32 Ch. D. 311, no costs of an opposed application were given to successful applicants, on the ground that they had caused the litigation by the manner in which they had put forward their case. By the rules under the Act of 1883 the proceedings subsequent to the case standing for the determination of the Court were to take the form of an application by the applicant to the Court by summons for leave to register. Now (T. M. A. 1905, § 14) the proceedings are assimilated to those in the case of an unopposed application for registration, and the rights of the parties are decided by the Registrar, with an appeal to the Court, or, by consent, to the Board of Trade. Under the earliest Acts and Rules the opponent was required to take out a summons for directions, which almost always resulted in the applicant being directed to apply for leave to register. See *In re Simpson, Davies & Sons*, 15 Ch. D. 525: also *In re Johnston*, 43 L. T. N. S. 672.

(*e*) It seems that if, for any reason, an opponent was not heard, his course was to apply for a mandamus: see *per* Bowen, L. J., in *In re Lambert*, 6 P. R. 344.

(*f*) The position which the comptroller ought to take up was thus defined by the Law Peers who formed the majority in *Eno* v. *Dunn*, 15 App. Cas. 252. Lord Watson said, "The statute nowhere confers an absolute right to register a

trade mark. The comptroller, by § 62, may, if he thinks fit, refuse to register, his refusal being subject to an appeal to the Board of Trade, who may either hear the parties, and decide whether and subject to what conditions, if any, registration is to be permitted, or may refer the matter to the Court for its determination. § 72 (2) prohibits the registration, with respect to the same goods or description of goods, of a trade mark so nearly resembling a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive. That provision is supplemented by the broader enactments of § 73 to the effect that 'It shall not be lawful to register, as part of or in combination with a trade mark, any words the exclusive use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice, or any scandalous design.' These prohibitory clauses cast upon the applicant the duty of satisfying the comptroller, or the Court, that the trade mark which he proposes to register does not come within their scope. In an inquiry like the present, he does not hold the same position which he would have occupied if he had been defending himself against an action for infringement. There the onus of showing that his trade mark was calculated to mislead rests, not on him, but upon the party alleging infringement; here he is *in petitorio*, and must justify registration of his trade mark by showing affirmatively that it is not calculated to deceive. It appears to me to be a necessary consequence that, *in dubio*, his application ought to be disallowed." Lord Herschell said, "The case was argued on behalf of the respondent as if he had an absolute right to have any trade mark registered which was not proved to fall within the terms of either the 72nd or 73rd section of the Act. I do not so read the statute. Those sections prohibit the registration of a trade mark in certain specified cases; but there is no duty cast upon the comptroller of registering every other trade mark that may be applied for. On the contrary, whilst he is in certain cases prohibited from registering, a discretion whether to register or not appears to me to be in all cases plainly conferred. Of course this discretion must be reasonably and not capriciously exercised: but it is, in my opinion, a reasonable exercise of it to refuse registration when it is not clear that deception might not result from it." See, however, *per* Lord Blackburn in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479, as to old marks. In accordance with the principles above laid down by Lord Herschell, registration of a device was refused by Kekewich, J., on the ground that a similar device was used by the opponent as an advertisement though not registered as a trade mark, notwithstanding that the case did not fall within either § 72 or § 73: *In re Sphometer Grip Armoured Hose Co.*, 10 P. R. 84; and North, J., came to a similar decision in the case of a label: *In re Roger* (2), 12 P. R. 149. And see *In re Pownd*, 18 P. R. 181; *In re Booth's Distillery Co., Ld.*, 21 P. R. 18; compare *In re Verity*, 19 P. R. 56. The comptroller had also power to deal with oppositions based on the alleged fraud of the applicant for registration: *In re Mael*, 7 P. R. 226.

(*q*) It was convenient that unless other directions were given by the Court or the Board of Trade, the appeal to the Court should be heard on the same evidence as before the comptroller: *In re Farrow*, 7 P. R. 260. But there was no binding limitation. See also *In re Roger*, 11 P. R. 637; *In re Kingsford & Sons*, 15 P. R. 197; *In re Extract of Meat (Baron Liebig) Photograph Brand, Ld.*, 17 P. R. 161, as to evidence where an appeal was referred to the Court. Under the Act of 1905 the declarations may be used in Court on an appeal (§ 49). On an opposed application coming before the Court, the Court had full jurisdiction to decide as to the validity of the mark, notwithstanding that the comptroller had originally, under § 62, passed it for registration: *In re Arbenz*, 35 Ch. D. 248. And where an application was duly opposed, all questions as to the validity of the mark were open to the consideration of the Court; but the Court would not readily overrule the comptroller: *In re Farrow*, 7 P. R. 260. The Court had no power to give leave to amend the notice of opposition, nor, after the appeal had been presented, had the comptroller, he being *functus officio*: *In re Robertson, Sanderson & Co.* (2), (1892) 2 Ch. 245. Where an opponent appealed against the comptroller, upon an application made by a Scotch or Irish firm having no address for service in the United Kingdom, and the appeal was referred to the Court, he might address the notice of motion to the comptroller only, and give informal notice of the proceedings to the applicant: *In re Robertson, Sanderson & Co.* (1), 9 P. R. 213. And see *In re King & Co.*, (1892) 2 Ch. 462. Where an opponent's appeal was referred to the Court, but before the hearing the parties agreed to its dismissal without costs, the registrar would not proceed with the registration without

an order of the Court; and in order to obtain the order, it was not sufficient for the applicant to produce the written consent of the parties, but the Court required the production of a consent brief: *In re Crosfield*, 15 P. R. 754.

Assignment and transmission of trade mark. **See T. M. A. 1905, s. 22.**

70. A trade mark, when registered, shall be assigned and transmitted (*a*) only in connection with the goodwill (*b*) of the business concerned in the particular goods or classes of goods for which it has been registered (*c*), and shall be determinable with that goodwill.

(*a*) This section came from § 2 of the Act of 1875.

Assignments and transmissions were to be entered in the register: see §§ 78, 87, *infra*. By § 4 of the Act of 1875, it was enacted that every proprietor registered in respect of a trade mark subsequently to the first registered proprietor should, as respected his title to that trade mark, stand in the same position as if his title were a continuation of the title of the first registered proprietor. This enactment was not repeated, the same result being effected by generalising the language of § 76. Compare the American case of *Walton* v. *Crowley*, 2 Bl. C. C. 440, R. Cox, 166.

(*b*) As to the connection between trade marks and the goodwill of the business, see *Cooper* v. *Hood*, 26 Beav. 293; *Churton* v. *Douglas*, Johns. 174; *Shipwright* v. *Clements*, 19 W. R. 599; *Colton* v. *Gillard*, 44 L. J. Ch. 90; *Ponto* v. *Badman*, 8 P. R. 181; *Hammond* v. *Malcolm, Brunker & Co.*, 9 P. R. 301; *In re Magnolia Metal Co.*, (1897) 2 Ch. 371; *In re Ashton*, 48 W. R. 389; *In re Harness*, 17 P. R. 40; *Reg* v. *Leconturier*, 25 P. R. 265; 27 P. R. 268; and the American cases of *Sohier* v. *Johnson*, 111 Mass. 238; *Williams* v. *Braun*, 44 Md. 303; *Taylor* v. *Bemis*, 4 Biss. 406; *Weston* v. *Ketcham* (1), 39 N. Y. Super. Ct. 54, and S. C. (2), 51 How. Pr. 455; *Morgan* v. *Rogers*, 19 Fed. Rep. 596; *Smith* v. *Fair*, 14 Ont. Rep. 729. "The main object of the restriction upon assignments imposed by the Act would seem to be to prevent confusion or deception by suggesting that the articles to which the mark is applied continue to have some connection or other with the original registered owner"; *per* Court of Appeal in *In re Magnolia Metal Co.*, (1897) 2 Ch. 371, 396; and it seems that in considering the sufficiency of the connection of the trade mark with the goodwill, regard must be had to this object. Where a trade mark has been placed on the register, but no business exists in which it is used, the mark cannot be assigned, since there is no goodwill to be assigned with it: *Ex parte Laurence Bros.*, 44 L. T. N. S. 98. See *In re Farina* (4), 44 L. T. N. S. 99. In *In re Wellcome*, 32 Ch. D. 213, the English agents of an American firm had registered in their own names two trade marks used by the latter, and subsequently assigned them to them; and it was held by Chitty, J., that the assignment being an assignment to the persons entitled to the goodwill of the business for the purposes of which the trade marks had been registered, it was an assignment of the trade marks in connection with the goodwill, within this section, notwithstanding that the persons originally registered had no interest in the goodwill; and where a member of a firm erroneously obtained registration in his own name of a mark belonging to the firm, the proper course was to assign to the firm, and the comptroller ought to register the assignment: *In re* [illegible], 9 P. R. 93; cf. cases on rectification at p. 639. As to goodwill, see Ch. IX.

(*c*) "An assignee has no exclusive right to a trade mark unless the assignment is of a business co-extensive with the trade mark as registered": *per* Fry, L. J., in *Edwards* v. *Dennis*, 30 Ch. D. 454. And an assignment of a trade mark with a goodwill consequently gives the assignee no right in the trade mark in connection with any goods other than those to which the goodwill extends: *Ib.*

A patentee is carrying on business, and has, therefore, an existing goodwill, as long as he receives royalties from licensees, though he does not himself manufacture: *In re Ralph*, 25 Ch. D. 194.

71. Where each of several persons claims to be registered as pro- Conflicting

claims to registration. See T. M. A. 1905, s. 20.

prietor of the same trade mark, the comptroller may refuse to register any of them until their rights have been determined according to law, and the comptroller may himself submit or require the claimants to submit their rights to the Court (*a*).

(*a*) This section came from § 5 of the Act of 1875. The rules under this Act directed that the mode of submission to the Court should be by special case. This was also provided by the Rules under the former Acts, and *Allsopp* v. *Walker*, Dig. 545, was heard on special case, and in *Ex parte Grimshaw*, W. N. 1877, p. 24, Hall, V.-C., refused to order otherwise. It was, however, found to be so difficult in practice to settle the statement of facts that in all cases of rival claim the practice was adopted of applying to the Court by way of motion or summons, asking at the same time for the leave of the Court to have the matter decided in that way, and it is believed that after the first year or two from the passing of the Act of 1875 there is no instance of a special case to be found. *Allsopp* v. *Walker* was a case in which the registration of a trade mark was objected to on the ground of its similarity to another trade mark, but the cases which this section and the rules under it appear to have been really intended to govern were cases in which not similar, nor even identical, trade marks were claimed, but in which *the same* trade mark was claimed, *e.g.*, where a partnership had been dissolved and a question had arisen between the former co-partners as to the way in which the trade marks of the partnership had been transmitted.

Restrictions on registration. See T. M. A. 1905, s. 19.

72.—(1.) Except where the Court has decided (*a*) that two or more persons are entitled to be registered as proprietors of the same trade mark, the comptroller shall not register (*b*) in respect of the same goods or description of goods (*c*) a trade mark identical with one already on the register with respect to such goods or description of goods.

(2.) [Except as aforesaid] (*d*) the comptroller shall not register (*b*) with respect to the same goods or description of goods (*c*) a trade mark *so nearly resembling* [having such resemblance to] a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive (*e*).

The amendments in this section were made by § 11 of the Act of 1888.

(*a*) This section came from § 6 of the Act of 1875, by which the "special leave" of the Court was required for such subsequent registration. Of this leave of the Court, Jessel, M. R., said in *In re Jelley, Son & Jones*, 51 L. J. Ch. 639, that it "is not a capricious leave. It merely means that the second man must show his title." The same principle continued to govern the decisions of the Court, which had to be obtained on motion or adjourned summons. It was for the Court to judge as to the similarity, so that registration might be granted notwithstanding the adverse decision of the Manchester Committee of Experts (see notes to cotton rules, *ante*), or refused, notwithstanding the favourable decision of a foreign Court: *In re Farina* (2), 27 W. R. 456. "The Court," being the High Court of Justice, an order of the House of Lords should be made an order of the High Court of Justice. See *In re Orr-Ewing* (2), 28 W. R. 412.

(*b*) The comptroller's discretion to allow registration was limited by this section: *In re Price's Patent Candle Co.*, 27 Ch. D. 681; *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278; *Eno* v. *Dunn*, 15 App. Cas. 252.

(*c*) The prohibition of § 6 of the Act of 1875 was of registration "in respect of the same goods or *classes* of goods." The alteration in the language confined the prohibition to cases in which the goods were substantially the same, so that it no longer applied to cases of different goods which happened to be grouped together in the same class. Thus, registration of a device was allowed for gelatine notwithstanding previous user of the same device (without registration) by the opponent for other goods in the same class, viz., sago and tapioca, on the ground that the goods were not so closely connected as to make the registration calculated to deceive: *In*

re Leiner, 20 P. R. 253. Even under the Act of 1875 registration was sometimes granted to similar marks for different goods included in the same class, when no clashing could take place. See note (*a*) to § 65, and note (*a*) to § 69.

(*d*) Before the introduction of these words by the Act of 1888 the prohibition was absolute; but it was held that the Court had a certain discretion where the case was not precisely covered by this section: *In re Australian Wine Importers*, *Ld.*, 41 Ch. D. 278.

"Calculated to deceive."

(*e*) The meaning of the words "calculated to deceive" was considered in *In re Lyndon*, 32 Ch. D. 109, in which Fry, L. J., said that "the words 'calculated to deceive' import at first sight a design to deceive; but I think it plain, from the rest of the section and the decisions of the Courts, that a mark is within the section 'calculated to deceive' when that mark, fairly used, is so like a mark on the register, also fairly used, as that the one is likely to be mistaken for the other." And Bowen, L. J., said "a trade mark is calculated, by its resemblance to another already on the register, to deceive, if in the course of its legitimate use in the trade it is likely to do so." In *In re Farina* (1), 26 W. R. 261, Hall, V.-C., appears to have thought that a mark ought only to be refused registration as being "calculated to deceive" if it bore such a resemblance to the earlier mark that an injunction would be granted to restrain the use of it; but in *In re Marks & Tellefsen*, 63 L. T. N. S. 234, Pearson, J., considered that the question in such cases was, not whether an injunction would necessarily be granted to restrain the use of the mark applied for, but whether it so nearly resembled the earlier mark as to be likely in future to give rise to litigation; and in *In re Speer*, 4 P. R. 521, Kay, J., took the same view, and went on to explain that the comptroller would be right in refusing to register a mark which was so composed as to be likely to cause the goods to which it was applied to be known by the same name in the market as the goods to which the older mark was applied. And see also *per* Kay, J., in *In re Dunn*, 41 Ch. D. 439, and *per* Stirling, J., in *In re Baschiera & Co.*, 33 Sol. J. 469. The House of Lords decided in favour of this view: *Eno* v. *Dunn*, 15 App. Cas. 252. Again, in *In re La Société Anonyme des Verreries de l'Etoile*, (1894) 1 Ch. 61; (1894) 2 Ch. 26, Stirling, J., thus lays down the duties of the comptroller: "If," he said, "it is brought to his notice by the evidence adduced by an oppouent that, even though the two marks are not physically similar, there is a reasonable probability of the public being misled into buying one thing when they think they are buying another, I apprehend that it would be his duty to refuse registration;" and on appeal, Lindley, L. J., intimated that if a device could not be registered as being calculated to deceive, a description of it in words could not be registered, inasmuch as regard ought to be had to the appeal to the ear as well as to the appeal to the eye. And see *In re Pomril*, 18 P. R. 181; *Reiners, Von Laur & Co.* v. *Fehr*, 9 Cape Good Hope, 306. In *In re Deichurst & Sons, Ld.*, (1896) 2 Ch. 137, the same principle was extended to a description in Burmese characters: and it was held further, that the consent of the owner of a mark already on the register was not conclusive on the question whether a mark was calculated to deceive. And see *In re Ehrmann*, (1897) 2 Ch. 495. The provisions of this section existed not merely for the benefit of the owners of trade marks, but for the protection of the public, viz., to prevent confusion and deception, and the like principle governed the Court in considering whether it ought to encourage concurrent applications. *Per* Stirling J., in *In re Ehrmann*, (1897) 2 Ch. 495, where applications by two persons who had dissolved partnership were refused although each consented to the other's application. Cf. *In re König & Ebhardt*, (1896) 2 Ch. 236, where the existence on the register of several marks containing a particular device for a variety of goods in a particular class was held no bar to registration of a mark containing a similar device for other goods in the same class subject to a note of disclaimer of the exclusive right to the device, the previous owners consenting or not objecting. If the essential and permanent particulars of the two marks were too similar, it was immaterial that there were differences in the non-essential and changeable elements: *In re Murphy & Co.*, 7 P. R. 163; *In re Currie*, 13 P. R. 381. It has been held in Victoria, that when A. and B. have for years used marks bearing a certain resemblance to one another, A. cannot afterwards register a mark still more similar to B.'s mark: *In re Rowley & Pyne*, 9 V. L. R. (L.) 307; and in Canada, the use of a heart-shaped label which the proprietor erroneously believed to be properly registered was held to be a bar to the registration of a label of a similar shape and general appearance: *De Kuyper* v. *Van Dulken*, 24 Can. Sup. Ct. Rep. 114.

Registration as a series.

See T.M.A. 1905, s. 26.

The restriction imposed on the registration of similar trade marks did not extend to similar marks of the same owner, but when one person applied for the registration of an essential particular, or combination of essential particulars, together with varying additions, the proper course was to register the marks as a series under § 66, *ante*. The older Act contained no provision corresponding to those of § 66, but the same course was considered to be the right one, viz., either to register the essential particular, omitting the additions, but stating that there were to be such, or else to register the essential particular with one form of addition, but stating that that might be varied. See *In re Barrows*, 5 Ch. D. 353; *In re Brook*, 26 W. R. 791; *In re William Dixon, Ld.*, Jessel, M. R., April 4th, 1879; *Davis* v. *Tylor*, Jessel, M. R., April 24th, 1879; *In re Clippens Oil Co.*, Jessel, M. R., March 11th, 1881; *In re Steedman*, L. J. N. of C. 1883, p. 83; though occasionally separate registration was granted to marks which differed only in non-essential respects, as in *In re Fox & Co.*, Hall, V.-C., May 7th, 1881; but see *Baker* v. *Rawson*, 45 Ch. D. 519, 530; *In re Player & Sons*, (1901) 1 Ch. 382. See the observations of Jessel, M. R., in *In re Kuhn & Co.*, 53 L. J. Ch. 238, as to registration with a note of disclaimer. Also *infra*.

Old marks favoured.

When the second of two trade marks which it was thought might conflict was claimed by a different person from the registered proprietor of the first one, it made a considerable difference whether the second mark was an old one or a new one; for it was the duty of a manufacturer, when adopting a new mark, to take especial care to select a distinctive one, and the Court was far more strict in deciding whether this had been done, than it would be in deciding as to similarities between old marks. So that old marks bearing a certain similarity to each other might sometimes be allowed to be registered, though if the mark last applied for were a new one, registration would be refused to it: *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Rosing*, 51 L. J. Ch. 975; *In re Lambert*, 6 P. R. 344; and see *per* Lord Blackburn in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 499.

The "Three Mark Rule."

When the Act of 1875 came into operation it was soon discovered that trade marks which were for practical purposes indistinguishable had in various instances been used by two or more firms, generally in different parts of the country, for the same or substantially the same goods, and the injustice of giving an exclusive right to the first of these firms was felt to be so great that what is known as the "Three Mark Rule" was promulgated by the Commissioners of Patents. The first public announcement of the new rule was made by Jessel, M. R., in *In re Walkden Aerated Waters Co.* (54 L. J. Ch. 394), when he stated that the Lord Chancellor was of opinion that the number of times that a device or emblem might be registered as a trade mark for articles of the same class ought, for the sake of distinctiveness, in no case to exceed three. That was a case in which the application was for the registration of a mark similar in its main features to two others already on the register. The mark was a new one, and the application was only allowed upon condition of the consent of both the previously registered proprietors being produced. On account of the mark in that case having been a new one, an idea arose that the rule was only applicable to new marks, but in *In re Hyde & Co.* (54 L. J. Ch. 395) the Master of the Rolls took another opportunity of referring to the rule, and stated that the Lord Chancellor had personally come to the decision that not more than three registrations of the same, or practically the same, mark should be allowed, and that this was also his own decision: and, in fact, that of the Commissioners of Patents, having been communicated to the Attorney and Solicitor-General. This decision was intended to cover old marks, and not merely new ones. A mark used in substance by more than three firms could not be registered, but must be treated as open. The rule therefore was, that where a mark had been used by more than three firms it was common to the trade and incapable of registration: that where a mark had been used by two firms or three firms before the 13th of August, 1875 (the date of the passing of the Act of 1875), it was the old mark of each firm, and each firm was entitled to registration, almost as of right, on proof of the facts; but that where a mark had been registered by one firm or two firms, another firm would not be allowed to register substantially the same mark for the same goods as a new mark, except by the consent of the previously registered proprietors. See *In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Brook*, 26 W. R. 791; *In re Powell*, Dig. 589; *Ex parte Sales, Pollard & Co.*, Dig. 620; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *Benbow* v. *Low* (4), 44 L. T. N. S. 875; *Monson & Co.* v. *Bacham*, 26 Ch. D. 398; and *In re Vergaras*, Hall, V.-C., June 3rd,

1881, in which last case the same mark was allowed to be registered by three separate firms as a new mark, all consenting. In *In re Walkden, &c. Co.*, 54 L. J. Ch. 394, the mark was allowed to be registered as a new mark with the consent of two other firms who had registered similar marks as their old marks. The tendency of later cases, however, appears to have been to attach less importance than formerly to the consent of previous owners, and to prohibit altogether the registration of a new mark similar to an old one; since the section, it was said, was framed for the protection of the public as well as of the trade mark owners: *In re Deerhurst & Sons, Ld.*, (1896) 2 Ch. 137, and *In re Ehrmann*, (1897) 2 Ch. 495, where registration was refused; and see *In re König & Ebhardt*, (1896) 2 Ch. 236. An old mark might be registered under the Three Marks Rule, notwithstanding that another similar mark had been on the register for upwards of five years: *Jackson & Co. v. Napper*, 35 Ch. D. 162: *In re Bancroft & Co.*, 5 P. R. 209. And to entitle a mark to such registration it was not necessary to show user on the identical goods for which it was sought to register; it was sufficient to show actual user before August, 1875, on substantially identical goods—*e.g.*, hatchets and axes, gimlets and augers, coopers' drawing-knives and carpenters' drawing-knives: *Jackson & Co. v. Napper*, 35 Ch. D. 162. In *In re United Vineyards Proprietors' Co.*, Stirling, J., Nov. 8th, 1889, the company applied in 1876 for the registration of a device of a salamander with the words "The Salamander" as their old mark for brandy, used upwards of twenty years before 1876; but the application lapsed in consequence of the applicants having never received a letter from the registrar requesting the final fee to be forwarded. The applicants supposed the mark to have been registered. In 1882 another firm obtained the registration of a different device of a salamander as their new mark for fermented liquors and spirits. In 1889 the original applicants became aware of the non-registration, and at once made a fresh application for registration of their original mark as their old mark for brandy, used since 1850. The firm registered in 1882 refused to consent to the application, but did not appear to oppose it; and it was held that the registration should proceed, the mark being an old one. Where a new mark had been registered and much used, and another similar mark which had not been much used was proved to be an old mark and was allowed to be registered, the new mark was not removed from the register, but was allowed to remain there side by side with the old one: *Mouson & Co. v. Boehm*, 26 Ch. D. 398. But where the word "Emollio" had been used for several years prior to 1870, but had been abandoned from that year till 1881, when the user was recommenced in a different form, and there had been considerable use of the word "Emolline" by another firm since 1876, "Emollio" was not allowed to be registered: *In re Grossmith*, 6 P. R. 180. In *In re Sone & Fleming Manufacturing Co.*, 30 Ch. D. 505, the applicants had used the mark in England and America since 1872, and had registered it in America in 1881. On their applying for registration in 1885 registration was refused by the comptroller on account of a somewhat similar mark having been registered by another firm in 1877, but that firm not appearing to oppose, though served with notice of the application, and the mark being an old one, registration was granted. So in *In re Bancroft & Co.*, 5 P. R. 209: *In re Kenrick & Jefferson*, 7 P. R. 321. To bring a mark within the rule and entitle it to registration, notwithstanding a previous similar registration for the same goods, foreign user was insufficient, and there must have been user within the United Kingdom: *In re Münch*, 30 L. T. N. S. 12: *Charles Bayer & Co. v. Strauss, Adler & Co.*, Cape Good Hope, 24 S. C. R. 27; with which compare *In re Riviere & Co.*, 26 Ch. D. 48; *Leonard & Ellis v. Wills & Co.*, 26 Ch. D. 288, *per* Fry, L. J.: and *Berliner Brauerei Gesellschaft Tivoli v. Knight, Steele & Co.*, W. N. 1883, p. 70; *In re Remfry*, 23 V. L. R. 44. And the mere passage of marked goods through England, without any sale or exposure for sale, is not user of the mark in England: *Jackson & Co. v. Napper*, 35 Ch. D. 162; *In re Mews*, (1891) 1 Ch. 41. And see *Norman v. Pinto*, 4 P. R. 508, *per* Kekewich, J. The user within the United Kingdom must have been substantial, and not merely nominal and unknown to the other proprietor: *In re Hudson, Tessier & Co.*, 86 L. T. N. S. 188. A mark would be held to have been in common use, and to be consequently incapable of registration in any name, if the substantial part of it was so, though the minor parts were sometimes varied; *e.g.*, in *In re Wragg*, 29 Ch. D. 551, the device of a syphon, hand and glass, was held to be common to the mineral waters trade, though in the six cases relied on the three elements appeared together in three only, the syphon and hand in one, and the syphon and glass in two. From the same case it appears that the cases of user, which make the mark common, need

not all have been on the goods, as in three out of the six cases the user was only on invoices and circulars, and not on the bottles. But see *In re Verity*, 19 P. R. 58, where it was held that the registration of a trade mark was not improper as calculated to deceive by reason only of the prior user of a similar trade mark in respect of similar goods not on the goods themselves, but on price lists advertising the goods, and that the latter trade mark was not entitled to registration.

Registration with a note. **See T.M.A. 1905, s. 21.**

In some cases the similarity between marks was got over by registering for different goods, though in the same class (see note (*a*) to § 65, *ante*; also *In re Kenrick & Jefferson*, 7 P. R. 321; *In re König & Ebhardt*, (1896) 2 Ch. 236); or restricting the manner of user in respect of colour (*In re Johnson, Philpott & Co.*, North, J., Feb. 21st, 1888; *In re Jeffrey & Co.*, Stirling, J., May 18th, 1888); or otherwise (*In re Whiteley*, 43 L. T. N. S. 627; *In re Sykes*, 43 L. T. N. S. 626; *In re Farina* (3), Dig. 654; see *In re De Otaduy*, W. N. 1885, p. 177); or the locality within which the mark is to be used (*In re Rabone*, Dig. 643; *In re Keep Brothers*, 26 Ch. D. 187; *In re Mitchell & Co.*, 28 Ch. D. 666; *In re Johnson, Philpott & Co.*, North, J., Feb. 21st, 1888; *In re Steel*, Chitty, J., Jan. 12th, 1893.) Where registration was granted with a limitation, the nature and extent of the limitation ought to appear on the face of the register, so as to be ascertainable by persons searching the register: *In re Mitchell & Co.*, 28 Ch. D. 666. See *In re De Otaduy*, W. N. 1885, p. 177. And in the same spirit, the improper grant of an exclusive right in common elements was avoided by the use of disclaimers (*In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Hubbuck*, Jessel, M. R., June 20th, 1879; *Ex parte Sales, Pollard & Co.*, Dig. 620; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *In re Hoyle & Sons, Ld.* (2), Chitty, J., Nov. 30th, 1883; *In re Davies*, Chitty, J., March 9th, 1885; *In re König & Ebhardt*, (1896) 2 Ch. 236; and see *In re Deuchurst & Sons, Ld.*, (1896) 2 Ch. 137; see also, § 74); and permission to use a mark was reserved to certain persons, on registration against all others being granted: *Ex parte Hemming & Son*, Jessel, M. R., April 27th, 1881. In *In re Deuchurst & Sons, Ld.*, (1896) 2 Ch. 137, the Court of Appeal held that registration subject to a condition imposing a geographical limit ought not to be allowed. See now, however, § 21 of the Act of 1905.

Marks compared as used.

In considering whether there is in fact such similarity between two marks as to exclude the second from registration, it is very important to compare them in the actual mode of user—*e.g.*, as branded on metal goods: *In re Jelley, Son & Jones*, 51 L. J. Ch. 639; *In re Rosing*, 54 L. J. Ch. 975; *Nuthall* v. *Vining*, C. A. Jan. 21st, 1880. And compare *Davis* v. *Reid*, 17 Grant, Up. Can. Ch. 69. And if there are blanks in the new mark, as tendered for registration or registered, regard will be had to the manner in which these are filled up in practice (*In re Christiansen*, 3 P. R. 54; *In re Lyle and Kinahan, Ld.*, 24 P. R. 249); and the manner of arrangement of parts common to the trade will also be taken into consideration: *ib.* And see *In re Farrow*, 7 P. R. 260. And it was held that, if one trade mark had been registered without colour, but was in practice used in a particular colour, and another trade mark was offered for registration which was distinguishable without colour, but might by the addition of colour be made to resemble the first mark, registration would be refused (*In re Worthington*, 14 Ch. D. 8); and see *In re La Union Agricola*, 25 P. R. 295; and *à fortiori*, where it was proved that the proposed new mark was intended to be used in the same colour as the opponent's mark: *In re Turney*, 11 P. R. 37. And see *In re Riegel*, 4 P. R. 525; and *In re La Société Anonyme des Verreries de l'Etoile*, (1894) 2 Ch. 26, in which case, it being conceded that where a device of a star had been registered for glass a device of a red star could not be registered, a mark consisting of the words "Red Star Brand" was removed from the register; also *In re La Union Agricola*, 25 P. R. 295.

Colour. **See T.M.A. 1905, s. 10.**

Although a trade mark had to be distinctive, irrespective of colour (*In re Hanson*, 37 Ch. D. 112), it might be registered in colour (§ 67), an advantage which was previously reserved for cotton marks and other marks of a special character requiring registration by deposit. In such a case it was held that the colour was part of the mark, so that a gold coin might be registered for goods for which a silver coin was already registered, though if both were in gold, or both in silver, there would be a similarity (*In re Robinson*, 29 W. R. 31). In *In re Lyndon*, 32 Ch. D. 109, it was held by the Court of Appeal that a mark tendered for registration must be compared with a mark already registered, not as actually used, but as registered, and on the footing that the applicant's mark will be fairly used; and "it is established now that when two marks are being compared together for the purpose of

seeing to what extent one resembles the other with reference to the question of registering or not, the Court must presume a fair user of the mark; and at the same time it is established that the Court must look, in deciding such a question as this, to the mode in which the mark would be stamped or affixed, the character of the goods upon which it is affixed, and generally to all the circumstances of the case with respect to the placing on of the mark and the user of it. But, though the circumstances are to be looked at, it is a cardinal proposition that the Court must presume a fair user": *per* Chitty, J., in *In re Haines, Batchelor & Co.*, 5 P. R. 669. In the same way Cotton, L. J., said, in *In re Lambert*, 6 P. R. 344, 351: "In considering whether the mark is calculated to deceive, we must consider what would be the ordinary use, without fraud, of the mark, and not go into the question of what might be done by a fraudulent user. If that were done—if there were a fraudulent user—then the Court would interfere, not because the man had not got the trade mark, but because he was using that trade mark fraudulently, so as to pass off his goods for those of another. That matter of fraud is not to be considered in dealing with the question whether the mark is so like another as to be calculated to deceive. In dealing with that question you must assume that it is fair and right." And see *In re Farrow*, 7 P. R. 260; and *In re Kutnow*, 10 P. R. 401. It has been held in Victoria (*Ex parte Kennedy*, 9 V. L. R. (L.) 335), and the same would appear to hold good in this country, that the marks ought to be compared taken apart, and not as seen side by side, and that the question is whether it is or is not probable that an incautious person would be deceived.

Cotton marks.

In the case of cotton marks which were brought before the Manchester Committee of Experts, due weight had to be given to their opinion as to the distinctiveness of the marks (*Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479), but they seem to have given somewhat too wide an interpretation to the expression "substantial similarity" in their instructions. See *In re Brook*, 26 W. R. 791. The cotton rules being repealed, a B. list mark might be registered without an application to the Court, if the Registrar considered that a mistake had been made.

Cases of refusal.

For instances of cases in which registration was refused on the ground of similarity, reference may be made to *Allsopp* v. *Walker*, Dig. 545, in which the first mark was a man's hand held upwards, and the second was a female hand pointed horizontally: *In re Jelley, Son & Jones*, 51 L. J. Ch. 639, in which the first mark was a pointer at a point, with the word "Stamneh," and the second was a pointer feeding out of a porridge pot; *In re Rosing*, 54 L. J. Ch. 975, in which the first mark was a plain horn with a looped cord, and the second was a sprig of two roses with a twisted horn; *Barrows* v. *Pelsall Coal and Iron Co.*, Dig. 530, in which the marks were a crown with "B. B. H." in Roman letters, and a crown with "B. B. S." in italics; *In re Worthington & Co.*, 14 Ch. D. 8, a plain triangle, and a triangle containing a church with an inscription: *In re Barker & Son*, 53 L. T. N. S. 23, where each label consisted of a sporting scene; *In re Marks & Tellefsen*, 63 L. T. N. S. 231, in which the general arrangement of the two marks was very similar: *In re Speer*, 4 P. R. 521, a dog, tower, and harp, in each case; *In re Sanitas Co., Ld.*, 4 P. R. 533, where the application was for the word "Sanitas," which was included in two previous marks; *In re Grossmith*, 6 P. R. 180, where "Emollio" was thought too similar to "Emolline"; *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278, where each mark contained prominently a device of a golden fleece; *In re Baschiera & Co.*, 33 Sol. J. 469, a lion and a winged lion; *In re Murphy & Co.*, 7 P. R. 163, a lion rampant with a crown and a lion rampant with a sheaf; *In re Dunn*, 41 Ch. D. 439; 15 App. Cas. 252, "Fruit Salt" for producing a beverage and "Fruit Salt" baking powder; *In re Farrow*, 7 P. R. 260, a bull's head and a bison; *In re Goodall*, 42 Ch. D. 566, a similar arrangement of common words; and see *In re Farina* (2), 27 W. R. 456; *In re Hargreaves*, 11 Ch. D. 669; *In re Meyerstein & Co.*, 43 Ch. D. 604; *In re Turney*, 11 P. R. 37; *In re Deichsel and Sons, Ld.*, (1896) 2 Ch. 137; *In re Pomril, Ld.*, 18 P. R. 181; *In re Booth's Distillery Co.*, 21 P. R. 18; *In re Capsuloid Co.*, 23 P. R. 782, ("Tablone" and "Tabloid"); *In re La Union Agricola*, 25 P. R. 295, and other cases; also *Ex parte Kennedy*, 9 V. L. R. (L.) 335, in Victoria.

Cases of non-refusal.

For instances of cases in which registration was not refused on the ground of similarity, see *In re Farina* (1), 26 W. R. 261, where a label had been registered with a small seal in one corner, and application was made for the registration of the same seal alone: *In re Lyndon*, 32 Ch. D. 109, a man's head surmounting the word "way," and a helmeted female head surmounting the word "Athena"; *In*

re Haines, Batchelor & Co., 5 P. R. 669, a shaded device of a pointer at a point, facing to the left, and surmounting the word "Staunch," and an outline device of a pig, facing to the left, and surmounting the initials "H. B. & Co."; *In re Burgoyne*, 6 P. R. 227. "Emu" and "Oomoo"; *In re Pianotist Co.*, 23 P. R. 774, "Pianola" and "Neola"; *In re Simpson*, L. J. N. of C. 1890, p. 143; *In re Loftus*, (1894) 1 Ch. 193. So also in Victoria. *In re Robert Harper & Co.*, (1906) V. L. R. 238, "Maizona" and "Maizena." See also *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479, and the other cotton cases mentioned in the notes to the old cotton rules. Except in the cases of cotton marks the opposition has usually been successful, and registration has either been refused altogether or only granted subject to limitations.

The comptroller was entitled to his costs of resisting an application on the ground of similarity to a registered mark; at all events, unless the marks were very clearly distinct. See *In re Patent Plumbago Crucible Co.*, Jessel, M. R., Aug. 1st, 1879. Now note sect. 48 of T. M. A. 1905.

Where the Registrar had refused to register on the ground of similarity to a registered mark, and the marks did not appear to be similar, but the owner of the registered mark had not been served with the notice of motion of the person applying for the registration of the second mark, Chitty, J., directed the registered owner to be served, and on that being done, and no objection being made, ordered the registration to proceed: *In re Milne & Co.*, Chitty, J., July 6th, 1883. And where the comptroller objected to register a mark on the ground of similarity to a registered mark, the usual practice came to be to require notice of the application to be given to the proprietor of the registered mark: *In re Sone & Fleming Manufacturing Co.*, 30 Ch. D. 505: *In re Bancroft & Co.*, 5 P. R. 209: *In re Baschiera & Co.*, 33 Sol. J. 469. And see *In re Extract of Meat (Baron Liebig) Photograph Brand, Ld.*, 17 P. R. 161. This practice was objected to, but approved by Parker, J., in *In re Royal Worcester Corset Co.*, 26 P. R. 185.

Further restriction on registration.
See T. M. A. 1905, s. 11.

73. It shall not be lawful to register as part of or in combination with a trade mark any words the *exclusive* use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a Court of Justice (*a*), or any scandalous design.

(*a*) This section was taken from § 6 of the Act of 1875, and was amended by § 15 of the Act of 1888. The wording of the original enactment was "would not be deemed entitled," and the present wording, "would be deemed disentitled," seems less open to misinterpretation. That the original enactment only referred to deceptiveness inherent in the mark itself, and not to liability to be mistaken for another mark, was held by Jessel, M. R., in *In re Horsburgh*, 53 L. J. Ch. 237. Kay, J., however (*In re Grossmith*, 6 P. R. 180; *In re Dunn*, 41 Ch. D. 439), and Stirling, J. (*In re Swift Specific Co.*, 6 P. R. 352), appear to have thought that words were within this section which bore a resemblance to words included in an earlier mark. And Cotton, L. J., took this view in *In re Dunn*, 41 Ch. D. 439. But in that case Lindley, L. J., expressly concurred in the view taken by Jessel, M. R., and Fry, L. J., did not dissent from it. And in *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278, the observations of Cotton, L. J., incline rather in the same direction.

However, since the decision of the House of Lords in *Eno* v. *Dunn*, 15 App. Cas. 252, which was considered on the footing that the section applied to words tendered for registration which were calculated to deceive by reason of similarity to words previously in use by a different trader, the wider construction has been given to the enactment. See *In re Hill*, 10 P. R. 113; *In re Thwaites & Blakey*, *ib.* 369. This much seems to be clear, that the comptroller was necessarily bound to refuse marks which offended against either §§ 72 or 73, whether he himself discovered the objection, or whether his attention was called to it in the course of an opposition; that the comptroller had a discretion either to register or not in cases which did not offend against these sections, though he ought not to reject an application without some adequate legal or moral reason, and that he could exercise this discretion either of his own motion under § 62, or on an opposition under § 69, which contains no

limitation of the grounds upon which a mark might be opposed. The question as to what was the exact meaning of § 73 was somewhat academical, when it was remembered that the comptroller had a judicial discretion to register or not, and that, even if an objectionable mark escaped his vigilance, it might be removed from the register under § 90 as having been registered without sufficient cause. Under this section an application might be refused by reason of the similarity of the trade mark to other trade marks which were not on the register, or which had been refused registration as calculated to deceive, and if the comptroller called the attention of the applicant to the existence of such marks, *semble*, the applicant would be bound to make inquiries as to the user: see *In re Booth's Distillery Co.*, 21 P. R. 18.

There is no doubt that § 73 applied to cases in which a trade mark contained a false statement of origin (*In re Horsburgh*, 53 L. J. Ch. 237); or in which the trade mark untruly stated that the proprietors were the "sole makers" (*In re Hayward & Sons*, 54 L. J. Ch. 1003); or in which it untruly stated the name and address of the maker *In re Hill*, 10 P. R. 113); or in which the mark was habitually used as part of a deceptive whole: *Wood* v. *Lambert*, 32 Ch. D. 247. If a trade mark tendered for registration contained the words "trade mark" so placed as to be likely to mislead the public into the belief that a particular part of the trade mark, and not the whole of it, was claimed and registered, registration ought to be refused under this section: *In re Apollinaris Co.*, (1891) 2 Ch. 186, 233, 235; *In re Wills*, (1893) 2 Ch. 262. See *Hammond* v. *Haledon, Bromley & Co.*, 9 P. R. 301; *In re Colman*, (1891) 2 Ch. 402; *In re Phillips*, (1891) 3 Ch. 139. Compare, however, *In re Bass, Ratcliff & Gretton, Ld.*, 19 P. R. 529. The onus of proving that a mark was not calculated to deceive under this section was on the applicant for registration (*Eno* v. *Dunn*, 15 App. Cas 252; *In re Thaelis & Blakey*, 10 P. R. 369); but a mark was not calculated to deceive merely because it included the capability of being used by the party registering it for purposes of deception: *per* North, J., in *In re Kutnow*, 10 P. R. 101. Thus, in *In re Smokeless Powder Co.*, (1892) 1 Ch. 590, it was held that the words "Smokeless Powder" used as part of the name of the company were not calculated to deceive the public into the notion that the company had a monopoly in smokeless powder. But registration was refused to a mark which, as previously used, contained fraudulent misstatements, though they were corrected in the mark as tendered for registration: *In re Fuente*, (1891) 2 Ch. 166.

Words which are descriptive or deceptive.

Where it was sought to register as a trade mark a word or words which were or might be appropriate to the article to which the trade mark was to be applied, the applicant was in the dilemma that the alleged trade mark was either descriptive or deceptive; if the word or words were properly applicable to the article and might be truly used with respect to it, they were descriptive and were not within the definition section; if they might be read as stating something with respect to the article which was untrue, they were deceptive within the present section; so that *quocunque eat* the application must fail. Thus, in *In re Seaman & Co.*, Dig. 625, where the mark was "Anglo-Portugo Oysters," either the oysters were of Anglo-Portuguese origin, in which case any one had a right to say that they were so, or they were not of such origin, in which case no one had a right to say so: and this was adopted by Lopes, L. J., in *In re Van Duzer*, 34 Ch. D. 623. And see *In re Hannay*, 7 P. R. 46; *In re Edge*, 8 P. R. 207. Under the corresponding section of the Victorian Act of 1890 it has been held that letters commonly used to denote words might be calculated to deceive, and accordingly the letters "P. & O." for whisky, which had no connection with the Peninsular and Oriental Co., were refused registration: *In re Ferguson & Co.*, 29 V. L. R. 331. These decisions have, of course, no application to words passed by the Board of Trade or the Court under § 9 (5) of the Act of 1905, and in *In re Crosfield*, 26 P. R. 837, Moulton, L. J., pointed out that a descriptive word might well become distinctive.

As to what will be deemed to disentitle to protection in a court of justice, see further Ch. 7, *ante*.

Saving for power to provide for entry on register of common marks as

74.—(1.) Nothing in this Act shall be construed to prevent the comptroller entering on the register, in the prescribed manner, and subject to the prescribed conditions, as an addition to any trade mark (*a*)—

(a.) In the case of an application for registration of a trade mark

additions to trade marks.

See T. M. A. 1905, s. 15.

used before the thirteenth day of August one thousand eight hundred and seventy-five—

Any distinctive (*b*) device, mark, brand, heading, label, ticket, letter, word, or figure, or combination of letters, words, or figures, though the same is common to the trade (*c*) in the goods with respect to which the application is made;

(b.) In the case of an application for registration of a trade mark not used before the thirteenth day of August one thousand eight hundred and seventy-five—

Any distinctive (*b*) word or combination of words, though the same is common to the trade (*c*) in the goods with respect to which the application is made;

(2.) *The applicant for entry of any such common particular or particulars must, however, disclaim* (*d*) *in his application any right to the exclusive use of the same, and a copy of the disclaimer shall be entered on the register.*

[(2.) The applicant for registration of any such addition must, however, state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register.

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

(3.) Any device, mark, brand, heading, label, ticket, letter, word, figure, or combination of letters, words or figures, which was, or were, before the thirteenth day of August, one thousand eight hundred and seventy-five, publicly used by more than three persons on the same or a similar description of goods shall, for the purposes of this section, be deemed common to the trade in such goods (*f*).

The amendments in this section were made by § 16 of the Act of 1888.

a This section was new in 1883, and was not very clearly expressed, but what was intended appears to be that when a trade mark sent in for registration contained, together with an essential particular, a feature which was in common use in the trade, that common feature must be disclaimed, so that the rest of the trade might not be deprived of their right to use it. The additions to which this section related were apparently not quite the same as the additions to an essential particular referred to in § 64 (2), but such as would be capable of distinguishing the goods, were it not that in point of fact they had been used by several different firms. Thus, if a device of an animal were registered in combination with the words "First quality," for iron, the case would be within § 64; but if the same device were to be registered in combination with a crown, the case would be within the present section, the crown being *primâ facie* distinctive, but in point of fact common to the trade. Long user did not entitle members of a trade to register a particular device as part of their trade marks when the user was fraudulent in its inception and was still calculated to deceive (*In re Heaton*, 27 Ch. D. 570); and if words forming part of a trade mark were calculated to deceive, the person claiming the mark could not assist his application for registration by disclaiming the objectionable words: *Eno* v. *Dunn*, 15 App. Cas. 252. It seems that where a distinctive label was registered as a whole, words which were included in the label were a part of the label, and not additions to it, and need not consequently be disclaimed under this section: *In re Apollinaris*

Co., (1891) 2 Ch. 186, 233; *Pinto* v. *Badman*, 8 P. R. 181, 188, 191; *In re Smokeless Powder Co.*, (1892) 1 Ch. 536; *In re Clement & Cie.*, (1900) 1 Ch. 114; but see *In re Wright, Crossley & Co.*, (1900) 2 Ch. 218.

(*b*) The word "distinctive" was applicable to all the matters here mentioned: *per* Chitty, J., in *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274. And see *per* Cotton, L. J., in *Waterman* v. *Ayres*, 39 Ch. D. 29. There is at first sight a contradiction in terms here, as a mark common to the trade could not, of course, be distinctive; but what was intended appears to be that any mark which was *primâ facie* distinctive, but which was really common to the trade, must be disclaimed when registered as part of a combination. The epithet "distinctive" would thus be here applied to every mark which was not inherently incapable of appropriation by an individual. This view was approved by Chitty, J., in *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274, and was subsequently adopted by the Court of Appeal in *In re Faulder*, (1902) 1 Ch. 125. From the dicta in the Court of Appeal in *In re Hudson*, 32 Ch. D. 311, and *In re Atkins Filter & Engineering Co., Ld.*, 3 P. R. 164, it would appear that their attention had not been directed to this word.

(*c*) The words "common to the trade" have been construed to mean "open to the trade": *Humphries* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820; and *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274: *In re Apollinaris Co.*, (1891) 2 Ch. 186, 209, 210: and this seems to be what was meant. In *Thompson* v. *Montgomery*, 41 Ch. D. 35, Lindley, L. J., said that "nothing can be common to the trade which is used only by one person in the trade": but in § 64, where it was intended to exclude from registration fancy words "in common use," that expression was employed, and the difference of language seems to show that the phrase here meant that which is of common right, whether in common use or not. When it was alleged adversely to an applicant for registration, that the whole or a part of his trade mark was common to the trade, the onus was upon the person alleging that this was so to prove it, not upon the applicant for registration to prove the contrary: *In re Leonard & Ellis*, 26 Ch. D. 288: *In re Edgington*, 6 P. R. 513: and see *Pinto* v. *Badman*, 8 P. R. 189: *Board & Sons* v. *Thom & Cameron, Ld.*, 24 P. R. 697. And the entries in the registry office books of applications for registration do not prove that a mark is in common use, as they only prove that the applications entered have been made, not that they have all been properly made, or upon true allegations, or that the marks applied for have in fact been used: *Orr-Ewing & Co.* v. *Johnston & Co.*, 13 Ch. D. 434. A mark is not made common to a particular trade by the fact that persons engaged in different trades have used it on goods of a different character (*Somerville* v. *Schembri*, 12 App. Cas. 453), nor by fraudulent user by infringers (*Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 414, 419), nor by the fact that goods marked with it have passed through England from one foreign country to another, without any offering for sale in England: *Newman* v. *Pinto*, 4 P. R. 508 (*per* Kekewich, J.). And see *Jackson & Co.* v. *Napper*, 35 Ch. D. 162; *In re Morris*, (1891) 1 Ch. 41. In considering whether a mark is common to the trade, the question is whether there is so much resemblance between the several marks in question as to be likely to cause confusion, and after a long uninterrupted user of a registered mark every reasonable intendment ought to be made in support of the registration: *In re Bass, Ratcliff, Gretton & Co.*, 19 P. R. 529. Where the marks to be compared are registered as old marks, there must be a substantial identity between them: the question is not of necessity the same as upon an opposition to the registration of a new mark by the owner of an old mark: *Ibid.* (*per* Romer, L. J.). In a number of cases since the Registration Acts marks have been found to be common to different trades: thus, a number of words and devices to the iron trade: *In re Barrows*, 5 Ch. D. 353; *In re Davies*, Chitty, J., March 9th, 1885: the words "Bank of England," to the sealing-wax trade: *In re Hyde & Co.*, 7 Ch. D. 724: the word "Selected," and other words and devices, to the steel-pen trade: *In re Leonardt*, Dig. 610: *In re Mitchell* (2), Dig. 611: *In re Kuhn & Co.*, 53 L. J. Ch. 238: the letters "S. P." to the snuff trade: *Ex parte Sales, Pollard & Co.*, Dig. 620: the Eton arms to the hat trade: *Lucke* v. *Webster*, Jessel, M. R., April 4th, 1879: the words "Braided Fixed Stars," to the match trade: *In re Palmer* (3), 24 Ch. D. 504: the words "La Minerva, Habana," "La Pureza," and "Gold Leaf," to the cigar and tobacco trade: *In re Lloyd & Sons*, 27 Ch. D. 646; *Newman* v. *Pinto*, 4 P. R. 508: *Partlo* v. *Todd*, 12 Ont. Rep. 171: a device of a syphon, hand, and glass to the mineral-water trade: *In re Wragg*, 29 Ch. D. 551: the words

Common marks.

"Extra," "Extra G.," "Coker," to the canvas trade: *In re Hayward & Sons*, 54 L. J. Ch. 1003; the words "Mandarin Tea" to the tea trade: *British Tea & Trading Association, Ld.* v. *Cooke*, Bacon, V.-C., June 8th, 1886; the words "Old Innishowen" to the whiskey trade: *Watt* v. *O'Hanlon*, 4 P. R. 1; the words "Parchment" and "Bank" to the paper trade: *In re Goodall*, 42 Ch. D. 566; *Pirie* v. *Goodall*, (1892) 1 Ch. 35; various animals, devices, and colours to the cotton trade: *Orr-Ewing & Co.* v. *Johnston & Co.*, 7 App. Cas. 219; *Wallace & Co.* v. *King & Co.*, Bombay High Ct., April 30th, 1879; *In re Hoyle & Sons, Ld.* (2), Chitty, J., Nov. 30th, 1883. And see *Orr-Ewing & Co.* v. *Registrar of Trade Marks*, 4 App. Cas. 479; *In re Brook*, 26 W. R. 791; *Board & Sons* v. *Thom & Cameron, Ld.*, 24 P. R. 697.

Disclaimers under the Act of 1875.

(*d*) The practice of entering disclaimers in the register appears to have originated with the cases of *In re Leonardt*, Dig. 610, and *In re Mitchell* (2), Dig. 611. In those cases the consent of the owner of the mark was required, but in *In re Kuhn & Co.*, 53 L. J. Ch. 238, an order for a disclaimer was made notwithstanding that the owner did not formally consent, and in other cases the registration was subjected to limitations entered on the register. See cases cited in note (*e*) to § 72, *supra*. The practice was carried so far, that in *In re Hoyle & Sons, Ld.* (2), Chitty, J., Nov. 30th, 1883, a trade mark, consisting of a pheasant sitting on a gate, was registered with a disclaimer of the bird, leaving only the gate. See the order of the House of Lords in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 479; and see also the statement by Jessel, M. R., in *In re Kuhn & Co.*, 53 L. J. Ch. 238; and *Baker* v. *Rawson*, 45 Ch. D. 519, 530.

In *In re Hudson*, 32 Ch. D. 311, the Court of Appeal appears to have thought that a disclaimer could not be compulsorily enforced under the Act of 1875; but there does not seem to have been much argument on the point, and the case was decided on the ground that the words of which it was sought to compel a disclaimer were descriptive, and could not in any event be claimed as a result of the registration of the label. The words not being *primâ facie* distinctive, the question as to disclaimer could not really arise. The same was the case in *In re Atkins Filter & Engineering Co., Ld.*, 3 P. R. 161. In *In re Hayward & Sons*, 54 L. J. Ch. 1003, Kay, J., held that the Court had power under the Act of 1875 to order a compulsory disclaimer, and he accordingly ordered a disclaimer to be entered of the words "Extra G," which were common to the trade. And see *Baker* v. *Rawson*, 45 Ch. D. 519, 530.

Disclaimers under the Acts of 1883—1888.

The provision in the Patent Acts being that the common particular must be disclaimed *in the application*, the question was raised whether such a disclaimer could be made at a later date, and North, J., in *In re Goodall*, 42 Ch. D. 566, decided that this could not be done, and that an application from which a necessary disclaimer had been omitted was simply null and void. So also Chitty, J., in *In re Meens*, (1891) 1 Ch. 41, Kekewich, J., in *In re Apollinaris Co.*, (1891) 2 Ch. 186, 212, and Byrne, J., in *In re Wright, Crossley & Co.*, (1900) 2 Ch. 218. See also *In re Player & Sons*, (1901) 1 Ch. 382. In *In re Swift Specific Co.*, 6 P. R. 352, Stirling, J., refrained from deciding whether an application defective in this respect was invalid, but directed a disclaimer to be entered on the register; and see *per* North, J., in *Baker* v. *Rawson*, 45 Ch. D. 519, 530. Subsequent disclaimers have also been directed under these Acts by Kay, J.: *In re Hayward & Co.*, 54 L. J. Ch. 1003 ("Extra," "Coker"); by Kekewich, J., *Humphries* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820 ("Herbalin"); and by Chitty, J.: *Burland & Co.* v. *Brochon Oil Co., Ld.* (2), 42 Ch. D. 271 ("Washerine"); *In re Edge*, 8 P. R. 207 ("Filtered Blue"). It was also held by Kekewich, J., that the fact that a common word had been registered as part of a trade mark, without a disclaimer, did not necessarily disentitle the owner of the mark to his costs in an action against a person who had adopted the same trade mark: *Newman* v. *Pinto*, 4 P. R. 508. Where a distinctive device had been registered, together with words which were in fact common to the trade, but without any disclaimer, no right was acquired in the common word, even after the lapse of five years from registration: *British Tea and Trading Association, Ld.* v. *Cooke*, Bacon, V.-C., June 8th, 1886 ("Mandarin Tea"). Inasmuch as the section only provided for disclaimer of matters common to the trade, a trader was not allowed to register, as an addition to a device, words which were not necessarily of common right and which had, in fact, been used by one firm only besides himself, with a disclaimer of any exclusive right to such words, for the purpose of avoiding a conflict with the longer user of the other firm. If

he had a concurrent right with the other firm, he must register without a disclaimer: if he had not, he could not register the words at all: *In re Meens*, (1891) 1 Ch. 41.

(*e*) See notes (*n*) and (*o*) to § 64 (3) (i); and *In re Apollinaris Co.*, (1891) 2 Ch. 186, 211.

(*f*) The intention of this sub-section was to introduce here the "Three Mark Rule," as to which see note (*e*) to § 72, *supra*. That rule was that registration of the same or substantially the same mark might be granted to not more than three persons, who could prove real user before August 13th, 1875, but that proof of user by more than three persons before that date debarred all persons from registering. For there to have been "public user" by more than three persons, it would seem that the user by each must have been substantial (*In re Hodson, Tessier & Co.*, 86 L. T. N. S. 188), and such as came or ought to have come to the knowledge of each of the others. But the marks used need not have been absolutely identical, nor in all cases on the actual goods: *In re Wragg*, 29 Ch. D. 551. It will be noticed that this sub-section only related to old marks. In the case of new marks a second registration of the same device would not be granted under § 72, except by the consent of the previously registered proprietor, and a disclaimer might even then be required as a condition of his consent. User is not proved by the books of applications for registration, as the allegations therein contained are not proved: *Orr-Ewing & Co. v. Johnston & Co.*, 13 Ch. D. 434.

Effect of Registration.

Registration equivalent to public use. **See T. M. A. 1905, s. 16.**

75. *Registration of a trade mark shall be deemed to be equivalent to public use of the trade mark* (*a*).

[Application for registration of a trade mark shall be deemed to be equivalent to public use of the trade mark, and the date of the application shall for the purposes of this Act be deemed to be, and as from the first day of January one thousand eight hundred and seventy-six to have been, the date of the registration (*b*).]

(*a*) The original § 75, for which the present section was substituted by § 17 of the Act of 1888, came from § 2 of the Act of 1875, the provision in which Act was made expressly subject to the existence of a connection with goodwill. This is not expressly stated in the present section, but must, in the view of the Court of Appeal, be implied, for the words "registration of a trade mark shall be equivalent to public use of the trade mark" "did not and could not mean that continued registration was equivalent to continued use": *per* Lindley, M. R., *In re Batt*, (1898) 2 Ch. 432. Registration did not entitle to an injunction in respect of goods for which the mark had not been used, though it had been registered for them, at all events unless the mark had been exactly copied: *Edwards* v. *Dennis*, 30 Ch. D. 454; *Hargreave* v. *Freeman*, (1891) 3 Ch. 39. And see *Apollinaris Co.* v. *Spook*, 7 P. R. 174; 8 P. R. 166. In the United States also registration is equivalent to public use. See *In re Dutcher Temple Co.*, U. S. Pat. Comm. Decis., 1871, 248. Apart from the legislation on the subject, public use of a trade mark gives a property in it. See *per* Lord Blackburn, in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 496. It has been decided that to constitute public use it is not sufficient for the marked goods to be advertised; they must be actually in the market. But so long as that is the case, length of user is not necessary. See *McAndrew* v. *Bassett*, 4 De G. J. & S. 380; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Wheeler* v. *Johnston*, 3 L. R. Ir. 284; *In re Simpson, Davies & Sons*, Jessel, M. R., Jan. 12th, 1881. And see the remarks of Chitty, J., on this section in *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 404.

(*b*) The last part of this clause, as altered, came from Rule 32 of the Rules of 1883, and originally from the old rules. The principle that registration dated from the receipt of the application prevailed throughout. By this section a slight alteration was made by substituting the date of the application for the date of the receipt of it.

Right of first proprietor to exclusive use of trade mark.

See T. M. A. 1905, ss. 39, 40.

76. The registration of a person as proprietor of a trade mark shall be *primâ facie* evidence (*a*) of his right to the exclusive use (*b*) of the trade mark, and shall, after the expiration of five years from the date of the registration, be conclusive evidence (*a*) of his right to the exclusive use of the trade mark, subject to the provisions of this Act (*c*).

Effect of registration.

(*a*) This section came from § 3 of the Act of 1875. Until the end of five years from registration the only effect of it was, as was said in the Court of Appeal in *Nuthall* v. *Vining*, C. A., Jan. 21st, 1880, to qualify the registered proprietor for suing infringers—in other words, registration was "simply a condition precedent to suing," *per* Chitty, J., in *Monson & Co.* v. *Boehm*, 26 Ch. D. 398; and in *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 405; *In re Hudson*, 32 Ch. D. 325; and see *Sen-Son Co.* v. *Britten*, (1899) 1 Ch. 692; *Baw* v. *Hart*, (1905) 1 K. B. 592; *Hommel* v. *Gebrüder Bauer & Co.*, 20 P. R. 801; and it seems that when an action was brought to restrain an alleged infringement of a trade mark which had been registered for less than five years, the defendant might rebut the *primâ facie* evidence of the plaintiff's right afforded by his registration, without moving to rectify the register by expunging the mark. See *In re Palmer* (1), 21 Ch. D. 47; *Lever* v. *Goodwin*, 4 P. R. 492; *Weaver* v. *Sanitary Engineering and Ventilation Co.*, L. J. N. of C., 1887, p. 144; *Weaver* v. *Stuff & Sons*, *ib.* After the expiration of five years from registration, the title of the registered proprietor was, for the purposes of an action for infringement, an absolute right, and could not be disputed except upon an application under § 90 to rectify the register: *Edwards* v. *Dennis*, 30 Ch. D. 454; *Apollinaris Co., Ld.* v. *Herrfeldt*, 4 P. R. 178; *Board & Sons* v. *Thom and Cameron, Ld.*, 21 P. R. 697; and if after that period the defendant in an infringent action set up a concurrent right it was necessary that he should apply to be put on the register, *ib.* Compare *Evans* v. *Smith*, 3 Times L. R. 390, and *Bodega Co., Ld.* v. *Owens*, 6 P. R. 236, where this principle does not appear to have had full effect given to it. This applied also to cases of colourable imitation, as well as to cases of direct copying: *Rodgers & Sons, Ld.* v. *Rottgen*, 5 Times L. R. 678. The lapse of five years from registration was, however, no bar to proceedings brought for the purpose of rectifying the register. It seems that the description of goods given on registration was not conclusive: *Hargreave* v. *Freeman*, (1891) 3 Ch. 39. In *Apollinaris Co.* v. *Spook*, 7 P. R. 471, the validity of a registered trade mark was not allowed to be questioned in an action for infringement, there being no motion to rectify, but the fact that the mark had been registered for less than five years, so that the registration was only *primâ facie* and not conclusive evidence of the right of the registered proprietor, does not seem to have been pointed out. The action was dismissed on appeal (see 8 P. R. 166), in consequence of the mark having been removed from the register in other proceedings, so that the decision of the Court of Appeal on the point here raised was not taken. The question came before the Court of Appeal in *Pinto* v. *Badman*, 8 P. R. 181, where a mark recently registered was alleged to have been infringed, and although there was no valid application to rectify, and the mark was, in fact, left on the register, yet the action was dismissed on the ground of want of title in the plaintiffs. Lord Esher, M. R., said (p. 189): "The 76th section of the Act says that the registration is *primâ facie* evidence of the plaintiff's right to the exclusive use of the label, but it is only *primâ facie* evidence. It follows that it can be met. That is not denied"; and Fry, L. J., said (p. 193): "It is undoubted that under the Statute of 1883, when a trade mark has been registered, it gives a *primâ facie* title to the registered owner to sue for an infringement of it; but that right is *primâ facie* only, and may be repelled by evidence of the defendant, or may be repelled by evidence which the plaintiff himself puts in." The view originally entertained as to the effect of this section, and the corresponding section of the Act of 1875 upon applications to rectify, appears to have been that during the first five years from registration the mark remained liable to removal from the register, *e.g.*, on application by the true proprietor of it, when it had been wrongfully registered in the name of another person, as in *Ex parte Laurence Bros.*, 41 L. T. N. S. 98; *In re Australian Wine Co., Ld.*, 61 L. T. N. S. 427; but that after the expiration of five years from registration the title of the registered proprietor was secure against individual rival claimants, but as "the Act only says that after five years the person who has registered a trade mark shall be entitled to the trade mark, but does not say that the mark as registered shall be

deemed to be a trade mark"—see *per* Jessel, M. R., in *In re Palmer* (1), 21 Ch. D. 47; and compare the Victorian cases of *Lewis* v. *Klapproth*, 11 V. L. R. (E.) 214; *Wolfe* v. *Alsop* (2), 12 V. L. R. (E.) 421; *Wolfe* v. *Lang & Co.*, 13 V. L. R. 752—the trade mark remained liable to removal for inherent defects in it—*e.g.*, that it contained no one of the essential particulars specified by § 64. Thus in *In re Palmer* (1), 21 Ch. D. 47; and (3) 24 *ib.* 504, the words "Braided fixed stars," registered for matches, were expunged, on the ground that at the date of the registration and ever since they had been merely descriptive of matches prepared in a particular way. So where the word "Valvoline" had been registered, though it had been used as a descriptive term: *In re Leonard & Ellis*, 26 Ch. D. 288. And see *In re Ralph*, 25 Ch. D. 194; *In re Lloyd & Sons*, 27 Ch. D. 646; *In re Wragg*, 29 Ch. D. 551; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Spencer*, 54 L. T. N. S. 659. Since the case of *Edwards* v. *Dennis*, 30 Ch. D. 454, however, it was generally recognized that § 90 (§ 5 of the Act of 1875) overrode the provisions of this section (§ 3 of the Act of 1875, and that even after the lapse of five years the registration of a mark which was for any reason wrongful might be rectified. In that case Cotton, L. J., said that "the third section (of the Act of 1875) is intended to afford assistance to a person who is bringing an action against another person for passing off his goods as the goods of the person who brings the action. In such a case, if the plaintiff shows that he has been on the register for five years, that dispenses with the necessity of his adducing evidence of exclusive use of his trade mark. But the third section is no bar to an application under the fifth section for rectification of the register, and in the case of such an application the Court is bound to consider whether the trade mark is properly on the register; for, although it may have been on for five years, if it ought not to have been on at all, then it can be taken off." And in this the other Lords Justices concurred. That there was no distinction for this purpose between the Acts of 1875 and 1883 was held by North, J., in *Baker* v. *Rawson*, 45 Ch. D. 519, 531. Where words common to the trade—*e.g.*, "Mandarin Tea"—had been registered in combination with a distinctive device, or in connection with a distinctive label, for upwards of five years, no exclusive right was thereby acquired in the words: *British Tea and Trading Association, Ld.* v. *Cooke*, Bacon, V.-C., June 8th, 1886; *In re Wills*, (1893) 2 Ch. 262; and the same principle as to the lapse of five years was applied in Scotland: *Coats* v. *Herbert*, 14 P. R. 436; and a corresponding provision in the Victorian Act has received a similar construction: *Mitchell & Co.* v. *Joshua Bros.*, 17 V. L. R. 736. In *Lamplough* v. *Beadler*, C. A., Nov. 12th, 1880, it was held that the registered words "Pyretic Saline" were purely descriptive. See *Reinhardt* v. *Spalding*, 49 L. J. Ch. 57; and *Wheeler* v. *Johnston*, 3 L. R. Ir. 284. In *In re Haggard & Co.*, 54 L. J. Ch. 1003, a note was entered on the register that in the case of a mark registered in 1885 the five years were to run from that date, and not from the date of the application, which was in 1879. In a Scotch case of *John Dewar & Sons, Ld.* v. *Dewar*, 17 P. R. 341, it was held that a mark might be impeached after it had been on the register for five years as not being registrable in an action for a declaration that the entry of the trade mark on the register was made without sufficient cause, inasmuch as that declaration would involve rectification even though the Scotch Court had no power itself to entertain an application under § 90. And see *Board & Sons* v. *Thom & Cameron*, 23 P. R. 509; 24 P. R. 697.

As to the effect of registration in Canada, see *McCall* v. *Theal*, 28 Grant, Up. Can. Ch. 48; *Partlo* v. *Todd*, 17 Can. Sup. Ct. 196; *Watson* v. *Westlake*, 12 Ont. Rep. 419; *De Kuyper* v. *Van Dulken*, 24 Can. Sup. Ct. 114; *Smith* v. *Fair*, 14 Ont. Rep. 729; and in New South Wales, *Harris* v. *Ogg*, 5 N. S. W. Rep. (E.) 114; *Walker* v. *Cargill*, 5 N. S. W. Rep. (E.) 243; *Bryant & May* v. *Hoyle*, 7 N. S. W. Rep. (E.) 72.

(*b*) The right to the exclusive use of a trade mark, first asserted in *Gout* v. *Aeplogu*, 5 Leg. Obs. 495, and *Millington* v. *Fox*, 3 My. & Cr. 338, and after much discussion affirmed by the Chancery judges (see Ch. 6, *ante*), was afterwards given by statute upon registration.

(*c*) See § 70 as to the connection with goodwill.

77. A person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of a trade mark unless, in the case of a trade mark capable of being registered under

Restrictions on actions for infringement, and on defence

to action in certain cases. See T. M. A. 1905, s. 42.

this Act, it has been registered in pursuance of this Act, or of an enactment repealed by this Act, or, in the case of any other trade mark in use before the thirteenth of August one thousand eight hundred and seventy-five, registration thereof under this part of this Act, or of an enactment repealed by this Act, has been refused (*a*). The comptroller may, on request, and on payment of the prescribed fee, grant a certificate that such registration has been refused (*b*).

Necessity for applying for registration.

(*a*) This part of this section came from § 1 of the Act of 1876. By § 1 of the Act of 1875, failure to obtain registration was fatal to the owner of a trade mark, whether old or new. The effect of the alteration introduced by the Act of 1876 was clearly explained by Lord Blackburn in the House of Lords in *Orr-Ewing* v. *Registrar of Trade Marks*, 4 App. Cas. 498, in which he said: "This alters the Act of 1875 in two respects: it renders registration a condition precedent to a proceeding to recover damages, as well as to a proceeding to prevent infringement; and it provides that if the proprietor of a trade mark in use before the passing of the principal Act has been refused registration, he may, notwithstanding such refusal, institute proceedings, either for prevention of, or damages for, the infringement of such trade mark, and need not wait till he has got the register rectified." And again he said: "It seems to me that the effect of the Act of 1876 is, that if one who says he is the proprietor of a trade mark wishes to institute proceedings against some one who, as he says, is infringing it, he must first try to have his trade mark registered. If the registration is refused for any reason, he may apply (under § 5 of the Act of 1875) to have the register rectified, and then the Court will have to determine as the principal question whether the reason of the refusal was sufficient. But he may also seek for more speedy redress. He may obtain a certificate of the refusal, and then institute proceedings to prevent the infringement, and then the Court will have to determine whether he was the proprietor of the trade mark." See, also, Malins, V.-C., in *In re Barrows*, 5 Ch. D. 353, 359, and *Twentsche Stoom Bleekery Gour* v. *Ellinger & Co.*, 26 W. R. 70. The effect of the present section was, as Fry, L. J., said, in *In re Hudson*, 32 Ch. D. 325, of § 1 of the earlier Act, to "put a fetter upon the right of suing" of the proprietor of a trade mark; and see *Monson & Co.* v. *Bochm*, 26 Ch. D. 388; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 405; and *Sen-Sen Co.* v. *Britten*, (1899) 1 Ch. 692; and if the owner of a trade mark for which registration or refusal to register was required was unable, when suing an infringer, to produce a certificate of registration or of refusal to register, his remedy was barred: *Goodfellow* v. *Prince*, 35 Ch. D. 9; even though he had made application for registration, and had only failed to obtain it because of delay in the office (*Hazzopulo* v. *Kaufmann*, 23 Sol. J. 819); and where a trade mark was registered in the name of a foreign producer, an importer, even with an exclusive contract for the United Kingdom, could not sue in his own name: *Richards* v. *Butcher* (1), 7 P. R. 288. In *Hart* v. *Colley*, 44 Ch. D. 193, North, J., decided that a trade mark which had been registered for some only of the goods in a class could not be protected in respect of other goods in the same class for which it had not been registered, and this decision appears to be in accordance with the spirit of the Act. It was held that where a mark had been properly registered under the Act, persons to whom it had been assigned with the goodwill were not precluded under this section from suing on it before transfer of the registration into their names: *Ihlee* v. *Hoshaw*, 31 Ch. D. 323; and see *Reredore* v. *Gateley*, 89 L. T. (Journal), 314; and the same has been decided in Canada: *Carey* v. *Goss*, 11 Ont. Rep. 619.

It appears that there was nothing in this section to preclude, in the absence of registration, the granting of an injunction where the get-up of goods had been imitated: *Lever* v. *Goodwin*, 36 Ch. D. 1 (with which compare the Canadian case of *Smith* v. *Fair*, 14 Ont. Rep. 729); nor where special words had been imitated, apart from trade mark: *Sanitas Co., Ld.* v. *Condy*, 4 P. R. 530; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 411, *per* Cotton, L. J.; nor where a distinctive name or mark had been imitated, under which the plaintiff's goods had become known in the market: *In re Sanitas Co., Ld.*, 4 P. R. 533; *Rodgers & Sons, Ld.* v. *Rotton*, 5 Times L. R. 678; *Jay* v. *Ludler*, 40 Ch. D. 649; nor where the registered trade mark was usually placed with other matters on a label or wrapper: *Great Tower St. Tea Co.* v. *Langford & Co.*, 5 P. R. 66; *Ascough* v. *Johnson & Co.*, 3 Times

L. R. 735; nor where spaces left blank in the trade mark as registered were in practice filled in: *Newman* v. *Pinto*, 4 P. R. 508, *per* Kekewich, J.; *Melachrino & Co.* v. *Melachrino Egyptian Cigarette Co.*, 4 P. R. 215; *M. Melachrino & Co.* v. *R. Melachrino & Co.*, Chitty, J., May 29th, 1888. The right to bring a passing-off action, irrespective of trade mark, is now expressly preserved by § 45 of the Trade Marks Act, 1905.

By § 1 of the Act of 1875, as amended by § 1 of the Act of 1876, the disability for suing without registration was to begin from July 1st, 1877. The time thus allowed for registration was extended, in the case of marks used in respect of any goods in Classes 23 to 35 ("textiles," by § 1 of the Act of 1877, and Orders in Council of Dec. 12th, 1877, and June 29th, 1878, to Dec. 31st, 1878); and in the case of marks used in respect of cotton piece goods, by further Orders in Council of Nov. 27th, 1878, and May 17th, 1879, to July 31st, 1879. Since the date last mentioned, a certificate of registration or of refusal to register has been a *sine qua non* in all cases within the Acts.

(*b*) See § 96. See, also, *per* Chitty, J., in *In re Norman Co., Ld.*, 35 Ch. D. 231.

Certificate as to exclusive use and costs thereon.

See T. M. A. 1905, s. 46.

[77A. In an action for infringement of a registered trade mark (*a*) the Court or a judge may certify that the right to the exclusive use of the trade mark came in question; and if the Court or a judge so certifies, then in any subsequent action for infringement the plaintiff in that action, on obtaining a final order or judgment in his favour, shall have his full costs, charges, and expenses as between solicitor and client, unless the Court or judge trying the subsequent action certifies that he ought not to have the same.]

This new section was introduced by § 18 of the Act of 1888.

(*a*) In *B. Edgington, Ld.* v. *John Edgington & Co.*, 6 P. R. 513, Kay, J., held that where the right to a trade mark was contested on a motion to rectify, and not actively attacked in the action, a certificate could not be granted. In *J. C. & J. Field & Co.* v. *Wigel Syndicate*, 1900, 1 Ch. 651, Buckley, J., held that in a case where the action and motion were tried together upon the same oral evidence the Court had power to grant a certificate, notwithstanding that the trade mark had been on the register for more than five years and was not impeachable in an action, and he granted a certificate: and this was followed in *Burroughs, Wellcome & Co.* v. *Thompson & Capper*, 21 P. R. 69, but, under apparently similar circumstances, Eady, J., in *Kodak, Ld.* v. *London Stereoscopic and Photographic Co.*, 20 P. R. 337, refused a certificate; and where the motion to rectify was abandoned at the hearing a certificate was not granted, *Bourne* v. *Swan & Edgar*, 1904, 1 Ch. 211. In *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 111, a certificate was given: also in *Apollonis Co.* v. *Snook*, 7 P. R. 474; and in *Pinto* v. *Badman*, 8 P. R. 181, 186. It seems that a certificate granted under this section was unappealable. See *Pinto* v. *Badman*, 8 P. R. 181, 188; *Haslam Co.* v. *Hall*, 20 Q. B. D. 491.

Register of Trade Marks.

Register of trade marks.

See T. M. A. 1905, s. 4.

78. There shall be kept at the Patent Office a book called the Register of Trade Marks (*a*), wherein shall be entered the names and addresses of proprietors of registered trade marks, notifications of assignments and of transmissions of trade marks, and such other matters as may be from time to time prescribed.

(*a*) The register of trade marks was previously kept under the authority of § 1 of the Act of 1875. As to entries in the register, see §§ 87, 91, and 92.

Removal of trade mark after fourteen years unless fee paid.
See T. M. A. 1905, ss. 28—31.

79.—(1.) At a time not being less than two months nor more than three months before the expiration of fourteen years (*a*) from the date of the registration of a trade mark, the comptroller shall send notice to the registered proprietor that the trade mark will be removed from the register unless the proprietor pays to the comptroller before the expiration of such fourteen years (naming the date at which the same will expire) the prescribed fee; and if such fee be not previously paid, he shall at the expiration of one month from the date of the giving of the first notice send a second notice to the same effect.

(2.) If such fee be not paid before the expiration of such fourteen years the comptroller may after the end of three months from the expiration of such fourteen years remove the mark from the register, and so from time to time at the expiration of every period of fourteen years.

(3.) If before the expiration of the said three months the registered proprietor pays the said fee together with the additional prescribed fee, the comptroller may, without removing such trade mark from the register, accept the said fee as if it had been paid before the expiration of the said fourteen years.

(4.) Where after the said three months a trade mark has been removed from the register for non-payment of the prescribed fee, the comptroller may, if satisfied that it is just so to do, restore such trade mark to the register on payment of the prescribed additional fee.

(5.) Where a trade mark has been removed from the register for non-payment of the fee or otherwise, such trade mark shall nevertheless, for the purpose of any application (*b*) for registration during *the five years* [one year] next after the date of such removal, be deemed to be a trade mark which is already registered [unless it is shown to the satisfaction of the comptroller that the non-payment of the fee arises from the death or bankruptcy of the registered proprietor, or from his having ceased to carry on business, and that no person claiming under that proprietor or under his bankruptcy is using the trade mark].

(*a*) This section came from the old rules. The amendments were made by § 19 of the Act of 1888.

(*b*) The effect of this was that (under § 72) the comptroller could not, for one year after a mark had been removed from the register, place another similar mark on the register for similar goods, except under the circumstances stated in the words added to the sub-section.

Fees.

Fees for registration, &c.
See T. M. A. 1905, s. 61.

80. There shall be paid in respect of applications and registration and other matters under this part of this Act, such fees as may be from time to time, with the sanction of the Treasury, prescribed by the Board of Trade (*a*); and such fees shall be levied and paid to the account of Her Majesty's Exchequer in such manner as the Treasury may from time to time direct.

(*a*) Under § 7 of the Act of 1875, these fees were fixed by the Lord Chancellor, with the assent of the Treasury.

Sheffield Marks.

Registration by Cutlers' Company of Sheffield marks.

81. With respect to the Master, wardens, searchers, assistants, and commonalty of the Company of Cutlers in Hallamshire, in the county of York (in this Act called the Cutlers' Company), and the marks or devices (in this Act called Sheffield marks) assigned or registered by the Master, wardens, searchers, and assistants of that Company (*a*), the following provisions shall have effect:— **See T. M. A. 1905, s. 63.**

(1.) The Cutlers' Company shall establish and keep at Sheffield a new register of trade marks (in this Act called the Sheffield register):

(2.) *The Cutlers' Company shall enter (b) in the Sheffield register, in respect of cutlery, edge tools, or raw steel, and the goods mentioned in the next sub-section, all the trade marks entered before the commencement of this Act in respect of cutlery, edge tools, or raw steel and such goods in the register established under the Trade Marks Registration Act, 1875, belonging to persons carrying on business in Hallamshire, or within six miles thereof, and shall also enter in such register, in respect of the same goods, all the trade marks which shall have been assigned by the Cutlers' Company and actually used before the commencement of this Act, but which have not been entered in the register established under the Trade Marks Registration Act, 1875 (c).*

(2.) The Cutlers' Company shall enter in the Sheffield register, in respect of metal goods as defined in this section, all the trade marks entered before the first day of January one thousand eight hundred and eighty-nine, in respect of metal goods, either in the register established under the Trade Marks Registration Act, 1875, or in the register of trade marks under this Act, belonging to persons carrying on business in Hallamshire or within six miles thereof. The Cutlers' Company shall also, on request made in the prescribed manner, enter in the Sheffield register, in respect of metal goods, all the trade marks which shall have been assigned by the Cutlers' Company and actually used before the first day of January one thousand eight hundred and eighty-four, but which have not been entered in either of the said registers.]

(3.) An application for registration of a trade mark used *on cutlery, edge tools, or on raw steel, or on goods made of steel, or of steel and iron combined, whether with or without a cutting edge,* [on metal goods] shall, if made after the commencement of this Act by a person carrying on business in Hallamshire, or within six miles thereof, be made to the Cutlers' Company (*d*).

(4.) Every application so made (*e*) to the Cutlers' Company shall be notified to the comptroller in the prescribed manner, and unless the comptroller within the prescribed time gives notice to the Cutlers' Company that he objects to the acceptance of the application, it shall be proceeded with by the Cutlers' Company in the prescribed manner:

(5.) If the comptroller gives notice of objection as aforesaid, the application shall not be proceeded with by the Cutlers' Company, but any person aggrieved may appeal to the Court:

(6.) Upon the registration of a trade mark in the Sheffield register the Cutlers' Company shall give notice thereof to the comptroller, who shall thereupon enter the mark in the register of trade marks; and such registration shall bear date as of the day of application to the Cutlers' Company, and have the same effect as if the application had been made to the comptroller on that day:

(7.) *The provisions of this Act, and of any general rules made under this Act, with respect to application for registration in the register of trade marks, the effect of such registration, and the assignment and transmission of rights in a registered trade mark, shall apply in the case of applications and registration in the Sheffield register (f); and notice of every entry made in the Sheffield register must be given to the comptroller by the Cutlers' Company, save and except that the provisions of this sub-section shall not prejudice or affect any life estate and interest of a widow of the holder of any Sheffield mark which may be in force in respect of such mark at the time when it shall be placed upon the Sheffield register (g):*

[(7.) The provisions of this Act, and of any general rules made under this Act, with respect to the registration of trade marks, and all matters relating thereto, shall, subject to the provisions of this section, apply to the registration of trade marks on metal goods by the Cutlers' Company, and to all matters relating thereto; and this Act, and any such general rules shall, so far as applicable, be construed accordingly, with the substitution of the Cutlers' Company, the office of the Cutlers' Company, and the Sheffield register, for the comptroller, the Patent Office, and the register of trade marks respectively: and notice of every entry, cancellation, or correction made in the Sheffield register shall be given to the comptroller by the Cutlers' Company: provided that this section shall not affect any life estate and interest of a widow of the holder of any Sheffield mark which may be in force in respect of such mark at the time when it shall be placed upon the Sheffield register (*h*).]

(8.) Where the comptroller receives from any person not carrying on business in Hallamshire or within six miles thereof an application for registration of a trade mark used on *cutlery, edge tools, or on raw steel, or on goods made of steel, or of steel and iron combined, whether with or without a cutting edge*, [on metal goods] he shall in the prescribed manner notify the application and proceedings thereon to the Cutlers' Company (*i*):

(9.) At the expiration of five years from the commencement of this Act the Cutlers' Company shall close the Cutlers' register of corporate trade marks, and thereupon all marks entered therein shall, unless entered in the Sheffield register, be deemed to have been abandoned:

(10.) A person may (notwithstanding anything in any Act relating to the Cutlers' Company) be registered in the Sheffield register as proprietor of two or more trade marks:

(11.) A body of persons, corporate or not corporate, may (notwithstanding anything in any Act relating to the Cutlers' Company) be registered in the Sheffield register as proprietor of a trade mark or trade marks:

(12.) Any person aggrieved by a decision of the Cutlers' Company in respect of anything done or omitted under this Act may, in the prescribed manner appeal (*k*) to the comptroller, who shall have power to confirm, reverse, or modify the decision, but the decision of the comptroller shall be subject to a further appeal to the Court:

(13.) So much of the Cutlers' Company's Acts as applies to the summary punishment of persons counterfeiting Sheffield corporate marks, that is to say, the fifth section of the Cutlers' Company's Act of 1814, and the provisions in relation to the recovery and application of the penalty imposed by such last-mentioned section contained in the Cutlers' Company's Act of 1791, shall apply to any mark entered in the Sheffield register (*l*).

[(14.) For the purposes of this section, the expression "metal goods" means all metals whether wrought, unwrought, or partly wrought, and all goods composed wholly or partly of any metal.

(15.) For the purpose of legal proceedings in relation to trade marks entered in the Sheffield register a certificate under the hand of the Master of the Cutlers' Company shall have the same effect as the certificate of the comptroller.]

The amendments in this section were made by § 20 of the Act of 1888.

(*a*) As to the Cutlers' Company, the old Sheffield corporate marks, and the system which prevailed with respect to Sheffield marks under the Trade Marks Registration Act, 1875, see Appendix K., *infra*. The specified goods now form a much wider class than formerly. This section provides for the closing of the old Cutlers' register, and the immediate establishment of a new one, intended to be an exact duplicate of the general register, so far as it related to marks used for the specified goods within the specified limits.

(*b*) Under this sub-section the Cutlers' Company were performing a mere ministerial act in registering marks which came within this sub-section, whether the marks were registered on the Company's own motion or on the application of a party claiming to be the proprietor of the marks, and there was no appeal from their action under sub-s. (12), nor any *locus standi* for an opposition to an application to them to register a mark under this sub-section, and they were directed to register marks within the sub-section for all the goods mentioned in the sub-section, though they might have been used for some only of those goods. And they were authorised to register, under this sub-section, marks which had been assigned by the proprietor on the Sheffield register to another, but which had not been surrendered by him to the Company and re-assigned by them to the assignee: *In re Lambert*, 5 P. R. 542: 6 *ib.* 344.

(*c*) By § 9 (6) of the Act of 1875, Sheffield corporate marks were allowed to be registered in the trade marks register in the same manner and upon the same terms and conditions in and upon which they might have been registered if they were not corporate marks. Under this provision it was held that where a corporate mark had been assigned by its proprietor, but had not been surrendered to the Company and re-assigned by them to the assignee, he must perfect his title with the Company before he could obtain registration under the Act: *In re Rabone*, Dig. 643. There was, however, no requirement for corporate marks to be registered.

(*d*) This sub-section related to new marks not within sub-s. (2), and it appears that applications to register such marks might be opposed by other persons in the trade (*In re Lambert*, 5 P. R. 542, *per* North, J.); and that if the Cutlers' Company

refused to hear such opposition the opponent's proper remedy was by mandamus: *ib.* 6 P. R. 344, *per* Bowen, L. J.

(*e*) This and the two next sub-sections related to new marks: *In re Lambert*, 5 P. R. 542.

(*f*) It appears that this first part of this sub-section related to new marks only: *In re Lambert*, 5 P. R. 542.

(*g*) This latter part of this sub-section related to all Sheffield marks, new or old: *In re Lambert*, 5 P. R. 542.

(*h*) It has been held that the company ought not to allow the register to be amended upon a change of name of the proprietor of a Sheffield mark without an order of the Court: *In re Burgon & Wilkinson*, 40 Sol. J. 336.

(*i*) In *In re Rosing*, 54 L. J. Ch. 975, the Company opposed the registration of a trade mark on the ground of similarity to a corporate mark, but, the objection failing in the Court of First Instance, were ordered to pay the costs of the motion. On appeal, however, the objection taken by the Company was supported.

(*k*) This sub-section applied to all cases in which the Cutlers' Company had arrived at a decision, but not to cases in which the Company had performed a mere ministerial act—*e.g.*, by registering an old mark under sub-section 2, in which case there was no appeal: *In re Lambert*, 5 P. R. 512.

(*l*) These provisions were, shortly, that a counterfeiter might be fined not exceeding 20*l.* by a justice or justices of the peace, subject to an appeal to Quarter Sessions. See Appendix K., *infra*.

PART V.

GENERAL.

Patent Office and Proceedings thereat.

Patent Office.

See P. & D. A. 1907, s. 62.

82.—(1.) The Treasury may provide for the purposes of this Act an office with all requisite buildings and conveniences, which shall be called, and is in this Act referred to as, the Patent Office:

(2.) Until a new Patent Office is provided, the offices of the Commissioners of Patents of inventions and for the registration of designs and trade marks existing at the commencement of this Act (*a*) shall be the Patent Office within the meaning of this Act.

(3.) The Patent Office shall be under the immediate control of an officer called the comptroller-general of patents, designs, and trade marks (*b*), who shall act under the superintendence and direction of the Board of Trade.

(4.) Any act or thing directed to be done by or to the comptroller may, *in his absence*, be done by or to any officer for the time being in that behalf authorised by the Board of Trade.

The words in *italics* were expunged by the Act of 1902, s. 4.

(*a*) This is in Southampton Buildings, Chancery Lane, W.C.

(*b*) Under the Trade Marks Registration Acts the registrar was at the head of the Registry Office. Now under the Trade Marks Act, 1905, the Comptroller-General is again, for trade marks purposes, referred to as the Registrar. (See § 4.)

Officers and clerks.

See P. & D. A. 1907, s. 63.

83.—(1.) The Board of Trade (*a*) may at any time after the passing of this Act, and from time to time, subject to the approval of the Treasury, appoint the comptroller-general of patents, designs, and trade marks, and so many examiners and other officers and clerks.

with such designations and duties as the Board of Trade think fit, and may from time to time remove any of those officers and clerks.

(2.) The salaries of those officers and clerks shall be appointed by the Board of Trade, with the concurrence of the Treasury, and the same and the other expenses of the execution of this Act shall be paid out of money provided by Parliament.

(a) The authority given by this section to the Board of Trade was formerly possessed by the Lord Chancellor, under § 7 of the Act of 1875.

Seal of Patent Office.

84. There shall be a seal for the Patent Office, and impressions thereof shall be judicially noticed and admitted in evidence.

See P. & D. A. 1907, s. 64.

Trust not to be entered in registers.

85. There shall not be entered in any register kept under this Act, or be receivable by the comptroller, any notice of any trust expressed, implied or constructive (*a*).

See T. M. A. 1905, s. 5.

(*a*) This section, so far as it related to trade marks, came from the old Rules. Under this section an order to rectify the register by adding to the registration of a trade mark a note stating that the user was restricted by an agreement of which the date only was given, was varied so that the terms of the agreement should appear on the face of the register (*In re Mitchell & Co.*, 28 Ch. D. 666); and in another case a similar agreement was allowed to be stated in the register so far as it restricted the goods on which a registered trade mark was to be used, but not so far as it regulated the manner of user or the way in which orders were to be executed: *In re De Cuadra*, W. N. 1886, p. 177. See now § 20 of the Act of 1905.

Refusal to grant patent, &c. in certain cases.

See T. M. A. 1905, s. 11.

86. The comptroller may refuse to grant a patent for an invention, or to register a design or trade mark, of which the use would, in his opinion, be contrary to law or morality (*a*).

(*a*) This was a new section. Compare § 73.

Entry of assignments and transmissions in registers.

See T. M. A. 1905, ss. 33, 38.

87. Where a person becomes entitled by assignment, transmission, or other operation of law to a patent, or to the copyright in a registered design, or to a registered trade mark, the comptroller shall on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent, copyright in the design, or trade mark, in the register of patents, designs, or trade marks, as the case may be (*a*). The person for the time being entered in the register of patents, designs, or trade marks, as proprietor of a patent, copyright in a design, or trade mark, as the case may be, shall, subject to [the provisions of this Act and to] any rights appearing from such register to be vested in any other person, have power absolutely to assign (*b*), grant licences (*c*) as to, or otherwise deal with, the same, and to give effectual receipts for any consideration for such assignment, licence, or dealing. Provided that any equities in respect of such patent, design, or trade mark may be enforced in like manner as in respect of any other personal property (*d*).

The amendment in this section was made by § 21 of the Act of 1888.

(*a*) Though § 4 of the Act of 1875 is not re-enacted, it seems that a subsequent proprietor will still, as regards his title to the trade mark, be in the same position as if his title were a continuation of the title of the first registered proprietor. In *In re Bryant & May, Ld.*, 4 Times L. R. 675, a question was raised as to a title by assignment, and it was held that an agreement to assign the goodwill and trade

marks was sufficient. Where a registered proprietor changed his name, the comptroller had power under this section to make the requisite alteration in the register, and it seems that if he refused, the Court might interfere under § 90: *In re New Ormonde Cycle Co.*, (1896) 2 Ch. 520. This is now provided for by § 32 of the Act of 1905.

(*b*) A trade mark could be assigned only in connection with the goodwill of the business. See § 70, *supra*. Also *In re Wellcome*, 32 Ch. D. 213: and Ch. III. ("Transfer").

(*c*) The power of granting licences must not be exercised so as to deceive the public, *e.g.*, so as to authorise the use of the mark on inferior goods. Nor does a licence to use a trade mark give any right to the exclusive use of a part only of the mark, which part would not of itself be capable of registration: *Lewis's v. Goodbody*, 67 L. T. N. S. 191. See Ch. VII. The power of granting licences at all seemed, in the case of trade marks, rather to conflict with § 70; the intention of which appeared to be that only the person entitled to the goodwill should have the right of using the trade mark. No such power is given by the Act of 1905.

(*d*) This proviso prevented the power of licensing from being used so as to defeat an agreement between former partners giving a restricted right to each to use the firm marks, such power being inconsistent with the purpose of the agreement: *Hanson v. Game, Harrison & Larner, Ld.*, 9 P. R. 186.

Inspection of and extracts from registers.
See T. M. A. 1905, s. 7.

88. Every register kept under this Act shall at all convenient times be open to the inspection of the public, subject to [the provisions of this Act and to] such regulations as may be prescribed (*a*); and certified copies, sealed with the seal of the Patent Office, of any entry in any such register shall be given to any person requiring the same on payment of the prescribed fee.

The amendment in this section was made by § 22 of the Act of 1888.

(*a*) This section was taken from the old Rules.

Sealed copies to be received in evidence.
See T. M. A. 1905, s. 50.

89. Printed or written copies or extracts, purporting to be certified by the comptroller and sealed with the seal of the Patent Office, of or from patents, specifications, disclaimers and other documents in the Patent Office, and of or from registers and other books kept there, shall be admitted in evidence in all courts in her Majesty's dominions, and in all proceedings, without further proof or production of the originals.

Rectification of registers by Court.
See T. M. A. 1905, ss. 35, 37.

90.—(1.) The Court may on the application (*a*) of any person aggrieved (*b*) by the omission without sufficient cause of the name of any person [or of any other particulars] (*c*) from any register kept under this Act, or by any entry made without sufficient cause in any such register (*d*), make such order for making (*e*), expunging (*f*), or varying (*g*) the entry, as the Court thinks fit; or the Court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the Court thinks fit (*h*).

(2.) The Court may, in any proceeding under this section, decide any question that it may be necessary or expedient to decide for the rectification of a register, and may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved (*i*).

(3.) Any order of the Court rectifying a register shall direct that due notice of the rectification be given to the comptroller (*k*).

This section came from § 5 of the Act of 1875, but was in rather different terms. The amendment was made by § 23 of the Act of 1888.

Mode of procedure for rectification.

(*a*) The register could not be rectified on counterclaim, and it seems questionable whether it could be rectified in an action: *Pinto* v. *Badman*, 8 P. R. 181, 187, 190. See, however, *Pinto* v. *Trott*, 8 P. R. 173. The Act was silent as to the procedure to be followed upon an application to expunge a mark registered in the name of a person domiciled out of the jurisdiction, and it seems that if sufficient notice of the nature of the application was given to the registered proprietor, the form of the notice was immaterial, but the usual course was to address the notice of motion to the comptroller only, and to send a copy of such notice to the registered proprietor with a letter informing him of the nature of the proceedings: *In re King & Co.*, (1892) 2 Ch. 462: *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer*, (1891) 3 Ch. 451: *In re Royal Baking Powder Co.*, 14 P. R. 425. It further appears that an application under this section was not subject to all the technical rules which apply to notices of motion, and therefore the alteration of the notice was a matter of detail, so that the striking out the name of the registered proprietor as respondent, or changing the date of the hearing, did not make it a new notice of motion requiring to be re-marked with the name of the judge in rotation. As a general rule the foreign proprietor who desired to appear on a motion for rectification, was not required to give security for costs: *In re La Société Anonyme des Verreries de l'Etoile* (1), 10 P. R. 290: but see *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer*, (1891) 3 Ch. 451.

"Person aggrieved."

(*b*) The first question on an application to rectify the register under this section, was whether the applicant was or was not a "person aggrieved." This question usually had to be considered with reference to cases in which it was alleged that a mark which was on the register ought not to be there; and it has been said that in such cases "any person interested in the same trade as the registered proprietor" was a person aggrieved (*Rose* v. *Evans*, 48 L. J. Ch. 618,; and that "the course of decision before the Act of 1883 was passed was that any person interested in the same trade might, without showing any special damage, be treated as a 'person aggrieved' by any improper or inaccurate registration": *In re Hayward & Sons*, 54 L. J. Ch. 1003. This principle was also acted on in *In re Edge*, 8 P. R. 207. That there must be some legal damage was laid down by Lord Selborne, C., in *In re Reddie*, 26 Ch. D. 48, where he pointed out that what was necessary to constitute a "person aggrieved" was that the thing complained of should be one of the grievances mentioned in the section, and that it should tend to his injury, to inflict upon him some damage, in a legal sense. Similarly, on the further hearing of the same case (53 L. T. N. S. 239), it was said by Fry, L. J., that "'any person aggrieved' means 'every person who will in reasonable probability suffer any injury or loss'—using those words in a legal and not in a sentimental sense—from the other persons claiming to use it": and *per* Lindley, L. J. (S. C.), that the person must be aggrieved "in the sense of sustaining legal damage, either immediate or prospective." But a person with a merely sentimental grievance was not a person aggrieved, and accordingly the secretary of the Society of Friends who applied for the removal of the word "Quaker" as a trade mark for spirituous liquors was held not to be a person aggrieved: *In re Ellis & Co.*, 21 P. R. 617. The question was much considered in the case of *In re Apollinaris Co.*, (1891) 2 Ch. 186, in which the Vichy Co. sought to expunge certain marks registered by the Apollinaris Co., and Fry, L. J., in delivering the judgment of the Court of Appeal said (p. 221), "Are the Vichy Co. persons ag[illegible]? Now we approach this question on the assumption, which is necessary, of co[illegible], to answer this question, that the trade mark was wrongly on the register, and further, with these two observations in the first place, that the question is merely one of *locus standi*, and in the second, that the words 'person aggrieved' appear to us to have been introduced into the statute to prevent the action of common informers or of persons interfering from merely sentimental motives, but that they must not be so read as to make evidence of great and serious damage a condition precedent to the right to apply. Further, we are of opinion that whenever one trader, by means of his wrongly-registered trade mark, narrows the area of business open to his rivals, and thereby either immediately excludes, or with reasonable probability will in the future exclude, a rival from a portion of that trade into which he desires to enter, that rival is 'an aggrieved person.' Again, if the effect produced, or likely to be produced, by the wrongful trade mark is not the exclusion, but the hampering, of a rival trader, that rival trader, again, is in our opinion a person aggrieved. A man in the same trade as the one who has wrongfully registered a trade mark, and who desires to deal in

the article in question, is *primâ facie* 'an aggrieved person.' This may be rebutted by showing that, by reason of some circumstances entirely independent of the trade mark, the person complaining never could carry on any trade in the article; but the burden of tendering such proof is on the man who claims the mark, and here that burden has not been discharged." That case was discussed in *In re Powell*, (1893) 2 Ch. 388, in which Bowen, L. J., says "persons who are aggrieved are persons who are in some way or other substantially interested in having the mark removed from the register, or persons who would be substantially damaged if the mark remained. It is very difficult to frame a nearer definition than that. In the *Apollinaris Case*, (1891) 2 Ch. 186, it was pointed out, not as a complete or exhaustive definition, that people would be aggrieved if they were in the same trade and dealt in the same article. To my mind, it is equally true that persons would be aggrieved if they are in the same trade, and might reasonably be expected to deal in the same article, though not prepared to prove at the moment that they had formed a clear determination to do so." *In re Powell* was affirmed by the House of Lords ((1894) A. C. 8), and Lord Herschell there said: "Wherever it can be shown that the applicant is in the same trade as the person who has registered the trade mark, and wherever the trade mark, if remaining on the register, would or might limit the legal rights of the applicant that, by reason of the existence of the entry upon the register, he could not lawfully do that which, but for the appearance of the mark upon the register, he could lawfully do, it appears to me that he has a *locus standi* to be heard as a person aggrieved." And see *In re Talbot*, 11 P. R. 77; *In re Zonophone Trade Mark*, 20 P. R. 450; *In re Neostyle Manufacturing Co.*, 20 P. R. 803. But an applicant, in order to show that he is a "person aggrieved," must show that in some possible way he may be damaged or injured if the trade mark is allowed to stand, the word "possible" being used in a practical sense and not fantastically: *per* Romer, J. approved by the Court of Appeal in *In re Wright, Crossley & Co.*, 15 P. R. 131; *ib.* 377. And where the mark sought to be removed is the name of the registered proprietor who has for many years carried on business under his own name, it can make no difference to an applicant having no right to the name that the name has been registered as a trade mark: *ib.* Where the grievance of the applicant is not that he can possibly be damaged by the particular entry on the register, but that he may be damaged by the respondent having any mark on the register, he is not a "person aggrieved": *per* Lindley, M. R., in *In re Wright, Crossley & Co.*, 15 P. R. 377. The observations of Lord Herschell in *In re Powell*, (1894) A. C. 8, do not justify the statement that the mere fact that a man is engaged in the same trade is sufficient to make him a person aggrieved. That is contrary to the principle of the decision in the House of Lords: *per* Rigby, L. J., *In re Wright, Crossley & Co.*, 15 P. R. 377. Where a trade mark had been registered which was in its essential particulars the same as an earlier registered mark of the same proprietor it was not removed at the instance of a rival trader, for if the registration is superfluous and adds nothing to the existing rights of the proprietor, the rival trader is not injured thereby and is not a person aggrieved: *In re A. & A. Crompton & Co.*, (1902) 1 Ch. 758. Where a trade mark has been registered for cotton yarn and sewing cotton, and used for cotton yarn only, it seems that a rival trader in cotton yarn is not a person aggrieved; and in any case his proper course would be to apply not to expunge but to restrict the registration. (*Ib.*)

Grievance by use of the trade mark in legal proceedings.

The commonest case is where the proprietor of a registered trade mark brings an action for infringement of it, and the defendant applies to have it removed from the register, on the ground that it never ought to have been placed there. In such cases it has been repeatedly held that the person sued is entitled to apply as a "person aggrieved": *In re Ralph*, 25 Ch. D. 194; *In re Leonard & Ellis*, 26 Ch. D. 288; *Lloyd & Sons* v. *Battomley*, 27 Ch. D. 646; *In re Wragg*, 29 Ch. D. 551; *Edwards* v. *Dennis*, 30 Ch. D. 454; *Wood* v. *Lambert*, 32 Ch. D. 247; *In re Spencer*, 54 L. T. N. S. 659; *In re Lever*, Chitty, J., Dec. 3rd, 1886; *In re Tongood*, 4 P. R. 67; *In re Ainslie*, 4 P. R. 212; *In re Perry Davis & Son*, 5 P. R. 333: 15 App. Cas. 316; *Baker* v. *Rawson*, 45 Ch. D. 519, 529; *Richards* v. *Butcher* (2), (1891) 2 Ch. 522. In *In re Gunnelis*, 6 P. R. 467, this was held to be so, though no relief was claimed in the action as for infringement of trade mark, seeing that the registration was set out in detail in the statement of claim, thus showing that it was intended to make some use of it. And in *Thompson* v. *Montgomery*, 41 Ch. D. 35, words registered as a trade mark were removed from the register on the appli-

cation of a person who was restrained by the same judgment from using them, and Lindley, L. J., said that "it is the duty of the Court, where its attention is called to an improper entry upon the register, to rectify upon an application being made." A similar result was brought about in the Yorkshire Relish case: *Powell* v. *Birmingham Vinegar Brewery Co.*, (1894) A. C. 8; *Birmingham Vinegar Brewery Co.* v. *Powell*, (1897) A. C. 710. Somewhat similarly it was held in *In re Ainslie*, 4 P. R. 212, that the fact that the applicants for rectification had contracted with the proprietors of the registered words "Ben Ledi," to sell no whiskey but theirs under that name, did not prevent them from applying as persons aggrieved. Equally a person is aggrieved when the presence of a mark on the register is used by the registered proprietor to support an application for the registration of a fresh mark, which is opposed by the person aggrieved. This was the case in *In re Apollinaris Co.*, (1891) 2 Ch. 186, in which Fry, L. J., said (p. 229): "In our opinion, when one trader uses the fact of his registration as any part of his case against another trader in any legal proceedings, that second trader is aggrieved, and this is not the less so because that trader may have other means of defending himself. If the owner of the registered trade mark says to a defendant in a litigation 'I am the owner of this registered trade mark, and therefore you are doing me a wrong,' the person attacked ought to be at liberty to reply two things: first, 'You ought not to be on the register,' and secondly, 'Even if you ought, I have done you no wrong.' The completeness of the second line of defence ought not to preclude the attacked person from availing himself of the first. If I am assailed with the conclusion of a syllogism, I am at liberty, both in logic and in law, to defend myself by denying both or either of the two propositions which are alleged in support of the conclusion, and I am aggrieved if I am unjustly deprived of that right. This liberty of defence is a matter of great importance to a litigant." In *In re Vignier*, 6 P. R. 490, the applicants were aggrieved, they having registered and used the word "Monopole" for champagne, and the respondents having registered the similar word "Monobrut." But where the alleged grievance consists in registering a mark which is not too similar to an earlier mark, there is no grievance: *In re Lambert*, 6 P. R. 344. In *In re Ball & Co.*, 6 P. R. 493, the applicants had used the word "Brymbo" on iron and steel, and the respondents had registered the words "The Brymbo Special" for the whole of Class 5, having used it only for tin-plates; and although the respondents offered to limit their registration to tin-plates, it was held that the applicants, being aggrieved by the registration as it stood, and the mark being bad in itself, it must come off altogether. There is no ground for thinking that only a person who is himself entitled to registration can be a person aggrieved (*In re Revere*, 26 Ch. D. 48), and it is not impossible for a person who only carries on a foreign trade to be aggrieved by a wrongful registration. *Ib.* If a registered proprietor becomes insolvent while proceedings to rectify his registration are pending, his representative in bankruptcy may be added as a respondent to the application for rectification: *In re Rowe*, 18 L. T. N. S. 388. And if an applicant for rectification dies, his successor in title may be substituted for him: *Re* v. *Leonhardt*, 25 P. R. 265; 27 *ib.* 268.

(c) These words remove the possibility of any question whether the Court is enabled under this section to direct any other entry than that of a name to be made. It has been decided that the Court has power to direct the correction of any entry which has been improperly made in the register, whether of a name or of a mark: *In re Arbuz*, 35 Ch. D. 248.

(d) With reference to the words "entry made without sufficient cause," it was said by Fry, L. J., in *In re Apollinaris Co.*, (1891) 2 Ch. 186, 234, 235, that: "The object of the statute is to protect trade marks, that is, marks placed on goods to indicate their origin, or their selection, or their importation, or some other trade qualification, and thereby to give information with regard to those goods to all persons trading in them. They are marks under which the trader trades. It may well be that in the case of new marks the intention to use as a trade mark may be presumed; but when it is apparent, as it is here, by the evidence and admissions at the bar, that there is no such intention, but that the registration is directed to a different end, then the entry has, within the meaning of § 90, been made without sufficient cause, and ought to be expunged." Further, it has been held by the Court of Appeal that these words ought to be read, not as if they were "made without sufficient cause at the time of registration," but as including any entry at any time on the register without sufficient cause, however it got there: *In re Ball & Co.*,

(1898) 2 Ch. 432. Under the Act of 1905, the Court can expunge "any entry wrongly remaining on the register" (§ 35).

Rectification by registration.

(*e*) It seems that the Court had no jurisdiction to rectify the register under this section, unless some entry had been made in it; and it could not rectify the register by directing a mark to be registered after it had been refused registration by the comptroller, except upon an appeal from the comptroller to the Board of Trade, referred by the Board to the Court under § 62: *In re Normal Co., Ld.*, 35 Ch. D. 231. An application to register, which was opposed by another trader, was not an application to rectify under this section, but was governed by § 69: *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278. The jurisdiction to rectify by making an entry was, therefore, confined to small matters of detail.

Rectification by removal.

(*f*) On an application under this Act to remove a mark from the register, the question whether it was entitled to registration had to be decided as at the date when registration was effected: *Wood* v. *Lambert*, 32 Ch. D. 247; *Barlow & Jones, Ld.* v. *Johnson & Co.*, 7 P. R. 395, 400; *In re Apollinaris Co.*, (1891) 2 Ch. 186, 230; *In re Bacril T. M.*, (1896) 2 Ch. 600; *In re Burroughs, Wellcome & Co.* (1904) 1 Ch. 736. See, however, *In re Batt*, (1898) 2 Ch. 432. But under § 36 of the Act of 1905, a mark which is registrable under that Act cannot be removed merely because it was registered under an earlier Act, under which it was not registrable. The burden of proof.

Burden of proof.

proof is upon the applicant for removal, but he may prove his case by the statements in or omissions from the evidence tendered on behalf of the registered proprietor: *In re Leonard & Ellis*, 26 Ch. D. 288; *Pinto* v. *Badman*, 8 P. R. 189. Consequently, if the mark is one which was inherently capable of being used as a trade mark, and the application for removal is based on an allegation that it was not used as a trade mark, but as a descriptive term, the burden of proving that it was not used as a trade mark is on the applicant. See *per* Cotton, L. J., in *In re Leonard & Ellis*, 26 Ch. D. 288; and *per* Stirling, L. J., in *In re Cheseborough*, (1902) 2 Ch. 1, 8. And where a word was registered in 1878 as an old mark, and an application was made in 1889 to remove it from the register on the ground that it had not been used as a trade mark before 1875, and the original proprietor and his family were dead, and his successors in business failed to prove user of the word *per se* as a trade mark on the goods before 1875, though they proved user in various other ways before that date, Kay, J., while refusing to receive in evidence the statutory declaration made by the original proprietor on applying for registration, held that the applicants for removal after so great a lapse of time had not discharged the burden which rested on them, and that the mark could not be directed to be removed from the register: *B. Edgington, Ld.* v *J. Edgington & Co.*, 6 P. R. 513. And it has been held that generally in cases of doubt where it was sought under this section to remove a mark which had been on the register for a great many years the benefit should be given to the proprietor: *In re Bass, Ratcliff and Gretton, Ld.*, 19 P. R. 529, 539; *In re Burroughs, Wellcome & Co.*, 1904, 1 Ch. 736; and see *Beard & Son* v. *Thom and Cameron, Ld.*, 24 P. R. 697; and the same principle has been recognized in Victoria (*In re National Starch Co.*, (1906) V. L. R. 244n.), though in that particular case it was held inapplicable. "The Court is not bound, upon the application of an unmeritorious applicant, to displace an entry on the register which, on the face of it, is not illegal, because the original registration might have been opposed on the ground of prior user by a third person who never opposed it on any such ground, and who at the time of the motion to rectify has discontinued such user:" *per* Bowen, L. J., in *In re Paine* (2), (1893) 2 Ch. 567; and see *In re Wright, Crossley & Co.*, 15 P. R. 131, 377; though it seems that if the mark were in itself illegal or improper the Court would expunge the entry in the interests of trade whatever the demerits of the applicant: *In re Paine* (2), (1893) 2 Ch. 567. And see *In re Hall*, 10 P. R. 113; *In re Talbot*, 11 P. R. 77.

Comparison of marks.

Where it is sought to remove a trade mark from the register on the ground of its too great similarity to an earlier mark, it is necessary, when comparing the two marks, to take into consideration (1) the manner in which blanks left in the earlier mark as registered are filled in in practice; (2) the manner in which the parts common to the trade are arranged; (3) the opinion of the trade as to the probability of deception: *In re Christianson*, 3 P. R. 51, in which Lopes, L. J., said, as to the second point: "In dealing with matters which are common to the trade, I think we must look at the combination of those different matters common to the trade, their collocation and arrangement, and if we find things that are common to the trade all inserted in a similar position, in a similar form, and in similar arrange-

ments, so as to make the whole so similar as to be calculated to deceive, I think that is enough." As to the third point, see *Mitchell* v. *Henry*, 15 Ch. D. 181. It is, however, necessary, when making such a comparison, to deal with the two marks on the footing that both will be fairly used (*In re Lambert*, 6 P. R. 344, *per* Cotton, L. J.; *In re Haines, Batchelor & Co.*, 5 P. R. 669; *In re Kutnow*, 10 P. R. 401): and it is not a ground for expunging a mark that a fraudulent use might be possible: *In re Wright, Crossley & Co.*, 15 P. R. 131. In considering the probability of deception, the length of time during which a mark has been on the register is material: *In re Talbot*, 11 P. R. 77; *In re Bass, Ratcliff & Gretton, Ld.*, 19 P. R. 529. And see notes to § 72. In determining whether an application to expunge should not be granted if an opposition to registration would have been successful, two things ought to be considered: (1) What was the reason of the delay in the application to expunge: (2) Has there been any substantial injury caused to the respondent through the application not having been made until after registration: *per* Romer, J., in *Eastman Photographic Materials Co.* v. *Griffiths Cycle Co.*, 15 P. R. 105, in which case a mark identical with a previous mark but registered in another class was ordered to be removed from the register on the ground that an opposition to registration would have been successful according to the principles laid down in *Eno* v. *Dunn*, 15 App. Cas. 252. And see *Bourne* v. *Swan & Edgar*, (1903) 1 Ch. 211, as to the effect of delay in moving to rectify.

Cases of removal.

The cases in which marks have been removed from the register are numerous, and the grounds of removal may be classified as follows:—

(i.) Name not printed in a distinctive manner (§ 64 (1) (*a*)): *In re Gianaclis*, 6 P. R. 467 ("Gianaclis Cigarettes"); *In re Hannay*, 7 P. R. 46 ("Hannay's Electroid Anti-fouling Composition"); *In re Edge*, 8 P. R. 207 ("Edge's Filtered Blue"). *Pirie* v. *Goodall*, (1892) 1 Ch. 42 ("Pirie's Parchment Bank" note-paper).

(ii.) Signature not the signature of applicant's firm (§ 64 (1) (*b*)): *Macmillan* v. *Ehrmann Bros., Ld.*, 21 P. R. 357.

(iii.) Device not distinctive, being in common use in the trade (§ 64 (1) (*c*)): *In re Wragg*, 29 Ch. D. 551 (Syphon, hand and glass): *Louise & Co., Ld.* v. *Gainsborough*, 20 P. R. 61 (Gainsborough's "Duchess of Devonshire," for millinery): *Anglo-Swiss Condensed Milk Co.* v. *Pearks, Gunston & Tee*, 20 P. R. 509; 21 P. R. 261 (Milk-maid for dairy produce).

(iv.) Words not distinctive or fancy words, being in common use in the trade (§ 64 (1) (*c*), § 64 (3)): *In re Hyde & Co.*, 7 Ch. D. 724 ("Bank of England" sealing-wax): *In re Lloyd & Sons*, 27 Ch. D. 646 ("La Minerva Habana" cigars): *Great Tower St. Tea Co.* v. *Smith*, 6 P. R. 165 ("Tower Tea"); *In re Knapton*, 24 P. R. 550 ("Sugar soap" as applied to a detergent powder).

(v.) Words not distinctive or fancy words, being descriptive (§ 64 (1) (*c*), § 64 (3)): *In re Palmer* (3), 24 Ch. D. 504 ("Braided Fixed Stars" cigar-lights): *In re Harden Star, &c. Co., Ld.*, 3 P. R. 132 ("Hand Grenade Fire Extinguisher"): *In re Stock*, 52 L. T. N. S. 123 ("Strathmore" whiskey): *In re Lever*, Chitty, J., Dec. 3rd, 1886, following *Lever* v. *Goodwin*, 36 Ch. D. 1 ("The Self Washer" soap): *In re Vaughan-Jones*, North, J., June 21st, 1884 ("Glenlivet" whiskey): *In re Tourgood Bros.*, 4 P. R. 67 ("The Jubilee" note-paper): *In re Ainslie*, 4 P. R. 212 ("Ben-Ledi" whiskey): *In re Laing*, L. J. N. of C. 1887, p. 102 ("Glengowrie Blend of fine old Highland Whiskey"): *In re Arbenz*, 35 Ch. D. 248 ("Gem" air-guns): *In re Waterman*, 39 Ch. D. 29 ("Reversi" game): *In re Perry Davis & Son*, 5 P. R. 333; 15 App. Cas. 316 ("Pain-Killer" medicine): *In re Davis & Co.*, 6 P. R. 207 ("Boköl" beer): *Humphries* v. *Taylor Drug Co.* (2), 5 P. R. 687 ("Herbalin" medicine): *Great Tower St. Tea Co.* v. *Smith*, 6 P. R. 165 ("Tower Tea"): *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274 ("Washerine" soap): *In re Vignier*, 6 P. R. 490 ("Monobrut" champagne): *In re Batt & Co.*, 6 P. R. 493 ("The Brymbo Special" metal goods): *In re Hannay*, 7 P. R. 46 ("Electroid" anti-fouling composition): *In re Apollinaris Co.*, (1891) 2 Ch. 186, 231 ("Apollinaris," "Friedrichshall" and "Hunyadi Janos" mineral waters and products): *In re Edge*, 8 P. R. 207 ("Filtered Blue"): *Pirie* v. *Goodall*, (1892) 1 Ch. 42 ("Parchment Bank" note-paper): *In re Lloyd*, 10 P. R. 281

("Carnival" cigarettes); *In re Talbot*, 11 P. R. 77 ("Emolliolorum" saddle paste); *In re Banks & James*, 44 W. R. 32 ("Shakspere" cigars); *In re Paris*, 14 P. R. 903 ("Compactum" umbrellas); *Meaby & Co.* v. *Triticine, Ld.*, 16 P. R. 1 ("Triticumina" food); *In re Magnolia Metal Co.*, (1897) 2 Ch. 371, 391 ("Magnolia" metal); *In re Gesteiner*, (1907) 2 Ch. 478; (1908) 1 Ch. 513 ("Cyclostyle" pens).

(vi.) Words not being invented words (§ 64 (1) (*d*)): *Christy & Co.* v. *Topper & Son*, (1904) 1 Ch. 696; (1905) 1 Ch. 1 ("Absorbine" embrocation); *Warwick Trading Co.* v. *Urban*, 21 P. R. 240 ("Bioscope" Cinematograph); *Hommel* v. *Gebrüder Bauer & Co.*, 21 P. R. 576; 22 P. R. 43 ("Hematogen" drug).

(vii.) Words not being words having no reference to the character or quality of the goods (§ 64 (1) (*c*)): *In re Edge*, 8 P. R. 207 ("Filtered Blue"); *In re Talbot*, 11 P. R. 77 ("Emolliolorum" saddle paste); *In re Magnolia Metal Co.*, (1897) 2 Ch. 371 ("Magnolia" metal); *In re Kodak, Ld.*, 20 P. R. 337 ("Panorama" photographic films).

(viii.) Words registered as old mark, but not used as a trade mark *per se* on the goods before 1875 (§ 64 (3)): *In re Palmer* (3), 24 Ch. D. 504 ("Braided Fixed Stars" cigar-lights); *In re Spencer*, 3 P. R. 73 ("Diamond Cast Steel"); *In re Hayward & Sons*, 54 L. J. Ch. 1003 ("Hayward's Coker Canvas"); *In re Perry Davis & Son*, 5 P. R. 333; 15 App. Cas. 316 ("Pain-Killer Medicine"); *In re Eno*, 41 Ch. D. 439 ("Fruit Salt" medicine); *Thompson* v. *Montgomery*, 41 Ch. D. 35 ("Stone Ale"); *In re Powell* (2), (1893) 2 Ch. 388; (1894) A. C. 8 ("Yorkshire Relish"); *In re Gordon & Dilworth*, 13 P. R. 629 ("Tomato Catsup"); *In re Royal Baking Powder Co.*, 14 P. R. 425 (a label containing the words "Royal Baking Powder").

(ix.) Device registered as old mark but not used as a trade mark *per se* on the goods before 1875 (§ 64 (3)): *Baker* v. *Bateson*, 45 Ch. D. 519, 528. In *In re Hull*, Kekewich, J., Dec. 6th, 1898, the mark was registered with a claim of user of 183 years, instead of three years or less, before 1875, and was expunged on that account.

(x.) Words registered as old mark, but used descriptively and not as a trade mark (§ 64 (3)): *In re Leonard & Ellis*, 26 Ch. D. 288 ("Valvoline" oil); *In re Harrison, McGregor & Co.*, 42 Ch. D. 691 ("Albion" tools); *Richards* v. *Butcher* (2), (1891) 2 Ch. 522 ("Monopole" champagne); *In re Powell* (2), (1894) A. C. 8 ("Yorkshire Relish"); *Day* v. *Riley*, 17 P. R. 517 ("Day & Sons' Black Drink"); *Bourne* v. *Swan & Edgar*, (1903) 1 Ch. 211 ("Swan bill" corsets).

(xi.) A mark registered for goods for which it was not used or intended to be used (§ 65): *Edwards* v. *Dennis*, 30 Ch. D. 454 ("Neptune" brand metal goods); *In re Apollinaris Co.*, (1891) 2 Ch. 186 (mark for Friedrichshall water); *In re Batt & Co.* (2), (1898) 2 Ch. 432; (1899) A. C. 428 (device of butterfly for food substances); *In re Valentine Extract Co., Ld.*, 18 P. R. 175 ("Valtine" for drugs and fermented liquors); *In re Hart*, 19 P. R. 569 (device of red rose for food substances); *In re Suter, Hartmann & Kuhljen's Composition Co.*, 19 P. R. 42 (device of a hand for chemical substances); *Anglo-Swiss Condensed Milk Co.* v. *Peurks, Gunston & Tee*, 20 P. R. 509; 21 P. R. 261 (device of milk-maid for butter); *In re Hare*, 24 P. R. 263.

(xii.) Registered proprietor carrying on no business (Rules of 1876, now repealed): *In re Ralph*, 25 Ch. D. 194 ("Homewasher" machine).

(xiii.) Mark registered without necessary disclaimer (§§ 64 (2), 74): *In re Faulder & Co.*, (1902) 1 Ch. 125.

(xiv.) Mark assigned without goodwill (§ 70): *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Harness*, 17 P. R. 40 ("Koptica"); *In re Johnson*, 26 P. R. 195.

(xv.) Mark abandoned (§ 70): *In re Ashton*, 48 W. R. 389.

(xvi.) Marks registered, though too similar to earlier marks (§§ 69, 72): *In re Barker & Son*, 53 L. T. N. S. 23 (a sporting scene in each case); *In re Christiansen*, 3 P. R. 54 (match-box labels); *In re Hayward & Sons*, 54 L. J. Ch. 1003 ("Hayward's Coker Canvas"); *In re Metcalf*, 31 Ch. D.

454 ("Milkmaid" brand and "Dairymaid" brand condensed milk); *In re Biegel*, 4 P. R. 525 (three-triangle devices for beer); *In re Vignier*, 6 P. R. 490 ("Monopole" and "Monobrut" champagne); *In re Ball & Co.*, 6 P. R. 493 ("Brymbo" and "The Brymbo Special" metal goods); *In re La Société Anonyme des Verreries de l'Etoile*, (1894) 2 Ch. 26 (the device of a star and the words "Red Star Brand"); *In re Valentine Extract Co.*, 18 P. R. 175 ("Valtine").

(xvii.) A mark identical with previous mark, but registered in another class, it being proved that the later mark was calculated to deceive (§§ 65, 69, 72): *Eastman Photographic Materials Co. v. Griffiths Cycle Co.*, 15 P. R. 105 ("Kodak" for cameras and for cycles).

xviii.) Marks inherently deceptive (§ 73): *In re Hayward & Sons*, 54 L. J. Ch. 1003 ("Sole Makers Extra Coker" canvas); *Wood v. Lambert*, 32 Ch. D. 247 ("Eton" cigarettes, made in London, but used with addresses in St. Petersburg and Constantinople); *In re Apollinaris Co.*, (1891) 2 Ch. 186, 233; *In re Wills* (2), (1893) 2 Ch. 262; *Day v. Riley*, 17 P. R. 517 (words "Trade Mark" used deceptively); (but see *In re Bass, Ratcliff & Gretton, Ld.*, 19 P. R. 529); *In re Hill*, 10 P. R. 113 ("Forrest" watches registered by a person having no connection with "Forrest" a London watchmaker).

(xix. Mark registered by servant of owner (*Ex parte Laurence Bros.*, 44 L. T. N. S. 98 (mark for printers' rollers), or other person not entitled to it: *In re "Zonophone,"* 20 P. R. 450 (name for recording apparatus); *In re North Shore Mill Co., Ld.*, 22 P. R. 599 (marks for flour).

(xx.) Marks belonging to foreign producer registered by importer: *In re Apollinaris Co.*, (1891) 2 Ch. 186 (marks for Apollinaris, Friedrichshall and Hunyadi Janos mineral waters and products): *In re European Blair Camera Co.*, 13 P. R. 600 ("Bull's-Eye" cameras); *In re Neostyle Manufacturing Co.*, 20 P. R. 803 ("Neostyle" stationery).

In some of the above cases the marks were not absolutely expunged, but some lesser step was taken: but in *In re Hill*, 10 P. R. 113, Chitty, J., considering the mark as a whole to be dishonest, ordered the whole mark to be expunged, although part of it was not objected to. In *In re Wills* (2), (1893) 2 Ch. 262, the Court ordered that the mark should be expunged unless an application to amend it was made within a reasonable time, but in *Day v. Riley*, 17 P. R. 517, this course was not followed. In *In re A. & J. Crompton & Co., Ld.*, (1902) 1 Ch. 758, it was held that where the registration was too wide, the proper remedy was restriction not removal, and a motion to expunge was refused. Where a word was registered for nearly the whole of Class 1, but was used only for paints, and the registered proprietor refused to consent to the registration of the same word by a trader who had acquired a reputation under that word for photographic plates, he was ordered to pay the costs of a motion to rectify by excluding from the registration photographic plates: *In re Hare*, 24 P. R. 263. Where a trade mark has been wrongly registered, it may be expunged forthwith, without waiting for the trial of an action to meet which the application is made: *In re Giannelis*, 6 P. R. 467. There is no established practice at the Patent Office that a mark ordered to be removed shall not be physically expunged from the register pending an appeal: *In re Neostyle Manufacturing Co.*, 20 P. R. 803. Five years' registration was no bar to the removal of the mark: *Edwards v. Dennis*, 30 Ch. D. 454; *In re Verity*, 19 P. R. 58. And see cases in note to § 76. But now see § 41 of the Act of 1905.

Applications for rectification were refused on various grounds in the following cases: *In re Riviere*, 53 L. T. N. S. 237; *Mauson & Co. v. Bochm*, 26 Ch. D. 398; *In re Charlton and Dugdale*, 53 L. T. N. S. 337; *In re James*, 33 Ch. D. 392; *In re Talbot*, 3 P. R. 276; *In re Lambert*, 6 P. R. 344; *In re B. Edgington, Ld.*, 6 P. R. 513; *Barlow & James, Ld. v. Johnson & Co.*, 7 P. R. 395; *In re Denshaw*, (1895) 2 Ch. 176; *In re Hall*, (1896) 1 Ch. 711; *In re Borril T. M.*, (1896) 2 Ch. 600; *Rowland v. Michell*, 1897) 1 Ch. 71; *Cuene v. Herbert*, 14 P. R. 136; *In re Wright, Crossley & Co.*, 15 P. R. 131, 377; *In re Clement & Co.*, 16 P. R. 173; *Freeman Bros. v. Sharpe Bros. & Co.*, 16 P. R. 205; *In re Hedley*, 17 P. R. 719; *In re Verity*, 19 P. R. 58; *In re A. J. Crompton & Co., Ld.*, (1902) 1 Ch. 58; *In re Chesebrough*, (1902) 2 Ch. 1; *In re Bass, Ratcliff & Gretton, Ld.*, (1902) 2 Ch. 579; *In re Kodak, Ld.*, 20 P. R. 337; *In re Ellis*, 21 P. R. 617; *In re Burroughs, Wellcome & Co.*, (1904) 1 Ch. 736

In *In re Palmer* (2), 22 Ch. D. 88, when the Court of Appeal had decided that the fact of five years' registration was not a legal bar to an application to expunge a mark, they refused to stay the hearing of the case with the evidence till after the determination by the House of Lords of an appeal from their decision on the point of law. In *Rey* v. *Leconturier*, 25 P. R. 265, the Court of Appeal refused to stay the order for removal pending an appeal to the House of Lords. It seems that an appeal from a decision upon an application for the removal of a trade mark from the register will not be treated as an interlocutory appeal, but that the case must be heard by three judges: *In re Riviere & Co.*, 26 Ch. D. 48; *In re Leonard & Ellis*, *ib.* 288. Where a mark is registered in the name of a domiciled Scotchman, it has been held in Scotland that the Scotch Courts have jurisdiction to order its removal: *Cowie* v. *Herbert*, 14 P. R. 436; but this has been doubted, see *John Dewar & Sons, Ld.* v. *Dewar*, 17 P. R. 341. It has been held in Ireland that the Irish Courts have no jurisdiction to order any alteration or rectification of the register of trade marks, that being a special jurisdiction conferred on the High Court in England: *Bayer* v. *Connell*, (1897) 1 I. R. 544. And see note to § 111.

For Australian cases of removal from the register, see *In re Rowley & Pyne*, 9 V. L. R. (L.) 307, in which R. & P. had used a device of a horse and groom for twenty years, and D. and his predecessor in business had used a device of a horse alone for twelve years, and then R. & P. adopted and registered a device of a horse alone, and it was removed from the Victorian register on D.'s application: *Harris* v. *Ogg*, 5 N. S. W. Rep. (E.) 114, in which a mark which had been registered by a person who had not used it, was removed from the New South Wales register on the application of a person who had long done so: *Blogg* v. *Anderson*, 21 N. S. W. L. R. Eq. 238, a similar case; *In re Hicks*, 22 V. L. R. 636, in which a trade mark was removed from the Victorian register upon similar grounds; *Lever* v. *Mowling*, 6 C. L. R. 136, where a number of marks which had been registered for soap and candles, but only used for soap, were limited to soap; *National Starch Manufacturing Co.* v. *Munn's Patent Maizena & Starch Co.*, 13 N. S. W. R. (E.) 101; (1894) A. C. 275, in which the name "Maizena" was removed from the New South Wales register on the ground that it had become *publici juris* at the date of registration; *In re National Starch Co.* (1906), V. L. R. 244, where the same name was removed from the Victorian register; *In re Webendorfer Bros.*, 23 V. L. R. 34, where a mark for cartridge cases was removed as calculated to deceive by reason of the existence of a similar mark for gunpowder; *In re Remfrey*, 23 V. L. R. 44, where "Hovis" for bread was removed on the ground of the reputation acquired by the same name in England for the same class of goods; *In re Tilley*, 26 V. L. R. 203, where "Curato" was removed on the ground of its similarity to "Cuticura" for soap; *In re Weingarten Bros.*, 29 V. L. R. 965, where a composite mark for corsets was removed because not distinctive; *John Lysaght, Ld.* v. *Reid & Russell Proprietary, Ld.* (1907), V. L. R. 432, where a mark was removed as calculated to deceive. In Cape Colony, the following words have been removed from the register as being descriptive: "Café noir" as applied to biscuits: *Peck, Frean & Co.* v. *Carr*, Cape Good Hope, 15 S. C. R. 172: "Club" as applied to soda water: *Wordon & Pegram* v. *Cantrell & Cochrane*, Cape Good Hope, 18 S. C. R. 142: "Irish Crown" as applied to soap: *Legg* v. *Finlay*, Cape Good Hope, 18 S. C. R. 107; "Lightfoot" as applied to boots: *Southall & Co.* v. *Cuthbert & Co.*, Cape Good Hope, 19 S. C. R. 453. In *Chas. Bayer & Co.* v. *Strauss, Adler & Co.*, Cape Good Hope, 24 S. C. R. 27, the letters C. B. as applied to corsets were removed on the ground that their registration as an old mark was not justified by user. In *Evshaw & Co.* v. *Van Ryn Wine & Spirit Co.*, Cape Good Hope, 21 S. C. R. 267, rectification on the ground of deception was refused on proof of concurrent user of the mark by the two firms for many years without deception.

Rectification by varying.

(*g*) The register has been rectified by varying an entry in the following ways:—

(i.) By restricting the goods for which the mark is registered: *Edwards* v. *Dennis*, 30 Ch. D. 454; *In re Metcalf*, 31 Ch. D. 454; *In re Banks & James*, 12 P. R. 333; *In re Batt & Co.* (2), (1898) 2 Ch. 432; *In re Suter, Hartmann & Rahtjen's Composition Co., Ld.*, 19 P. R. 42; *In re Hart*, 19 P. R. 569; *In re Hare*, 24 P. R. 263.

(ii.) By striking some part of the mark out of it: *In re Stock*, 52 L. T. N. S. 123 (word "Strathmore" struck out of a whiskey mark); *In re Vaughan-Jones*, North, J., June 21st, 1884 (word "Glenlivet" struck out of a whiskey mark); *In re Birgel*, 4 P. R. 525 (three-triangle device struck

out of a beer mark). And see *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274.

(iii.) By causing a partial disclaimer to be entered on the register, as in *In re Leonardt*, Dig. 610; *In re Mitchell* (2), Dig. 611; *In re Hubbuck*, Jessel, M. R., June 20th, 1879; *In re Kuhn & Co.*, 53 L. J. Ch. 238; *In re Johnson, Philpott & Co.*, North, J., Feb. 21st, 1888; *Humphries & Co.* v. *Taylor Drug Co.* (2), 59 L. T. N. S. 820; *Burland & Co.* v. *Broxburn Oil Co., Ld.* (2), 42 Ch. D. 274; *Baker* v. *Rawson*, 45 Ch. D. 519, 534; *In re Edge*, 8 P. R. 207; *In re Steel*, Chitty, J., Jan. 12th, 1893; *In re Thompson*, 13 P. R. 35. See notes to §§ 72 and 74.

(iv.) By directing an alteration in the name of the registered proprietor. It is, however, very questionable whether this can be done, and when registration has been effected in accordance with the application, but the application was wrong in some respect, it seems that the Court will amend the register by expunging the entry, but not by varying it so as to make the registration stand in another name. Thus Hall, V.-C., said, in *In re Ward, Sturt & Sharp*, 50 L. J. Ch. 347: "I cannot rectify the register where no error has been committed. The term 'rectification' is only applicable to cases in which there has been some mistake or error in the registration. In other cases the applicant must follow the course laid down for cases of assignment or transmission." So in *Ex parte Lawrence Bros.*, 44 L. T. N. S. 98, Jessel, M. R., expunged the entry, and left the rightful owners of the mark to make a fresh application in their own names. So in *In re Farina* (4), 44 L. T. N. S. 99, he directed administration to be taken out to the estate of the deceased registered proprietor, and the administrator, when appointed, to assign to the rightful proprietor. In *In re Rust & Co.*, 44 L. T. N. S. 98, however, the same learned judge allowed a mark to be transferred from the name of an individual member of a firm, stated to be trading under the name of the firm, into the names of all the partners trading under the name of the firm. It appears to have been thought by Jessel, M. R., in *Ex parte Lawrence Bros.*, 44 L. T. N. S. 98, that it might not be impossible for the Court to transfer a registration from one name into another, if the registered proprietor had registered another's trade mark in his own name when he was actually employed by the true owner to register it for him, and was so the agent and trustee for the other. In that case there was no agency, and no such order was made; but in *In re Australian Wine Co., Ld.*, 61 L. T. N. S. 427, where the sole consignee in England of the wine from certain Australian vineyards had registered the name of the vineyards as his own trade mark, but intending it to be for the benefit of the owner of the vineyards, an order transferring the mark into the name of the owner of the vineyards was made. In *In re Riviere*, 53 L. T. N. S. 237, however, the Court of Appeal seems to have been decidedly of opinion that such an order could not be made, and Cotton, L. J., said: "In my opinion, whatever might be the result of the application to strike the name of the French firm off the register, the other application ought not to be granted. Without saying that it is impossible to grant such an application as this in any case where one person is improperly on the register, and another person who is entitled to the trade mark wishes to be put on, yet, as a rule (and I do not know a case where there would be an exception), when any one applies in the first instance to be publicly registered as the proprietor of a trade mark, the requirements of the Act and Rules as to issuing advertisements and otherwise ought to be complied with. For there may be cases—and I can imagine them—where, although the person applying to strike a name off the register may be entitled to say, as against the person on the register, that he is improperly registered as owner of the trade mark, yet there may be persons, not present at the litigation, who have a right, as against the applicant, to rectify the register, and to say that such applicant is not himself entitled to be there so as to prevent such third person from using the mark. I have thought it right to express my opinion on that part of the case at once." And Lindley, L. J., added: "If the applicants had succeeded in making out a case to remove the name of Riviere & Co., I do not think they would have been entitled to have themselves registered in respect of this mark,

I think Mr. Stirling's observation is conclusive—that they could not have registered anew in respect of the old mark without advertising and taking the other steps required by the Act and Rules. I say that on behalf of the public." The same view was taken independently by Kay, J., in *In re Kingsford & Son*, 6 P. R. 413. The most expedient course to adopt in such cases, where the parties are friendly, is indicated by the case of *In re Wellcome*, 32 Ch. D. 213, where an agent had registered his foreign principal's mark in his own name, but for the benefit of the principal, and subsequently assigned the trade mark to the principal, and it was held that the assignment was an assignment in connection with the goodwill, within § 70, and ought to be registered. A similar course was directed by Stirling, J. (following *In re Farina* (4), 44 L. T. N. S. 99, and distinguishing *In re Rust & Co.*, 44 L. T. N. S. 98) in *In re Greenlees*, 9 P. R. 93, where a member of a firm had erroneously registered the mark of the firm in his own name, the Court expressing its opinion that the comptroller ought to register the assignment. A very special order was made in *In re April*, Stirling, J., April 20th, 1888, in which persons to whom the registered proprietor of a trade mark had assigned her business and goodwill, with the right to use the trade mark, all for a limited period of six-and-a-quarter years, at the end of which period these rights were to revert to her, procured themselves to be registered as the proprietors of the trade mark in succession to their assignor; but, on her making complaint, they applied to the Court to restore the register to its previous condition, and it was accordingly ordered that the register should be rectified by removing their names as subsequent proprietors of the mark and re-entering the name of the original proprietor. In *In re Patent Plumbago Crucible Co.* (2), 7 P. R. 282, two trade marks were registered in 1879 as the property of the Patent Plumbago Crucible Co., an unregistered company. In 1882 the Company assumed the name of "The Morgan Crucible Co.," and in 1890 the marks were allowed to be transferred into the name of "The Morgan Crucible Co., formerly trading as the Patent Plumbago Crucible Co." And this case was followed by Kekewich, J., in *In re Burgon & Wilkinson*, 40 Sol. J. 336; but the proprietor being in that case a registered company, the learned judge held that the words "originally called" should be substituted for the words "formerly trading as." The decision of Stirling, J., was, however, questioned by North, J., in *In re New Ormonde Cycle Co.*, 13 P. R. 475, from which it seems that where a registered proprietor changed his name the application ought to be made under § 87. See now T. M. A. 1905, § 32. In *Rey* v. *Lecouturier*, 25 P. R. 265, 27 *ib.* 268, the entry of the name of a subsequent proprietor was ordered to be expunged, so as to replace the marks in the name of the former owner.

Under the Acts prior to 1905 it was held that once a trade mark had been improperly registered, the register could be rectified on an application by a person aggrieved, even though, by reason of a change in the circumstances, or by the coming into operation of a new Act of Parliament, the registration might be immediately renewed, seeing that the public must have an opportunity of opposing the new application: *In re Apollinaris Co.*, (1891) 2 Ch. 186, 231. Compare *In re Riviere*, 53 L. T. N. S. 237. See now T. M. A. 1905, § 36.

(*h*) It was held that opposed applications for the registration of trade marks were not within this section, and that the Court had no jurisdiction to give a successful opponent his costs of the proceedings in the Registry Office: *In re Australian Wine Importers, Ld.*, 41 Ch. D. 278; following *In re Brandreth*, 9 Ch. D. 618. As to the costs of applications to remove marks, see Chap. VII. *sub fine*.

(*i*) The question of a claim for damages occasioned by a wrongful registration was considered in Scotland in *Reid* v. *Thomson & Co.*, 22 P. R. 376; 25 *ib.* 153, but the provision as to damages does not now reappear in sect. 35 of the Act of 1905.

(*k*) Where the respondent to a motion for rectification consented to an order for the removal of his mark, subject to an agreement being entered into by which the future use of the marks was to be regulated, the Court required notice to be given to the comptroller of the appointment before the Registrar to settle the order: *In re Golding*, 19 P. R. 375; and when the registration authorities are not represented on a motion to rectify, it is usual to require such notice to be given.

Power for comptroller to correct clerical errors. See T. M. A. 1905, s. 32.

91. The comptroller may, on request in writing, accompanied by the prescribed fee,—

(a.) Correct any clerical error in or in connection with an application for a patent, or for registration of a design or trade mark; or

(b.) Correct any clerical error in the name, style or address of the registered proprietor of a patent, design, or trade mark.

(c.) Cancel the entry or part of the entry of a trade mark on the register (*a*): Provided that the applicant accompanies his request by a statutory declaration made by himself, stating his name, address, and calling, and that he is the person whose name appears on the register as the proprietor of the said trade mark.

[(d.) Permit an applicant for registration of a design or trade mark to amend his application by omitting any particular goods or classes of goods in connection with which he has desired the design or trade mark to be registered.]

The amendment in this section was made by § 24 of the Act of 1888.

(*a*) This came from the old rules. In *In re Lysaght*, Dig. 623, a registration for all the goods in Class 5 was, on application by the proprietor, corrected by limitation to galvanized sheet iron only. In *Ex parte Sales, Pollard & Co.*, Dig. 620, the registered proprietors of a trade mark for snuff, consisting of the letters "S. P.," the initials of their firm, discovered that that mark had been for many years in common use in the snuff trade, though used originally by themselves, and procured the cancellation of the registration.

Alteration of registered mark. See T. M. A. 1905, s. 34.

92.—(1.) The registered proprietor of any registered trade mark may apply to the Court for leave to add to or alter (*a*) such mark in any particular, not being an essential particular (*b*) within the meaning of this Act, and the Court may refuse or grant leave on such terms as it may think fit.

(2.) Notice of any intended application to the Court under this section shall be given to the comptroller by the applicant; and the comptroller shall be entitled to be heard on the application.

(3.) If the Court grants leave, the comptroller shall, on proof thereof and on payment of the prescribed fee, cause the register to be altered in conformity with the order of leave.

(*a*) This section is taken from the old rules.

(*b*) For what was an "essential particular," see § 64, *supra*. The alteration of a mark in non-essential respects did not deprive a mark of the benefit of the period of user before the alteration: *In re Bryant & May, Ld.*, 4 Times L. R. 675.

Alteration of trade marks.

Old Marks.

An important question which was raised for the first time in 1891, after the registration system had been in operation for sixteen years or thereabouts, and after many orders had been made by the Court by which alterations of various kinds in old marks, *i.e.*, marks originally used before the date of the Act of 1875, were allowed, was how far, if at all, the provisions of this section authorized the alteration of old marks. In *In re Phillips*, (1891) 3 Ch. 139, it seems to have been suggested by Chitty, J., that old marks ought to remain on the register in the precise form in which they had been originally used; and in *In re Adams*, 9 P. R. 174, and *In re Henry Clay & Bock & Co.*, (1892) 3 Ch. 540, the same view was taken by Kekewich, J. It is, however, to be noticed that the nature of the alteration desired in these cases, or, at all events, in the first two of them, was very serious, and might have had the effect of making a good mark out of a bad one, while, in the first case, it certainly would have resulted in depriving the public of the indication of a restricted claim which previously existed, and this was pointed out by Chitty, J., in the case

referred to. From the list of orders given below it will be seen that Chitty, J., allowed alterations of old marks in many cases, and Kekewich, J., in a few, so that it may perhaps be considered that the observations made in the cases above cited were intended to have special reference to the cases then before the Court, in which the alteration would have materially altered the marks there in question. This much is clear, that neither in § 92 itself, nor in Rule 35 of the Rules under the Act of 1875, from which this section was taken, was the power of the Court to permit alterations restricted in any way to new marks, that the great bulk of the marks to which the rule was applicable when it was made in 1875 were old marks, and that, as a matter of fact, the majority of the instances in which alterations were allowed, at all events for many years, occurred with reference to old marks. The old mark must, no doubt, be registered precisely as used, but when the mark had once been properly registered the Court had full power to permit it to be altered in non-essential particulars if the case appeared to be a proper one for such an indulgence. The true principle seems to have been that no mark, whether old or new, should be allowed to be altered where the alteration, whether in a technically "essential particular" or not, would materially alter the nature or appearance of the mark, or make a good mark out of a bad, or possibly bad, one; but that when the proposed alteration was not open to such an objection there was no reason why the Court should not allow the alteration if it thought fit, whether the mark was old or new. The language of § 9 (5) of the Trade Marks Act, 1905, relating to the registration of old marks, seems to support this view for the future.

Classes of alterations.

The Trade Marks Journal contains numerous instances of announcements of alterations in registered trade marks authorized by the Court, and a list of them is given at pp. 646—652, distinguishing them as they refer to old and new marks respectively. In two or three cases the orders referred to do not appear to have been advertised in the Trade Marks Journal, the reason being that the applicants remained content with obtaining their orders and omitted to notify them to the office, so that the register has *de facto* continued unaltered. In the earlier years the registrar or comptroller was not represented on these applications, but it ought hardly to be assumed that the orders were made without proper consideration on that account.

It seems convenient to classify the orders made under the headings: (1) Alterations in the name or initials appearing on the mark; (2) alterations in respect of the word "limited" or abbreviations of it; (3) alterations in respect of the words "patent" or "trade mark" on the mark; (4) other alterations in respect of wording, type, &c., appearing on the mark; to which may be added (5) alterations made, not in the mark itself, but in the name of the registered proprietor of the mark.

Alterations in name on mark.

In several cases it has happened that a registered mark has contained the name of the proprietor of the mark, but that, on account of a subsequent change of ownership, it has become desirable that the name in the mark should be changed so as to correspond with the altered circumstances, and in such cases the Court has usually allowed the change to be made. Thus, in *In re Dewhurst*, February 23rd, 1878, March 19th, 1880, and July 9th, 1880, Jessel, M. R., allowed a number of marks in the cotton classes to be altered by substituting the names of the new proprietors for the names of the former proprietors, "Alexander Collie & Co." and "Balfour, Heugh & Co." But in one of these cases, in which the name of the former proprietor was printed in the form of a signature, so as to constitute an essential particular, the Master of the Rolls refused to allow the alteration. See also *In re Murphy & Co.*, 7 P. R. 163, and *In re Hammond & Stow, Ld.*, 22 P. R. 299. In *In re Boord*, Mar. 25th, 1881, Jessel, M. R., allowed the registered proprietors of a mark for beer which contained a former name of their firm, "Swaine, Boord & Co." in ordinary type, to remove the name from the mark, leaving the space vacant, and to add a note to the registration stating that the name of the person or firm for the time being entitled to the mark might, in practice, be inserted in the blank space. See, however, *In re Brown*, 11 P. R. 365. Again, in *In re Bass, Ratcliff & Gretton, Ld.*, July 21st, 1882, Chitty, J., allowed the name of the above company to be substituted for "Bass & Co.," and in *In re Moeller & Schreiber*, Mar. 7th, 1888, Kay, J., allowed the initials of the existing firm, "M. & S.," to be substituted for other initials. The above were all old marks, and the same was the case in *In re Kirkpatrick*, Chitty, J., Feb. 21st, 1890; *In re Brown*, Stirling, J., 11 P. R. 365; and *In re Maw, Son & Thompson*, Buckley, J., 19 P. R. 260, where the name of the firm had been changed to "Maw, Son & Sons," and the name of the old firm in the trade mark was altered accordingly by substituting "Sons" for "Thompson." In

In re Henry Clay & Bock & Co., (1892) 3 Ch. 540, however, an old mark was not allowed to be altered by substituting the name of the new proprietors for the initials of the former owners. In the case of new marks alterations have also, in various instances, been authorized to be made in the name or initials on the mark. Thus, by substituting "N. W. T. S. A., Ld." for "A. J. S. & Co., Ld.": *In re National Wholesale Tea Supply Association, Ld.*, 10 P. R. 164; "Stockowners' Meat Company," for "Graziers' Meat Export Company": *In re Stockowners' Meat Company of New South Wales*, 14 P. R. 733. And see list below.

Alterations in respect of word "Limited."

In *In re Guinness, Son & Co., Ld.*, 5 P. R. 316, the firm of Arthur Guinness, Son & Co. had registered an oval label bearing, with other words and a device of an Irish harp, the printed signature "Arthur Guinness, Son & Co.," and the goodwill having been subsequently assigned to a limited company called "Arthur Guinness, Son & Co., Ld.," leave was given to alter the registered trade mark, which was an old one, by adding the word "Limited" in ordinary type, beneath the signature. The addition of the word "Limited" has in many similar cases been since permitted, the addition being sometimes made to a printed signature, as in *In re Burke*, W. N. 1891, p. 2, but more frequently to a name in ordinary print; and in *In re Bryant & May, Ld.*, 4 Times L. R. 675, Stirling, J., said that such leave would be given as a matter of course; and see *In re J. T. Davenport, Ld.*, 21 P. R. 726. But where the sole essential of the trade mark was a written signature, the name was allowed to be repeated in ordinary type underneath the signature with the addition of the word "Limited," instead of adding that word to the signature: *In re Hammond & Stow, Ld.*, 22 P. R. 299. In *In re Adshead*, Kekewich, J., Nov. 25th, 1892, the addition permitted was "& Co., Ld.," and in several cases the abbreviation "Ltd." or "Ld." has been sanctioned, *e.g.*, *In re Ind, Coope & Co., Ld.*, Stirling, J., June 22nd, 1888; *In re Younger*, Stirling, J., June 22nd, 1888; *In re Macintosh*, Stirling, J., Nov. 29th, 1889; *In re Foster*, Chitty, J., July 25th, 1890, but more recently Stirling, J., expressed himself unwilling to allow the addition of the word "Limited" in the form of any abbreviation, preferring that it should be printed at full length: *In re Robert Porter & Co.*, W. N. 1895, p. 102; *In re Hayward*, 13 P. R. 729; and this was followed by Cozens-Hardy, J., in *In re Holbrook's, Ld.*, 18 P. R. 447. The objection seems to have been founded on the supposition that the wish for the addition proceeded from a desire to comply with the provisions of § 42 of the Companies Act, 1862, which did not provide for the use of any abbreviation of the word. It seems, however, reasonably clear that this section of the Companies Act had no application to the case of a trade mark, and if a company was desirous of using a trade mark which had been used by the firm which preceded it in business, but with the addition of "Ld.," there seems to have been no reason in law why it should not do so. Then, if it wished to have the registration altered so as to correspond with the actual form in which the mark was lawfully used, it is not very easy to see what substantial objection there could be to it. See now Companies (Consolidation) Act, 1908. On the occasions of the alteration of the marks in *In re Ind, Coope & Co., Ld.*, Stirling, J., June 22nd, 1888: *In re Younger*, Stirling, J., June 22nd, 1888; and *In re Orlando Jones & Co.*, 12 P. R. 278, the further addition was permitted of the words "This label is issued only by 'Ind, Coope & Company, Limited,' or 'Wm. Younger & Co., Limited, Brewers, Edinburgh,' or 'Orlando Jones & Co., Lim.'" In *In re Jones & Co.*, Chitty, J., July 20th, 1883, on the other hand, the word "Limited," which had been inserted by mistake, was allowed to be expunged.

Alterations in respect of "Trade Mark." "Patent."

After the decision of the Court of Appeal in *In re Apollinaris Co.*, (1891) 2 Ch. 186, 233—235, that the presence in a trade mark of the words "trade mark," so placed as to be likely to mislead the public into the belief that a part only of the trade mark, and not the whole, was registered and claimed, was sufficient to vitiate the registration, an application was made by Messrs. Colman (*In re Colman*, (1891) 2 Ch. 403) for leave to alter, under § 92, a considerable number of trade marks registered by them, by striking out of each mark the words "trade mark," except in one case in which the mark was intended for use in France, and the words sought to be removed were "marque de fabrique." Kekewich, J., acceded to the application, making it a condition that the applicants should undertake to endorse on their original applications for registration, and enter on the register, a statement of the essential particulars of each mark, and a disclaimer of the exclusive right to the added matter, if any, to the satisfaction of the comptroller, with liberty to apply to the Court in case of difference. All the marks had been registered under the Act of 1883, so that the effect of the order was to place them on the same footing as if they

had been registered under the Act of 1888, in which case the conditions imposed by the Court would have been enforceable by virtue of the amended § 64. No further application was made to the Court in the matter, the terms of the claims and disclaimers being arranged between the applicants and the comptroller. The terms so arranged were advertised in Vol. 16 of the Trade Marks Journal, at p. 813 (August 16th, 1891). In this case all the marks sought to be altered were, with two exceptions only, registered as new marks, *i.e.*, as not having been in use prior to the Act of 1875. In the case of the two old marks no conditions were imposed. The words "trade mark" were again allowed to be removed from new trade marks in which they appeared, by Stirling, J., in *In re Badische Anilin & Soda Fabrik*, July 3rd, 1891, and by Romer, J., in *In re Franklyn, Morgan & Davey*, July 17th, 1891. When the same application, however, was made in *In re Phillips*, (1891) 3 Ch. 139, Chitty, J., refused leave to remove the words "trade mark" on various grounds, one of which was that the trade and the public were entitled to have on the register the same indication of a restricted claim as previously. He also expressed the view that the mark, being an old mark, ought not to be altered; but, for the reasons stated in an earlier part of this note, it seems reasonable to suppose that this was only intended to apply to alterations of so serious a character as that here sought. The question as to the position of the words "trade mark" in the mark is not now of much importance, having regard to the decision of the Court of Appeal in *In re Bass, Ratcliff & Gretton, Ld.*, 19 P. R. 529.

In two comparatively early cases—*In re Mantz*, Kay, J., Dec. 13th, 1883, and *In re Beanes*, Chitty, J., May 16th, 1884—the word "Patent" was allowed to be removed from trade marks, the vacant space being filled up in the first instance by the introduction of the words "Yellow Metal." The presence in a trade mark of the word "Patent" seems, however, to be even more material than that of the words "Trade Mark," and the decision of Kekewich, J., in *In re Adams*, 9 P. R. 174, in which he refused to allow the alteration of an old mark by striking out the word "Patent," which had been improperly used, does not seem to be open to question. In fact, it would seem that the application should have met the same fate even if the mark had been a new one.

Alterations in addresses.

In numerous other cases, some of old marks, some of new marks, as may be seen by the list below, alterations of various kinds have been allowed to be introduced into registered trade marks. Frequently such alterations have consisted in varying the address given on the mark, *e.g.*, *In re Walker*, Dig. 624, where a trade mark consisting of the letter "W," a crown, and the word "Netherton," was allowed to be altered by substituting "Dudley" for "Netherton." So, in *In re Dunn*, Hall, V.-C., Dec. 20th, 1880, "Middlesboro'" was substituted for "Wolsingham." In *In re Hargreaves*, Stirling, J., Jan. 11th, 1890, the address, "Heywood, Manchester," was struck out, and in *In re Kinahan*, North, J., Dec. 16th, 1891, "Guildford Street, York Road, Lambeth, London, S.E.," was substituted for "20, Great Titchfield Street, Oxford Street, W." See also *In re J. T. Davenport, Ld.*, 21 P. R. 727, and *In re Cockle*, 20 P. R. 353, where the address was altered. Other cases will be found in the list. It is usual for an exhibit to be prepared, showing how the mark will appear after the proposed alterations, and for the order to be made with reference to this exhibit: *In re Cockle*, 20 P. R. 353.

Alterations in wording.

In some cases descriptive words have been struck out of a composite mark, *e.g.*, *In re Skinner*, Jessel, M. R., Aug. 3rd, 1881; *In re Burke*, North, J., Jan. 13th, 1891; but in *In re Orlando Jones & Co.*, 12 P. R. 278, Stirling, J., while allowing the words "superior quality" to be added to a new mark, in which they had always in practice been used, only did so upon condition that the applicants should disclaim, not merely the added words, but all the common words in the mark, as in *In re Colman*, (1891) 2 Ch. 403. So, prices of goods have been removed: *In re Clarkson & Fenlay*, Kay, J., April 5th, 1889; *In re Scott & Bowne*, Stirling, J., May 4th, 1886. In *In re British Tea & Trading Association, Ld.*, North, J., Oct. 26th, 1886, the registered trade mark, which was an old mark, consisted of three sides of a wrapper for packets of tea, of which those on the right and left consisted of arrangements of Chinese words, and that in the centre of the head of a mandarin, with the words "The British Tea Association" above it, and below it the words "Imperial Mandarin Tea, imported direct from the Imperial district in China," and leave was given to alter it by substituting for the words "imported direct from the Imperial district in China" (which had never been used by the applicants themselves, and not by their predecessors in business since 1877) the words "This label is protected by registration as a trade mark." In *In re Reiss Brothers*, 5 P. R. 291, the

registered mark consisted of a combination mark for cotton piece goods, which comprised various words and devices, including the applicants' name and address, "Reiss Brothers, Manchester," and the words "Grass Bleach, Best Quality." "Grass Bleach" was the name of a description of bleaching which had gone out of use, and leave was given to alter the word "Grass" to "Reiss," notwithstanding that another firm's combination mark, registered for similar goods, bore the name "Reiss & Co., Batavia," the remainder of the latter mark being quite dissimilar from the applicant's mark. In one case—*In re Read*, Hall, V.-C., July 7th, 1881—the words "Dog's Head Bottling" were allowed to be substituted for "Bull Dog Bottling"; and in another case—*In re Smith*, Kay, J., Aug. 3rd, 1882—the whole of the mark, except the word "Glenlivet," was struck out, leaving that word to stand alone as the trade mark. But these two cases would hardly be followed now; *e.g.*, in *In re Orlando Jones & Co., Ld.*, 12 P. R. 278, Stirling, J., refused to alter a pictorial label by removing two curved lines common to the trade, but this was without prejudice to an application for the separate registration of the remaining portion of the label. However, in *In re Scott & Bourne*, May 4th, 1896, Stirling, J., allowed two side panels, in French and German, of a tripartite label to be struck out. In some cases, the size and arrangement of the printed matter on the label, or of some of it, have been altered, *e.g.*, *In re Lazenby*, Malins, V.-C., Feb. 26th, 1880; *In re Burham Brick, Lime & Cement Co.*, 9 P. R. 422. See also *In re J. T. Davenport, Ld.*, 21 P. R. 726.

Alterations in Russian inscriptions.

In *In re Ermen & Roby*, 4 P. R. 70, leave was given to alter a new mark on which were words in Russian, by changing a capital E from the English into the Russian character, and inserting the Russian word meaning "of" between "Roby" and "Manchester." Again, in *In re Le Coq* (Stirling, J., Dec. 19th, 1890), Russian words meaning "Deposited at the Department of Commerce and Manufactures," were allowed to be added between two circles which formed part of the mark, and a rim of two circular lines to be added to the outer circle. (But in *In re Orlando Jones & Co., Ld.*, 12 P. R. 278, as stated above, two oval lines were not allowed to be removed from a new mark.) On the other hand, where an old trade mark contained words partly in Russian and partly in English characters, North, J., refused to allow the mark to be altered by turning the bulk of the words into Russian characters, and making certain additions to and omissions from the name and place of business of the proprietor, on the ground that the alterations, whether in essential particulars or not, were in very material respects as regarded the appearance of the marks: *In re Sarin*, 13 P. R. 21.

Alterations in name of proprietor.

In various instances the name entered in the register as that of the registered proprietor has been allowed to be altered under this section, usually on account of the name of the proprietor having been altered. Thus, in *In re Moet & Chandon*, Bacon, V.-C., Aug. 19th, 1882, "Chandon et Cie, successors to Moet & Chandon," was substituted for "Moet & Chandon"; in *In re Booth*, Kay, J., Dec. 21st, 1882, "Booth Cotton Mills" was substituted for "Booth Manufacturing Company"; in *In re Porous Plaster Co.*, Pearson, J., Feb. 6th, 1885, the words "trading as the Porous Plaster Co." were struck out; in *In re Patent Plumbago Crucible Co.*, 7 P. R. 282, "The Morgan Crucible Co., formerly trading as the Patent Plumbago Crucible Co.," was substituted for "The Patent Plumbago Crucible Co."; in *In re Milne & Co.*, Kekewich, J., April 15th, 1890, "James Virtue McEntire" was substituted for "Milne & Co."; in *In re Birmingham Wagon Co., Ld.*, Chitty, J., Nov. 22nd, 1890, "The Birmingham Railway Carriage and Wagon Company, Limited," for "The Birmingham Wagon Co., Ld."; in *In re National Wholesale Tea Supply Association, Ld.*, 10 P. R. 164, the new name of the company for "Albert John Slaney, Ld."; in *In re W. Wilkinson & Sons, Ld.*, Kekewich, J., March 6th, 1896; 40 Sol. J. 336, "Burgess & Wilkinson, Limited," originally called "W. Wilkinson & Sons, Ld.," for "W. Wilkinson & Sons, Ld."; in *In re Findlater, Mackie & Co.*, North, J., April 24th, 1896, "Findlater Gamble & Co." for "Findlater, Mackie & Co." But in *In re New Ormonde Cycle Co.*, (1896) 2 Ch. 520, North, J., pointed out that the language of § 92 only referred to leave being given to add to or alter a mark, and the alteration of the name of the proprietor not being an alteration in the mark, he did not consider that he would be justified in treating the section as enabling him to sanction the alteration proposed, but he suggested that the comptroller might make the alteration under § 87. See now § 32 of the Act of 1905.

For List of Cases, see next page.

List of Alterations of the Register sanctioned by the Court under Sect. 92.

I.—Marks in use before the 13th August, 1875 (Old Marks).

(1) *Alterations in the Name or Initials appearing on the Mark.*

Name.	Date.	Judge.	Length of user before August, 1875.	Nature of order.
Re Dewhurst	Feb. 23, '78.	Jessel, M.R.	{ 9½ yrs. / 5½ yrs. }	"G. & R. Dewhurst" substituted for "Alexr Collie & Co."
Re Dewhurst	Mar. 19, '80.	Jessel, M.R.	{ 9½ yrs. / 17 yrs. }	"G. & R. Dewhurst" substituted for "Alexr Collie & Co."
Re Dewhurst	July 9, '80.	Jessel, M.R.	26 yrs.	"G. & R. Dewhurst" substituted for "Balfour, Heugh & Co."
Re Boord	Mar. 25, '81.	Jessel, M.R.	21 yrs.	"Swaine, Boord & Co." removed from mark, and note added to the registration that the mark may be used with the name of the person or firm entitled inserted in the place left vacant.
Re Bass, Ratcliff & Gretton, Ld.	July 21, '82.	Chitty, J. ..	{ 20 yrs. / 18 yrs. }	"Bass, Ratcliff & Gretton, Ld." substituted for "Bass & Co."
Re Moeller & Schreiber	Mar. 7, '88.	Kay, J.....	1½ yrs.	"M. & S." substituted for "D. G. F. H."
Re Kirkpatrick	Feb. 21, '90.	Chitty, J. ..	3 yrs.	"& Sons" added after "Thomas Kirkpatrick."
Re Brown ..... (11 P. R. 365.)	May 25, '94.	Stirling, J. .	{ 30 yrs. / 5 yrs. }	"and Son" added after "E. Brown."
Re Joseph Rodgers & Sons	June 9, '02.	Farwell, J. .	38 yrs.	"E" substituted for "V" and "His" for "Her."
Re Allcock Manufacturing Co.	Jan. 20, '05.	Joyce, J. ..	10 yrs.	"Allcock M'f'g Company" substituted for "Porous Plaster Co. of the Village of Sing Sing, N.Y."
Re Greg & Co.	Feb. 26, '05.	Kekewich, J.	25 yrs.	"R. Greg & Co., Stockport," substituted for "R. H. Greg & Co., Manchester."

(2) *Alterations in respect of the Word "Limited," or Abbreviations of it.*

Re Jones	July 20, '83.	Chitty, J. ..	1 yr.	"Limited" struck out.
Re Guinness ..... (5 P. R. 316.)	May 11, '88.	Chitty, J. ..	13 yrs.	"Limited" added to signature.
Re Ind, Coope & Co., Ld.	June 22, '88.	Stirling, J. .	{ 6 yrs. / 9 yrs. / 12 yrs. }	"Limited" added in some cases. "Ltd." in others. "This label is issued only by Ind, Coope and Company, Limited," in others.
Re Younger.....	June 22, '88.	Stirling, J. .	20 yrs.	Same as in *Re Ind, Coope & Co., Ld.*
Re Allsopp	July 6, '88.	Chitty, J. ..	13 yrs.	"Limited" added after name.
Re Schweitzer	Mar. 25, '89.	North, J.	7 yrs.	"Limited" added after name.
Re Macintosh	Nov. 29, '89.	Stirling, J. .	10 yrs.	"Ld." added after name.

LIST OF ALTERATIONS OF THE REGISTER—*continued.*

Name.	Date.	Judge.	Length of user before August, 1875.	Nature of order.
Re Foster	July 25, '90.	Chitty, J. ..	13 yrs. 1 yr.	"Limited" added in some cases, "Ltd." in others.
Re Burke ..... (W. N. 1891, p. 2.)	Jan. 13, '91.	North, J. ..	11 yrs. 7 yrs.	"Limited" added after signature.
Re Adshead	Nov. 25, '92.	Kekewich, J.	17 yrs.	"& Co., Ltd.," added after name.
Re Oakey	Aug. 26, '93.	North, J. ..	20 yrs. 15 yrs. 12 yrs. 10 yrs. 4 yrs.	"Limited" added after name.
Re Day & Martin, Ld.	Aug. 2, '94.	Stirling, J. .	75 yrs. 20 yrs. 5 yrs.	"Limited" added in some cases, "Ltd." in others.
Re Jones .... (12 P. R. 278.)	Apr. 23, '95.	Stirling, J. .	20 yrs. 10 yrs.	"This label is issued only by Orlando, Jones, & Co., Ld." added on marks.
Re Hayward ..... (13 P. R. 729.)	July 24, '96.	Stirling. J. .	86 yrs. 43 yrs.	"Limited" added after name.
Re Joule & Sons, Ld.	June 14, '01.	Kekewich, J.	27 yrs.	"Limited" and "this label is issued only by John Joule & Sons, Ltd." added.
Re Colman	July 10, '03.	Byrne, J. ..	8 yrs.	"Ltd." in some cases, and "Limited" in others, added after signature.
Re Davenport ..... (21 P. R. 726.)	Aug. 12, '04.	Joyce, J. ...	12 yrs.	"Limited" added after name.

(3) *Alterations in respect of Words "Patent" or "Trade Mark" on Mark.*

Re Muntz	Dec. 13, '83.	Kay, J.	10 yrs.	"Yellow metal" substituted for word "Patent."
Re Beanes	May 16, '84.	Chitty, J. ...	6 yrs. 5 yrs.	"Patent" struck out.
Re Colman ..... ((1891) 2 Ch. 403.)	April 11, '91.	Kekewich, J.	13 yrs.	"Trade mark" struck out.

(4) *Other Alterations in respect of Wording, Type, &c. appearing on Mark.*

Re Walker ..... (Dig. 624.)	Aug. 6, '79.	Malins, V.-C.	3 mos.	"Dudley" substituted for "Netherton."
Re Lazenby	Feb. 26, '80.	Malins, V.-C.	15 yrs.	"Manufactory" and "Prepared by" struck out, and alterations made in type.
Re Smith	Aug. 3, '82.	Kay, J.	50 yrs.	The two circles and the plaid pattern on the inner circle struck out, leaving the word "Glenlivet" alone.
Re Hanson	June 2, '85.	Bacon, V.-C.	3 yrs.	Words "and Parisian relevé," also "et de relevé Parisien" and "agents" struck out.

LIST OF ALTERATIONS OF THE REGISTER—*continued*.

Name.	Date.	Judge.	Length of user before August, 1875.	Nature of order.
Re British Tea & Trading Assooiation.	Oct. 26, '86.	North, J....	4 yrs.	Words "This label is protected by registration as a trade mark" substituted for words "Imported direct from the Imperial District in China."
Re Bloxwich Iron & Steel Co., Ld.	Nov. 24, '87.	Chitty, J...	2 yrs.	"Bloxwich" substituted for "Birchills Hall."
Re Reiss ..... (5 P. R. 291.)	Apr. 11, '88.	North, J....	5 yrs.	"Reiss" substituted for "Grass."
Re Harris	Jan. 11, '89.	Stirling, J..	3 yrs.	"Charles" and "& Co." struck out, and position of word "Calne" altered.
Re Schweitzer	Mar. 25, '89.	North, J....	7 yrs.	"10, Adam St., Adelphi," struck out.
Re Clarkson & Finlay.	Apr. 5, '89.	Kay, J.....	24 yrs.	Prices of goods struck out of marks.
Re Kirkpatrick	Feb. 21, '90.	Chitty, J...	3 yrs.	"& Hindley Green nr Wigan" added after "Tyldesley, Manchester."
Re Lincoln, Bennett & Co.	Apr. 18, '90.	Chitty, J...	12 yrs.	"London" added.
Re Melton & Co......	May 23, '90.	North, J. ..	8 yrs.	"& Co." added after name, "to the Queen" struck out, "the late" inserted before "Napoleon," "London" substituted for "194, Regent St.," and "Trade mark" substituted for "London."
Re Le Coq	Dec. 19, '90.	Stirling, J..	40 yrs.	Russian words meaning "Deposited at the Department of Commerce and Manufactures" added between the two circles, and a rim of two circular lines added to the outer circle.
Re Burham Brick, Lime & Cement Co. (9 P. R. 422.)	July 22, '92.	Stirling, J..	9 yrs. 3 yrs.	"Works" omitted after "Burham," also "Murston," and type of remaining words expanded.
Re Brown ..... (11 P. R. 365.)	May 25, '94.	Stirling, J..	30 yrs. 5 yrs.	Numerous alterations in addresses.
Re Day & Martin, Ld.	Aug. 2, '94.	Stirling, J..	75 yrs. 20 yrs.	"Late" inserted before the address "High Holborn."
Re Foster	Mar. 22, '95.	North, J. ..	13 yrs. 4 mos.	"London" substituted for "27, Brook St., Bond St., London."
Re Cockle & Co. .. .. (22 P. R. 353.)	Feb. 6, '03.	Farwell, J..	70 yrs.	"18, New Ormond Street" substituted for "18. New Ormond Str." and "Great Britain" added.

Name.	Date.	Judge.	Length of user before August, 1875.	Nature of order.
Re Colman	July 10, '03.	Byrne, J. ..	8 yrs. 7 yrs. 1 yr.	"By special appointment to the King" substituted for "Manufacturers to the Queen" in some cases, "late" inserted before "Queen" in others, "by special appointment to His Majesty the King" substituted for "Mustard Manufacturers to Her Majesty the Queen," and "Purveyors to His Majesty the King, to the King of Italy, The Queen of Holland, and to H.R.H. The Prince of Wales" substituted for "Manufacturers to Her Majesty the Queen, to the King of Italy and The Queen of Holland, and Purveyors to H.R.H. The Prince of Wales," "Bull's Head" shifted to left of circle round device.
Re Davenport ..... (21 P. R. 726.)	Aug. 12, '04.	Joyce, J. ..	12 yrs.	"Manufacturers, Chemists, Pharmaceutists" substituted for "Manufacturer, Chemist, Pharmaceutist," "17, Union Street, London, S.E., England" substituted for address on label, "the late" inserted before "Duke of Cambridge," and "Government" omitted.

(5) *Alterations in Name of Proprietor of Mark.*

Re Moet & Chandon ..	Aug. 19, '82.	Bacon, V.-C.	40 yrs. 9 yrs. 4 yrs.	"Chandon et Cie, successors to Moet & Chandon" substituted for "Moet & Chandon."
Re Booth	Dec. 21, '82.	Kay, J.	30 yrs.	"Booth Cotton Mills" substituted for "Booth Manufs Co."
Re Australian Wine Co. (61 L. T. N. S. 427.)	Jan. 23, '85.	Chitty, J. ..	3 yrs.	"J. H. Symon and E. V. Joyner" substituted for "The Australian Wine Co."
Re Avril	Apr. 20, '88.	Stirling, J..	3 yrs.	Names of Thomas Monckton and others, subsequent proprietors, removed, and name of "Louise Avril, widow," proprietor, restored.
Re Birmingham Wagon Co., Ld.	Nov. 22, '90.	Chitty, J. ..	19 yrs.	"Birmingham Railway Carriage and Wagon Company, Limited," substituted for "Birmingham Wagon Company, Limited."
Re Wilkinson ..... (40 Sol. J. 336.)	Mar. 6, '96.	Kekewich, J.	100 yrs.	"Burgon and Wilkinson, Limited," substituted for "William Wilkinson and Sons, Limited."
Re Findlater	Apr. 24, '96.	North, J. ..	2 yrs.	"Findlater, Gamble & Co." substituted for "Findlater, Mackie & Co."

LIST OF ALTERATIONS OF THE REGISTER—*continued.*

II.—MARKS NOT IN USE BEFORE THE 13TH AUGUST, 1875 (NEW MARKS).

(1) *Alterations in the Name or Initials appearing on the Mark.*

Name.	Date.	Judge.	Nature of order.
Re Bass, Ratcliff & Gretton, Ld.	July 21, '82.	Chitty, J. ..	"Bass, Ratcliff & Gretton, Ld." substituted for "Bass & Co."
Re May & Baker, Ld.	May 1, '91.	North, J. ..	"W. G. Baker," "R. C. Heath," "T. Tyrer," and "W. E. B. Blenkinsop," struck out.
Re National Wholesale Tea Supply Association, Ld. (10 P. R. 164.)	Apr. 11, '93.	Chitty, J. ..	"N. W. T. S. A., Ld." substituted for "A. J. S. & Co."
Re Explosives Co., Ld.	July 31, '96.	North, J. ..	"Explosives" substituted for "E. C. Powder."
Re Stock Owners' Meat Co. of N. S. W. (14 P. R. 733.)	July 9, '97.	Romer, J...	"Stock Owners' Meat" substituted for "Graziers' Meat Export."
Re Maw, Son & Sons (19 P. R. 260.)	Apr. 11, '02.	Buckley, J.	"Sons" substituted for "Thompson."
Re Hammond & Stow, Ld. (22 P. R. 299.)	Feb. 24, '05.	Farwell, J.	"Hammond & Stow, Ltd.," added.
Re Taddy	May 19, '05.	Eady, J. ..	"Taddy's" substituted for "Peacock's."

(2) *Alterations in respect of the Word "Limited," or Abbreviations of it.*

Re Allsopp	July 6, '88.	Chitty, J. ..	"Limited" added after name.
Re Foster	July 25, '90.	Chitty, J. ..	"Limited" added in some cases, "Ltd." in others.
Re Burke ..... (W. N. 1891, p. 2.)	Jan. 13, '91.	North, J. ..	"Limited" added after signature.
Re May & Baker, Ld.	May 1, '91.	North, J. ..	"Limited" added after name.
Re Day & Martin, Ld.	Aug. 2, '94.	Stirling, J..	Do.
Re Salt	Nov. 23, '94.	North, J. ..	Do.
Re London Chemical Co., Ld.	Mar. 22, '95.	North, J. ..	Do.
Re Porter ..... (W. N. 1895, p. 102.)	June 12, '95.	Stirling, J..	Do.
Re Scott & Bowne....	May 4, '96.	Stirling, J..	Do.
Re Hayward ..... (13 P. R. 729.)	July 24, '96.	Stirling, J..	Do.
Re Thwaites	Dec. 10, '97.	Kekewich, J.	Do.
Re Hoe & Co., Ld.....	Jan. 19, '98.	Stirling, J..	Do.
Re Colman	July 10, '03.	Byrne, J. ..	"Limited" substituted for "Ltd." in some cases, "Limited" added in other cases, and "Ltd." in others.
Re Bush & Co., Ld. ..	July 28, '05.	Kekewich, J.	"Limited" added after name.

LIST OF ALTERATIONS OF THE REGISTER—*continued*.

(3) *Alterations in respect of Words "Trade Mark" on Mark.*

Name.	Date.	Judge.	Nature of order.
Re Colman ..... ((1891) 2 Ch. 403.)	Apr. 11, '91.	Kekewich, J.	"Trade mark" and "Marque de Fabrique" struck out.
Re Badische Anilin & Soda Fabrik.	July 3, '91.	Stirling, J..	"Trade mark" struck out.
Re Franklyn, Morgan & Davey.	July 17, '91.	Romer, J...	Do.

(4) *Other Alterations in respect of Wording, Type, &c. appearing on Mark.*

Re Dunn	Dec. 20, '80.	Hall, V.-C.	"Middlesboro'" substituted for "Wolsingham."
Re Read	July 7, '81.	Hall, V.-C.	"Dog's Head Bottling" substituted for "Bull Dog Bottling."
Re Skinner.....	Aug. 3, '81.	Jessel, M.R.	Words "containing phosphates of iron, lime, soda, &c., for nourishing and invigorating the brain and nerves" struck out.
Re Ermen & Roby.... (4 P. R. 70.)	Dec. 21, '86.	Chitty, J...	A capital E altered from the English into the Russian character, and the word "of" in Russian inserted between "Roby" and "Manchester."
Re Hargreaves	Jan. 11, '90.	Stirling, J. .	Address "Heywood, Manchester," struck out.
Re Burke ..... (W. N. 1891, p. 2.)	Jan. 13, '91.	North, J. ..	Words "Refreshing, invigorating, and constituting an appetising tonic, whilst slightly stimulating. Easy of digestion. Specially selected and shipped only by" struck out.
Re Badische Anilin & Soda Fabrik.	July 3, '91.	Stirling, J. .	"Fabrik Zeichen" struck out.
Re Kinahan	Dec. 16, '91.	North, J. ..	"Guildford Street, York Road, Lambeth, London, S.E.," substituted for "20, Great Titchfield Street, Oxford Street, W."
Re Day & Martin, Ld.	Aug. 2, '94.	Stirling, J. .	"Late" inserted before "High Holborn, London," and "Commercial Road, Liverpool."
Re Foster	Mar. 22, '95.	North, J. ..	"London" substituted for "27, Brook Street, Bond Street, London."
Re Scott & Bowne....	May 4, '96.	Stirling, J. .	Words "A reliable remedy for pulmonary diseases, coughs, colds, and general debility; contains the tonic and nutritive properties of these popular remedies in their fullest form, very pleasing to the taste, and easily digested, and is highly recommended by the medical faculty," substituted for words "A nutritive chemical food, contains all the tonic and nutritive properties of these valuable reconstructive agents, pleasing to the taste, easily digested, and is recommended and prescribed by physicians generally." "Price 2/6" struck out. Also two side panels in French and German struck out.

LIST OF ALTERATIONS OF THE REGISTER—*continued.*

Name.	Date.	Judge.	Nature of order.
Re Colman	July 10, '03.	Byrne, J. ..	"By special appointment to the King" substituted for "manufacturers by Special Warrant to the Queen" and "By Special Warrant Manufacturers to the Queen," "Bull's" transposed from right to left of device, "late" inserted before "Queen" in some cases, "Acts 1875—99" substituted for "Act 38 & 39 Vic. ch. 63," "Purveyors of Mustard and Starch by special appointment to the King" substituted for "Mustard Manufacturers to the Queen" in others, and "Sale of Food and Drugs Acts, 1875—1899" substituted for "Act 38 & 39 Vic. ch. 63" in others.
Re Taddy	May 19, '05.	Eady, J. ..	"Tobacco" substituted for "Tobaccos, Cigars and Cigarettes."
Re Midland Vinegar Co.	May 26, '05.	Kekewich, J	"H. P." omitted and "is a combination of the choicest Oriental fruits, spices and pure malt vinegar blended with the utmost care to ensure a digestive relish even for the most fickle appetite, this object having been attained by years of practical experience in the Sauce Trade. Manufactured by Sole Proprietors, Midland Vinegar Co., Birmingham, England," substituted for "is a combination of the choicest Oriental fruits and spices judiciously blended to please the most fastidious epicure and to ensure a digestive relish to the most fickle appetite, these objects having been obtained by the Firm's years of practical experience in the Sauce Trade. 6*d.* per bottle. Manufactured by F. G. Garton & Co., Nottingham."
Re Bush & Co., Ld. ..	July 28, '05.	Kekewich, J.	"28, Ash Grove, Hackney, London, N.E." substituted for "20, 21, 22, 23, Artillery Lane, Bishopsgate, London," "28" for "Works" and "London, N.E.," for "20—23, Artillery Lane, Bishopsgate, London."
			(5) *Alterations in Name of Proprietor of Mark.*
Re Porous Plaster Co.	Feb. 6, '85.	Pearson, J. .	Words "trading as the Porous Plaster Co." struck out.
Re Patent Plumbago Crucible Co. (7 P. R. 282.)	Mar. 21, '90.	Stirling, J. .	"The Morgan Crucible Company, lately trading as" inserted before "The Patent Plumbago Crucible Co."
Re Milne.....	Apr. 15, '90.	Kekewich, J.	"James Virtue McEntire" substituted for "Milne & Co."
Re National Wholesale Tea Supply Association. (10 P. R. 164.)	Apr. 11, '93.	Chitty, J. ..	"National Wholesale Tea Supply Association, Ld.," substituted for "Albert John Slaney and Co., Ld."

93. If any person makes or causes to be made a false entry in any register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders, or causes to be produced or tendered, in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanour.

Falsification of entries in registers.

See T. M. A. 1905, s. 66. Also P. & D. A. 1907, s. 89.

94. Where any discretionary power is by this Act given to the comptroller, he shall not exercise that power adversely to the applicant for a patent, or for amendment of a specification, or for registration of a trade mark or design, without (if so required within the prescribed time by the applicant) giving the applicant an opportunity of being heard personally or by his agent.

Exercise of discretionary power by comptroller.

See T. M. A. 1905, s. 53.

95. The comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to either of the law officers (*a*) for directions in the matter.

Power of comptroller to take directions of law officers.

(*a*) The Attorney-General or Solicitor-General for England, See § 117.

See T. M. A. 1905, s. 56.

96. A certificate purporting to be under the hand of the comptroller as to any entry, matter, or thing which he is authorised by this Act, or any general rules made thereunder, to make or do, shall be *primâ facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone (*a*).

Certificate of comptroller to be evidence.

See T. M. A. 1905, s. 51.

(*a*) This section was somewhat modified from § 8 of the Act of 1875, by which the certificate of the registrar was made evidence. Under this section the certificate was to be *primâ facie* evidence only.

97.—(1.) Any application, notice or other document authorised or required to be left, made, or given at the Patent Office or to the comptroller, or to any other person under this Act, may be sent by a prepaid letter through the post; and if so sent shall be deemed to have been left, made, or given respectively at the time when the letter containing the same would be delivered in the ordinary course of post.

Applications and notices by post.

See P. & D. A. 1907, s. 81.

(2.) In proving such service or sending, it shall be sufficient to prove that the letter was properly addressed and put into the post.

98. Whenever the last day fixed by this Act, or by any rule for the time being in force, for leaving any document or paying any fee at the Patent Office, shall fall on Christmas Day, Good Friday, or on a Saturday or Sunday, or any day observed as a holiday at the Bank of England, or any day observed as a day of public fast or thanksgiving, herein referred to as excluded days, it shall be lawful to leave such document or to pay such fee on the day next following such excluded day, or days if two or more of them occur consecutively.

Provision as to days for leaving documents at office.

See P. & D. A. 1907, s. 82.

99. If any person is, by reason of infancy, lunacy or other inability, incapable of making any declaration or doing anything required or permitted by this Act or by any rules made under the authority of this Act, then the guardian or committee (if any) of such incapable person, or if there be none, any person appointed by any court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing

Declaration by infant, lunatic, &c.

See P. & D. A. 1907, s. 83.

such thing, may make such declaration or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person, and all acts done by such substitute shall for the purposes of this Act be as effectual as if done by the person for whom he is substituted (*a*).

(*a*) This section, so far as it related to trade marks, came from the old rules.

Transmission of certified printed copies of specifications, &c.

See P. & D. A. 1907, s. 80.

100. Copies of all specifications, drawings, and amendments left at the Patent Office after the commencement of this Act, printed for and sealed with the seal of the Patent Office, shall be transmitted to the Edinburgh Museum of Science and Art, and to the Enrolments Office of the Chancery Division in Ireland, and to the Rolls Office in the Isle of Man, within twenty-one days after the same shall respectively have been accepted or allowed at the Patent Office; and certified copies of or extracts from any such documents shall be given to any person requiring the same on payment of the prescribed fee; and any such copy or extract shall be admitted in evidence in all courts in Scotland and Ireland and in the Isle of Man without further proof or production of the originals.

Power for Board of Trade to make general rules for classifying goods and regulating business of Patent Office.

See T. M. A. 1905, s. 60.

101.—(1.) The Board of Trade may from time to time make such general rules (*a*) and do such things as they think expedient, subject to the provisions of this Act—

(a.) For regulating the practice of registration under this Act:

(b.) For classifying goods for the purposes of designs and trade marks:

(c.) For making or requiring duplicates of specifications, amendments, drawings, and other documents:

(d.) For securing and regulating the publishing and selling of copies, at such prices and in such manner as the Board of Trade think fit, of specifications, drawings, amendments, and other documents:

(e.) For securing and regulating the making, printing, publishing, and selling of indexes to, and abridgments of, specifications and other documents in the Patent Office; and providing for the inspection of indexes and abridgments and other documents:

(f.) For regulating (with the approval of the Treasury) the presentation of copies of Patent Office publications to patentees and to public authorities, bodies, and institutions at home and abroad:

(g.) Generally for regulating the business of the Patent Office, and all things by this Act placed under the direction or control of the comptroller or of the Board of Trade.

(2.) Any of the forms in the First Schedule to this Act may be altered or amended by the rules made by the Board as aforesaid.

(3.) General rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed.

(4.) Any rules made in pursuance of this section shall be laid before both Houses of Parliament, if Parliament be in session at the time of making thereof, or, if not, then as soon as practicable after the beginning of the then next session of Parliament, and they shall also be advertised twice in the official journal to be issued by the comptroller.

(5.) If either House of Parliament, within the next forty days after any rules have been so laid before such House, resolve that such rules or any of them ought to be annulled, the same shall after the date of such resolution be of no effect, without prejudice to the validity of anything done in the meantime under such rules or rule or to the making of any new rules or rule.

(*a*) The power of making rules was formerly, by § 7 of the Act of 1875, vested in the Lord Chancellor.

Annual reports of comptroller.

102. The comptroller shall, before the first day of June in every year, cause a report respecting the execution by or under him of this Act to be laid before both Houses of Parliament, and therein shall include for the year to which each report relates all general rules made in that year under or for the purposes of this Act, and an account of all fees, salaries and allowances, and other money received and paid under this Act.

See T. M. A. 1905, s. 57. Also P. & D. A. 1907, s. 76.

Proceedings of Board of Trade.

[102A.—(1.) All things required or authorised under this Act to be done by, to, or before the Board of Trade, may be done by, to, or before the President or a secretary or an assistant secretary of the Board.

(2.) All documents purporting to be orders made by the Board of Trade and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or by any person authorised in that behalf by the President of the Board, shall be received in evidence, and shall be deemed to be such orders without further proof, unless the contrary is shown.

(3.) A certificate signed by the President of the Board of Trade, that any order made or act done is the order or act of the Board, shall be conclusive evidence of the fact so certified.]

See T. M. A. 1905, ss. 52, 58.

This section was introduced by § 25 of the Act of 1888.

International and Colonial Arrangements.

International arrangements for protection of inventions, designs, and trade marks.

103.—(1.) If her Majesty is pleased to make any arrangement with the government or governments of any foreign state or states for mutual protection of inventions, designs, and trade marks, or any of them, then any person who has applied for protection for any invention, design, or trade mark in any such state, shall be entitled to a patent for his invention or to registration of his design or trade mark (as the case may be) under this Act, in priority to other applicants (*a*); and such patent or registration shall have the same date as the *date of the protection obtained* [date of the application] in such foreign state.

See T. M. A. 1905, s. 65. Also P. & D. A. 1907, ss. 91, 88.

Provided that his application is made, in the case of a patent within seven months, and in the case of a design or trade mark within four

months (*b*), from his applying for protection in the foreign state with which the arrangement is in force.

Provided that nothing in this section contained shall entitle the patentee or proprietor of the design or trade mark to recover damages for infringements happening prior to the date of the actual acceptance of his complete specification, or the actual registration of his design or trade mark in this country, as the case may be.

(2.) The publication in the United Kingdom or the Isle of Man during the respective periods aforesaid of any description of the invention, or the use therein during such periods of the invention, or the exhibition or use therein during such periods of the design, or the publication therein during such periods of a description or representation of the design, or the use therein during such periods of the trade mark, shall not invalidate the patent which may be granted for the invention, or the registration of the design or trade mark:

(3.) The application for the grant of a patent, or the registration of a design, or the registration of a trade mark under this section, must be made in the same manner as an ordinary application under this Act: Provided that, in the case of trade marks, any trade mark the registration of which has been duly applied for in the country of origin may be registered under this Act (*c*):

(4.) The provisions of this section shall apply only in the case of those foreign states with respect to which her Majesty shall from time to time by Order in Council declare them to be applicable, and so long only in the case of each state as the Order in Council shall continue in force with respect to that state (*d*).

(*a*) This section was new in 1883. The amendment in it was made by § 6 of the Act of 1885. In the case of trade marks used by aliens, the existence of a convention between the state to which the alien belonged and the British Government was not a necessary condition precedent to his registration here. The Act did not say that to obtain priority the application for registration in a foreign state with which there was a convention must have been made by a subject of that state. That was apparently the intention of the section; but there is nothing to say that the same priority was to be refused to a subject of a different state, with which there might possibly be no convention, or even to a British subject, who had applied in a country with which there was a convention. On the other hand, in the proviso in sub-s. (3) the term "country of origin" was employed. Again, in sub-s. (3) the words were "has been *duly* applied for," whereas in sub-s. (1) there was nothing about "duly," and for all that appeared the application might be one which could not possibly succeed in the foreign country. The object of this section was to enable effect to be given to the International Convention of 1883. The exceptional rights of foreigners in respect of the registration of trade marks in the United Kingdom depended exclusively upon the terms of this Act, and the Court could not have reference to the terms of the International Convention, 1883: *In re Californian Fig Syrup Co.*, 40 Ch. D. 620. Similarly, in the United States, the Courts cannot give effect to the convention without legislation. See opinion of the Attorney-General of the United States in 47 U. S. Pat. Gaz. 397.

(*b*) The application within four months was imperative, and if application was made after that time all special rights under this section were gone. And this was so though the foreign registration was effected before this section was made applicable to the particular foreign country: *In re Californian Fig Syrup Co.*, 40 Ch. D. 620. If a subject or citizen of a foreign state which was a party to the convention had registered in England a mark which was of doubtful validity according to English law, and was desirous of obtaining for it the benefits of this section (particularly sub-s. (3)), it seems that his proper course was to obtain its removal from the English register, and then to make an application for protection in his own country. Upon this being

done, he would be in a position to apply again (within the four months) for registration in England under this section. See, *per* Kay, J., in *In re Vignier*, 6 P. R. 490.

(*c*) The proviso in this sub-section was construed by North, J., as though the words "may be registered" were "may be the subject of an application for registration," and it seems that no trade mark would be registered under this section unless it was within the definition of a registrable trade mark in § 64: *In re Carter Medicine Co.*, (1892) 3 Ch. 472. See *In re Californian Fig Syrup Co.*, 40 Ch. D. 620. The proviso gave no independent right of registration, but had to be read with sub-s. (1), which required application within four months.

(*d*) For list of Orders in Council, see Appendix D.

Provision for Colonies and India.

See T. M. A. 1905, s. 65. Also P. & D. A. 1907, ss. 91, 88.

104.—(1.) Where it is made to appear to her Majesty that the legislature of any British possession (*a*) has made satisfactory provision for the protection of inventions, designs, and trade marks, patented or registered in this country, it shall be lawful for her Majesty from time to time, by Order in Council, to apply the provisions of the last preceding section, with such variations or additions, if any, as to her Majesty in Council may seem fit, to such British possession (*b*).

(2.) An Order in Council under this Act shall, from a date to be mentioned for the purpose in the Order, take effect as if its provisions had been contained in this Act; but it shall be lawful for her Majesty in Council to revoke any Order in Council made under this Act.

(*a*) See the definition of "British possession" in § 117, *infra*.

(*b*) For list of Orders in Council, see Appendix D.

Offences.

Penalty on falsely representing articles to be patented.

See T. M. A. 1905, s. 67. Also P. & D. A. 1907, s. 89.

105.—(1.) Any person who represents that any article sold by him is a patented article, when no patent has been granted for the same (*a*), or describes any design or trade mark (*b*) applied to any article sold by him as registered which is not so, shall be liable for every offence on summary conviction (*c*) to a fine not exceeding five pounds.

(2.) A person shall be deemed, for the purposes of this enactment, to represent that an article is patented or a design or a trade mark is registered, if he sells the article with the word "patent," "patented," "registered," or any word or words expressing or implying that a patent or registration has been obtained for the article stamped, engraved, or impressed on, or otherwise applied to, the article (*d*).

(*a*) This section, so far as it relates to an untrue representation as to the existence of a patent, was in substance a re-enactment of § 7 of 5 & 6 Will. IV. c. 83. In that case, however, the penalty of £50 was imposed, recoverable in an action, and a fraudulent intention was of the essence of the offence. See *Myers* v. *Baker*, 3 H. & N. 802. This section appears to have followed that in not imposing a penalty where there had been a patent, though it might have expired. But it was an offence to represent that an article was patented, after application had been made for a patent and provisional protection had been obtained, but before the actual grant (*R.* v. *Wallis*, 3 P. R. 1; *R.* v. *Crampton*, 8 P. R. 367); but not after the complete specification had been accepted by the comptroller and before the statutory time for giving notice of opposition had expired (*R.* v. *Townsend*, 13 P. R. 265), but a false representation by a trader in his price list that a label had been registered, such false representation being due to a *bonâ fide* mistake, has been held to be no bar to an application to register the label. *In re Lyle & Kinahan, Ld.*, 24 P. R. 249.

See § 3 (1) (e) of the Merchandise Marks Act, 1887.

(*b*) Previously no penalty was recoverable for untruly representing that a trade mark was registered. An offence was committed if a trade mark was represented to be registered before it actually was so, even though application for registration had been made and advertised: *R.* v. *Morris*, Great Marlborough Street Police Court, Dec. 16th, 1886. In *Wright, Crossley & Co.* v. *William Dobbin & Co.*, 15 P. R. 21, the Irish Queen's Bench Division held that it was an offence within the section for an Irish trader to sell the goods of an American manufacturer under a label bearing the word "Registered" after the label had been expunged from the English register, although the label was still registered in America. And this decision was followed in the English Queen's Bench Division in a similar case: *MacSymons' Stores, Ld.* v. *Shuttleworth*, 15 P. R. 748. The use of the words "trade mark" was not necessarily a representation that the trade mark was registered so as to constitute an offence under this sub-section: *Sen-Sen Co.* v. *Britten*, (1899) 1 Ch. 692.

(*c*) As to "summary conviction" in Ireland, see § 117.

(*d*) See Ch. 7, *ante*.

Penalty on unauthorised assumption of Royal Arms.

See T. M. A. 1905, s. 68. Also P. & D. A. 1907, s. 90.

106. Any person who, without the authority of her Majesty, or any of the Royal Family, or of any Government department, assumes or uses in connection with any trade, business, calling, or profession, the Royal Arms, or arms so nearly resembling the same as to be calculated to deceive, in such a manner as to be calculated to lead other persons to believe that he is carrying on his trade, business, calling, or profession by or under such authority as aforesaid (*a*), shall be liable on summary conviction (*b*) to a fine not exceeding twenty pounds (*c*).

(*a*) This section was new. For an offence against it to be committed it was not sufficient to prove that a person was using the Royal Arms without authority, or that what he was doing was calculated to lead to the belief that the user of the arms was authorised; but it must be proved that that user was calculated to lead to the belief that the trader *was carrying on his business* by Royal or Governmental authority. However, in *R.* v. *Cameron*, Times, Jan. 13th, 1900, it was held that the statement "Late Contractor to Her Majesty's Government" did not prevent the unauthorised use of the Royal Arms from being calculated to deceive. Convictions were also obtained under this section in *R.* v. *Crisp*, Times, Feb. 2nd, 1897, and *R.* v. *Edmondson*, Times, May 14th, 1903. But where the royal arms were cut into the stone wall of a house leased from the Crown, and the respondent could not obliterate them without a breach of covenant, it was held that this was not a user in connection with the business. *R.* v. *Glare*, Times, May 8th, 1903. And where the Royal Arms had for 70 years formed part of the defendant's trade mark in combination with mythical figures engaged in mechanical arts, a summons for the wrongful assumption of the Royal Arms was dismissed. *R.* v. *Milner's Safe Co.*, Times, July 26, 1900.

(*b*) As to "summary conviction" in Ireland, see § 117.

(*c*) The following notice was published in the *London Gazette*:—

"FRIDAY, FEB. 22ND, 1884.

"BOARD OF GREEN CLOTH, BUCKINGHAM PALACE, FEB. 19TH.

"Notice is hereby given that by section 106 of the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Victoria, cap. 57) a penalty of £20 is incurred by any persons who, without proper authority, assume the Royal Arms with a view to lead other persons to believe that they are employed under any department of Her Majesty's Household. "SYDNEY, Lord Steward."

It will be observed that the above notice treated fraudulent intention as of the essence of the offence; but this does not appear to be in accordance with the provisions of the section.

See § 20 of Merchandise Marks Act, 1887, as to false representations with reference to holding a Royal warrant.

Scotland, Ireland, &c.

Saving for Courts in Scotland. **See P. & D. A. 1907, s. 94.**

107. In any action for infringement of a patent in Scotland the provisions of this Act, with respect to calling in the aid of an assessor, shall apply, and the action shall be tried without a jury, unless the Court shall otherwise direct, but otherwise nothing shall affect the jurisdiction and forms of process of the Courts in Scotland in such an action or in any action or proceeding respecting a patent hitherto competent to those Courts. For the purposes of this section "Court of Appeal" shall mean any Court to which such action is appealed.

Summary proceedings in Scotland. **See T. M. A. 1905, s. 72. Also P. & D. A. 1907, s. 94.**

108. In Scotland any offence under this Act declared to be punishable on summary conviction may be prosecuted in the Sheriff Court.

Proceedings for revocation of patent in Scotland. **See P. & D. A. 1907, s. 94.**

109.—(1.) Proceedings in Scotland for revocation of a patent shall be in the form of an action of reduction at the instance of the Lord Advocate, or at the instance of a party having interest with his concurrence, which concurrence may be given on just cause shown only.

(2.) Service of all writs and summonses in that action shall be made according to the forms and practice existing at the commencement of this Act.

Reservation of remedies in Ireland. **See P. & D. A. 1907, s. 95.**

110. All parties shall, notwithstanding anything in this Act, have in Ireland their remedies under or in respect of a patent as if the same had been granted to extend to Ireland only.

General saving for jurisdiction of Courts. **See T. M. A. 1905, s. 69. Also P. & D. A. 1907, ss. 94, 95.**

111.—(1.) The provisions of this Act conferring a special jurisdiction on the Court as defined by this Act, shall not, except so far as the jurisdiction extends, affect the jurisdiction of any Court in Scotland or Ireland in any proceedings relating to patents or to designs or to trade marks; and with reference to any such proceedings in Scotland, the term "the Court" shall mean any Lord Ordinary of the Court of Session, and the term "Court of Appeal" shall mean either Division of the said Court; and with reference to any such proceedings in Ireland, the terms "the Court" and "Court of Appeal" respectively mean the High Court of Justice in Ireland and her Majesty's Court of Appeal in Ireland (*a*).

(2.) If any rectification of a register under this Act is required in pursuance of any proceeding in a Court in Scotland or Ireland, a copy of the order, decree, or other authority for the rectification, shall be served on the comptroller, and he shall rectify the register accordingly.

(*a*) This provision did not exclude the jurisdiction of the High Court of Justice in England to expunge from the register a mark registered in the name of a domiciled Scotchman or Irishman: *In re King & Co.*, (1892) 2 Ch. 462. The question whether the Scotch and Irish Courts had a concurrent jurisdiction was there left open. The question was decided by the Court of Session in the affirmative as to Scotland (*Cowie* v. *Herbert*, 14 P. R. 436), but in the more recent case of *John Dewar & Sons, Ld.* v. *Dewar*, 17 P. R. 341, the matter was left in doubt. It was, however, there decided that, whether this were so or not, it did not affect the jurisdiction of the Court to make a declaration that the entry of the trade mark was made without sufficient cause and ought to be expunged. In Ireland it was held by the Master of the Rolls that the Court had no jurisdiction to expunge a mark wrongly registered: *Bayer* v. *Connell*, (1897) 1 I. R. 514.

Isle of Man.

See T. M. A. 1905, s. 70. Also P. & D. A. 1907, s. 96.

112. This Act shall extend to the Isle of Man, and—

(1.) Nothing in this Act shall affect the jurisdiction of the Courts in the Isle of Man, in proceedings for infringement or in any action or proceeding respecting a patent, design, or trade mark competent to those Courts;

(2.) The punishment for a misdemeanour under this Act in the Isle of Man shall be imprisonment for any term not exceeding two years, with or without hard labour, and with or without a fine not exceeding one hundred pounds, at the discretion of the Court;

(3.) Any offence under this Act committed in the Isle of Man which would in England be punishable on summary conviction may be prosecuted, and any fine in respect thereof recovered at the instance of any person aggrieved, in the manner in which offences punishable on summary conviction may for the time being be prosecuted.

Jurisdiction of Lancashire Palatine Court.

See T. M. A. 1905, s. 71.

[112A. The Court of Chancery of the County Palatine of Lancaster shall, with respect to any action or other proceeding in relation to trade marks, the registration whereof is applied for in the Manchester Office, have the like jurisdiction under this Act as her Majesty's High Court of Justice in England, and the expression "the Court" in this Act shall be construed and have effect accordingly.

Provided that every decision of the Court of Chancery of the County Palatine of Lancaster, in pursuance of this section, shall be subject to the like appeal as decisions of that Court in other cases.]

This section was introduced by § 26 of the Act of 1888.

Repeal; Transitional Provisions; Savings.

Repeal and saving for past operation of repealed enactments, &c.

See T. M. A. 1905, s. 73. Also P. & D. A. 1907, s. 98.

113. The enactments described in the Third Schedule to this Act are hereby repealed. But this repeal of enactments shall not—

(a.) Affect the past operation of any of those enactments, or any patent or copyright or right to use a trade mark granted or acquired, or application pending (*a*), or appointment made, or compensation granted, or order or direction made or given, or right, privilege, obligation, or liability acquired, accrued, or incurred, or anything duly done or suffered under or by any of those enactments before or at the commencement of this Act; or

(b.) Interfere with the institution or prosecution of any action or proceeding, civil or criminal, in respect thereof, and any such proceeding may be carried on as if this Act had not been passed; or

(c.) Take away or abridge any protection or benefit in relation to any such action or proceeding.

(*a*) Applications under the Act of 1875 had to be decided under that Act: *In re Hudson*, 32 Ch. D. 311. But § 63 applied to applications pending at the date of the passing of this Act, and not completed within twelve months by the applicants' default: *In re Hayward & Co.*, 54 L. J. Ch. 1003.

Former registers to be deemed continued.
See T. M. A. 1905, s. 6.

114.—(1.) The registers of patents and of proprietors kept under any enactment repealed by this Act shall respectively be deemed parts of the same book as the register of patents kept under this Act.

(2.) The registers of designs and of trade marks (*a*) kept under any enactment repealed by this Act shall respectively be deemed parts of the same book as the register of designs and the register of trade marks kept under this Act.

(*a*) The register of trade marks was previously to this Act kept under the authority of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91, by § 1 of which it was established), and the amending Acts (39 & 40 Vict. c. 33, and 40 & 41 Vict. c. 37). Those Acts placed the register under the superintendence of the then Commissioners of Patents, now abolished. See *In re Meikle*, 24 W. R. 1067; *In re Barrows*, 5 Ch. D. 353, 351; *In re Rotherham*, 11 Ch. D. 250; 14 Ch. D. 585.

Saving for existing rules.
See T. M. A. 1905, s. 73.

115. All general rules made by the Lord Chancellor or by any other authority under any enactment repealed by this Act, and in force at the commencement of this Act, may at any time after the passing of this Act be repealed, altered, or amended by the Board of Trade, as if they had been made by the Board under this Act, but so that no such repeal, alteration, or amendment shall take effect before the commencement of this Act; and, subject as aforesaid, such general rules shall, so far as they are consistent with and are not superseded by this Act, continue in force as if they had been made by the Board of Trade under this Act.

Saving for prerogative.
See P. & D. A. 1907, s. 97.

116. Nothing in this Act shall take away, abridge, or prejudicially affect the prerogative of the Crown in relation to the granting of any letters patent or to the withholding of a grant thereof.

General Definitions.

General definitions.
See T. M. A. 1905, s. 3. Also P. & D. A. 1907, ss. 92, 93.

117. In and for the purposes of this Act, unless the context otherwise requires,—

"Person" includes a body corporate;

"The Court" means (subject to the provisions for Scotland, Ireland, and the Isle of Man) her Majesty's High Court of Justice in England (*a*):

"Law Officer" means her Majesty's Attorney-General or Solicitor-General for England:

"The Treasury" means the Commissioners of her Majesty's Treasury:

"Comptroller" means the Comptroller-General of Patents, Designs, and Trade Marks:

"Prescribed" means prescribed by any of the schedules to this Act, or by general rules under or within the meaning of this Act:

"British possession" means any territory or place situate within her Majesty's dominions, and not being or forming part of the United Kingdom, or of the Channel Islands, or of the Isle of Man; and all territories and places under one legislature, as hereinafter defined, are deemed to be one British possession for the purposes of this Act:

"Legislature" includes any person or persons who exercise legislative authority in the British possession; and where there are local

legislatures as well as a central legislature, means the central legislature only.

In the application of this Act to Ireland "summary conviction" means a conviction under the Summary Jurisdiction Acts, that is to say, with reference to the Dublin Metropolitan Police District the Acts regulating the duties of justices of the peace and of the police for such district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending it.

(*a*) See § 112A, *supra*. In *Bow* v. *Hart*, (1905) 1 K. B. 592, the Court of Appeal left open the point whether the definition of "the Court" in this section excluded the jurisdiction of the County Court in actions for infringement of trade marks, but they held upon the construction of the County Courts Acts and the Judicature Act that the County Court had no jurisdiction to entertain such an action.

SCHEDULES.

The First Schedule.

Forms.

The Second Schedule.

Fees on Instruments for obtaining Patents and Renewal.

The Third Schedule.

Enactments Repealed.

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38 & 39 Vict. c. 91 (1875).—The Trade Marks Registration Act, 1875.

39 & 40 Vict. c. 33 (1876).—The Trade Marks Registration Amendment Act, 1876.

40 & 41 Vict. c. 37 (1877).—The Trade Marks Registration Extension Act, 1877.

APPENDIX G.

EXTRACTS FROM THE REPORT, *dated the* 16*th March*, 1888. *of the* DEPARTMENTAL COMMITTEE *appointed by the Board of Trade on the* 24*th of February*, 1887, "*to inquire into the duties, organization and arrangements of the Patent Office under the Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *so far as relates to trade marks and designs.*"

LORD HERSCHELL, Chairman.

REPORT.

The complaints which have been made to us of the working of the Act of 1883, and the suggestions which have been submitted of amendments in the law and its administration, have had reference both to the registration of trade marks and designs. We propose to deal with these matters separately, directing attention first to the subject of trade marks.

I.—TRADE MARKS.

1. We propose first to consider the suggestions which have been made for improvements of procedure in relation to the registration of trade marks.

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15. We have given very careful consideration to the evidence which has been laid before us by those interested in the trade of Lancashire. The number of marks registered in Classes 23, 24, and 25, which are commonly described as the Cotton Classes, is very large; and the administration of the Act in relation to these classes is of great importance to the trade. There can be no doubt that the working of the Trade Marks Act has not given satisfaction in Lancashire. Even if at times there may have been a disposition to expect too much, we think there have been substantial grounds for the dissatisfaction which has prevailed. The great bulk of the goods manufactured in Lancashire in respect of which trade marks are used is exported to other countries, and there can be no doubt that these marks fulfil important functions in the trade between Lancashire and India, and other countries. One chief complaint has been

that the usages of the trade and the character of the markets where the marks are intended to serve their purpose have not been sufficiently kept in view by the Patent Office. By § 72, sub-sect. 2, the Comptroller is directed not to register, with respect to the same description of goods, a trade mark so nearly resembling a trade mark already on the register with respect to such description of goods as to be calculated to deceive. It is on the question whether marks do so nearly resemble one another as to be calculated to deceive, and what extent of resemblance to an old mark ought to cause the rejection of an application, that the chief difference has arisen between the trade and those to whom the administration of the Act has been entrusted. The tendency of the office has been to construe the words of the enactment more favourably towards applicants for new marks than the trade have thought right. We think the difference has arisen in part from the wording of the Act. The comptroller has felt unable to say that the two marks "so nearly" resemble each other as to be calculated to deceive. He has thus not considered himself at liberty to take into consideration to the extent that he otherwise might, the character of the market in which the mark is to serve its purpose. Two marks, when placed side by side, may exhibit many and various differences, yet the idea left upon the mind by both may be the same, so that a person acquainted with the mark first registered, and not having the two side by side for comparison, might well be deceived, if goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same mark as that with which he was acquainted. Take, for example, a mark representing a game of football; another mark may show the players in a different dress, and in very different positions, and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trade-marked goods, and relying, as they frequently do, upon the marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing.

In order to avoid misapprehension in the future we recommend, even though it may not be absolutely necessary, a slight amendment of the Act, substituting for the words "so nearly resembling" the words "having such resemblance to"; and further we would suggest that when the question arises whether a mark applied for bears such resemblance to one on the register as to be calculated to deceive, it should be determined by considering what is the leading characteristic of each. The one might contain many, even most, of the same elements as the other, and yet the leading, or it may be the only, impression left on the mind might be very different, whilst, on the other hand, a critical comparison of two marks might disclose numerous points of difference, and yet the idea which would remain with any person seeing them apart at different times might be the same.

In this connection we may refer to a point which has been the subject of considerable controversy, namely, how far registered or common marks when combined together are to be regarded as a new mark. We think that the juxtaposition of two or more such marks is

not, if there be nothing more than this, a combination constituting a new mark. An important test appears to be whether the existing marks are so combined as to suggest a new idea. For instance, assuming a cat and a fiddle to be each an old mark, we do not think the mere representation of a cat and a fiddle together would be a new mark, but the representation of a cat playing upon a fiddle, the idea conveyed by which would be neither the cat nor the fiddle, but a cat playing upon a fiddle, would be a good combination, and might properly be registered. We think this view differs somewhat from that which has been at times, at all events, entertained by the Board of Trade, but it appears to us to be the sound one.

Where several common or open marks are worked into a single new design by being grouped together within a border or otherwise, we think that such a combination may be entitled to registration, but that it would be well to require that all the common elements should be disclaimed.

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18. We have had under our serious consideration the question whether it would be expedient and possible to provide for the registration of what are known in the cotton trade as line headings. It is clear that it could only be done by an alteration of the law, making in that case the colours used an essential part of the registered mark. There appears to be a somewhat general concurrence of view, that if it were practicable to provide effectually for the registration of these headings it would be desirable to do so, but the most opposite opinions were expressed by persons of large experience in the Manchester trade on the point whether it would be practicable. We are disposed to concur with those who pronounce it impracticable, but whether this view be correct or not, we clearly cannot recommend the adoption of a scheme the practicability of which is open to such serious doubt. At the same time we are fully conscious of the evils to which our attention has been directed. Woven line headings no doubt play an important part in many markets; they become associated in the minds of buyers with the make of a particular manufacturer, or the merchandize of a particular merchant, and goods bearing particular marks obtain, on account of their proved quality, a high reputation in the market. Thereupon, some other manufacturer or merchant sends to the very market where he knows this reputation has been acquired goods of an inferior quality bearing, not the identical heading, but one so resembling it as to leave on the mind of a person seeing it the same impression. He is thus enabled to undersell the merchant who originally introduced the mark to the market, whilst still securing a good profit for himself on account of the inferior quality of his goods, and this process often goes on until the very mark which gained the reputation is shunned by the buyers who at one time valued the goods to which it was attached.

Even those witnesses who have felt most strongly the impossibility of protecting line headings by registration have admitted the magnitude of the evil, and that these resemblances of headings, of which complaint is made, are not accidental, but intentional. We

are satisfied that not only do individual traders incur loss from this cause, but that the trade of Lancashire suffers from it.

The imitation of headings, however, is not the only mode by which this kind of false representation is successfully carried on. We have had before us pieces of cloth, each of which bore different trade marks, tickets, words, figures, and other marks, but on which those trade marks, tickets, &c., were so coloured and distributed as to convey the impression, in the absence of careful examination, that the goods bore the same marks. No one looking at those pieces of cloth could doubt that the resemblance was intentional, and was designed for the very purpose of deceiving. Although we arrived at the conclusion that it would not be possible to give to line headings the protection of registration, we felt that the fraudulent trading to which our attention had been called ought not to remain unchecked, and that something ought to be done to remedy a state of things so detrimental to sound and honest trading; we, therefore, procured the insertion in the Merchandise Marks Act of a clause having for its object to bring these frauds within the penalties of the law and thus to check their practice. The clause has been the subject of a good deal of criticism, and some alarm has been expressed lest it should press hardly on persons acting with perfect honesty. We do not think this is likely to be the case. It is, of course, difficult so to frame a law as to make it effectual against wrongdoers, and at the same time to guard those who have no unlawful intention from all possible risk of inconvenience. The operation of the Act must, no doubt, be carefully watched, and it may well be capable of amendment, but we could not resign ourselves to the conclusion that mischievous frauds must be allowed to continue without even an attempt to put a stop to them.

* * * * * *

24. We will next proceed to consider the objections which have been taken to the law which now governs what may be registered as trade marks, and the important suggestions which have been made for its amendment.

25. By section 64 (1) (c) of the Act a trade mark may be registered which consists of or contains "a distinctive device, mark, brand, heading, label, ticket, or fancy word, or words not in common use." Some controversy has arisen with reference to the meaning of the word "brand" as distinguished from the other words employed. There can be no doubt that the term derives its origin from the practice of producing some mark by means of burning, but it appears now to be in use in certain trades for the purpose of describing trade marks no longer produced in this way, and differing in no respect from the labels or tickets mentioned in the section; nevertheless a distinction has been made in the practice of the Office, and trade marks have been allowed registration in certain trades as brands when they would not be accepted in other classes as labels or tickets. We see no reason for this distinction. It does not appear to us to receive support from the language of the Act, and we think that in future brands should be dealt with in precisely the same way as labels or tickets.

26. The most difficult question which has arisen upon the enact-

ment under consideration is to determine what may properly be regarded as "fancy words." Words are, undoubtedly, a most popular form of trade mark, but some limit must obviously be put upon the words which an individual may be permitted to register and claim the exclusive use of. The expression "fancy word" is certainly not a happy one, and has naturally given rise to considerable differences of opinion as to its meaning.

It will be convenient to consider first what words ought to be allowed as trade marks. There can be no objection to permitting the registration of an invented word not to be found in the vocabulary of our own or any other country. It seems to us further that existing words may with advantage be permitted as trade marks, subject to limitations which at once suggest themselves. It is manifest that no one ought to be granted the exclusive use of a word descriptive of the quality or character of any goods. Such words of description are the property of all mankind, and it would not be right to allow any individual to monopolise them and exclude others from their use. Again geographical words, which can be regarded as descriptive of the place of manufacture or sale of the goods, are open to obvious objections. One manufacturer or merchant cannot properly be allowed to prevent all his competitors from attaching to their goods the name of the place of their manufacture or sale. The mischief would not be the same where the person seeking to register was the first who had manufactured or sold the goods in the place the name of which he seeks to appropriate as a trade mark. But there are objections to giving a monopoly even in that case, and to attempt to draw any such distinction would be likely to lead to difficulty and litigation. We think, therefore, that geographical names ought only to be permitted where they clearly could not be regarded as indicative of the place of manufacture or sale. We would add upon this point that we think that where an English word would be rejected as not entitled to registration no person ought to be permitted to register its translation into any other language. The question has been raised whether a word having the same sound as one entered on the register, though differently spelt and with a different meaning should be registered. The question in such a case would seem to be whether the resemblance between the old mark and that applied for was such as to be calculated to deceive; if it were it ought, of course, to be rejected.

Our attention has been called to the rejection of words which it is said indicate the use to be made of the articles to which they are to be applied. As, for example, "Mariner's Rum." We think that if the word sought to be registered would be understood as suggesting a special use of the goods, or their adaptability to a particular purpose, it would be objectionable as descriptive of their character.

Registration, it appears, is sometimes sought of devices which are descriptive of the goods to which they are to be applied, *e.g.*, a representation of a hinge to be applied to doors. We think these are not legitimate marks.

Complaints have also been made that where words have been refused as not being distinctive, they have afterwards been allowed

where the applicant has applied for a mark consisting of the same word preceded by the applicant's name with an apostrophe. We think this course ought not to be pursued. Little or no mischief might result where the name of the applicant was an uncommon one, but where the name was a common one the result would be to deprive all persons bearing the same name of their right to use a common word in connexion with their own name, and even if the name were an uncommon one it would be impossible to say that there were not other persons bearing it who might wish to use in connection with it the common word which it is sought to monopolise.

Evidence has been given that marks consisting of a combination of the applicant's name with the article he manufactures or sells are highly valued. There can be no doubt that if a manufacturer or vendor has obtained for his goods a reputation amongst the public he could, by process of law, quite apart from the Trade Marks Act, prevent goods that were not his from being offered to the public on the representation that they were so. But it would be quite a different thing to give by virtue of registration under the Trade Marks Act a right to prevent another manufacturer or merchant honestly describing his own goods by his own name.

It is said that there is often a desire to register short phrases, such as proverbs, &c., and that owing to the difficulty of finding the representation that they were so. But it would be quite a objection to this, provided that they are in no way descriptive of the character or quality of the goods, or of their place of origin, sale, or manufacture.

It is said that there is often a desire to register short phrases, those interested in the cotton classes that words should not be permitted to be registered as trade marks in Classes 23 and 24. If the desire be so general as is represented, we see no reason in principle why it should not be yielded to. But there appears to be a serious difficulty in the way of making such a change at present, owing to the International Convention which has been entered into. We understand that word marks are registered in the cotton classes in some of the countries which are parties to the Convention; and there would be an anomaly in permitting such marks to be registered here when first registered in those countries, whilst registration is denied them if first applied for in England.

27. By section 64, sub-section 2, there may be added to any one or more of the essential particulars "any letters, words, or figures, or combination of letters, words, or figures or of any of them." There is here, it will be seen, no limitation as to the letters, words, or figures, which may be combined with the essential part of a trade mark. By section 74, however, it is provided that nothing in the Act shall be construed to prevent the comptrolle registering as an addition to any trade mark "any distinctive word, or combination of words, though the same is common to the trade in the goods with respect to which the application is made." But this section enacts, sub-section 2, that "The applicant for entry of any such common particular or particulars must however disclaim in his application any right to the exclusive use of the same, and a copy of the disclaimer shall be entered on the register." It has

been said, and we think truly, that it is not easy to understand what is the exact status of the added matter provided for by section 64. Where the added words are not common to the trade in the goods with respect to which the application is desired, the right of exclusive use need not be disclaimed, yet it is presumed that the proprietor of the trade mark could not object to their use by any other person except in connection with the essential particular of his trade mark. What purpose then do they serve? Perhaps they may be useful in the case of a colourable imitation of the essential particular. If with such an imitation the same added words were used it would assist the proprietor in establishing that his trade mark had been infringed. But the added matter may, it is assumed, be of so distinctive a character as to form an essential part of the trade mark, so that its use might be an infringement. We think it would clearly be desirable that the added matter, which the proprietor does not claim the exclusive use of, should be disclaimed so that the public may know exactly what is the trade mark registered. We think, too, that all disclaimers should appear in connexion with the mark in the Official Journal. Some misapprehension might perhaps arise if the person registering the mark were compelled to disclaim his own name or the foreign equivalent for it. We think, therefore, this might be excluded from the necessity of disclaimer, but it should be provided that the proprietor of the mark should not thereby acquire the right to prevent any other person *bonâ fide* using his own name in connexion with his goods.

* * * * * *

41. It has been suggested that there is a necessity for some statutory definition of the trade mark rights which are acquired in connection with words used as the names of patented articles. Where a patent has been obtained for some article of commerce, and the patentee gives it a name which he registers as his trade mark, has he a right at the end of the term of his patent to prevent other people from selling it under that name? It is clear that he obtains the patent upon the condition that at the expiration of the term of his monopoly the public should have the right to manufacture and use it, and if the only name by which it is known is that which the proprietor has registered as a trade mark, it would certainly seem inconsistent with the right thus intended to be conferred on the public if every one except the original patentee were prevented from calling it, or from selling it, by that name which alone it bears. The authorities appear, however, to show that such a claim could not be maintained.

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II.—Designs.

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(Signed) HERSCHELL.
CRAWFORD.
MACNAGHTEN.
A. J. MUNDELLA.
H. DE WORMS.
JAMES F. HUTTON.

16th March, 1888.

APPENDIX H.

THE MERCHANDISE MARKS ACTS, 1887—1909, AND THE STATUTES, REGULATIONS AND ORDERS CONNECTED THEREWITH.

THE MERCHANDISE MARKS ACT, 1887.

50 & 51 Vict. c. 28.

An Act to consolidate and amend the Law relating to Fraudulent Marks on Merchandise. [23rd August, 1887.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Merchandise Marks Act, 1887 (*a*).

(*a*) It was held that it was not against the policy of the law for proceedings taken under the Merchandise Marks Act, 1862, now repealed by this Act, to be compromised: *Fisher* v. *Apollinaris Co.*, L. R. 10 Ch. 297.

Offences as to trade marks and trade descriptions.

2.—(1.) Every person (*a*) who—

(a.) forges (*b*) any trade mark (*c*); or

(b.) falsely applies (*d*) to goods (*e*) any trade mark (*c*) or any mark so nearly resembling a trade mark as to be calculated to deceive; or

(c.) makes any die, block, machine, or other instrument (*f*) for the purpose of forging (*b*), or of being used for forging (*b*), a trade mark (*c*); or

(d.) applies any false trade description (*g*) to goods (*e*); or

(e.) disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging (*b*) a trade mark (*c*); or

(f.) causes any of the things above in this section mentioned to be done,

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud (*h*), be guilty of an offence against this Act.

(2.) Every person who sells, or exposes for, or has in his possession for sale, or any purpose of trade or manufacture, any goods or

things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—(*i*)

(a.) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(b.) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things (*k*); or

(c.) That otherwise he had acted innocently (*l*);

he guilty of an offence against this Act.

(3.) Every person guilty of an offence against this Act shall be liable—

(i.) on conviction on indictment (*m*), to imprisonment, with or without hard labour, for a term not exceeding two years, or to fine, or to both imprisonment and fine; and

(ii.) on summary conviction (*m*) to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding twenty pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding fifty pounds; and

(iii.) in any case, to forfeit to Her Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed.

(4.) The Court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the Court thinks fit.

(5.) If any person feels aggrieved by any conviction made by a court of summary jurisdiction, he may appeal therefrom to a court of quarter sessions.

(6.) Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted, and any articles liable to be forfeited under this Act by a court of summary jurisdiction may be forfeited in manner provided by the Summary Jurisdiction Acts: Provided that a person charged with an offence under this section before a court of summary jurisdiction shall, on appearing before the Court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires be so tried accordingly. 42 & 43 Vict. c. 49.

(*a*) Person includes any body of persons: see § 3 (1).

(*b*) Forgery of a trade mark is defined by § 4.

(*c*) Trade mark is defined by § 3 (1).

(*d*) Application and false application of a trade mark are defined by § 5; and see § 6. See *Coppen* v. *Moore* (1), (1898) 2 Q. B. 300, and the Scotch cases of *Lord Advocate* v. *Jacobs*, (1908) S. C. 90, and *Lord Advocate* v. *Suits, Ld.*, (1908) S. C. 1163.

(*e*) "Goods" is defined by § 3 (1).

(*f*) As to making dies and blocks, see § 6.

(*g*) Trade description and false trade description are defined by § 3 (1): and see also § 3 (2) and (3), and also § 6. Compare § 18.

(*h*) In *Gridley* v. *Swinborne*, 5 Times L. R. 71, the Court appears to have entertained the view that the burden was on the prosecutor to prove a *mens rea* on the part of the defendant; but an intent to defraud a purchaser is not a necessary ingredient in the offence: *Wood* v. *Burgess*, 24 Q. B. D. 162; and in *Starey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90, it was held, in proceedings taken by a trade society, that though the article supplied was of the quality contracted to be supplied, and had been accepted by the purchaser without objection, and no pecuniary loss or injury of any kind had been suffered by the purchaser, yet, inasmuch as the vendors were known as manufacturers only, and not as dealers, and they had placed their own name on the goods, without any notification that the goods had been obtained by them from elsewhere, they were not entitled to say that there was no intent to defraud.

(*i*) This Act renders the master or principal criminally liable for the acts of his agents and servants in all cases within § 2, sub-ss. 1 and 2, where the act constituting the offence is done by the servant or agent within the scope or in the course of his employment, subject to this, that the master or principal may be relieved from criminal responsibility where he can prove that he has acted in good faith, and has done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act: *Coppen* v. *Moore* (2), (1898) 2 Q. B. 306; and it seems that *Budd* v. *Lucas*, (1891) 1 Q. B. 408, must be treated as overruled on this point. See also *R.* v. *Barnado*, Times, Jan. 18th, 1889; *R.* v. *Hickling*, Times, July 28th, 1890; *R.* v. *Melin*, Times, March 25th, 1896; *R* v. *Jenkinson*, Times, Jan. 3rd, 1901. In the case of an offence under this sub-s. the absence of a fraudulent intent is not of itself sufficient to bring the defendant within Clause (c), and if he offends knowingly he is not acting innocently: *Haddon* v. *Neilson*, Ct. Sess. Cas. 5th Ser. II. 19; *Thwaites & Co.* v. *McEvilly*, 20 P. R. 663; 21 P. R. 397; (with which compare *Donohoe* v. *Cherry*, 26 P. R. 545); *North Eastern Breweries, Ld.* v. *Gibson*, 91 L. T. N. S. 78; *Burns* v. *Turner*, Ct. Sess. Cas. 4th Ser. XXV. 38; *Stone* v. *Burn*, 27 Times L. R. 6. But a defendant accused of an offence under this sub-s. may prove that he has acted innocently though he has not taken all reasonable precautions, and though he had reason to suspect the genuineness of the article. Accordingly auctioneers who, on being informed that certain china articles on view in their sale rooms were not genuine Dresden, and that the marks were forged, sold it for what it was, were held by the Divisional Court to have acted innocently: *Christie, Manson & Woods* v. *Cooper*, (1900) 2 Q. B. 522. In an earlier case of *R.* v. *Tooth*, Times, Aug. 7th, 1891 (which was not cited to the Divisional Court), Sir P. Edlin had held that, where an auctioneer who, on being informed that a piano in his show room was marked with a colourable imitation of a name of a well-known maker, withdrew the lot from the sale, he must none the less be held guilty of an offence under this section. In Scotland it has been held that where the master had given orders that goods were only to be described by the terms employed in the invoice from the manufacturer to himself, and a servant supplied goods which had been invoiced to the master as "overcoating," to a customer who had ordered "Scotch tweed," and the goods were not properly Scotch tweed, it was held that the master had acted innocently within the Act: *Lord Advocate* v. *Suits, Ld.* (1908), S. C. 163.

(*k*) Under the present statute a person in possession of wrongfully marked goods for sale, &c., has to give information with respect to the persons from whom he obtained the goods, if he wishes to escape the penalties of the Act. By § 6 of the repealed Merchandise Marks Act, 1862, he was compellable to give the information under a special penalty.

(*l*) Clauses (a) and (b) of sub-s. 2 apply to cases where the goods in question are in the possession of the accused for sale, or are sold with the forged trade mark or false trade description already stamped upon them, and not to a case where the false trade description is applied upon the occasion and as part of the terms of the sale, in which case the accused must rely on Clause (c): *Coppen* v. *Moore* (1), (1898) 2 Q. B. 300.

(*m*) Whether a person charged with an offence under this Act is dealt with summarily or on indictment, the principles to be applied are the same: *per* Lord Coleridge, C. J., in *Gridley* v. *Swinborne*, 5 Times L. R. 71.

Definitions. 46 & 47 Vict. c. 57.

3.—(1.) For the purposes of this Act—

The expression "trade mark" means a trade mark registered in the register of trade marks, kept under the Patents, Designs, and

Trade Marks Act, 1883, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of § 103 of the Patents, Designs, and Trade Marks Act, 1883, are, under Order in Council (*a*), for the time being applicable:

The expression "trade description" means any description, statement, or any other indication, direct or indirect (*b*),

(a.) as to the number, quantity, measure, gauge, or weight of any goods (*c*), or

(b.) as to the place or country in which any goods were made or produced (*d*), or

(c.) as to the mode of manufacturing or producing any goods (*e*), or

(d.) as to the material of which any goods are composed (*f*), or

(e.) as to any goods being the subject of an existing patent (*g*), privilege, or copyright,

and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act;

The expression "false trade description" means a trade description which is false in a material respect (*h*), as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act (*i*):

The expression "goods" means anything which is the subject of trade, manufacture, or merchandise:

The expressions "person," "manufacturer, dealer, or trader," and "proprietor" include any body of persons corporate or unincorporate:

The expression "name" includes any abbreviation of a name.

(2.) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are (*k*).

(3.) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression "false name or initials" means, as applied to any goods, any name or initials of a person which—

(a.) are not a trade mark, or part of a trade mark, and

(b.) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description, and not having authorised the use of such name or initials (*l*), and

(c.) are either those of a fictitious person or of some person not *bonâ fide* carrying on business in connection with such goods (*m*).

(*a*) See Table of Orders in Council in Appendix D. Sect. 91 of the Patents and Designs Act, 1907, is now substituted for §§ 103, 104 of the Act of 1883.

(*b*) See § 18. The Act does not apply to verbal descriptions, but it is not necessary that there should be any physical connection between the description and the goods to which it is applied. The false trade description may be found in the invoice: *Coppen* v. *Moore* (1), (1898) 2 Q. B. 300. See also *Budd* v. *Lucas*, (1891) 1 Q. B. 408; *Langley* v. *Bombay Tea Co.*, (1900) 2 Q. B. 460; *Lord Advocate* v. *Jacobs*, (1908) S. C. 90; and *Lord Advocate* v. *Suts, Ld.*, *ib.* 1163. And as to the corresponding Canadian statute, see *R.* v. *T. Eaton Co.*, 31 Ont. R. 276. Where a butcher followed up a verbal description that mutton was New Zealand mutton by writing in the invoice the letters "N. M.," meaning thereby New Zealand mutton, he was held guilty of an offence under the Act: *Cameron* v. *Wiggins*, (1901) 1 K. B. 1. So, in *R.* v. *English Farmers' Association*, Times April 27, 1899, it was held that initials might be a sufficient trade description (New Zealand mutton described as "W. Leg. M.," meaning Welsh leg of mutton). And see the Scotch cases referred to in note (*b*) to § 5. The definition of "trade description" has been held in two cases in the Manchester Police Court to be wide enough to reach a somewhat complicated system of fraud practised in the cotton trade. Cotton yarn is reeled into certain lengths called hanks, each hank containing by the custom of the trade 840 yards. In this country the yarn is sold by weight, and is usually made up in bundles of 5 lbs. or 10 lbs. The price is regulated by what is called "the count" of the yarn, or, in other words, by the number of times a hank is contained in a pound weight of yarn, the greater number of hanks in the pound the finer the yarn and the higher the price. For example, yarn containing twelve hanks to the pound is spoken of as twelves, and would fetch a smaller price than yarn containing sixteen hanks to the pound, called sixteens. It is possible for any one acquainted with the trade to tell at a glance, from the make-up of the bundles, how many hanks the yarn contains to the pound, that is to say, the make-up affords an indication of the count of the yarn. In the first case, *Reg.* v. *Ananiadi* (Manchester Police Court, July 30th, 1889), the defendant, for the purposes of his export trade, caused bundles of yarn containing forty-five hanks to the pound to be made up as yarn containing sixty hanks to the pound. This was effected by a process technically known as "short reeling," by which the length of the hank was reduced below its proper number of yards so far as was necessary to increase the number of hanks per pound from forty-five to sixty. In addition to this, the number "60" was placed on the outside of each bundle to indicate the count of the yarn, though this was done without the express instructions of the defendant, and the numbers were subsequently removed by his orders. In this way a double fraud was committed, since the yarn was made to appear to be of a finer quality than it really was, and the hank, instead of containing its normal number of yards, viz., 840, contained only about 630 yards, and was, in fact, a spurious hank. Consequently there was a misrepresentation both as to the length and as to the fineness of the yarn. The magistrate held that the make-up of the bundles afforded a sufficient indication of the measure of the goods within the definition of "trade description" in § 3, and that it was immaterial whether or not the number of the count was affixed to the wrappers of the bundles, and he convicted the defendant. In the second case, *Reg.* v. *Manoukian* (Manchester Police Court, May 10th, 1898), the defendant was also convicted upon a similar state of facts.

The effect of the convictions in *Reg.* v. *Ananiadi* in 1889, and in *Reg.* v. *Manoukian* in 1898, was to render it difficult, if not impossible, for a merchant desirous of placing "short-reeled" yarn on the market to procure it in Manchester, but in 1903 another person also named Manoukian, a relation of the defendant in the 1898 case, was charged in Manchester under § 11 with having been an accessory to the

commission of a similar offence abroad and convicted: *R.* v. *Manoukian* (2), Manchester Police Court, September 8th, 1903. In this case the defendant was a member of a firm carrying on business in Manchester and in Constantinople as dealers in cotton yarn. The Constantinople branch of the firm caused yarn to be manufactured and made up in Italy and then supplied to them in Constantinople for sale in the Turkish market. The payment to the Italian manufacturers was made by means of bills drawn upon Manchester and accepted there by the defendant. The yarn which formed the subject of the prosecution had been manufactured in Italy, supplied to Constantinople, and paid for in Manchester in this course of trade. It was made up in 10 lb. bundles purporting to be "fourteens," "twenties" and "twenty-fours," that is to say, each bundle ought to have contained fourteen, or twenty, or twenty-four times 840 yards of yarn, whereas in fact the bundles contained far short of this number of yards by reason of coarser and heavier yarn being used, though the weight was correct. Thus each bundle of "fourteens" contained 91,000 yards instead of 117,600 yards, each bundle of "twenties" contained 129,600 yards instead of 168,000 yards, each bundle of "twenty-fours" contained 168,960 yards instead of 201,600 yards, so that the yarn supplied was both smaller in quantity and inferior in quality than the make-up of the bundles indicated to be the case. If this "short-reeling" had been done in Manchester, the defendant must have been convicted in accordance with the previous decisions, and it was held that as the defendant was a member of the firm trading in Constantinople as well as in Manchester, and had paid for the "short-reeled" yarn by accepting the bills, he must be convicted as an accessory, notwithstanding that he alleged that the Constantinople branch was responsible and that he had had no personal knowledge of the "short-reeling." He was fined 20*l.* with 100*l.* costs. The bundles were also numbered "14," "20," "24," and this marking was the subject of later counts, but the prosecution did not further press the matter after obtaining a conviction on the first count, which was as to the make-up of the bundles.

(*c*) See *Reg.* v. *Ananiadi* (Manchester Police Court, July 30th, 1889); *Hooper* v. *Balfour*, 62 L. T. N. S. 646; *Budd* v. *Lucas*, (1891) 1 Q. B. 408; *Reg.* v. *Manoukian* (Manchester Police Court, May 10th, 1898); *R.* v. *Lipton*, 32 L. R. Ir. 115. Where goods sold in packets are labelled with a given weight, it is an offence under this clause to weigh in the wrapper: *R.* v. *Lipton* (2), Times, June 16th, 1899; *Star Tea Co.* v. *Whitworth*, 91 L. T. N. S. 87. But where the defendant, in answer to a demand for half-a-pound of tea, handed to the customer a packet stamped with the words "the weight of this packet including the wrapper is half-a-pound," and that was true, he was held not guilty inasmuch as a description expressed in words or implied by conduct was not a trade description within the Act: *Langley* v. *Bombay Tea Co.*, (1900) 2 Q. B. 460.

(*d*) See *Starey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90; *R.* v. *Lipton*, 32 L. R. Ir. 115; *Bischop* v. *Toler*, 65 L. J. M. C. 1, where a man who prepared in England a substitute for butter mainly consisting of margarine manufactured in France was held properly convicted of an offence under the Act in having described the product as manufactured in France. A thing is considered to be manufactured at the place where it first becomes a finished article: *Ibid.*; and see *R.* v. *Van Straughton, Leon & Co.*, Times, Jan. 20, 1899; *R.* v. *Coopman*, Times, Feb. 22, 1906; also § 7 as to watches. Fines have been imposed in many cases where English-made cigars or cigarettes have been sold as foreign: *R.* v. *Egan*, Times, Dec. 24, 1888; *R.* v. *Callow*, Times, Feb. 8, 1890; *R.* v. *B. Muriatti, Sons & Co., Ld.*, Times, May 3, 1890; *R.* v. *Jones*, May 15, 1900; *R.* v. *Drapkin*, Times, June 13, 1900; *R.* v. *B. Morris & Sons, Ld.*, Times, June 15, 1900; *R.* v. *Robinson & Barnsdale*, Times, Apr. 2, 1901; *R.* v. *Wholesale Tobacco Co., Ld.*, Times, Jan. 28, 1908; *R.* v. *Nathan*, Times, Feb. 14, 1908; *R.* v. *Butcher*, 1 Cr. App. R. 54; *R.* v. *Phillips*, 2 Cr. App. R. 295. In some of the above cases the use on the boxes of foreign terms indirectly indicating the origin of the goods has been held sufficient for a conviction. In *R.* v. *Robinson & Barnsdale*, Times, Apr. 2, 1901, it was further held to be no defence that the back of the box contained the words "made in England." So where foreign ham or bacon has been described as of this country: *R.* v. *Melia*, Times, March 25, 1896; *R.* v. *Watts*, Times, Apr. 7, 1897; *R.* v. *Metropolitan & Provincial Stores, Ld.*, Times, July 13, 1897; *R.* v. *Frost & Co.*, Times, Nov. 17, 1897, where fines were imposed on both principal and servant: but in *Morris* v. *Royle*, 31 L. J. (Jo.) 339, the words "Finest Wiltshire Cut" as applied to Irish bacon were held referable to the shape and mode of cutting. Offences against this clause are common also in the china trade: *R.* v. *Hickling*, Times, July 28,

1890; *R.* v. *Grossbaum*, Times, Apr. 20, 28, 1898; *R.* v. *Harrod's Stores*, Times, May 17, 1898; *R.* v. *Hampton*, Times, June 23, 1898; *R.* v. *Price*, Times, Feb. 1, 1899; *R.* v. *Hopeon*, Times, May 10, 1900; *R.* v. *Midland Education Co.*, Times, Nov. 9, 1901; and in the wine trade: *R.* v. *Lipton*, Times, March 18, 1908 (Spanish wine described as port); *R.* v. *Camoccio*, Times, Jan. 9, 1909; July 10, 1909 (Australian burgundy described as burgundy); *R.* v. *Homburger*, Times, Sept. 15, 1908 (wine from the Berneastler district but not from the Berneastler Doctor vineyard sold as Berneastler Doctor). So it has been held a false trade description to describe as sparkling wine foreign still wine aerated in this country: *R.* v. *Graeger*, Feb. 20, 1890. Where wine was sold under the description of "Stower's Tarragona Port," to which was added in smaller letters the words "Blended with wine produced from finest foreign grapes," and it was proved that one-third of the wine consisted of a special kind of Tarragona (which is a Spanish wine) only fit for blending, and that the remaining two-thirds were composed of a wine made in Greece, from grape must, which consisted of the concentrated juice of fresh grapes grown in Greece, the Divisional Court held that the magistrate was justified in saying that this was not a false trade description: *Hooper* v. *Riddle*, 21 Cox, 177. In *R.* v. *Cam Portland Cement Co.*, Times, March 21, 1901, an unsuccessful attempt was made to prove that "blue" lime in the trade was confined to lime got from the Midlands, and it was held to be a generic term; accordingly the defendants, who applied it to lime got from Cambridge, were acquitted. In *Watson* v. *Dr. Jaeger's Sanitary Woollen System Co.*, 13 Times L. R. 150, upon a summons charging the defendants with causing to be applied a false trade description, to wit, a mark purporting to be an English trade mark, to woollen goods of German manufacture, it was held that evidence that according to the custom of the trade an English trade mark indicated that the goods to which it was applied were of English manufacture, was admissible and the case was remitted to the magistrate. In *R.* v. *Daniel*, March 6, 1907, it was held an offence to describe tweeds as Donegal. In *R.* v. *Rylands & Sons, Ld.*, Times, Apr. 9 and Dec. 9, 1909, it was held an offence to describe Yorkshire blankets as Witney, and the defence (under § 18) that the word "Witney" was used in the trade to describe a special mode of manufacture was held bad; the practice being recent and not lawful. Fines were also imposed in *R.* v. *Smith*, Times, Sept. 11, 1889 (German saws sold as Sheffield); *R.* v. *Paget*, Times, May 10, 1890 (tea wrongly described as Logama, the name of a particular tea garden); *R.* v. *Rhensius*, Times, March 9, 1899 (German lampholders sold as Austrian); *R.* v. *Peugeot*, Times, May 23, 1906 (French cycle chains sold as English); *R.* v. *Bacco*, Times, Sept. 15, 1909 (fountain pen made in Austria sold as Irish); *R.* v. *Pike*, Times, Sept. 15, 1909 (Birmingham penholders sold as Irish); and in *Cameron* v. *Wiggins*, (1901) 1 K. B. 1; and *R.* v. *English Farmers' Association*, Times, Apr. 27, 1899, as to which, see *ante*, p. 674.

(*e*) It has been held an offence under this clause to describe machine-made files as hand-cut (*R.* v. *Bramall*, Times, Dec. 18, 1889), and to describe machine-cut tobacco as hand-cut (*Kirshenboim* v. *Salmon & Gluckstein*, (1898) 2 Q. B. 19; *R.* v. *Cohen, Weenen & Co.*, Times, May 3, 1899; *R.* v. *Phillips*, Times, Dec. 11, 1900); also to sell factory butter as creamery butter (*R.* v. *Jones, Dickenson & Co.*, Times, June 9, 1908), it being shown that in the trade creamery butter means butter made by centrifugal or machine power as distinguished from factory butter, which is made by putting milk in dishes and allowing the cream to rise.

(*f*) In *Gridley* v. *Swinborne*, 5 Times L. R. 71, it was held by the Q. B. D. that it was not a false trade description to apply the term "isinglass" to a material which, though not in the most strictly scientific sense isinglass, was yet very similar to it and was frequently called by that name. It is an offence under this clause to describe margarine as butter (*R.* v. *Goodwin*, Times, April 16, 1896; *R.* v. *Semprini*, Times, Jan. 25, 1899; *R.* v. *Davies Bros.*, Times, May 14, 1903), and to describe butter mixed with foreign matter as guaranteed pure butter (*R.* v. *Coopman*, Times, Jan. 25, 1906); also to describe as pure lard lard solidified with 10 per cent. of ox stearine (*R.* v. *Nicholls*, Times, Dec. 14, 1896). So it is an offence to describe as linen things made of cotton (*R.* v. *Thornton*, Times, Sept. 15, 1909), or of a mixture of linen and cotton (*R.* v. *Jones Bros.*, Times, Jan. 16, 1899; *R.* v. *Dr. Deimel Underwear Fabric Co.*, Times, Oct. 24, 1903); and to describe as "natural wool" underclothing containing more cotton than wool, notwithstanding the allegation that the description was in accordance with the practice of the trade (*R.* v. *Downing*, Times, Oct. 20, 1893); and to describe a mattress made of carpet waste (hemp and wool) as a wool mattress (*Meadows* v. *Oatesby*, 107 L. T. (Jo.) 440). On the other hand,

it has been held that the term "flannelette," which material is all cotton, does not import that the substance is made of wool (*R.* v. *Whiteley*, Times, Jan. 16, 1895), and in *Davenport* v. *Apollinaris Co., Ld.* (20 Cox, 502), that the water from the Apollinaris spring was not improperly described as a natural mineral water, notwithstanding that a certain quantity of natural carbonic acid gas was added to it to replace what had been given off during storage. In *Fowler* v. *Cripps*, (1906) 1 K. B. 16, it was held by the Divisional Court (Darling, J., dissenting) that the mere fact that a description, as applied to particular goods, is scientifically correct will not prevent it from being a false trade description where it is proved that the term has acquired in the trade a special limited sense. Accordingly where Glauber's salts (sulphate of soda) were sold under the name "soda crystals," which name in the trade was always used to denote washing soda (carbonate of soda), it was held that the description, though chemically accurate, was none the less a false trade description; and see *R.* v. *Burgoyne & Co.*, Times, Jan. 10, 1904, and *R.* v. *Gilbert*, Times, Apr. 23, 1907. So in the silver and goldsmiths' trade a description which indicates to the public that the goods contain a larger proportion of gold or silver than they do in fact is a false trade description: *R.* v. *Peel*, Times, Jan. 11, 1888; *R.* v. *Crompton*, Times, July 9, 1908. Where Guinness' stout was diluted with water, it was held to be an offence to describe the mixture as Guinness' stout: *R.* v. *Tweedy*, Times, Oct. 17, 1893. Convictions have been obtained in various other cases: *R.* v. *Hall*, Times, Jan. 4, 1889 (carbolic acid described as Condy's fluid); *R.* v. *Adcock*, Times, Mar. 4, 1901 (disinfectant deficient in chlorine described as chloros); *R.* v. *Jacobs*, Times, Nov. 21, 1907 (mixture of sugar and paraffin wax described as chocolate); *R.* v. *Ashenfarb*, Times, Dec. 31, 1908 (copal described as amber). But in *R.* v. *Clark*, Times, May 8, 1907, the description of "Juvis," which contained 18 per cent. only of meat extract, as a meat extract, with qualifying words added, was held not to be a false trade description.

(*g*) See § 89 of the Patents and Designs Act, 1907, replacing § 105 of the Patents Act, 1883. In *Gradley* v. *Swinborne*, 5 Times L. R. 71, an article had been sold for upwards of forty years as "Swinborne's Patent Refined Isinglass," there having originally been a patent granted in 1817; and it was held that to continue to use the word "Patent," as had so long been done, was not to apply to the article a false trade description. It has been held that a person who himself wrongly inserted or retained the word "Patent" in his trade mark could not avail himself of the Merchandise Marks Act, 1862: *Morgan* v. *McAdam*, 36 L. J. Ch. 228. See *R.* v. *Vaughan*, Times, Feb. 25, 1888: *R.* v. *Gruber*, Times, Nov. 20, 1891, where the defendant was convicted although the complete specification had been accepted; cf. *R.* v. *Townsend*, 13 P. R. 265, where the defendant was not convicted.

(*h*) There is nothing to show what is meant by "in a material respect," but it would appear that a trade description which is inaccurate is not false in a material aspect unless the inaccuracy would have some effect on the mind of a purchaser. *Starey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90, seems to show that a very stringent interpretation will be placed on the Act. In that case a firm of English gunpowder manufacturers, who usually sold gunpowder of their own make only, had entered into a contract with the Government for the supply of a quantity of powder, the contract containing no stipulation that the powder was to be of their own or of English manufacture. They were unable, in consequence of an accident, to supply the powder of their own make, and they consequently supplied German powder in barrels marked with their name, but without any statement where or by whom the powder was made; and it was held that although the quality was correctly stated, and the powder was as good as if it had been made by them, and the Government had accepted it without objection, yet, inasmuch as the expectation would be that a firm known only as manufacturers and not as dealers would supply only gunpowder of their own make, the use of their name, without a statement as to the foreign origin of the powder, was an application to the goods of a false trade description. Again, in *Kirshenboim* v. *Salmon & Gluckstein*, (1898) 2 Q. B. 19, where machine-made cigarettes were falsely described as hand-made, it was held no answer to the question of materiality that the thing supplied was as good in quality as that which was asked for.

(*i*) In many of the cases reported only in the newspapers it does not clearly appear whether the charge was for applying a false trade description or for forging a trade mark, but in some of the cases both charges are included. Convictions have been obtained where the deception of the public has been procured by the effacement of a trade mark: in *R.* v. *Egan*, Times, Dec. 24, 1888; *R.* v. *Levy*, Times, Nov. 23,

1903; *R.* v. *Dunlop Rubber Tyre Co.*, Times, Jan. 11, 1908; *R.* v. *James' Drug Stores, Ld.*, Times, May 14, 1908; in *R.* v. *Zender*, Times, June 6, 1909, the defendant was heavily fined for applying to a piano not of Bechstein's make, a colourable imitation of Bechstein's name; and see *R.* v. *Tooth*, Times, Aug. 7, 1891. So convictions have been obtained for wrongly marking guns with the names of well known makers: *R.* v. *Goff*, Times, Nov. 9, 1899; *R.* v. *McCarthy, Buck & Co.*, Times, Apr. 6, 1900; *R.* v. *Styles*, Times, Feb. 6, 1901; *R.* v. *Jeffery*, Times, Oct. 12, 1892, where genuine rifle barrels inscribed with the maker's name were bought second hand by the defendant and were made new and re-marked with the name of the original maker. Other cases are *R.* v. *Crosse*, Times, Sept. 24, 1891 (sauce wrongly marked Goodall's); *R.* v. *Ingold*, Times, Jan. 21, 1896 (lampholders marked with a colourable imitation of Edison & Swan's trade mark); *R.* v. *Weisberg*, Times, June 24, 1904 (spurious gas mantle labelled Welsbach); *R.* v. *Tobins*, Times, May 4, 1904 (phonograph records falsely described as Edison's); *R.* v. *Edmans*, Times, July 15, 1905 ("Ormonde" trade mark falsely applied to bicycles); *R.* v. *Jenkinson*, Times, Jan. 3, 1901 (bicycle wrongly invoiced as having B. S. A. (Birmingham Small Arms) fittings); *R.* v. *Shepherd*, Times, Dec. 23, 1904 (trade mark falsely applied to rag book); *R.* v. *Northwood*, Times, Jan. 23, 1908 (pills falsely described as Beecham's); *R.* v. *Moss*, Times, Feb. 18, 1904 (Swiss watches falsely described as "Waltham" (an American make)); *R.* v. *Parkes' Drug Stores*, Times, Apr. 2, 1908 (Fayard's Eau de Quinine invoiced as Giraud's); *R.* v. *Jacobs*, Times, Nov. 21, 1907 (chocolate marked with a colourable imitation of Cailler's name). For the cases in the china trade, see *R.* v. *Grossbaum*, Times, Apr. 28, 1898; *R.* v. *Midland Education Co.*, Times, Nov. 9, 1901, and other cases collected under note (*d*) (*ante*, pp. 675, 676). In some cases the false trade description consists of or is supplemented by the forgery of a government mark giving a certain cachet to the goods to which it is applied: *R.* v. *Steel, Peach, Tozer & Co.*, Times, Sept. 23, 1898; *R.* v. *Jones*, Times, May 15, 1900. In *R.* v. *Hersey*, Times, June 13, 1900, a charge of selling cigarettes with a colourable imitation of the prosecutor's label was dismissed for want of similarity. So in *R.* v. *Coupland*, Times, Jan. 31, 1896, it was held that the fact that the defendant's name appeared on one of the wheels of a coach was no sufficient indication that he was the maker of the coach, and the charge of applying a false trade description was dismissed. Again, the affixing to a bottle of bovril the number of a registered design which had run out through lapse of time was held not a false trade description of the bottles of bovril: *R.* v. *Bovril, Ld.*, Times, June 29, 1898. It is an offence to bake bread not made of Hovis flour in tins supplied by the Hovis Company and marked with their name: *R.* v. *Johnson*, Times, March 7, 1900; *R.* v. *Jung*, Times, Sept. 26, 1900. Very analogous to this are the cases which so constantly occur in the mineral water trade where a manufacturer, on getting back from his customers bottles moulded with the names of other makers, fills them with mineral water of his own manufacture: *Wood* v. *Burgess*, 24 Q. B. D. 162; *Burns* v. *Turner*, Ct. Sess. Cas. 4th Ser. XXV. 38; *R.* v. *Evans*, Times, Oct. 26, 1888; *R.* v. *Wredon*, Times, Nov. 25, 1890; *R.* v. *Julier*, Times, Dec. 20, 1890; and in such cases it is no defence that the defendant had his own label on the bottles: *R.* v. *Butler*, Times, May 31, 1889; *R.* v. *Hickling*, Times, July 28, 1890; *R.* v. *Tissell*, Times, Apr. 14, 1892; *Thwaites & Co.* v. *McEvilly*, 21 P. R. 397 (contrast *Donohoe* v. *Cherry*, 26 P. R. (Ir.) 545), or even that the defendant had put up a notice that servants using other manufacturers' bottles would be dismissed: *R.* v. *Hickling*, Times, July 28, 1890; and see *R.* v. *Barnado*, Times, Jan. 18, 1889. Similar cases occur in the beer and spirit trades: *R.* v. *Clarke*, Times, Oct. 26, 1891; *Haddow* v. *Neilson*, Ct. Sess. Cas. 5th Ser. II. 19; *R.* v. *Horrigan*, Times, Nov. 15, 1901; *R.* v. *Welsh*, Times, Oct. 31, 1899; *R.* v. *Brown & French*, Times, March 2, 1901; *R.* v. *Pratt*, Times, May 29, 1901; *R.* v. *Cox*, Times, Apr. 23, 1907; *Stone* v. *Burn*, 27 Times L. R. 6. In many of the above cases confiscation has been ordered. See *R.* v. *Tobins*, Times, May 4, 1904; *R.* v. *Jeffery*, Times, Oct. 12, 1892; *R.* v. *Jacobs*, Times, Nov. 21, 1907, and other cases, but confiscation will be refused where the offence is not serious: *R.* v. *Hopcon*, Times, May 10, 1900; *R.* v. *Burgoyne & Co.*, Times, Jan. 9, 1904. Under the corresponding statute in Canada it has been held that the same tests are to be applied in a criminal prosecution for forging a trade mark as in a civil action for infringement: *R.* v. *Autier*, 6 Q. O. R. (Q. B.) 146; and that it is open to the person charged to show that the trade mark is invalid: *R.* v. *Crittenden*, 10 Ont. L. R. 80.

(*k*) A good example of the application of a false trade description to goods which falls within this sub-section is supplied by the case of *R.* v. *Ellinger*, Manchester

Police Court, July 18th, 1893, where the imitation was of a combination marking used by Messrs. G. & R. Dewhurst on grey shirtings for the Indian market. Messrs. Dewhurst's combination consisted of the following marks, arranged vertically one above the other:—An upright oblong green ticket printed in black, with a figure of a lion rampant and some wording in an ornamental border; the signature "G. & R. Dewhurst"; an upright oblong black ticket, printed in silver, with two discs vertically arranged, and containing representations of the two sides of a rupee in an ornamental border; the length, "38½ yds." in ornamental printing; the words "Trade Mark X 3." There was also a coloured heading. The defendant's combination consisted of the following marks, arranged vertically one above the other:—An upright oblong green ticket, printed in black, with a coat-of-arms and some wording in an ornamental border; a horizontal oblong black ticket printed in silver, with two ovals arranged side by side, and containing portraits of the Czar Peter I. and the Czarina Catherine II. in an ornamental border; the signature, "Isaac Wright & Co.;" the length, "37½/38 yds.," in the same printing as Messrs. Dewhurst's; the name, "Isaac Wright & Co.," in plain type, with "O 3." There was also a coloured heading bearing some resemblance to Messrs. Dewhurst's. The tickets were of approximately the same size as Messrs. Dewhurst's. It was held that the "combination" was intended and calculated to deceive, and the defendants were convicted, and a penalty was inflicted with costs.

(*l*) See *Wood* v. *Burgess*, 24 Q. B. D. 162, and other cases cited above.

(*m*) See *R.* v. *Racco*, Times, Sept. 15, 1909. Clauses (b) and (c) of this sub-section are to be read disjunctively: *R.* v. *Lipton*, 32 L. R. Ir. 115. In that case a trader who sold inferior qualities of his own goods under his foreman's name was held properly convicted under Clause (c), the accused not having set up the plea that he acted innocently within the proviso in sub-s. 2 of § 2, and not having claimed the benefit of § 18.

Forging trade mark.

4. A person shall be deemed to forge a trade mark who either—

(a.) without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling that trade mark as to be calculated to deceive; or

(b.) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise;

and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark.

Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant.

Applying marks and descriptions.

5.—(1.) A person shall be deemed to apply a trade mark or mark or trade description to goods who—

(a.) applies it to the goods themselves; or

(b.) applies it to any covering (*a*), label, reel or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or

(c.) places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied (*b*); or

(d.) uses a trade mark or mark or trade description any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark or mark or trade description (*c*).

(2.) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper; and the expression "label" includes any band or ticket.

A trade mark, or mark, or trade description, shall be deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing (*b*).

(3.) A person shall be deemed to falsely apply to goods a trade mark or mark, who without the assent of the proprietor of a trade mark applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive, but in any prosecution for falsely applying a trade mark or mark to goods the burden of proving the assent of the proprietor shall lie on the defendant.

(*a*) For definition of "covering," see sub-s. (2) of this section.

(*b*) As to these provisions, see *Stone* v. *Burn*, 27 Times L. R. 6.

(*c*) As to what is a false trade description, see notes to § 3. It has been held that a false trade description inserted in an invoice is applied to the goods (*Coppen* v. *Moore* (1), (1898) 2 Q. B. 300; *Budd* v. *Lucas*, (1891) 1 Q. B. 408); but (in Scotland) that the supply of goods in response to an order in which the goods ordered are described in a way to which the goods supplied do not correspond, is not an application of a false trade description to the goods: *Lord Advocate* v. *Jacobs* (1908), S. C. 90; *Same* v. *Suits, Ld.*, *ib.* 1163.

Exemption of certain persons employed in ordinary course of business.

6. Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves—

(a.) That in the ordinary course of his business he is employed on behalf of other persons to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or, as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(b.) That he took reasonable precautions against committing the offence charged; and

(c.) That he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(d.) That he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied—

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence.

Application of Act to watches.

7. Where a watch-case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall *primâ facie* be deemed to be a description of that country within the meaning of this Act, and the provisions of this Act with respect to goods to which a false trade description has been applied, and with respect to selling or exposing for, or having in possession for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly, and for the purposes of this section, the expression "watch" means all that portion of a watch which is not the watch-case (*a*).

(*a*) Persons have been held guilty of falsely describing foreign watches as English in *R.* v. *Campbell*, Times, Feb. 9th, 1889; *R.* v. *Kendall*, Times, March 9th, 1889; *R.* v. *Allpass*, Times, March 16th, 1889; *R.* v. *Hyland*, Times, Aug. 15th, 1890; *R.* v. *Bettle*, Times, Feb. 9th, 1891; *R.* v. *Pierce*, Times, March 28, 1893, notwithstanding that in some cases portions of the watch were made in England, the question under the Act being whether the watch is substantially made in England: *R.* v. *Bettle*, *supra*. Accordingly in *Williamson* v. *Tierney*, 83 L. T. N. S. 592, it was held that although the mere fact that a watch includes certain parts which are partly made abroad does not necessarily imply that the description of the watch as English is false, the Court may come to that conclusion upon the evidence.

Mark on watch-case.

8.—(1.) Every person who after the date fixed by Order in Council sends or brings a watch-case (*a*), whether imported or not, to any assay office in the United Kingdom for the purpose of being assayed, stamped, or marked, shall make a declaration declaring in what country or place the case was made. If it appears by such declaration that the watch-case was made in some country or place out of the United Kingdom, the assay office shall place on the case such a mark (differing from the mark placed by the office on a watch-case made in the United Kingdom), and in such a mode as may be from time to time directed by Order in Council (*b*).

(2.) The declaration may be made before an officer of an assay office, appointed in that behalf by the office (which officer is hereby authorised to administer such a declaration), or before a justice of the peace, or a commissioner having power to administer oaths in the Supreme Court of Judicature in England or Ireland, or in the Court of Session in Scotland, and shall be in such form as may be from time to time directed by Order in Council (*b*).

(3.) Every person who makes a false declaration for the purposes of this section shall be liable, on conviction on indictment, to the penalties of perjury, and on summary conviction to a fine not exceeding twenty pounds for each offence.

(*a*) Gold and silver watch cases are gold and silver plate within the meaning of the Customs Act, 1842 (5 & 6 Vict. c. 47), s. 59; *Goldsmiths' Co.* v. *Wyatt*, (1907) 1 K. B. 95, a decision which led to the passing of 7 Edw. VII. c. 8, to condone previous omissions. So also imported articles of gold or silver decorated with enamel: *Fabergé* v. *Goldsmiths' Co.*, Parker, J., Nov. 21, 1910.

(*b*) See Order in Council of Nov. 28th, 1887, p. 690, *infra*, for the marks which had to be used from Jan. 1st, 1888, to May 14th, 1907, and Order in Council of May 7th, 1907, p. 690, *infra*, for marks to be used since that date.

Trade mark, how described in pleading.

9. In any indictment, pleading, proceeding, or document, in which any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that trade mark or forged trade mark to be a trade mark or forged trade mark.

Rules as to evidence.

10. In any prosecution for an offence against this Act,—

(1.) A defendant, and his wife or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and, if called, shall be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness.

(2.) In the case of imported goods, evidence of the port of shipment shall be *primâ facie* evidence of the place or country in which the goods were made or produced.

Punishment of accessories.

11. Any person who, being within the United Kingdom, procures, counsels, aids, abets, or is accessory (*a*) to the commission, without the United Kingdom, of any act, which, if committed in the United Kingdom, would under this Act be a misdemeanour, shall be guilty of that misdemeanour as a principal, and be liable to be indicted, proceeded against, tried, and convicted in any county or place in the United Kingdom in which he may be, as if the misdemeanour had been there committed.

(*a*) For an example of a conviction under this section see *R.* v. *Manoukian* (2), Manchester Police Court, Sept. 8th, 1903, the facts of which are stated *ante*, p. 675.

Search warrant.

12 (*a*).—(1.) Where, upon information of an offence against this Act, a justice has issued either a summons requiring the defendant charged by such information to appear to answer to the same, or a warrant for the arrest of such defendant, and either the said justice on or after issuing the summons or warrant, or any other justice, is satisfied by information on oath that there is reasonable cause to suspect that any goods or things by means of or in relation to which such offence has been committed are in any house or premises of the defendant, or otherwise in his possession or under his control in any place, such justice may issue a warrant under his hand by virtue of which it shall be lawful for any constable named or referred to in the warrant to enter such house, premises, or place at any reasonable time by day, and to search there for and seize and take away those goods or things; and any goods or things seized under any such warrant shall be brought before a court of summary jurisdiction for the purpose of its being determined whether the same are or are not liable to forfeiture under this Act.

(2.) If the owner of any goods or things which, if the owner thereof had been convicted, would be liable to forfeiture under this Act (*a*), is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and a court of summary jurisdiction may cause notice to be advertised stating that, unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be forfeited, and at such time and place the Court, unless the owner or any person on his behalf, or other person interested in the goods or things, shows cause to the contrary, may order such goods or things or any of them to be forfeited.

(3.) Any goods or things forfeited under this section, or under any other provision of this Act, may be destroyed or otherwise disposed of, in such manner as the Court by which the same are forfeited may direct, and the Court may, out of any proceeds which may be realised by the disposition of such goods (all trade marks and trade descriptions being first obliterated), award to any innocent party any loss he may have innocently sustained in dealing with such goods.

(a) See *Commissioners of Trade and Customs* v. *Bell*, (1902) A. C. 563.

Extension of 22 & 23 Vict. c. 17, to offences under this Act.

13. The Act of the session of the twenty-second and twenty-third years of the reign of Her present Majesty, chapter seventeen, intituled "An Act to prevent vexatious indictments for certain misdemeanours," shall apply to any offence punishable on indictment under this Act, in like manner as if such offence were one of the offences specified in § 1 of that Act, but this section shall not apply to Scotland.

Costs of defence or prosecution.

14. On any prosecution under this Act the Court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

Limitation of prosecution.

15. No prosecution for an offence against this Act shall be commenced after the expiration of three years next after the commission of the offence, or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens.

Prohibition on importation.

16. Whereas it is expedient to make further provision for prohibiting the importation of goods which, if sold, would be liable to forfeiture under this Act; be it therefore enacted as follows:

(1.) All such goods (*a*), and also all goods of foreign manufacture bearing any name or trade mark being or purporting to be the name or trade mark of any manufacturer, dealer, or trader in the United Kingdom (*b*), unless such name or trade mark is accompanied by a definite indication (*c*) of the country in which the goods were made or produced, are hereby prohibited to be imported into the United Kingdom, and subject to the provisions of this section, shall be included among goods prohibited to be imported as if they were specified in § 42 of the Customs Consolidation Act, 1876 (*d*). 39 & 40 Vict. c. 36.

(2.) Before detaining any such goods, or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs may require the regulations (*e*) under this section, whether as to information, security, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the goods are such as are prohibited by this section to be imported.

(3.) The Commissioners of Customs may from time to time make, revoke and vary, regulations (*e*), either general or special, respecting the detention and forfeiture of goods, the importation of which is prohibited by this section, and the con-

ditions, if any, to be fulfilled before such detention and forfeiture, and may by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4.) Where there is on any goods a name which is identical with or a colourable imitation of the name of a place in the United Kingdom (*f*), that name, unless accompanied by the name of the country in which such place is situate (*g*), shall be treated for the purposes of this section as if it were the name of a place in the United Kingdom.

(5.) Such regulations may apply to all goods the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

(6.) The Commissioners of Customs, in making and in administering the regulations, and generally in the administration of this section, whether in the exercise of any discretion or opinion, or otherwise, shall act under the control of the Commissioners of Her Majesty's Treasury.

(7.) The regulations may provide for the informant reimbursing the Commissioners of Customs all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

(8.) All regulations under this section shall be published in the London Gazette and in the Board of Trade Journal.

(9.) This section shall have effect as if it were part of the Customs Consolidation Act, 1876, and shall accordingly apply to the Isle of Man as if it were part of the United Kingdom.

46 & 47 Vict. c. 55.

(10.) Section 2 of the Revenue Act, 1883, shall be repealed as from a day fixed by regulations under this section, not being later than the first day of January one thousand eight hundred and eighty-eight (*h*), without prejudice to anything done or suffered thereunder.

(*a*) The only goods which are prohibited by this section to be imported are, in addition to foreign goods bearing a real or spurious British name or trade mark, goods which, if sold, would be liable to forfeiture under this Act. The goods liable to forfeiture are the goods in relation to which an offence against the Act has been committed (§ 2 (3) (iii.)). On a strict reading of the Act, it would therefore appear that, except in the case of foreign goods with British marks, for goods to be seized it ought to be proved that an offence against the Act has been committed: and that, seeing that such an offence is not necessarily committed whenever the goods have on them a forged trade mark or a false trade description, as the owners have an opportunity of clearing themselves by proving that they acted without intent to defraud (§ 2 (1)), or that otherwise they had acted innocently (§ 2 (2)), the goods ought not to be seized before ascertaining that the owners were unable to clear themselves under these provisions. In a case under the corresponding provisions of the New Zealand statute, which is in substantially the same language, it was, however, held by the Privy Council that the general scope and object of the Act required that goods bearing a false trade mark or false trade description should be excluded from importation and subjected to seizure whatever the state of mind of the importer, and that the words "goods which, if sold, would be liable to forfeiture," must be read as meaning "goods which, if sold, would be liable to forfeiture on conviction of the seller," or "goods, the sale of which would expose the seller to the liability of having the goods forfeited by due process of law":

Commissioners of Trade and Customs v. *Bell & Co.*, (1902) A. C. 563. See also § 12 (2) as to forfeiture.

(*b*) See 46 & 47 Vict. c. 55, § 2 (1) (a), also 39 & 40 Vict. c. 36, § 42, and 16 & 17 Vict. c. 107, § 44.

(*c*) See § 18.

(*d*) See p. 689. When goods have been wrongfully seized for an alleged offence, the owner's remedy is to bring an action against the officer who seized the goods. Such actions are now controlled by 39 & 40 Vict. c. 36, §§ 268—274, and 40 Vict. c. 13, §§ 4, 5. By §§ 268, 269 of the earlier Act one month's notice in writing is to be given before the action is commenced, and by § 270 the officer may tender amends within the month. By § 272 an action against an officer is to be commenced within one month (enlarged by 40 Vict. c. 13, § 4, to two months) after the day of seizure. After that time the only remedy appears to be to apply to the Commissioners of Customs or to the Treasury, under sub-s. (6) of this section. In *Jacobsohn* v. *Blake*, 7 Scott, N. R. 772, the defendants, who were Custom-house officers, took possession of and detained goods imported by the plaintiff, believing them to be subject to forfeiture; but the goods were never actually seized, and ultimately it turned out that the goods were not liable to forfeiture, and they were delivered over to the plaintiff. The latter thereupon commenced an action for trespass; but it was held that, the goods never having been actually seized, but having been only detained for examination, the action would not lie.

(*e*) See these Regulations at p. 693.

(*f*) See 46 & 47 Vict. c. 55, § 2 (1) (b), also 39 & 40 Vict. c. 36, § 42, and 35 & 36 Vict. c. 20, § 4.

(*g*) See 46 & 47 Vict. c. 55, § 2 (3), also 39 & 40 Vict. c. 36, § 42, and 35 & 36 Vict. c. 20, § 4.

(*h*) This was the date fixed by the Regulations, p. 696, *infra*.

Implied warranty on sale of marked goods.

17. On the sale or in the contract for the sale of any goods to which a trade mark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

Provisions of Act as to false description not to apply in certain cases.

18. Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods (*a*), the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied: Provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there.

(*a*) See *Marshall* v. *Ross*, L. R. 8 Eq. 651, "patent thread." In *Gridley* v. *Swinborne*, 5 Times L. R. 71, it was held that the defendant had a good defence under this section. For advantage to be taken of the section it has to be proved that the trade description was lawfully in use at the passing of the Act, *e.g.*, *R.* v. *Rylands & Sons, Ld.*, Times, April 9th and Dec. 9th, 1909 ("Witney" blankets).

Savings.

19.—(1.) This Act shall not exempt any person from any action, suit, or other proceeding which might, but for the provisions of this Act, be brought against him.

(2.) Nothing in this Act shall entitle any person to refuse to make a complete discovery, or to answer any question or interrogatory in any action, but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Act.

(3.) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the United Kingdom who *bonâ fide* acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master.

False representation as to Royal warrant.

20. Any person who falsely represents that any goods are made by a person holding a Royal Warrant, or for the service of Her Majesty, or any of the Royal Family, or any Government Department, shall be liable, on summary conviction, to a penalty not exceeding twenty pounds (*a*).

(*a*) See § 68 of the Trade Marks Act, 1905, and § 90 of the Patents and Designs Act, 1907, as to unauthorised use of the Royal Arms.

Application of Act to Scotland.

21. In the application of this Act to Scotland the following modifications shall be made:—

The expression "Summary Jurisdiction Acts" means the Summary Procedure Act, 1864, and any Acts amending the same.

The expression "justice" means sheriff.

The expression "court of summary jurisdiction" means the Sheriff Court, and all jurisdiction necessary for the purpose of this Act is hereby conferred on sheriffs.

Application of Act to Ireland.

22. In the application of this Act to Ireland, the following modifications shall be made:—

The expression "Summary Jurisdiction Acts" means, so far as respects the police district of Dublin metropolis, the Acts regulating the powers and duties of justices of the peace of such district, and as regards the rest of Ireland means the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.

14 & 15 Vict. c. 93.

The expression "court of summary jurisdiction" means justices acting under those Acts.

Repeal of 25 & 26 Vict. c. 88.

23. The Merchandise Marks Act, 1862, is hereby repealed, and any unrepealed enactment referring to any enactment so repealed shall be construed to apply to the corresponding provision of this Act: provided that this repeal shall not affect—

(a.) any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; nor

(b.) the institution or continuance of any proceeding or other remedy under any enactment so repealed for the recovery of any penalty incurred, or for the punishment of any offence committed, before the commencement of this Act; nor

(c.) any right, privilege, liability, or obligation acquired, accrued, or incurred under any enactment hereby repealed.

THE MERCHANDISE MARKS ACT, 1891.

54 VICT. c. 15.

An Act to amend the Merchandise Marks Act, 1887.

[11th May, 1891.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Customs entry to be trade description.

1. The customs entry relating to imported goods shall, for the purposes of the Merchandise Marks Act, 1887, be deemed to be a trade description applied to the goods.

50 & 51 Vict. c. 28. Official prosecutions.

2.—(1.) The Board of Trade may, with the concurrence of the Lord Chancellor, make regulations providing that in cases appearing to the Board to affect the general interests of the country, or of a section of the community, or of a trade, the prosecution of offences under the Merchandise Marks Act, 1887, shall be undertaken by the Board of Trade, and prescribing the conditions on which such prosecutions are to be so undertaken. The expenses of prosecutions so undertaken shall be paid out of moneys provided by Parliament.

(2.) All regulations made under this section shall be laid before Parliament within three weeks after they are made if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act, and shall be published under the authority of Her Majesty's Stationery Office.

(3.) Nothing in this Act shall affect the power of any person or authority to undertake prosecutions otherwise than under the said regulations.

Short title.

3. This Act may be cited as the Merchandise Marks Act, 1891, and the Merchandise Marks Act, 1887, and this Act may be cited together as the Merchandise Marks Acts, 1887 and 1891.

THE MERCHANDISE MARKS (PROSECUTIONS) ACT, 1894.

57 & 58 VICT. c. 19.

An Act for enabling the Board of Agriculture to undertake Prosecutions in certain cases under the Merchandise Marks Act, 1887.

[20th July, 1894.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Power of

1. The powers exercisable by the Board of Trade under the Mer-

Board of Agriculture to prosecute in certain cases.

chandise Marks Act, 1891, with respect to the prosecution of offences under the Merchandise Marks Act, 1887, may in cases which appear to the Board of Agriculture to relate to agricultural or horticultural produce be exercised by that Board, and in such cases the former Act shall apply as if the Board of Agriculture were referred to therein instead of the Board of Trade.

Extent of Act.

2. This Act shall not extend to Ireland.

Short title.

3. This Act may be cited as the Merchandise Marks (Prosecutions) Act, 1894, and shall be read with the Merchandise Marks Acts, 1887 and 1891.

THE MERCHANDISE MARKS (IRELAND) ACT, 1909.

9 Edw. VII. c. 24.

An Act to enable the Department of Agriculture and Technical Instruction for Ireland to undertake Prosecutions in certain cases under the Merchandise Marks Act, 1887.

[25th November, 1909.]

Be it enacted by the King'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:—

Official prosecutions under 50 & 51 Vict. c. 28.

1.—(1.) The Department of Agriculture and Technical Instruction for Ireland (in this Act referred to as "the Department") may, with the concurrence of the Lord Chancellor of Ireland and of the Board of Trade, make regulations providing that, in cases which appear to the Department to relate to Irish agricultural produce, or to the produce of any other Irish rural industry, and to affect the general interests of the country, or of a section of the community, or of a trade, the prosecution in Ireland of offences under the Merchandise Marks Act, 1887, shall be undertaken by the Department, and prescribing the conditions on which such prosecutions are to be so undertaken.

50 & 51 Vict. c. 28.

(2.) All regulations made under this section shall be laid before Parliament within three weeks after they are made if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the next session of Parliament, and shall have effect as if enacted by this Act.

(3.) Nothing in this Act shall affect the power of any person or authority to undertake prosecutions otherwise than under the said regulations.

62 & 63 Vict. c. 50.

(4.) In this section the expression "rural industries" means the rural industries mentioned in subsection one of section thirty of the Agriculture and Technical Instruction (Ireland) Act, 1890.

(5.) The expenses of prosecutions undertaken by the Department in pursuance of this section shall be paid out of moneys provided by Parliament.

2. This Act shall apply to Ireland only, and may be cited as the Merchandise Marks (Ireland) Act, 1909. Extent and short title.

CUSTOMS ACTS.

THE CUSTOMS CONSOLIDATION ACT, 1876—39 & 40 VICT. c. 36.

§ 42 (*a*). The goods enumerated and described in the following table of prohibitions and restrictions inwards are hereby prohibited to be imported or brought into the United Kingdom, save as thereby excepted. and if any goods so enumerated and described shall be *imported or brought into the United Kingdom contrary to the prohibitions or restrictions contained therein*, such goods shall be forfeited, and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct. Table of prohibitions and restrictions.

A TABLE OF PROHIBITIONS AND RESTRICTIONS INWARDS.

Goods prohibited to be imported.

* * * * * *

Clocks and watches, or any other article of metal impressed with any mark or stamp representing or in imitation of any legal British assay mark or stamp, or purporting by any mark or appearance to be of the manufacture of the United Kingdom (*b*).

* * * * * *

(*a*) This section was amended by 46 & 47 Vict. c. 55, now replaced by § 16 of the Merchandise Marks Act, 1887, and it has since been amended by 52 & 53 Vict. c. 42, 59 & 60 Vict. c. 28, and 60 & 61 Vict. c. 63.

(*b*) This is re-enacted from 16 & 17 Vict. c. 107, § 44.

§ 153. If any articles of foreign manufacture, and any packages of such articles, bearing any names, brands, or marks being or purporting to be the names, brands, or marks of manufacturers resident in the United Kingdom, shall be imported into any of the British possessions abroad, the same shall be forfeited (*a*). Foreign manufactures with British marks.

(*a*) This is re-enacted from 16 & 17 Vict. c. 107, § 161.

THE CUSTOMS AND INLAND REVENUE ACT, 1879—42 & 43 VICT. c. 21.

PART I.—CUSTOMS.

§ 6. * * Provided also, that if any British goods brought into the United Kingdom bear the name, brand, or mark of any British manufacturer, the same shall, either by bill of store, or by and with the consent in writing of the proprietor of such name, brand, or mark, Entry of British goods returned.

or his legal representative, or on proof to the satisfaction of the Commissioners of Customs, by declaration of the importer, that such goods are of British manufacture, be admitted to entry as British (*a*).

(*a*) This is re-enacted from 30 & 31 Vict. c. 82, § 6, and 39 & 40 Vict. c. 36, § 63.

ORDERS IN COUNCIL UNDER § 8 OF THE MERCHANDISE MARKS ACT, 1887. (*Foreign watch-cases.*)

I. At the Court at Windsor, the 28th day of November, 1887.

PRESENT,

The QUEEN'S Most Excellent Majesty in Council.

(*This Order in Council was in substantially the same terms as the Order of May 7th*, 1907, *which follows, except that the prescribed marks were different.*)

SCHEDULE I.

Form of Declaration.

* * * * * *

SCHEDULE II. (*a*).

On a foreign gold case:—

Within a shield of the form of a Cross, and of the size shown in Figure I. of the Appendix hereto, the word "Foreign," over which a hall mark particular to each office shown in Figure III. and the carat value of the gold, and under which the decimal equivalent of the carat value of the gold together with the variable annual date letter.

On a foreign silver case:—

Within a shield of the form of a regular octagon and of the size shown in Figure II. of the Appendix hereto, the word "Foreign," over which a hall mark particular to each office shown in Figure III. and under which the variable annual date letter.

The particular hall mark above referred to for each of the seven assay offices at which foreign cases may be stamped is shown in Figure V. of the Appendix hereto.

(*a*) See a table of the marks prescribed by this Schedule in Appendix K. *infra*. These were used from January 1st, 1888, to May 14th, 1907.

II. At the Court at Buckingham Palace, the 7th day of May, 1907.

PRESENT,

The KING'S Most Excellent Majesty in Council.

WHEREAS by the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), it is, amongst other things, provided that:—

§ 8.—(1.) Every person who after the date fixed by Order in

Council sends or brings a watch-case, whether imported or not, to any assay office in the United Kingdom for the purpose of being assayed, stamped, or marked, shall make a declaration declaring in what country or place the case was made. If it appears by such declaration that the watch-case was made in some country or place out of the United Kingdom, the assay office shall place on the case such a mark (differing from the mark placed by the office on a watch-case made in the United Kingdom), and in such a mode as may be from time to time directed by Order in Council:

(2.) The declaration may be made before an officer of an assay office, appointed in that behalf by the office (which officer is hereby authorised to administer such a declaration), or before a justice of the peace, or a commissioner having power to administer oaths in a Supreme Court of Judicature in England or Ireland, or in the Court of Session in Scotland, and shall be in such form as may be from time to time directed by Order in Council:

(3.) Every person who makes a false declaration for the purposes of this section shall be liable on conviction on indictment, to the penalties of perjury, and on summary conviction to a fine not exceeding twenty pounds for each offence;

And whereas by Order in Council dated the 28th November, 1887, Her late Majesty did order and declare the marks to be placed by the Authorities mentioned in such Order upon watch-cases which had been made in some country or place out of the United Kingdom;

And whereas it appears expedient to alter the marks prescribed by the Order in Council dated the 28th November, 1887;

Now, therefore, His Majesty, by and with the advice of His Privy Council, and in exercise of the powers vested in him by the above-recited provisions of the said Act, is pleased to order and declare and doth hereby order and declare that where it appears by the declaration required by the above-recited provisions that such watch-cases have been made in some country or place out of the United Kingdom, then the following Authorities, that is to say:—

The Wardens and Commonalty of the Mystery of Goldsmiths of the City of London;
The Guardians of the Standard of Wrought Plate, Birmingham;
The Company of Goldsmiths of the City of Chester;
The Guardians of the Standard of Wrought Plate, Sheffield;
The Incorporation of Goldsmiths of the City of Edinburgh;
The Goldsmiths Company of the City of Glasgow;
The Fraternity or Company of the City of Dublin;

shall respectively cause to be placed on such watch-cases the marks more particularly described and delineated in Schedule II. hereunto annexed, and such marks shall be substituted for the marks prescribed by the said Order in Council of the 28th November, 1887:

And it is hereby further ordered and declared that the declaration to be made shall be in the form set forth in Schedule I. hereto annexed:

And it is hereby further ordered and declared that as from the coming into operation of this Order the said Order in Council dated the 28th November, 1887, shall be repealed:

This Order shall come into operation on the fourteenth day of May, 1907.

A. W. FITZROY.

SCHEDULE I.

Form of Declaration.

I (*a*) of do hereby declare that the (watch-case) (watch-cases) (brought) (sent) by me this day to the assay office at in number and in a parcel marked (was) (were) made in .

(*b*).

Declared at this day of 19 .

Before me (*c*).

NOTE.—This Declaration may be made before an officer of an assay office appointed in that behalf by the office or before a Justice of the Peace, or a Commissioner having power to administer oaths in the Supreme Court of Judicature in England or Ireland or in the Court of Session in Scotland.

(*a*) Insert name, address, and description of Declarant.
(*b*) Signature of Declarant.
(*c*) Signature of person before whom Declaration is made and appropriate description in accordance with note above.

SCHEDULE II. (*a*).

On Foreign Gold Watch-cases.

The hall mark particular to each assay office, as shown in Figure I. of the Appendix hereto, the carat value of the gold, together with the decimal equivalent of the carat value, as shown in Figure II. of the Appendix.

On Foreign Silver Watch-cases.

The hall mark particular to each assay office, as shown in Figure I. of the Appendix hereto, together with the decimal equivalent of the standard value of the silver, as shown in Figure II. of the Appendix.

The mark for the annual date letter is to be added by each assay authority after the mark for the particular hall and the mark for standard.

(*a*) See a table of the marks prescribed by this Schedule in Appendix K., *infra*.

REGULATIONS MADE BY THE COMMISSIONERS OF CUSTOMS UNDER § 16 OF THE MERCHANDISE MARKS ACT, 1887.

WHEREAS by the Merchandise Marks Act, 1887 (hereinafter called "the Act"),

After various provisions against the sale, or exposure for sale, or possession for sale, trade or manufacture, of goods with forged trade marks or false descriptions, or trade marks falsely applied to them:

And after defining (amongst other things) the expression "trade mark" in manner therein set forth, with reference to "The Patents, Designs, and Trade Marks Act, 1883," and the law of indicated British Possessions and Foreign States:

And after defining the expression "trade description" as any description, statement or other indication, direct or indirect, as to number, quantity, measure, gauge, or weight, of goods, as to place or country in which any goods were made or produced, as to the mode of manufacturing or producing any goods, or as to the material of which any goods are composed, or as to any goods being the subject of any existing patent, privilege, or copyright:

And after defining the expressions "false trade description" and "goods," "apply," and "falsely apply":

It is provided by § 16 that—

(i.) All such goods as above mentioned, and

(ii.) All goods of foreign manufacture, bearing any name or trade mark, being or purporting to be the name or trade mark of any manufacturer, dealer, or trader, in the United Kingdom, unless such name or mark be accompanied by definite indication of the country in which such goods were made or produced,

shall be prohibited to be imported, and, subject to the provisions of the said section, shall be included among goods prohibited to be imported, as if they were specified in § 42 of "The Customs Consolidation Act, 1876":

And whereas by § 18 of the Act, after authorising the continued use of trade descriptions lawfully and generally applied to goods of the particular class, or manufactured by a particular method, to indicate such class or method, it is provided that, where such trade description includes the name of a place or country calculated to mislead as to where the goods were actually made or produced, such goods not having been actually made or produced there, the said reciting section should not apply (and, consequently, goods so marked would be prohibited), unless there be added to the trade description, immediately before or after the name of the place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there:

And whereas it is also provided, by the said § 16, that the Commissioners of Customs (hereinafter called "the Commissioners") may, from time to time, make, revoke and vary regulations, either general or special, respecting the detention and forfeiture of goods the importation of which is prohibited as hereinbefore mentioned, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of the said section, and the mode of verification of such evidence:

And it is further provided by the said last-mentioned section:—

That before detaining goods or taking proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners may require that such regulations as aforesaid shall be complied with, and satisfy themselves as to the liability of the goods to forfeiture:

That such regulations may apply to all goods, the importation of which is prohibited by the said section, or different regulations may be made respecting different classes of such goods:

And also that the regulations may provide for the informant reimbursing the Commissioners all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention:

And it is also provided, by the said section, that § 2 of the Revenue Act, 1883, shall be repealed from a day to be fixed by regulations under the said reciting sections, such day not being later than the first day of January, 1888, without prejudice to anything done or suffered thereunder:

And whereas § 2 of the Revenue Act, 1883, is the law under and by virtue of which goods of foreign manufacture infringing the proprietary rights of British subjects in names, addresses, and trade marks, or bearing or having upon them, under certain conditions, the name of a place in or a part of the United Kingdom, are at the present time, detected and stopped by officers of customs acting on their own observation and responsibility, under directions laid down by the Commissioners, and without the requirement of previous information, security, or other conditions:

Now, therefore, the Commissioners under and by virtue of the hereinbefore recited power in that behalf, hereby make and require to be complied with the following regulations, viz.:

1. Goods prohibited to be imported as hereinbefore recited, having applied to them forged trade marks, false trade descriptions, or marks, names, or descriptions otherwise illegal, which, upon examination, are detected by the officers of customs, are to be detained by them without the requirement of previous information.

2. In giving information with a view to detention an informant must fulfil the following conditions, viz.:

(i.) He must give to the collector or superintendent, or the chief officer of customs of the port (or sub-port) of expected importation, notice in writing stating,

the number of packages expected, as far as he is able to state the same;

the description of the goods by marks or other particulars sufficient for their identification;
the name or other sufficient indication of the importing ship;
the manner in which the goods infringe the Act;
the expected day of the arrival of the ship.

(ii.) He must deposit with the collector or other officer as aforesaid a sum sufficient, in the opinion of that officer, to cover any additional expense which may be incurred in the examination required by reason of his notice.

3. If, upon arrival and examination of the goods, the officer of customs is satisfied that there is no ground for their detention, they will be delivered. If he is not so satisfied, he will decide either to detain the goods, as in a case of detention upon ordinary examination, or to require security from the informant, for reimbursing the Commissioners or their officers all expenses and damages incurred in respect of the detention made on his information, and of any proceedings consequent thereon.

4. The security thus required must be an immediate *ad valorem* deposit of ten pounds per cent. on the value of the goods, as fixed by the officer from the quantities of value shown by the entry; and, also, subsequently a bond to be completed within four days *in double the value of the goods* (*a*), with two approved sureties. The *ad valorem* deposit will be returned upon completion of the bond, and will not be required if, as an alternative where time permits, the informant prefers to give a like bond before examination, upon estimated value of the goods declared to by him under statutory declaration. If the security is not duly given as above required, there will be no further detention of the goods.

(*a*) For the words in italics are now substituted the words "for such sum not less than double the value of the goods as the Commissioners may require." – G. O. 38 1905.

5. In the above regulations the words "officer of customs" mean an officer acting under the general or special direction of the Commissioners, and the words "value of the goods" mean value irrespective of duty.

6. The "notice" and "bond" required as above shall be in the forms contained in the Schedule to these regulations, or in such other forms as the Commissioners may from time to time order and direct.

7. The security taken under these regulations will be given up at the times following, that is to say:—

Where given before examination, and if no detention, forthwith.

Where given on detention:—

If the forfeiture is completed, either by lapse of time or ultimate condemnation by the Court of Justice, then on such completion of forfeiture.

If the forfeiture is not completed, then

If the goods are released by the Commissioners, and no action or suit has been commenced against them, or any of their officers, in respect of the detention, then at the expiration of

three months from the time of detention; or, if the goods are released for failure of proceedings taken for the forfeiture and condemnation thereof upon information under § 207 of "The Customs Consolidation Act, 1876," and no action or suit has been commenced against the Commissioners, or any of their officers, in respect of the detention, then at the expiration of *three months* from the trial of such information (*a*).

If within such periods as aforesaid any such action or suit as aforesaid has been commenced, then upon the ultimate conclusion of such action or suit, and the fulfilment of the purpose for which the security was given.

(*a*) For the period given in italics "six months" is now substituted. G. O. 38/1905.

8. These regulations apply to transhipment and transit goods as well as to goods landed to be warehoused, or for home consumption.

9. The 1st day of January, 1888, is, by these "regulations," fixed as the day from which § 2 of the "Revenue Act, 1883," shall be repealed, subject to the terms of the recited Act; and these regulations will take effect from the date of such repeal.

CHARLES DU CANE
H. MURRAY
HORACE SEYMOUR
} Commissioners of H. M. Customs.

Custom House, London,
1*st December*, 1887.

SCHEDULE.

(Notice.)

THE MERCHANDISE MARKS ACT, 1887.

To the Collector, Superintendent, or
Chief Officer of Customs at the
Port [*or* Sub-Port] of

I hereby give you notice that the under-mentioned goods, that is to say, (*a*)

are about to be imported into your port on or about the day of next, in the (*b*)
from

That such goods are liable to detention and forfeiture being (*c*)

That Mr. of

and Mr. of
are prepared to become my sureties in such bond as may be required upon detention of the goods.

And I request that the said goods may be detained and dealt with accordingly.

Dated this day of , 18 .

A. B.
(or Agent for)

NOTE.—Mr. refers to his Bankers (or) Solicitors, and Mr. to his Bankers (or) Solicitors as to his sufficiency for the penalty of the bond.

(*a*) Describe the goods, number of packages, marks used, and any other particulars necessary for their identification.

(*b*) Describe the ship, and give name or indication.

(*c*) State how the goods infringe the Act, and if the infringement is one as to a forged trade mark protected in a British Possession or Foreign State, state the Possession or State, or if the infringement is one as to place or country of origin, state the name of the place or country falsely used.

(Bond.)

THE MERCHANDISE MARKS ACT, 1887.

KNOW ALL MEN BY THESE PRESENTS, THAT WE A. B. and are firmly bound unto Our Sovereign Lady Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, in the sum of Pounds to be paid to our said Lady the Queen, her heirs or successors. For which payment well and truly to be made we bind ourselves, jointly and severally, our heirs, executors, and administrators, firmly by these presents. Sealed with our Seals. Dated this day of , in the year of our Lord one thousand eight hundred and

WHEREAS the above named A. B. has by a notice dated the day of , informed the Collector of Customs at that the undermentioned goods, that is to say,
were about to be imported into the port of contrary to § 16 of the Merchandise Marks Act, 1887, and requested that the said goods should be detained and dealt with accordingly. And whereas the said goods duly arrived in the said port on the day of last, and are now detained pursuant to the said notice. Now the condition of this obligation is such that if the said A. B. his executors or administrators, shall well and effectually indemnify, save harmless, and keep indemnified, Her Majesty, her heirs and successors, and all her and their officers of customs, and their executors or administrators, from and against all loss or

damage, payment or payments, and all costs and expenses which Her said Majesty, her heirs or successors, and her and their officers of customs, their executors or administrators, shall or may sustain or incur by reason or on account of any detention of the said goods following upon the information contained in such notice and any proceedings consequent upon such detention, then this obligation shall be void, or otherwise shall be and remain in full force and virtue.

Signed, sealed, and delivered

GENERAL ORDERS made by the Commissioners of Customs for carrying into Effect the Merchandise Marks Act, 1887.

(Superseding many earlier General Orders.)

General Order $\frac{15}{1900}$.

Custom House, London,
26th February, 1900.

MERCHANDISE MARKS ACT, 1887. CONSOLIDATED INSTRUCTIONS.

The following consolidation of the General Orders and other instructions on the subject of the Merchandise Marks Act of 1887, is issued for the information and guidance of the officers.

1. The Regulations made by the Board under § 16 of the Merchandise Marks Act, 1887, will be found on page [693, *ante*].

Goods without marks.

2. Goods imported into the United Kingdom which do not bear any marks whatever, either on the goods themselves or on the coverings containing them, are not subject in any way to the Act, and therefore need not bear any statement or indication, such as "Made abroad," "Made in Germany," &c.

3. Although the Act draws no special distinction, except as regards the requirement of qualification in certain cases under § 16, between goods prohibited on account of marks suggesting British origin and goods prohibited on other grounds, for the purposes of Customs administration it is convenient to deal with them separately. The goods, therefore, prohibited under the Act to which the attention of Officers is called may be classed under two heads—

(A) Goods with marks which suggest British origin and require, in order to legalise their importation, some counteracting qualification (paragraph 4).
(B) Goods with marks prohibited on other grounds (paragraph 19).

It is to be noted that by § 1 of the Merchandise Marks Act, 1891 (54 Vict. c. 15), the Customs entry relating to imported goods shall,

for the purposes of the Merchandise Marks Act, 1887, be deemed to be a trade description applied to the goods.

(A.) Goods with Marks suggesting British Origin.

4. Goods falling under (A) may be again subdivided—

(a) Goods, whether manufactured or raw, having applied to them any description, figures, words, or marks, or arrangement or combination thereof, which by being or including, either expressly or by reference, the name of a place in or a part of the United Kingdom (*e.g.*, "Irish" = "of Ireland"), or in any other way, constitute a statement or other indication, direct or indirect, that the goods were made or produced in the United Kingdom.

(b) Goods of foreign manufacture bearing any name or mark which is, or purports to be, the name or trade mark of a manufacturer, dealer, or trader in the United Kingdom.

(c) Goods, whether manufactured or raw, having applied to them a generally used trade description, which in indicating a particular class of goods or method of manufacture, includes expressly the name of a place in, or a part of, the United Kingdom, and is thereby calculated to mislead as to the place of the manufacture or production of the goods. This class, though in fact only a case of (a), is dealt with specially by the Act (§ 18).

5. (A) (b) relates to manufactured goods, and not to entirely raw goods, and the word "purports" is to be understood as referring to any name or names reasonably suggesting a British manufacturer, dealer, or trader, whether the name is or is not known to the Officer; or as referring to a trade mark, not being merely matter of decoration or ornament, which reasonably suggests itself as British by containing English wording, or other representation specially designed to convey, and, in fact, conveying, an impression of British manufacture.

Places indicating method of manufacture.

6. As to (c) that the words "trade description which in indicating a particular class of goods or method of manufacture, includes the name of a place in or a part of the United Kingdom, and is thereby calculated to mislead" (see 4 (c)) mean such terms as Kidderminster Carpets, "Balbriggan" on Hosiery, or "Shetland" on Shawls, and the like, which, although they might be held to be merely phrases descriptive of method of manufacture, are yet calculated to mislead as to place of origin. Where, however, such a description has become associated with a particular class of goods in a manner practically to preclude any probability of deception, as "Portland Cement" and "Bath Chaps," the description need not be accompanied by a statement of the country of actual production. This applies also to the case of Colonial names describing, for instance, classes of wool, &c., where although the names are British, the circumstances preclude mistake.

7. All such goods as above specified are to be detained and reported to the Board unless they are qualified as follows:—

As to (a), by a definite indication of make or production out of the United Kingdom.

As to (b), by a definite indication of the country in which the goods were made.

As to (c), by the name of the country in which the goods were actually made or produced, with a statement that they were made or produced there.

When "made in" not required.

8. With regard to (a), "Made abroad" will be generally sufficient. With regard to (b), the name of the country is a sufficient indication, without the words "made in," if the name or trade mark only appears. Where there is an address, as "John Smith, Sheffield," then the qualification must be "Made in Germany," or similar wording; "Germany" alone would not counteract "Sheffield," nor would "Made in Germany."

Actual place of origin.

9. Officers are not expected to decide whether goods were actually made or produced in the country from which in the qualification they are stated to come; the name of *some* foreign country, or of some place in a foreign country is sufficient.

Place-name alike in United Kingdom and abroad.

10. If the goods bear the name of a place identical with, or a colourable imitation of, the name of a place in the United Kingdom, the name should be accompanied by the name of the country in which the place is situated. Thus Boston, in Massachusetts, should be accompanied by the name "United States," or by the initials "U.S.A.," or even by the abridgment "Mass."

English language on goods.

11. The use of the English language applied as a description to goods imported from non-English speaking countries is not, simply *as* language and where not involving the name of any place in, or part of, the United Kingdom, a "direct," and, as a rule, is not to be regarded as an "indirect," indication of British origin. Where, however, there is good ground for considering that the use of the language was specially designed to convey, and does in fact convey, an impression of such origin, then the language will be a description within (a) of paragraph 4.

Initials.

Initials.

12. "Initials" under the Act, though not treated as names generally, are to be so treated in certain cases, of which the following are all of which the Officers need take cognizance:-

(i.) Where the initials are followed by affixes distinctly suggesting a British firm as "& Co." from countries where that affix is not used, which includes all the Continental countries except Germany, and "Brothers" or "Bros." or the like, which applies to all non-English speaking countries. This holds as to all goods whether manufactured or raw: but in respect of baskets and the like, holding raw fruit, eggs, &c., and sent to and from the Continent, the rule, when the baskets, &c., will not meet the eyes of retail buyers, is not strictly applied.

(ii.) Where, in respect of manufactured goods, the name or mark of a manufacturer, dealer, or trader in the United Kingdom is prohibited on foreign goods, even his own property, without a definite qualification, the initials will fall within the prohibition if they are easily recognizable as those of persons or firms so well-known as to make the initials practically equivalent to the name itself; and also, where they are the initials of known consignees of the goods who will bring them into consumption in the same "coverings." Where the consignees are not known, and no special fact calls attention to the goods, they may, as regards initials, be passed.

Packing Cases and Coverings.

Cases and coverings.

13. Goods will not be liable to detention when the name of a port or place of destination is applied to mere packing cases or outer wrappers in which goods are clearly not intended to be sold or exposed for sale, or if exposed for sale, then in an export market. Address marks, when they are merely and manifestly such, for purposes of carriage only, are not marks within the Act.

14. "Coverings" such as boxes, capsules, bottles, &c., are to be judged with discrimination as to whether the marks, if any, on them, refer to them, or to the goods they are to cover. If the marks on them refer, as is rarely the case, distinctly to the coverings, the case should be reserved for the Board. If the marks, such as Royal Arms, or the like, refer to the goods to be covered, and it is shown to the satisfaction of the Officer that they will be British goods, or goods as to which British marks are not objectionable, and do not refer to the coverings themselves, then the coverings may be regarded as not contrary to the Act.

15. This principle will apply to coverings (such as ornamental boxes for tobacco, tea, or confectionery), with names on them of firms who have ordered the coverings for their own goods, or where such firms though not having actually ordered the coverings themselves, consent in writing to their importation for such goods.

Grain Sacks.

Grain sacks.

16. The name and address of a merchant in this country upon Grain Sacks, are to be regarded as an indication that the Grain is of British origin, and will require the addition of a statement of the country of production. In the case of Grain imported in bulk and transferred *after due entry and clearance* into Sacks on board the importing ship, such marking of the Sacks need not be qualified with a statement of the foreign origin of the Grain.

Samples, &c.

Samples.

17. Samples or patterns, readily distinguished as such, and valueless in themselves, are not to be treated as under the Act so far as British origin is concerned.

Goods not Produced in United Kingdom.

Non-products of United Kingdom.

18. Goods not produced in the United Kingdom, such as wine, tea, and other produce not grown in this country, such as linseed, rapeseed, &c., are also treated as not under the Act, so far as British origin is concerned. This is applied further to some special forms of manufacture which, by shape, make, or colour, cannot be mistaken for the manufacture here of the same article, as, for instance, Dutch cheese of the kind well-known to be made in Holland, bearing the initials of British dealers.

(B) Goods Prohibited on other grounds.

19. Goods prohibited on grounds other than marking suggestive of British origin are those which, whether manufactured or raw, have applied to them a false trade description—

(a) as to the place or country in which they were made or produced;
(b) as to trade-marks or names so as to constitute forgery;
(c) as to number, quantity, measure, gauge or weight, and mode of manufacture or material;
(d) as to being the subject of any existing patent, privilege, or copyright.

Marks as between foreign countries.

20. As to (a), this relates, of course (British origin having been dealt with above), to questions between two foreign countries; that is to say, to goods with marks indicating make or production in a place or country which is not that in which the goods were made or produced. The Act does not specify particularly what is to be the qualification here; but if the mark indicates, expressly, or by reference, a place or country not that, in reality, of the make or production of the goods, there must be a definite qualification to the effect that the goods were not made or produced in the place or country indicated; *or*, a definite indication of the place or country in which the goods were made or produced.

Mark including place-name.

21. A mark which, though not naming, *includes* the name of a place or country, is to be held as naming such place or country. For instance, a wine, the produce of Germany, and described as "Port" or "Sherry" (which words include the names of the places Oporto and Xeres), should have that description accompanied by the statement "produced in Germany," or should be described as "German Port" or "Australian Sherry," &c. Such a mark as "Lancashire Swedish" on Swedish iron, where the qualifying word follows the misleading name, may be admitted. As in marks suggesting British origin, exception to this rule is made in cases where the name of a place in a trade description is indicative merely of the character of the goods, and is not calculated to mislead as to the country of origin. The description "Brussels Carpet" is an exception of this kind.

Port of shipment evidence of origin.

22. For judging between two foreign countries the Act provides that, in the absence of proof to the contrary, the port of shipment of goods shall be *primâ facie* evidence of the place or country in

which the goods were made or produced; and this rule the Officers can, generally, act upon. Where, however, the port of shipment is merely an ordinary trading route from some inland country, as Rotterdam or Antwerp with respect to Germany, or Hamburg with respect to Austria, the Officers may, if they have no reason to doubt the good faith of the importer, accept the statement that the goods are the make or produce of the inland country.

Foreign language not of country of origin.

23. The use of language of one foreign country on goods of another must not be viewed more strictly than its use in cases indicating British origin, dealt with in paragraph 11. The use of a certain language is allowed freely to all countries when, by custom, that language is usually applied to such goods: *e.g.*, Spanish on tobacco and cigars, when the recognized words are applied only to colour, shape, size, and the like; or French on sardines, when confined to the words "Sardines à l'huile," without any additional French description.

Forging trade-mark.

24. The forging of a trade-mark (par. 19 (b)) is the application to goods of any figure, words, or marks, or arrangement or combination thereof, reasonably calculated to lead persons to believe that the goods are the manufacture or the merchandise of some person other than the person whose manufacture or merchandise they really are; and this includes the name or initials of a person. The figures, words, or marks applied need not be an actual trade-mark, or actual name or initials, provided they are a colourable imitation of the mark, name, or initials of a person carrying on business in connexion with goods of the same description, and are used without his authority.

Registration.

Registration.

25. As to goods under all the three heads, (b), (c), and (d), of paragraph 19, the difficulty of detection by Officers, without special information, and more particular examination than is ordinarily bestowed for revenue purposes, is greater than in the case of goods falling under (a), but as regards the forging of trade-marks (b), as above explained, while it would not be possible for Officers to enter into the examination of all names and marks so as to detect fraud of this kind, the Board have, nevertheless, felt that a manufacturer, dealer, or trader who has reason to believe that his name or trade-mark is one not unlikely to be imitated, so as to constitute a forgery, is entitled to ask that, without the requirement of information beforehand, goods so marked shall be stopped; and to meet this the Board have established the following system.

Detention on account of registration.

26. They have established a system of registration of name or marks so that a manufacturer, dealer, or trader may register his name or mark at such port or ports as he desires. In respect of names or marks so registered, it will be the duty of the Officers, at the particular port or ports, to prevent the delivery of goods to which such names or marks or imitations of them as above explained may be applied, unless the delivery is authorised by the registered proprietor.

27. When goods are thus detained on account of names or marks which have been registered in this Department, care is to be taken in every case that, in addition to the usual notice of seizure required under § 207 of the Customs Consolidation Act, information of the detention and of the cause of such detention, shall be at once given in writing to the person who has so registered his name or mark, or to the representative appointed by him to authorise delivery of the goods, who is to be informed that unless immediate attention is given to the matter the goods will be released. If, at the end of forty-eight hours, the Collector (or other Principal Officer concerned) does not receive a reply he will release the goods; but Collectors will observe that the limit to the time of detention here laid down does not apply in cases where the marks are such as to render the goods liable to detention irrespective of the question of registration. In any case of detention under this system of registration the Board, if they see fit, may order security to be given if prolongation of the detention is requested, and the matter is, at all, one of doubt.

Registering foreign marks; and agency.

28. Any manufacturer, dealer, or trader, whether British or Foreign, may register his name or mark; but Officers may refuse registration to any name or mark which they consider to be of a character too indefinite or indistinct to recognise, referring to the Board in any case of doubt. An applicant for registration must prove his proprietorship of the name or mark by declaration (see Form C. in the Appendix); and if, in order to avoid delay, he desires to do so, he may appoint an agent to give authority for delivery of his goods.

Registered marks on goods imported by owner.

29. It must, however, be distinctly understood that the use by any manufacturer, dealer, or trader in the United Kingdom of even his *own* name on foreign goods, and the use by any manufacturer, dealer, or trader, on like goods, of words, figures, or marks of any kind stating or indicating, directly or indirectly, make or production in the United Kingdom, are prohibited unless such goods are properly qualified by the required definite indication of origin. It must, therefore, be clearly explained to every person registering a name or mark which involves any such statement or indication, as will probably often be the case, that, while the name or mark will be guarded by such registration, it will not be rendered admissible unless duly qualified, as the law may require, in every case.

Release when qualified.

30. Goods bearing a mark registered in this Department may be delivered by the Officers without reference to the Board on receipt by them of the authority of the proprietor of the mark, or of his duly appointed agent, provided the mark be properly qualified, as in this Order shown.

General.

British Returned Goods.

British returned goods

31. British goods returned bearing the name, brand, or mark of any British manufacturer may be admitted upon proof of their origin being furnished. This may be done by Bill of Store; or by a declaration by the importer that the goods are, to his knowledge, British

goods returned, and were originally manufactured in this country; or by and with the consent in writing of the proprietor of such name, brand, or mark, or his legal representative (42 & 43 Vict. c. 21, s. 6).

32. The declaration by the importer as to the British origin of the goods may be in the usual form as an ordinary Customs document, but if the Officer sees reason to doubt it, he should refer the papers to the Board; and he should, in no case, require a statutory declaration, under the Act as to such declarations, without the Board's order.

33. On any other point British goods returned will not be dealt with except on information.

Goods for Private Use.

Private use.

34. Dutiable.—Tobacco, except cigars, not exceeding 20 lbs. (*a*), wine not exceeding twelve gallons, and spirits not exceeding one-half that quantity, in any one consignment, may be admitted free of the Act, on the Officer being satisfied that the goods are for private use.

(*a*) This exception of cigars is under General Order $\frac{13}{1910}$.

35. Non-dutiable. Such goods sent as presents, or for personal use, and not in any process of sale or purchase, are similarly free of the Act, and this especially includes articles not new, and which are manifestly private property, such as clothing, or other personal effects, and old, used, and damaged articles sent for repairs, imported by, or consigned to, persons whose names are on them. This applies also to presents to corporate bodies or public institutions.

Goods in Transit.

Transhipment goods.

36. Under the Transhipment Regulations, transhipment and transit goods are not to be specially examined for the purpose of scrutinising marks *in the absence of information* (General Order $\frac{13}{1910}$); nor are such goods to be detained under the Merchandise Marks Act unless they infringe its provisions in one or other of the following ways:—

(a) By reason of their bearing marks which raise a clear and direct claim to British origin; or

(b) By reason of their bearing the name or trade-mark of a manufacturer, dealer, or trader in the United Kingdom, without qualification; or

(c) By reason of their bearing a trade-mark specially registered at the Customs.

When the mark on a package, or on goods found therein, contravene the Merchandise Marks Act, all the packages of the same mark on the Entry are to be examined, the packages with other marks being treated as if on a separate entry.

This direction also applies to goods entered for home consumption, but intended to be forthwith re-shipped for exportation, on

production of satisfactory evidence (such as Bills of Lading, Invoices, &c.), of the final destination abroad of the goods; but they are subject to examination under G.O. [illegible], as laid down in G.O. [illegible] par. (8).

Marks not descriptive but part of the Goods.

Marks where part of goods.

37. Wording or marking, whatever may be its character, if it is not a description "applied" to goods, but part of the goods themselves, as, for instance, the regulating words on a thermometer, the titles of books, christian names on handkerchiefs, such words as "a present from Margate" on china, and the like, are not amenable to the Act.

Goods imported for advertising purposes only, and not for sale, although bearing the name, or name and address of a British trader, provided he is not a maker of, or dealer in, such articles, may be delivered upon a written statement to that effect from the person whose name is on the goods.

Reports of Detention.

Detained goods to be reported at once; monthly and quarterly.

38. Report (on Form 291) is to be made immediately of all cases of detention of goods, stating briefly the number of packages detained, the port from which they come, the marks and numbers of the packages, the description and value of the goods, and the objectionable marking, whether by means of labels or on the goods themselves, on account of which they are detained. Reference should be made to any previous cases of the importation of illegally marked goods consigned to the same merchants or coming from the same consignor.

A monthly return is to continue to be made to the Board, being forwarded to the Solicitor on Forms 401 and 402.

A quarterly return is to be made to the Board (Div. IV.) on Form No. 398, for which purposes the present form of record at the various stations is to be maintained.

When report dispensed with.

39. Immediate reports of detentions of goods may be dispensed with when such detentions are made in consequence of the absence of evidence that the marks on the goods are correct, provided that the Officers have reason to believe that such evidence will be forthcoming within a reasonable time. On production of the evidence, the Officers, if satisfied therewith, will deliver the goods. This direction will include British returned goods bearing marks which would be open to objection on goods of foreign origin; also goods bearing marks indicative of origin in some country other than that from which the goods are imported, when such marks are believed to be authentic.

All marks to be reported.

40. The whole of the marks found on the detained goods should be reported, including the marks on cartons, cases, &c., containing the goods and not merely the actual mark for which the detention has been made.

Qualifying Words to be conspicuous, &c.

Qualification to be conspicuous.

41. The Officers are to take care that, in all cases where the Board allow qualifying words to be added before the delivery of goods, such words are applied in characters clear, conspicuous, and as indelible as the marks requiring qualification, and in close proximity to those marks.

Seizures and Unclaimed Goods.

Seizures. Full examination.

42. In all cases in which goods are ordered to be retained as seizures, a *full examination* of the contents of all the packages should be made as soon as the order for seizure is given, and any discrepancy between the marks originally reported and those found on the goods should be communicated to the Board forthwith.

But if an importer should express a wish not to have *all* his packages opened, Officers may forego this upon a consent in writing from him, or his agents, that the whole consignment shall be taken as having marks applied to them similar to those on the goods in the packages already opened.

Goods in London not claimed within two months.

43. Goods which have been placed under detention on account of illegal marks, and in respect of which no applications have been made by the importers for, or no steps taken to carry out the conditions imposed by the Board on their release, are to be removed to the Queen's Warehouse, within two months from the date of the Board's order for their detention, without special directions in each case, if the Officers see no circumstances which call for exceptional treatment. They are to be entered in the Monthly Seizure Account.

Patent or Copyright on Goods.

Goods for sale: Patent or copyright.

44. In order that there may be no risk of goods protected by Patent or Copyright in the United Kingdom being offered for sale by this Department, in submitting Accounts of Seizures under the Act, particular attention should be called in column 8 to any goods included for disposal marked "Patent." or "Copyright." or which the Officers have any reason to suppose are patented, or the subject of copyright, in this country.

Watch Cases and Watches.

Watch cases and watches.

45. A special provision as to Watch Cases and Watches is made by § 7 of the Act. It provides that, as regards Watches, any mark on the case is to be deemed to extend to the Watch. If, therefore, a Watch Case is made in this country, with any statement or indication of origin such as, for instance, a British Hall-Mark, and, having been exported, is returned with a foreign movement, then, in the absence of a counter description on the Watch itself, the mark on the case will apply to the Watch.

General Order [illegible], which goes fully into this subject, is not affected by this Consolidating Order.

Procedure on Information.

Detentions on information.

46. It must be borne in mind that information, in itself, even though given, is not a mandate to the Crown to detain; and no detention should on account of it be made where it is clear that the law would be against it. Officers may sometimes see at once that a consignment to which the information points does not infringe the law, and they will then not detain the goods. But they are authorized to make, when necessary, a fuller examination than ordinarily takes place.

Deposit or bond.

47. In any other case the Officer will detain the goods, and require (if it is not already given) immediate security, as in Regulation 4 [page 695, *ante*]. The sufficiency of the sureties named in the notice of information must be tested in the usual way. Regulation 7 [page 695, *ante*] shows when the security will be delivered up.

No security, no detention.

Whenever security is not duly given, there will be no further detention.

Information as to origin.

48. Information will not generally touch the point of origin. Whenever it does do so, and affects the interests of "British Possessions" or "Foreign States," if the name complained of is found to be applied to the goods, and is the name of a country, or of a place in a country, not the country of the port of shipment, the Officer may, in the absence of proof of make or produce at the place or in the country named on them, be satisfied that the alleged infringement clearly exists. This is in accordance with the principle in paragraph 22.

Forged marks in certain States and British Possessions.

49. Wherever an information relates to a forged trade-mark alleged to be one recognised in a British Possession or foreign State, information will not be good unless it relates to a Possession or State to which § 103 of the Patents, Designs, and Trade Marks Act, 1883, has been applied by Orders in Council (*a*), viz.:

British Possessions	New Zealand. Queensland. Tasmania. Western Australia.
Foreign States in Europe ..	Belgium. Denmark, including Faröe Islands. France. Greece. Italy. The Netherlands. Norway. Portugal, including Azores and Madeira. Roumania. Servia. Spain. Sweden. Switzerland.

In N. and S. America and the W. Indies.	Brazil. Ecuador. Mexico. Paraguay. San Domingo. Surinam and Curaçoa. The United States of America. Uruguay.
In Africa	Tunis.
In Asia	Japan. Netherlands East India Colonies.

(a) See list at date of this book on p. 573, *ante*.

Definitions.

50. The Officers will note the meanings given by the Act to the Definitions. following expressions, viz.:—

"Goods" "Trade Mark" *"Trade Description" "False Trade Description" "Person" "Manufacturer" "Dealer" or "Trader" "Proprietor" "Name" "Name or initials"	Section 3, and *54 Vict. c. 15, s. 1.
"Applied" "Falsely applied" "Coverings"	Section 5, (1), (2), and (3).

51. The following General Orders are hereby cancelled:—

Nos. 81 and 99 of 1887.
Nos. 10, 14, 26, 33, 39, 44, 121, 122, 125 and 147 of 1888.
No 7 of 1889.
Nos. 1 and 8 of 1890.
Nos. 50 and 68 of 1893.
No. 4 of 1894.
Nos. 4, 28, 34 and 82 of 1895.
Nos. 4 and 9 of 1896.
No. 63 of 1897.

By Order of the Board,
JOHN COURROUX.

C.

MERCHANDISE MARKS ACT, 1887.

50 & 51 Vict. c. 28.

DECLARATION ON REGISTRATION UNDER PARAGRAPH 28 OF GENERAL ORDER $\frac{15}{1900}$.

Port of

I (*a*) hereby declare that (*b*) (*c*) the Proprietor of (*d*) , viz., which (*e*) expect to be applied to goods imported from time to time, at this Port; and that (*f*) have appointed Mr. (*g*) of to be (*h*) agent, to give authority for the delivery of such goods.

I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Statutory Declaration Act, 1835.

Signed

Declared this day of , 19 .

At

Before me

A Commissioner to Administer Oaths, &c.

(*a*) Full name and address of declarant.

(*b*) "I" or "I and my partners, trading as Messrs. ," or, "such and such a company, of which I am the representative official," or "so and so of such and such a place abroad whom I represent in this country."

(*c*) "Is" or "are."

(*d*) "The following name as a trade description," or "the following trade mark," or "the following name as a trade description and trade mark."

(*e*) "I" or "we."

(*f*) "I" or "we."

(*g*) This portion as to appointment of agent may be erased, where such appointment is not desired.

(*h*) "My" or "our."

N.B.—Registration in pursuance of this declaration is subject to the provisions of the Act which forbid the importation, by a registered proprietor, even of his own goods which bear, in name or mark, any statement or indication, direct or indirect, of make or produce in the United Kingdom unless qualified as the Act requires.

GENERAL ORDER $\frac{9}{1888}$.

CUSTOM HOUSE, LONDON,
18*th January*, 1888.

SIR,

In accordance with paragraph 33 of General Order 99/1887, I now transmit to you the directions of the Board, to enable you to deal with watch-cases and watches, under the Merchandise Marks Act; the latter term, watches, meaning as provided by § 7 of the Act, "all that portion of a watch which is not the watch-case."

Your attention has already, by G. O. 81/1887, been called to the position in which watch-cases, under this section, stand in relation to watches; and the consequent importance of the assay mark on watch-cases, which mark, by virtue of § 3 (1) of the Act, would be deemed a trade description as to place or country of origin.

You will note, in addition, that by § 8 (1) of the Act provision is made for preventing foreign-made watch-cases from obtaining the mark placed on a watch-case made in the United Kingdom: and it is enacted that a different mark shall be placed on foreign watch-cases of such pattern, and in such mode as directed by Order in Council.

An Order in Council to this effect, dated the 28th November last, was published in the London Gazette of 9th December last; and a copy of this order, together with sheets 1 and 2 of Appendix to Schedule II. therein referred to, which contain diagrams of the required new marks, are sent to you herewith.

You will carefully study these sheets, and note how the marks apply variously to the different assay offices in the United Kingdom.

The directions to be observed by you in applying this new law will relate to—

(a.) Watch-cases with assay marks imported alone.
(b.) Like watch-cases imported with the watches, that is to say, watches of foreign manufacture in them.

(a.) *Watch-cases with Assay Marks imported alone.*

If the cases are wholly unmarked, or are duly marked in accordance with the Order in Council, or with a foreign assay mark, and there is not, in addition, any wording on any part of the case proper, or on the dome, indicating make or produce in the United Kingdom, the goods may be delivered. If, on the other hand, there is any such wording, the goods must be detained and the matter referred to the Board.

If the cases are marked with a British Hall Mark as placed on watch-cases made in the United Kingdom, you will detain the goods unless they are entered as "British goods brought back," in which case they may be admitted under the usual regulations.

(b.) *Watch-cases imported with the Watches in them.*

If the cases are wholly unmarked, or are marked either—
In accordance with the Order in Council, or
With a foreign assay mark, or

With a British assay mark as placed on a watch-case made in the United Kingdom, and with an equally conspicuous statement either above or below the assay mark, that the watch is of foreign make;

And if there is no wording either as an addition on the case or dome, or upon the watch itself, whether on the dial or the plate, or any part of the works, indicating make or produce in the United Kingdom, then the goods may be delivered.

If, on the other hand, there is any such wording, the goods must be detained and the matter referred to the Board.

If the cases are marked with a British assay mark as placed on a watch-case made in the United Kingdom, and with no statement of foreign make on the cases, as required above, you will detain them as a seizure, unless there is upon the dial of each watch and also on the top "plate" (where the watch is of that construction) or on the bottom "plate" (where the watch is of that construction) visibly, between the "bridges," an indelible and definite indication of the place or country in which the watches were made. *Such an indication* will be considered definite, if it is, or contains only the name of the place or country of origin; if in addition, it contains the name of a place in, or a part of the United Kingdom, as, for instance, "Geneva and London," or if there is anywhere on the watch an indication by figures, words, or otherwise, that the watch might be the make or produce of the United Kingdom, then, in addition to the name of place or country of origin, there must be a distinct statement that the watches were there made.

I am, Sir,
Your obedient Servant.
E. Goodwyn

The Collector at .

N.B.—The above Order was saved by General Order $\frac{15}{1900}$.

$\frac{45}{\text{General Order } 1898}$.

Custom House, London.
6th July, 1898.

Revised Transhipment and Transit Regulations.

* * * * * *

Application of Merchandise Marks Acts on information.

(3.) Transhipment goods are not to be specially examined for the purpose of scrutinising marks. If, however, information as to any such goods is given, under Regulations B of General Order 99/1887, that they infringe the provisions of the Merchandise Marks Acts in one or other of the following ways:

(a) By reason of their bearing marks which raise a clear and direct claim to British origin; or
(b) By reason of their bearing the name or trade mark of a manufacturer, dealer, or trader in the United Kingdom without qualification; or

(c) By reason of their bearing a trade mark specially registered at the Customs,

the goods are to be examined and, if found to be illegally marked, detained.

* * * * * *

GENERAL ORDER 70 1898.

CUSTOM HOUSE, LONDON.
15th October, 1898.

Marks on imported Chinaware.

Officers are informed that representations have reached the Board from persons interested in chinaware, to the effect that importations are made into this country of china bearing marks indicative of the manufacture of certain well-known factories abroad and in this country, such marks being spurious.

The marks which are most commonly used for the purpose are as follows, viz.:—

The Worcester Mandarin Mark (a grating) always printed in blue, slightly blurred, on the bottom of articles. It is the mark used by the Royal Worcester Porcelain Co. (*a*).

The Crown Derby Mark: always printed in red, and generally on the bottom of articles. It was a mark used by the Royal Crown Derby Porcelain Co. (*b*).

The Royal Chelsea Gold Anchor Mark: printed in gold, generally on the back, but sometimes on the side of articles. There is now no factory at Chelsea (*c*).

(Similar to Worcester.) The Lowestoft Mark: printed always in red. There is now no factory at Lowestoft (*d*).

A Sèvres Mark: printed in very dark blue on vases, generally with ormolu mounts (*e*).

A Sèvres Mark: printed in black (with two other changeable marks) on tea sets, plates, and small goods generally (*f*).

A Dresden (Meissen) Mark: printed in dark blue or green (*g*).

A Capo di Monte Mark: printed in gold (*h*).

It is further stated that it is frequently the custom to cover the mark on the Chinaware with a paper label, bearing the words "made in Germany," &c., printed on it.

Officers are accordingly instructed that such paper labels should be viewed with suspicion, and that china goods to which they are applied should occasionally be examined to see whether they bear other marks below the labels.

Where marks are found on the china itself under such circumstances, the goods should be detained, and instructions sought from the Board.

By Order of the Board,
R. T. PROWSE.

a Illustrations of the marks referred to are included in the order. The Worcester mark is a grating with five bars.

(*b*) A crown surmounting a capital D in cursive type.
(*c*) An anchor.
(*d*) A grating with three bars.
(*e*) Two capital L's in cursive type, placed back to back.
(*f*) A crown surmounting two conjoint letters, placed back to back, each composed of a combination of P and L.
(*g*) Two swords crossed.
(*h*) A coronet surmounting a capital N.

GENERAL ORDER $\frac{1}{1906}$

CUSTOM HOUSE, LONDON,
1*st January*, 1906.

Entries for Wine described as Port or Sherry.

The Board direct that the Importation Code be amended by the addition of the following direction at the end of paragraph 311:

Entries in which wine from countries other than Portugal is described as Port, unaccompanied by satisfactory evidence that the wine is the produce of that country, should not be accepted unless the word Port is qualified by an unmistakable indication of the country in which the wine was produced, such as Spanish Port, French Port, or German Port. Such descriptions as Tarragona Port, Catalonia Port, Roussillon Port, or Hamburg Port must be accompanied by the words "Produce of Spain," "Produce of France," or "Produce of Germany," as the case may be. Wines described as Sherry imported from countries other than Spain should be similarly qualified.

By Order of the Board,
R. HENDERSON.

GENERAL ORDER $\frac{38}{1907}$

CUSTOM HOUSE, LONDON,
29*th June*, 1907.

Imported Gold and Silver Watch Cases (with or without Works).

A copy of an Order in Council, dated 7th May, 1907, altering the marks prescribed to be placed upon foreign-made watch cases by the Order in Council, dated 28th November, 1887, is transmitted herewith for the information and government of Officers concerned.

Officers are further informed that, in accordance with a recent decision in the High Court (*a*), watch cases (either with or without works inserted therein) are deemed to be plate within the meaning of § 5 of the Customs Act, 1842, and § 10 of the Revenue Act, 1883, and that, as from the 1st instant inclusive, all such goods imported

are therefore to be treated as subject to these Acts in regard to assay.

The attention of importers of Watches is to be called to this Order.

* * * * * *

By Order of the Board,
R. HENDERSON.

NOTE.—This General Order cancels Circular of the 28th ultimo. No. 50.

(*a*) *Goldsmiths' Co. v. Wyatt*, (1907) 1 K. B. 95.

MERCHANDISE MARKS.

WATCH CASES.

REGULATIONS, *dated August 6th, 1907, made by the Commissioners of Customs under sect. 1 of the Imported Watch Cases (Existing Stocks Exemption) Act, 1907.*

The Commissioners of Customs in pursuance of the power vested in them by § 1 of the Imported Watch Cases (Existing Stocks Exemption) Act, 1907, do hereby make the following Regulations:—

1. Any person possessed of a watch case imported from foreign parts into the United Kingdom before the 1st day of June, 1907, who, on or after the 2nd day of September, 1907, desires to export it from the United Kingdom for repair or any other purpose, and to claim that it is exempt from assay upon being subsequently re-imported into the United Kingdom for sale or exchange, must comply with the following rules:—

(a) He must before exporting the watch case submit the same for inspection to the prescribed Assay Office in order that it may be capable of identification on being re-imported.

(b) He must, at the time of submitting the watch case, produce evidence by statutory declaration or otherwise to satisfy the Officers of the Assay Office that it was imported into the United Kingdom before the 1st day of June, 1907.

(c) He must, at the time of submitting the watch case, leave with the Officers of the Assay Office a form in duplicate in the Form No. 1 set forth in the Schedule hereto filled in with the particulars thereby required and duly signed by him. One form countersigned by the Officer of the Assay Office must be sent abroad with the watch case or watch cases referred to therein, and must be returned with it or them to the Assay Office on re-importation.

Any person possessed of a watch case so imported as aforesaid who, having before the said 2nd day of September, 1907, exported it from the United Kingdom for repair or any other purpose, desires to claim that it is exempt from assay upon being re-imported into the United Kingdom for sale or exchange after the date of these regulations, must produce evidence to the satisfaction of the pre-

scribed Assay Office that it is so exempt, and for this purpose any watch case so re-imported after the 1st day of June, 1907, and now remaining in Customs' charge, shall be deemed to have been re-imported after the date of these regulations.

2. The Officer of the Assay Office may require production of such books and invoices relating to any watch case as he may think necessary.

3. The following fees shall be paid to the Assay Office upon submission of any watch case before exportation, or if the watch case was exported before the 2nd day of September, 1907, before delivery thereof from the Assay Office, that is to say:—

For each gold watch case ..... Two pence.
For each silver watch case ..... One penny.

4. Upon the importation of a watch case which is claimed to be exempt from assay by reference to the provisions of the said Act the Officer of Customs at the port of importation shall cause the watch case to be sent under the usual conditions applicable to imported plate to the prescribed Assay Office accompanied by an Advice Note in the Form No. 2 in the Schedule hereto, and if the watch case is identified as having been imported from foreign parts into the United Kingdom before the 1st day of June, 1907, the Officer of the Assay Office shall return the form to the said Officer of Customs with a certificate to that effect in the Form No. 3 in the said Schedule.

5. For the purpose of the said Act and these Regulations Goldsmiths' Hall, in the City of London, shall until otherwise determined be the prescribed Assay Office (*a*).

Dated this 6th day of August, 1907.

T. J. Pittar.
F. S. Parry.

Two of the Commissioners of Customs.

(*a*) By additional regulation of Nov. 12th, 1908, "the Assay Office in the City of Birmingham" is added as a "prescribed Assay Office."

THE SCHEDULE.

Form No. 1.

Form of Identification.

To
The Deputy Warden (or Assay Master).
Assay Office,

Date 19 .

Sir,

Herewith in accordance with the Regulations made by the Commissioners of Customs under the Imported Watch Cases (Existing Stocks Exemption) Act, 1907, I forward for your identification (*a*)

Watch as described in the Schedule, hereunto annexed, which I propose to export to (*b*) in order that (*c*)
Signed (*d*)
Address

(*a*) Here insert the number of watches sent.
(*b*) Here give the full name and address of the person to whom the watch watches) is (are) to be sent.
(*c*) Here state purposes of exportation.
(*d*) Full name and address of the exporter.

SCHEDULE.

No.	Description of Watch. State whether Hunter, Half-Hunter, Crystal, &c.	Name and Number on Case.	Name and Number on Movement.	Any other Marks on Case or Movement.	Nature of Repair. State whether to Case or Movement.

NOTE 1.—This form is to be filled in and signed in duplicate by the exporter.
NOTE 2.—One form is to be retained by the Assay Office and the other is to be forwarded abroad with the watch or watches and returned with them to the Assay Office on re-importation.

FORM NO. 2.

Advice Note of Imported Watch Cases.

To the Deputy Warden (or Assay Master),
at
The Watch Cases herein described have been forwarded for inspection, they having been claimed as exempt from assay under the provisions of the Imported Watch Cases (Existing Stocks Exemption) Act, 1907.

Port of Importation (Station)

Ship's Name.	Rotation Number.	Port or place whence.	Importer's Name and Address.

Marks on Packages.	Particulars of Watch Cases.

Officer of Customs.

Date 19 .

FORM No. 3.

Certificate of the Assay Office.

Imported Watch Cases (Existing Stocks Exemption) Act, 1907.

It is hereby certified that the Watch Cases above described have been identified as imported from foreign parts into the United Kingdom before the first day of June, 1907, and that they are exempt from assay.

(Deputy Warden (or Assay Master).

Assay Office . 19 .

To the Collector of Customs at (*a*)

(*a*) Port of importation.

No. $\frac{11288}{1909}$.

Memorandum respecting Marks on Goods Imported for Home Use.

1. Foreign goods imported into the United Kingdom which do not bear any marks whatever, either on the goods themselves or on the packages or wrappers containing them, are not required to bear any qualifying statement or indication, such as "Made abroad," "Made in Germany," &c.

2. Foreign manufactured goods bearing a name or trade mark, being, or purporting to be, the name or trade mark of a manufacturer, dealer, or trader, in the United Kingdom, must have that name or trade mark accompanied by a definite indication of the country of origin of the goods. The name of the country is a sufficient indication, without the words "Made in," if a name or trade mark only appears, *e.g.*, "John Smith, Germany," would be satisfactory. If such a mark as "John Smith, Sheffield," is used, then the qualification must be "Made in Germany," or similar wording.

3. If foreign imported goods bear the name of a place identical with, or a colourable imitation of, the name of a place in the United Kingdom, the name should be accompanied by the name of the country in which the place is situated. Thus Boston, in Massachusetts, should be accompanied by the name "United States," or by the initials "U.S.A."

4. If a trade description includes the name of a place, and the goods on which it appears are not the produce of that place, or of the country in which it is situated, the trade description must be accompanied by a statement indicating the actual country of production. For instance, a Wine, the produce of Germany, and described as "Port" or "Sherry" (which words are derived from the names of the places Oporto and Xeres), should have that description accompanied by the statement "Produced in Germany," or should be described as "German Port" or "German Sherry." An exception to this rule is made in cases where the name of a place

in a trade description is indicative merely of the character of the goods, and is not calculated to mislead as to the country of origin. Thus such a description as "Brussels Carpet," or "Portland Cement," need not be accompanied by a statement of the country of actual production, unless as required under paragraph 2 above.

5. Trade descriptions in the English language applied to foreign goods imported for home use from non-English-speaking countries are not regarded as indirect indications that the goods are of British or Irish origin, unless the officers have good ground for considering that such trade descriptions are specially designed to convey, and do in fact convey, an impression of British or Irish origin for the goods.

Trade descriptions on imported goods in a foreign language, which is not that of the country from which the goods are imported, must be accompanied by a statement of the actual country of production of the goods, *e.g.*, "Made in Germany."

6. As regards Watches, any mark on the case is deemed to extend to the Watch. If, therefore, a Watch Case is made in this country, and bears any statement or indication of such origin (as, for instance, a British assay mark), and the Watch itself is made in Switzerland, then there must appear either—

(a) in close proximity to the assay mark a conspicuous statement that the Watch is of foreign make: or

(b) on the dial and also on the top or bottom plate of the movement, visible between the bridges, an indelible statement or indication that the Watch is of Swiss origin.

7. All qualifying statements or indications must be distinct, in equally conspicuous and indelible characters with, and in close proximity to, the marks they are intended to qualify.

8. Marks on samples or patterns, whether of British or foreign manufacture, are not required to be accompanied by any qualification, provided such samples or patterns are valueless in themselves, do not form whole or complete articles, and can be readily distinguished as samples or patterns.

CUSTOM HOUSE, LONDON.
18th October, 1909.

Secretary Customs.

REGULATIONS, *dated May 21st, 1892, made by the Board of Trade, with the concurrence of the Lord Chancellor, under s 2 of the Merchandise Marks Act, 1891, with regard to the prosecution of offences under the Merchandise Marks Act, 1887.*

1. The prosecution of offences under the Merchandise Marks Act, 1887, shall, subject to the condition hereinafter prescribed, be undertaken by the Board of Trade in cases which appear to the Board to affect the general interests of the country, or of a section of the community, or of a trade.

2. Every application to the Board to undertake a prosecution shall be accompanied by the following documents:—

(a) A statement showing the nature and circumstances of the case and sufficient to enable the Board to form an opinion whether the case affects the general interests of the country, or of a section of the community, or of a trade.

(b) A statement showing the facts which, if the Board undertake the prosecution, will be capable of proof, and setting out the proofs and names of the witnesses available to prove such facts.

The Board may require the above statements to be supplemented or additional evidence to be furnished.

3. If, on the evidence, the Board is of opinion that there is no reasonable prospect of a conviction being obtained, the Board will not, unless it thinks fit, undertake the prosecution.

4. If the Board is of opinion that the prosecution would be better or more properly conducted under some Act of Parliament other than the said Acts, the Board will not undertake the prosecution.

5. The Board may, before undertaking a prosecution, require the applicant to give security for costs on such terms and in such manner as it thinks proper.

6. For the purpose of carrying these regulations into effect the Board may, from time to time, prescribe the use of such forms and give such directions as it may deem expedient.

M. E. Hicks-Beach,
President of the Board of Trade.

I concur,
Halsbury, C.

21*st May*, 1892.

Regulations, *dated October 27th*, 1894, *made by the Board of Agriculture, with the concurrence of the Lord Chancellor, pursuant to* § 1 *of the Merchandise Marks (Prosecutions Act*, 1894, *with regard to the prosecution of offences under the Merchandise Marks Act*, 1887, *relating to agricultural or horticultural produce.*

1894. No. 400.

1. The Board of Agriculture shall, where it appears to them from the statements hereinafter mentioned, that there is a reasonable prospect of a conviction being obtained, and subject to the other conditions in the next following regulation prescribed, undertake the prosecution of offences under the Merchandise Marks Act, 1887, in cases which appear to the Board to relate to agricultural or horticultural produce, and to affect the general interests of the country, or of a section of the community, or of a trade.

2.—(i.) Every application to the Board to undertake a prosecution shall be accompanied by the following documents:—

(a) A statement showing the nature and circumstances of the case, and sufficient to enable the Board to form an opinion whether the case relates to agricultural or horticultural produce, and affects the general interests of the country, or of a section of the community, or of a trade.

(b) A statement of the facts capable of proof, with the names and addresses of the witnesses available to prove such facts.

(ii.) The Board may require the above statements to be supplemented, or additional evidence to be furnished.

3. For the purpose of carrying the foregoing regulations into effect, the Board may, from time to time, prescribe the use of such forms and give such directions as they may deem expedient.

(Signed) T. H. ELLIOTT,
Secretary of the Board of Agriculture.

I concur,

27th October, 1894. (Signed) HERSCHELL, C.

REGULATIONS, *dated April 14th*, 1910, *made by the Department of Agriculture and Technical Instruction for Ireland, with the concurrence of the Lord Chancellor of Ireland and of the Board of Trade, pursuant to sect.* 1 (1) *of the Merchandise Marks (Ireland) Act*, 1909 (9 *Edw. 7. c.* 24) *with regard to the Prosecution in Ireland of Offences under the Merchandise Marks Act*, 1887 (50-1 *V. c.* 28).

1910. No. 471.

1. The Department of Agriculture and Technical Instruction for Ireland shall, subject to the conditions in the next following Regulations prescribed, undertake the prosecution in Ireland of offences under the Merchandise Marks Act, 1887, in cases which appear to the Department to relate to Irish agricultural produce, or to the produce of any other Irish rural industry, and to affect the general interests of the country, or of a section of the community, or of a trade.

2.—(i.) Every application to the Department to undertake a prosecution shall be accompanied by the following documents:—

(a) A statement showing the nature and circumstances of the case and sufficient to enable the Department to form an opinion whether the case relates to Irish agricultural produce, or to the produce of any other Irish rural industry, and affects the general interests of the country, or of a section of the community, or of a trade.

(b) A statement showing the facts which, if the Department undertake the prosecution, will be capable of proof, and

setting out the proofs and names of witnesses available to prove such facts.

(ii.) The Department may require the above statements to be supplemented or additional evidence to be furnished.

3. If, on the evidence, the Department are of opinion that there is no reasonable prospect of a conviction being obtained, the Department will not, unless they think fit, undertake the prosecution.

4. If the Department are of opinion that the prosecution would be better or more properly conducted otherwise than under these Regulations, the Department will not undertake the prosecution.

5. The Department may, before undertaking a prosecution, require the applicant to give security for costs on such terms and in such manner as they think proper.

6. For the purpose of carrying these Regulations into effect, the Department may, from time to time, prescribe the use of such forms and give such directions as they may deem expedient.

T. P. Gill,
Secretary of the Department of Agriculture and Technical Instruction for Ireland.

14th April, 1910.

I concur in these Regulations.

S. Walker, C.

The Board of Trade concur in these Regulations.

H. Llewellyn Smith.
Secretary.

APPENDIX I.

STATUTORY ENACTMENTS WITH RESPECT TO MARKS ON GOODS, &c.

WEIGHTS AND MEASURES.

The Weights and Measures Act, 1878.
41 & 42 Vict. c. 49.

PART I.—LAW OF WEIGHTS AND MEASURES.

Stamping and Verification of Weights and Measures.

Stamping of weights and measures with denomination.

§ 28. Every weight, except where the small size of the weight renders it impracticable, shall have the denomination of such weight stamped on the top or side thereof in legible figures and letters.

Every measure of [length or] (*a*) capacity shall have the denomination thereof stamped on the outside of such measure in legible figures and letters.

A weight or measure not in conformity with this section shall not be stamped with such stamp of verification under this Act as is hereinafter mentioned.

(*a*) These words were introduced by the Weights and Measures Act, 1904, c. 28, § 13.

Stamping of verification on measures and weights.

§ 29. Every measure and weight whatsoever used for trade shall be verified and stamped by an inspector with a stamp of verification under this Act.

Every person who uses or has in his possession for use for trade any measure or weight not stamped as required by this section, shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and shall be liable to forfeit the said measure or weight; and any contract, bargain, sale, or dealing made by such measure or weight shall be void.

Lead or pewter weights.

§ 30. *A weight made of lead or pewter, or of any mixture thereof, shall not be stamped with a stamp of verification or used for trade, unless it be wholly and substantially cased with brass, copper, or iron, and legibly stamped or marked "cased":*

Provided that nothing in this section shall prevent the insertion into a weight of such a plug of lead or pewter as is bonâ fide *necessary for the purpose of adjusting it and of affixing thereon the stamp of verification.*

A person guilty of any offence against or disobedience to the provisions of this section, shall be liable to a penalty not exceeding five pounds, or in case of a second offence ten pounds (*b*).

(*b*) This section was repealed by the Weights and Measures Act, 1904, under which the Board of Trade has power to make regulations.

Stamping of verification on weights for coin.

§ 31. Every coin weight, not less in weight than the weight of the lightest coin for the time being current, shall be verified and stamped by the Board of Trade with a mark of verification under this Act, and otherwise shall not be deemed a just weight for determining the weight of gold and silver coin of the realm.

Every person who uses any weight declared by this section not to be a just weight shall be liable to a fine not exceeding fifty pounds.

Forgery, &c., of stamps on measures or weights.

§ 32. If any person forges or counterfeits any stamp used for the stamping under this Act of any measure or weight, or used before the commencement of this Act for the stamping of any measure or weight, under any enactment repealed by this Act, or wilfully increases or diminishes a weight so stamped, he shall be liable to a fine not exceeding fifty pounds.

Any person who knowingly uses, sells, utters, disposes of, or exposes for sale any measure or weight with such forged or counterfeit stamp thereon, or a weight so increased or diminished, shall be liable to a fine not exceeding ten pounds.

All measures and weights with any such forged or counterfeit stamp shall be forfeited.

The Coal Mines Regulation Act, 1887.

50 & 51 Vict. c. 58.

Application of 41 & 42 Vict. c. 49, to weights, &c., used in mines.

§ 15. (1.) The Weights and Measures Act, 1878, shall apply to all weights, balances, scales, steelyards, and weighing machines used at any mine for determining the wages payable to any person employed in the mine according to the weight of the mineral gotten by him, in like manner as it applies to weights, balances, scales, steelyards, and weighing machines used for trade.

The Weights and Measures Act, 1889.

52 & 53 Vict. c. 21.

Verification of weighing instruments

§ 1. (1.) Every weighing instrument used for trade shall be verified and stamped by an inspector of weights and measures with a stamp of verification under this Act.

(2.) Every person who, after the expiration of twelve months from the commencement of this Act, uses or has in his possession for use for trade any weighing instrument not stamped as required by this Act, shall be liable to a fine not exceeding two pounds, or in the case of a second offence five pounds.

(4.) Sect. 32 of the principal Act (*a*) shall apply to weighing instruments in like manner as it applies to weights and measures.

(*a*) The principal Act is the Weights and Measures Act, 1878.

The Weights and Measures Act, 1901.
4 Edw. VII. c. 28.

§ 10.—(1.) Any person who removes a stamp from any weight or measure or weighing or measuring instrument, and inserts the same into another weight or measure or weighing or measuring instrument, shall be deemed to forge or counterfeit a stamp within the meaning of sect. 32 of the principal Act. Forging of stamps.

(2.) Such of the provisions of the said section as impose penalties on any person who wilfully increases or diminishes a weight after it has been stamped, or who knowingly uses, sells, utters, disposes of or exposes for sale a weight so increased or diminished, shall apply to measures in like manner as they apply to weights.

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: Penalty on counterfeiting brand.

(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:

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* This Act was repealed in part by 41 & 42 *Vict. c.* 49.

(6.) *Or knowingly weigh or cause to be weighed, contrary to the provisions of this Act, or act or consist in committing or connive at any fraud respecting the weighing or the weight or measure of any such article as in Part II. of this Act is mentioned* (*a*):

(7.) Or, with intent to defraud, alter any ticket specifying the weight of any such article:

(8.) Or, with intent to defraud, make or use, or be privy to the making or using of any such ticket, falsely stating the weight of any such article, or of any covering, cart, or load:

(9.) Or shall dispose of, sell, or cause to be sold any weight or measure having a false or counterfeit stamp, or a stamp purporting to resemble a genuine stamp.

Penalty for fraudulently increasing weight of butter in casks.

§ 15. If any person shall wilfully pack up or mix, or cause to be packed up or mixed, with or in any butter contained in any firkin or cask, any salt pickle, or other substance, with intent to increase the weight of such butter, and shall bring or send any butter so packed or mixed to any market for sale, he shall be liable to pay a fine not exceeding forty shillings, or be imprisoned for any period not exceeding one month, as the justice or justices shall determine.

Penalty for fraudulently increasing weight of fleeces.

§ 16. If any person shall wind or cause to be wound in any fleece any wool not being sufficiently rivered or washed, or wind or cause to be wound within any fleeces any deceitful locks, cots, skin, or lamb's wool, or any substance, matter, or thing, whereby the fleece may be rendered more weighty, to the deceit and loss of the buyer, such person shall be liable to a penalty of two shillings for every fleece so fraudulently made up.

(*a*) This sub-clause is repealed by the Statute Law Revision Act, 1893.

The Cran Measures Act, 1908.

8 Edw. VII. c. 17.

§ 1. The cran and quarter-cran measures to be the only legal measures for use in the sale of fresh herrings. The measures to be branded or otherwise marked by an inspector of weights and measures in the prescribed manner.

§ 2.—(1.) Provision made for marking measures.

(2.) Penalties for wrongful marking by an inspector.

§ 5. Penalties for counterfeiting marks for cran or quarter-cran measures.

THE EXHIBITION MEDALS ACT, 1863.

26 & 27 Vict. c. 119.

Penalty on false representations.

As to having obtained medals.

§ 1. If any trader commits any of the offences following, that is to say:

(1.) Falsely represents that he has obtained a medal or certificate from the Exhibition Commissioners (*a*) in respect of any article or process for which a medal or certificate has been awarded by the Commissioners:

(2.) Falsely represents (knowing such representation to be false) that any other trader has obtained a medal or certificate from the Exhibition Commissioners:

(3.) Falsely represents (knowing such representation to be false) that any article sold or exposed for sale has been made by, or by any process invented by, a person who has obtained in respect of such article or process a medal or certificate from the Exhibition Commissioners:

he shall incur the following penalties, that is to say:

(1.) For the first offence he shall forfeit to Her Majesty a sum not exceeding five pounds:

(2.) For any subsequent offence he shall forfeit to Her Majesty a sum not exceeding twenty pounds, or be imprisoned for a period not exceeding six months.

By § 2, in proceedings under this Act, it is not necessary to prove that any person has sustained damage by the false representations.

By § 3 no provision of this Act is to affect any right or civil remedy.

(*a*) Of 1851 or 1862. See § 8.

REGISTERED DESIGNS.

The Patents and Designs Act, 1907.

7 Edw. VII. c. 29.

Marking registered designs.

§ 54.—(1.) Before delivery on sale of any articles to which a registered design has been applied, the proprietor shall—

(a) * * * * * * * *

(b) Cause each such article to be marked with the prescribed mark, or with the prescribed words or figures, denoting that the design is registered; and if he fails to do so, the proprietor shall not be entitled to recover any penalty or damages in respect of any infringement of his copyright in the design unless he shows that he took all proper steps to ensure the marking of the article, or unless he shows that the infringement took place after the person guilty thereof knew or had received notice of the existence of the copyright in the design.

(2.) Where a representation is made to the Board of Trade by or on behalf of any trade or industry that in the interests of the

trade or industry it is expedient to dispense with or modify as regards any class or description of articles any of the requirements of this section as to marking, the Board may, if they think fit, by rule under this Act, dispense with or modify such requirements as regards any such class or description of articles to such extent and subject to such conditions as they think fit (*a*).

(*a*) The marking of articles bearing a registered design with some prescribed mark for the purpose of intimating to persons who might desire to reproduce the design that this is protected by registration has always been insisted on, and under § 51 of the Patents Act, 1883, the penalty for non-marking was the loss of copyright in the design, unless the proprietor could show that he had taken all proper steps to ensure the marking of the article. Now the failure to mark the goods no longer involves the loss of the copyright, but only the minor penalty of the loss of penalties and damages, while if it can be shown that the infringer was aware of the fact of registration he cannot rely on non-marking for even this limited purpose. Moreover, by sub-s. (2) the Board of Trade may, under certain conditions, dispense with the requirement of marking altogether.

Under the old Copyright of Designs Acts it was held that the copyright was lost by the sale of pattern pieces of wall paper containing the whole of the registered design, unmarked *Heywood* v. *Potter*, 1 E. & B. 159; by the sale in France of lace bearing the design, unmarked (*Sarazin* v. *Hamel*, 32 Beav. 151); by the sale of a small number of articles bearing the design, unmarked (*Pocock* v. *Worth*, 18 L. T. N. S. 710); by the sale of one such article unmarked (*Hunt* v. *Stevens*, W. N. 1878, p. 79). But it was held that the copyright was not lost by the sale of a book containing patterns of registered designs, the book being unmarked (*De la Branchardière* v. *Elwell*, 4 Ex. 380); nor by the sale of a butter-dish with a cover, the dish being marked but the cover not (*Fielding* v. *Hanley*, 48 L. T. N. S. 639). And it seems that if the design were applied, but obscured in the process of manufacture, the same would have been the result (*ib.*; but see *Johnson* v. *Bailey*, 11 P. R. 21).

Under the Act of 1883 it was held that where a manufacturer was instructed by his principal to place the right mark on the goods, but by mistake placed on them an old and incorrect mark, the proprietor's right was saved by the proviso in the section, especially as each mark bore the abbreviation "Rd" (*Wittmann* v. *Oppenheim*, 27 Ch. D. 260). Also that where a narrow trimming was sold in lengths round each of which was placed a paper band bearing the proper mark, the marking was sufficient (*Blank* v. *Footman*, 39 Ch. D. 678). On the other hand, it has been held, following *Heywood* v. *Potter* (1 E. & B. 439), that where a design was registered for dusters, the marking of each piece containing a dozen dusters is not a compliance with the statute (*Hathersall* v. *Moore*, 9 P. R. 27). The right of a manufacturer who had registered a design for lace has been held to be lost by the sale of the article in an unfinished state unmarked to a finisher, under an arrangement by which the finisher was to mark the article before putting it on the market, notwithstanding that the mark on the unfinished article would be destroyed in the finishing, and that there was no retail trade in such article (*Woolley* v. *Broad*, 9 P. R. 429). The copyright was not lost by marking an article required by the Rules to be marked "Rd" with the fuller abbreviation "Regd" (*Heinrichs* v. *Bostendorff*, 10 P. R. 160). It was held in Scotland (*Johnson* v. *Bailey*, 11 P. R. 21), that it was not enough for the registered proprietor to give general instructions that the protected article should be marked in compliance with the statute; he must see that adequate means are taken to carry out his instructions, and that every article was examined before being sent out; and where the marking was made from a mould, which was so far worn out that the mark had ceased to be legible, the rights of the proprietor were held to be forfeited (*ib.*; cf. *Fielding* v. *Hanley*, 48 L. T. N. S. 639); and it would appear that, under the Act of 1883, as under the former Acts, the sale of a single article unmarked might be a ground for depriving the registered proprietor of his right (*ib.*; see also *Wedekind* v. *General Electric Co.*, 14 P. R. 190).

The proprietor of a registered design was not deprived of his right to protection merely because he placed on the articles which he sold, besides the registered number of his design, other registered numbers which ought not to be there; consequently, where a design was registered for a stove, and two other designs were registered for certain adjuncts of the stove, the placing by the proprietor of all three marks upon

the stove, though improper, was held no bar to an action to restrain an infringement of the design for the stove (*Harper & Co.* v. *Wright & Butler Lamp Manufacturing Co.*, (1896) 1 Ch. 142). The proprietor of a design might so acquiesce in the public delivery on sale of the registered article unmarked as to deprive himself of his copyright, although no formal relationship of principal and agent existed between him and the person who delivered the goods on sale (*Wedekind* v. *General Electric Co.*, 14 P. R. 190). Where, owing to the mistake of a die-sinker employed by the proprietor, the wrong number was stamped on the registered article, a "5" being substituted for a "3," and the mistake was not discovered for two years, but was then immediately rectified: it was held by the House of Lords, affirming Kekewich, J., and the Court of Appeal, that the proprietor had taken all proper steps to ensure the marking of the article within the proviso (*In re Rollason*, (1898) A. C. 499; (1898) 1 Ch. 237). The object of the section being to give the public warning of the registration, a proprietor needed a much stronger case to escape the loss of his copyright where the article was not marked at all than where there was some error in the marking, if there were such compliance as plainly to denote that the design was a registered one (*ib.*, *per* Lord Herschell). The mark ought to be placed on some part of the article which is included in the registered design, as to place it on some other part not only fails to comply with the requirement of the Act, but suggests untruly that the part on which the mark is placed is protected: *In re Morton*, 17 P. R. 117; *Lea & Perrins* v. *Price*, 22 P. R. 122. But see *Ingram & Kemp, Ld.* v. *Edwards*, 21 P. R. 463.

Now that the penalty for non-marking has been reduced to the loss of penalties and damages leaving the copyright intact, it would appear probable that the Courts will show themselves not more lenient in cases of non-marking than was the case under the more stringent Acts.

The Designs Rules, 1908.

Registration mark.

68. Before delivery on sale of any article to which a registered design has been applied, the proprietor of such design shall cause each such article to be marked with the word "Registered" or with the abbreviation "Regd." or with the abbreviation "Rd.," as he may choose, and also (except in the case of articles to which have been applied designs registered in classes 9, 13, 14 and 15), with the number appearing on the certificate of registration (*a*).

(*a*) Class 9 includes "Lace."

Class 13 includes "Printed or woven designs on textile piece goods (other than checks or stripes)."

Class 14 includes "Printed or woven designs on handkerchiefs and shawls (other than checks or stripes)."

Class 15 includes "Printed or woven designs (on textile piece goods or on handkerchiefs or shawls) being checks or stripes."

APPENDIX K.

STATUTORY ENACTMENTS WITH RESPECT TO MARKS ON SPECIAL CLASSES OF GOODS (*a*).

CUTLERY.

59 *Geo.* 3, *c.* 7 (1819). "An Act to regulate the Cutlery Trade in England."

§ 1. Manufacturers may mark with the figure of a hammer articles of cutlery made by them by means of the hammer.

§ 3. No person is to mark articles of cutlery not made by means of the hammer with the figure of a hammer, or to possess for the purpose of sale, or offer for sale such articles so marked, under penalty of forfeiture of the articles so marked, together with a fine of 5*l.* a dozen.

§ 4. No person is to mark articles of cutlery, or possess for the purpose of sale, or offer for sale articles marked with any words indicative of a quality other than the true one, under similar penalties

§ 5. No person is to mark articles, or possess, &c., articles marked with the words "London" or "London made," unless such articles were made within the City of London, or twenty miles distance therefrom, under the penalty of forfeiture, together with a fine of 10*l.* a dozen.

§ 14. Articles of cutlery subject to forfeiture by virtue of the Act may be seized and destroyed, &c., by order of justices.

The remaining provisions refer chiefly to forms of procedure, recovery of penalties, &c.

The Cutlers' Company of Hallamshire.

21 *Jac.* 1, *c.* 31 (1623).

§ 1 (*b*). The cutlers living in Hallamshire, or within six miles distance therefrom, are incorporated under the corporate name of "The Master, Wardens, Searchers, Assistants and Commonalty of the Company of Cutlers in Hallamshire in the county of York."

(*a*) The Acts abstracted in the text are in force at present.

(*b*) The remainder of this Act is repealed by 31 Geo. 3, c. 58.

31 *Geo.* 3, *c.* 58 (1791) (*a*).

§ 1. The company to consist of the trades hereinafter mentioned, and of none other.

§ 3 enumerates "the arts or trades of makers of knives, sickles, shears, scissors, razors, files and forks."

§ 7. Apprentices who have served for seven years are to have, at twenty-one years of age, their freedom of the company and a mark to be assigned them.

§ 17. Members of the company counterfeiting marks assigned to others are for every offence to pay a penalty not exceeding 20*l.* nor less than 4*l.*

§ 26. Penalties may be sued for by the company, or by the party aggrieved, in the Courts at Westminster.

§ 27. One or more justice or justices of the peace for the West Riding of the county of York, or for the county of Derby, shall, upon information of an offence for which a penalty is imposed, summon the parties and witnesses, and hear and determine the matter in a summary way, and give judgment with costs, and issue a warrant for levying the penalties by distress, and if the goods are insufficient, then shall commit the offender to the House of Correction for one month. Costs may be given to a person wrongly accused.

§ 28 contains a form of conviction.

§ 29. An appeal is given to the Court of Quarter Sessions at Sheffield, Rotherham, Barnsley, Wakefield, or Pontefract.

§ 31. The penalties which come to the company are to be distributed among the poor of the company.

The Act contains other provisions with respect to the constitution of the company, procedure, &c.

41 *Geo.* 3, *c.* 97 (1801), (Local).

§ 2. A freeman of the company is empowered to give his mark by will to any person or persons, in the same manner as his other personalty, subject to the life estate therein which his widow is to have during her widowhood or any future coverture, and which she may sell, though on her death the provisions of the husband's will take effect.

§ 3. In default of a will, the mark is to pass in the same manner as its owner's other personalty, subject to the widow's life estate (*b*).

§ 5. Parish apprentices who shall prove to the satisfaction of a justice that they have regularly served a freeman for seven years shall be entitled to their freedom and a mark.

54 *Geo.* 3, *c.* 119 (1814), (Local).

This Act repeals several of the provisions of the Act of 1791, in favour of free trade.

§ 3. Any person carrying on any of the specified trades within the specified limits has a right to have a mark assigned to him by

(*a*) Considerable portions of this Act have been repealed by the Acts which follow.

(*b*) And see § 6 of the Act of 1814.

the company on application, which mark is not to be one that is the property of another, nor a surname (*a*); and for such mark he is to pay forty shillings, and if the mark be one previously assigned but surrendered, 3*l.* in addition, besides, in either case, any stamp duty imposed by Act of Parliament (*b*).

§ 4. No mark is to be assigned by the company if they have notice that it is in common use, or in the use of any person within the district (*c*).

§ 5. Members of the company, or any other persons carrying on any of the specified trades within the specified limits, who shall use a mark assigned by the company to another person, with intent to counterfeit, shall for every offence forfeit and pay a sum not exceeding 20*l.*, half of the fine to go to the injured person, the other half to the company. The fine is to be recovered and applied as under the Act of 1791.

§ 6. The provisions made by § 2 of the Act of 1801, for the devolution of marks on the deaths of their owners, are to apply to marks assigned under the present Act (*d*), but not more than one person of the family shall be entitled to use the mark at the same time.

23 *Vict. c. xliii.* (1860), (Local).

§ 1. The provisions of the previous Acts are extended to "the arts or trades of manufacturers of steel and makers of saws and edge-tools and other articles of steel, or of steel and iron combined, having a cutting edge."

§ 2. Any person exercising any of the trades formerly or now specified, within the specified limits, may and shall, on application to the company and payment of 20*l.* in addition to any other fees payable, become a freeman of the company and have a mark assigned to him.

§ 3. The former and present Acts may be cited as "The Cutlers' Company's Acts, 1623, 1791, 1801, 1814, 1860," respectively.

The rights of the Cutlers' Company were expressly reserved by the Merchandise Marks Act, 1862 (*e*), § 25, and also by the Trade Marks Registration Act, 1875, § 9.

See also the special provisions in regard to the Cutlers' Company

(*a*) The similar provision in § 24 of the Act of 1791 (repealed by the present Act), with respect to non-freemen, provided that, on a non-freeman having a mark assigned to him, he should become a freeman of the company. This is not repeated here.

(*b*) A mark assigned to a non-freeman is assignable by him. See *Bury* v. *Bedford*, 4 De G. J. & S. 352. But where a person to whom a Sheffield mark had been assigned had assigned it to another, and had not gone through the process of surrendering it to the company for re-assignment to his assignee, the latter was not recognised by the company as the proprietor of the mark, nor admitted to registration under the Trade Marks Registration Act, 1875, until he had perfected his title: *In re Rabone*, Dig. 643.

(*c*) By the Trade Marks Registration Act, 1875, § 9, no mark was to be assigned by the company which had been registered under the Trade Marks Registration Acts, notice of the registration having been given to the Cutlers' Company.

(*d*) Thus including non-freemen in possession of company's marks.

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

contained in the Trade Marks Registration Act, 1875, § 9, and in 46—56 of the Rules under that Act, now repealed; the effect of which was that the registrar of trade marks was to be supplied with copies of all Sheffield corporate marks, and the Cutlers' Company with copies of all trade marks registered for goods or classes of goods within § 2 of the Cutlers' Company's Act, 1860: that notice of applications for assignment or registration of such marks, and of such assignment or registration, when complete, was to be given by the Cutlers' Company to the registrar and *vice versâ*: that marks identical with or similar to marks already assigned or registered, were not to be registered or assigned respectively (except, in the former case, with the special leave of the Court), and that Sheffield marks might be registered under the Trade Marks Registration Acts.

By § 81 of the Patents, &c. Act, 1883, and Rules 53—56 of the Trade Marks Rules, 1883, all now repealed, the Sheffield Cutlers' Register was re-organised. A new "Sheffield Register" was established, in which were to be entered all trade marks for cutlery, edge-tools, raw steel, or goods made of steel, or of steel and iron combined, whether with or without a cutting edge, belonging to persons carrying on business in Hallamshire, or within six miles thereof, and registered under the Act of 1875, or assigned by the Cutlers' Company and actually used before the commencement of the Act of 1883. All applications for marks for similar goods were, when made by persons trading within the specified limits, to be made to the company. Notice of such applications was to be given by the company to the comptroller, who might give notice of objection; and notice of applications by persons trading outside the specified limits for marks for similar goods was to be given by the comptroller to the company. Notice of registrations in the Sheffield register was to be given to the comptroller, who was to enter the marks in the general register; and notice of all other entries was also to be given to him. The practice at Sheffield was to follow generally that at London, and an appeal was given from the company's decisions to the comptroller, and from him to the Court. The provisions of the company's Acts for the summary punishment of persons counterfeiting Sheffield corporate marks were to apply to marks entered in the new Sheffield Register. The old Cutlers' register of corporate marks was closed after five years from the commencement of the Act (*i.e.*, after five years from December 31st, 1883). The net result was to make the Sheffield Register an exact duplicate of the general register, so far as that related to marks used for the specified goods within the specified limits.

The provisions of § 81 were altered to some extent by § 20 of the Act of 1888, the principal alteration being the enlargement of the class of goods to which the section was made applicable. Such goods were therein described by the term "metal goods," which was defined as meaning "all metals, whether wrought, unwrought, or partly wrought, and all goods composed wholly or partly of any metal."

The provisions of the Patents, &c. Acts, 1883—8, relating to the Sheffield Register, were repealed by the Trade Marks Act, 1905,

and the "Sheffield Register" is now governed by § 63 of the Act of 1905, and the Trade Mark Rules 107—112 of 1906. The only alteration of any consequence is that under the new Act an appeal against a decision of the Cutlers' Company has to be brought direct to the Court.

GOLD AND SILVER PLATE.

England.

2 *Hen.* 6, *c.* 17 (in Ruffhead's ed. c. 14) (1423) (*a*).

No goldsmith or silversmith in the city of London to sell wrought silver of less than sterling fineness. No harness of silver to be offered for sale in that city, until touched with the touch of the leopard's head, if it may reasonably bear the same, and also with the workman's mark, under penalty of forfeiture of double value. The mark of every goldsmith to be known to the wardens of the same craft. In the cities of York, Newcastle-upon-Tyne, Lincoln, Norwich, Bristol, Salisbury, and Coventry, to be divers touches. In other places, where no touch is ordained, silver not to be worked of less than sterling fineness, nor to be offered for sale without the worker's mark. Penalty of double value (*b*).

18 *Eliz.* *c.* 15 (1576) (*c*).

If plate marked by the Goldsmiths' Company be found deceitful, the Company to forfeit the value.

8 *& 9 Will.* 3, *c.* 8 (1697).

§ 8 (in Ruffhead's ed. § 9) (*d*). No silver plate to be made of less fineness than 11 oz. 10 dwt. in the lb. troy (*e*), nor offered for sale until marked (*f*).

(*a*) The earliest statute on the subject was 28 Edw. 1, c. 20 (1300), by which it was provided, among other things, that no vessel of silver should pass out of the worker's hands until assayed by the wardens of the craft, and marked with the leopard's head, and that no worse gold should be worked than that of the touch of Paris. This Act was repealed, saving the King's prerogative, by 19 & 20 Vict. c. 64.

(*b*) 4 Hen. 7, c. 2 (1487) (repealed by 19 & 20 Vict. c. 64), required finers of gold and silver to put their marks upon the metal.

(*c*) It was provided by the earlier part of this Act (repealed by the Statute Law Revision Act, 1863) that gold should not be made or sold under 22 carats in fineness, nor silver under 11 oz. 2 dwt.; and that no silver plate should be sold without the worker's mark, under penalty of forfeiting the value.

(*d*) The remainder of the Act was repealed by the Statute Law Revision Act, 1867.

(*e*) The standard was thus raised from that fixed by the preceding Act (11 oz. 2 dwt.), but by 6 Geo. 1, c. 11, both standards were established. See *infra*.

(*f*) The following marks are appointed by this Act:—

The worker's mark, to be expressed by the two first letters of his surname.

The mark of the mystery or craft of the goldsmiths, which, instead of the leopard's head and the lion, shall for this plate be the figure of a lion's head erased, and the figure of a woman commonly called Britannia.

A distinct variable mark to denote the year of manufacture of the plate.

Penalty—Forfeiture of the plate or its value, half to the Crown, half to the informer. See 12 Geo. 2, c. 26, § 5.

ENGLISH HALL MARKS AT THE PRESENT DAY (*a*).

	GOLD.					SILVER.	
	22 *Carats.*	18 *Carats.*	15 *Carats.*	12 *Carats.*	9 *Carats.*	11 *oz.* 2 *dwt.*	11 *oz.* 10 *dwt.*
Quality Mark	22	18	15·625	12·5	9·375	None (*b*).	None.
Standard Mark.....	Crown.	Crown.	None.	None.	None.	Lion passant.	Britannia.
Date Mark	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.
Maker's Mark	Initials.	Initials.	Initials.	Initials.	Initials.	Initials.	Initials.
Duty Mark (*c*)	Sovereign's head.	Sovereign's head.	None.	None.	None.	Sovereign's head.	Sovereign's head.
Assay Town Mark (*d*).....	On all qualities of gold and silver the special mark of the town.						

(*a*) Gold and silver of all these qualities are manufactured at London, Chester, Newcastle-on-Tyne, and Birmingham. At Exeter, only gold of 22 carats and silver of 11 oz. 2 dwt. are manufactured; at Sheffield, only silver of 11 oz. 2 dwt. and 11 oz. 10 dwt. At York and Norwich no plate is now manufactured. At Bristol, the powers conferred by 12 & 13 Will. 3, c. 4, were never exercised.

(*b*) Except at Newcastle, where the mark of a leopard's head crowned is used.

(*c*) Disused since 53 & 54 Vict. c. 8.

(*d*) The special marks of the assay towns are as follows:—London, a leopard's head (except for silver of 11 oz. 10 dwt., for which it is a lion's head erased); Exeter, a castle; Chester, a dagger and 3 sheaves; Newcastle, 3 castles; Sheffield, a crown; Birmingham, an anchor. The marks for York and Norwich (now discontinued) were:—York, 5 lions on a cross; Norwich, a castle and a lion passant.

If plate marked by the Goldsmiths' Company be found deceitful, the Company to forfeit the value, half to the Crown, half to the informer.

12 & 13 *Will.* 3, *c.* 4 (1700), "An Act for appointing wardens and assay masters for assaying wrought plate in the cities of York, Exeter, Bristol, Chester, and Norwich" (*a*).

§ 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.

A distinct variable mark or letter in Roman character to denote the year (*b*).

Penalty—Forfeiture of the plate or value, half to the Crown, half to the informer.

The Act also contains provisions with respect to the appointment of wardens and assayers, procedure, &c.

1 *Anne*, *c.* 3 (1 Anne, stat. 1, c. 9, in Ruffhead's ed.) (1701).

The provisions of the last Act extended to Newcastle-upon-Tyne, and "The Company of Goldsmiths of Newcastle-upon-Tyne" incorporated.

6 *Geo.* 1, *c.* 11 (1719) (*c*).

§ 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 (*d*).

12 *Geo* 2, *c.* 26 (1739) (*e*).

§ 1. Gold plate not to be made under 22 carats in fineness, nor silver plate under 11 oz. 2 dwt. Penalty, 10*l*.

(*a*) Bristol never exercised the powers hereby conferred. York and Norwich have discontinued doing so.

(*b*) See 12 Geo. 2, c. 26, § 5.

(*c*) The whole of this Act but §§ 1-3 and § 41 was repealed by the Statute Law Revision Act, 1870.

(*d*) Silver plate of 11 oz. 10 dwt. to be marked with—

The workman's mark.

The mark of the wardens of the Goldsmiths' Company.

The figure of the lion's head erased.

The figure of Britannia.

Silver plate of 11 oz. 2 dwt. to be marked with—

The workman's mark.

The mark of the wardens of the Goldsmiths' Company.

The figure of a lion passant.

The figure of a leopard's head.

See 12 Geo. 2, c. 26, § 5.

(*e*) Repealed in part, 30 Geo. 3, c. 31, § 1; Statute Law Revision Acts, 1867 and 1887.

	GOLD.					SILVER.	
	22 *Carats.*	18 *Carats.*	15 *Carats.*	12 *Carats.*	9 *Carats.*	11 *oz.* 2 *dwt.*	11 *oz.* 10 *dwt.*
Quality Mark	22	18	15	12	9	None.	Britannia.
Standard Mark—							
Edinburgh.....	Thistle.	Thistle.	None.	None.	None.	Thistle.	Thistle.
Glasgow.....	Lion rampant.	Lion rampant.	Lion rampant.	Lion rampant.	Lion rampant.	Lion rampant.	Lion rampant.
Date Mark	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.
Maker's Mark	Initials.	Initials.	Initials.	Initials.	Initials.	Initials.	Initials.
Duty Mark (*b*)	Sovereign's head.	Sovereign's head.	None.	None.	None.	Sovereign's head.	Sovereign's head.
Assay Town Mark (*c*)	On all qualities of gold and silver the special mark of the town.						

(*a*) Gold and silver of all these qualities are manufactured at Edinburgh and Glasgow.
(*b*) Disused since 53 & 54 Vict. c. 8.
(*c*) The special marks of the assay towns are:—Edinburgh, a castle; Glasgow, a tree, fish, and bell.

§ 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 (*a*), 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

The mark of one of the said cities or towns.

Penalty—10*l.* fine, or, in default, hard labour not exceeding six months (*b*).

§ 21. All goldsmiths, &c., to enter their new marks, names, and places of abode in one of the assay offices at London, York, Exeter, Bristol, Chester, Norwich, or Newcastle-upon-Tyne. Such new marks to be of a character or alphabet different from their old marks; all old marks to be broken. Penalty—10*l.* fine, and 10*l.* more for using any other mark; in default, hard labour not exceeding six months.

13 *Geo.* 3, *c.* 52 (1772), "An Act for appointing wardens and assay-masters for assaying wrought plate in the towns of Sheffield and Birmingham" (*c*).

§ 2. Incorporation of "The Guardians of the Standard of Wrought Plate for Birmingham" (*d*).

§ 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.

(*a*) By 38 Geo. 3, c. 69, § 2, gold plate of 18 carats fine is to be marked with a crown and 18, instead of the lion passant, and by 7 & 8 Vict. c. 22, § 15, gold of 22 carats with a crown and 22.

(*b*) See *Robinson* v. *Currey*, 6 Q. B. D. 21; 7 *ib.* 465.

(*c*) Repealed as to Birmingham by 5 Geo. 4, c. lii. (local). As to Sheffield, see 24 Geo. 3, sess. 2, c. 20. The present Act only deals with silver.

(*d*) Or "Sheffield."

IRISH HALL MARKS AT THE PRESENT DAY (*a*).

	GOLD.						SILVER.
	22 *Carats.*	20 *Carats.*	18 *Carats.*	15 *Carats.*	12 *Carats.*	9 *Carats.*	11 *oz.* 2 *dwt.*
Quality Mark	22	20	18	15·625	12·5	9·375	None.
Standard Mark	Harp crowned.	Plume of 3 feathers.	Unicorn's head.	None.	None.	None.	Harp crowned.
Date Mark	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.
Maker's Mark	Initials.	Initials.	Initials.	Initials.	Initials.	Initials.	Initials.
Duty Mark (*b*)	Sovereign's head.	Sovereign's head.	Sovereign's head.	None.	None.	None.	Sovereign's head.
Dublin Mark	Hibernia.	Hibernia.	Hibernia.	Hibernia.	Hibernia.	Hibernia.	Hibernia.

(*a*) The only assay town in Ireland is Dublin, where gold is manufactured of a standard (20 carats) not used in England or Scotland, but silver only of the earlier standard of 11 oz. 2 dwt., and none of 11 oz. 10 dwt.

(*b*) Disused since 53 & 54 Vict. c. 8.

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 assayors, the process of assaying, punishment of counterfeiting, &c.

24 *Geo.* 3, *sess.* 2, *c.* 20 (1784), relates to Sheffield.

§ 2. Manufacturers of goods plated with silver, within Sheffield or 100 miles thereof, may strike upon such goods their surname or the name of their firm, together with some other mark, figure, or device.

§ 3. Names to be in legible characters and struck with only one punch, and marks to be approved and registered by the Guardians for Sheffield.

24 *Geo.* 3, *sess.* 2, *c.* 53 (1784) (*a*).

§ 5. *The assaying officer to mark with an additional new mark, of the King's head, all gold and silver plate sent to be touched, marked and assayed, but to ask and receive duty before touching, marking, or assaying.*

§ 8. *Gold and silver plate not to be sold or exported until marked with the King's head. Penalty—50l., or, in default, hard labour of not more than one year, nor less than six months. Also, forfeiture of the unmarked plate, half to the Crown, half to the informer.*

30 *Geo.* 3, *c.* 31 (1790).

This Act regulates the exemptions from marking.

38 *Geo.* 3, *c.* 69 (1798).

§ 1. Gold plate may be manufactured down to 18 carats fine.

§ 2. Such gold plate not to be sold or exported until marked with a crown and the figures 18, instead of the lion passant. Penalty —10*l.*

§ 3. Gold plate of 18 carats fine may be marked by the various goldsmiths' companies, &c., as before, with the exception of the alteration of this mark.

§ 4. Gold plate of 22 carats may still be made, sold, exported, &c.

§ 5. This Act not to authorise the application of the mark used before the Act to gold plate of less than 22 carats fine.

§ 6. Penalty of 50*l.* for selling, exporting, &c., gold plate not marked with one of the marks.

(*a*) This Act is now repealed by the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8).

HALL MARKS FOR IMPORTED PLATE, 1904—6 (*a*).

	GOLD.						SILVER.	
	22 *Carats.*	20 *Carats.*	18 *Carats.*	15 *Carats.*	12 *Carats.*	9 *Carats.*	11 *oz.* 2 *dwt.*	11 *oz.* 10 *dwt.*
Quality Mark	22·916	20·833	18·75	15·625	12·5	9·375	·925	·9584
Date Mark.....	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.
Shape of Shield.....	Octagon.	Octagon.	Octagon.	Octagon.	Octagon.	Octagon.	Oval.	Oval.
Assay Town Mark	On all qualities of gold and silver the special mark of the town.							

The special marks for this purpose of the assay towns are as follows:—London, Phœbus; Birmingham, equilateral triangle; Chester, acorn and two leaves; Sheffield, four crossed arrows: Edinburgh, St. Andrew's cross; Glasgow, bishop's mitre; Dublin, shamrock.

(*a*) Prescribed by the Order in Council of October 24th, 1904. See note (*a*), p. 746.

§ 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.* 3, *c.* 185 (1815) (*b*).

§ 7 (*c*). *Penalties for forging duty marks on plate, or selling or exporting plate so marked, or possessing dies, &c.*

5 *Geo.* 4, *c. lii.* (1824) (Local—Birmingham and thirty miles round).

§ 1. 13 *Geo.* 3, *c.* 52, repealed, so far as relates to Birmingham.

§ 4. Re-incorporation of "The Guardians of the Standard of Wrought Plate in Birmingham," with authority within a radius of thirty miles.

§ 20. No goldsmith, silversmith, &c., within Birmingham or thirty 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 (*d*).
" 18 " " crown and 18.
Silver of 11 oz. 2 dwt. fine with the lion passant.
" 11 oz. 10 dwt. " Britannia.

And all gold and silver alike with the following additional marks:—

The worker's mark (the first letters of his Christian and surname, or in case of any partnership, the initials of the name or firm of such partnership).
The company's mark (an anchor).
A distinct variable mark or letter, to denote the year.

Penalty—Forfeiture of the plate or its value, half to the Crown, half to the informer.

§ 21. Goldsmiths, silversmiths, &c., within Birmingham and thirty miles, to enter their names, marks, and places of abode with the company. Penalty—100*l.*, half to the informer, half to the purposes of the Act.

§ 22. Penalties of counterfeiting, &c.

The Act also contains numerous provisions with respect to the constitution of the company, the election of its officers, its procedure, &c.

7 & 8 *Vict. c.* 22 (1844).

This Act (which see) regulates the punishments and penalties for counterfeiting, &c., hall marks (*e*).

(*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*) This Act is now repealed by the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8).

(*c*) Already before 53 & 54 Vict. c. 8, the greater part of this Act was repealed by 33 & 34 Vict. c. 99, and 36 & 37 Vict. c. 91.

(*d*) By 7 & 8 Vict. c. 22, § 15, a crown and 22.

(*e*) Repealed in part by the Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8). See *R.* v. *Lee*, 1 Leach, 416, and *R.* v. *Ogden*, 6 C. & P. 631, decided on the earlier statutes; also *R.* v. *Suter & Coulson*, 10 Cox, 577; and *R.* v. *Ardley*, L. R. 1 C. C. R. 301; 12 Cox, 23, in which a spurious hall mark was made the means of obtaining money by false pretences. In *R.* v. *Roberts*, 70 L. T. (Journal) 265, the jury found that the marks used by the defendant were not imitations of the genuine hall mark. An action by the Goldsmiths' Company for penalties under this Act is not an action by a

HALL MARKS FOR IMPORTED FOREIGN WATCH-CASES, 1887—1907 (*a*).

	GOLD.						SILVER.
	22 *Carats.*	20 *Carats.*	18 *Carats.*	15 *Carats.*	12 *Carats.*	9 *Carats.*	
Quality Mark	22·917	20·833	18·75	15·625	12·5	9·375	None.
Date Mark	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.
Foreign Mark	"Foreign."	"Foreign."	"Foreign."	"Foreign."	"Foreign."	"Foreign."	"Foreign."
Shape of Shield	Cross.	Cross.	Cross.	Cross.	Cross.	Cross.	Octagon.
Assay Town Mark	On all qualities of gold and silver the special mark of the town.						

The special marks for this purpose of the assay towns are as follows:—London, Phœbus; Birmingham, equilateral triangle; Chester, acorn and two leaves: Sheffield, four crossed arrows; Edinburgh, St. Andrew's cross; Glasgow, bishop's mitre; Dublin, shamrock.

(*a*) Prescribed by the Order in Council of Nov. 28th, 1887, p. 690, *supra*; and replaced by Order in Council of May 7th, 1907, *ib.*

§ 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 (*a*).

18 & 19 *Vict. c.* 60 (1855) (*b*).

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 (*d*).

5 & 6 *Vict. c.* 56 (1842) (Customs Act).

§ 6 (*e*). 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 (*f*). *Foreign gold and silver plate imported and sent to an assay office in the United Kingdom for assay shall be marked, in*

common informer within 31 Eliz. c. 5, nor an action by a "party grieved" within 3 & 4 Will. 4, c. 42, § 3, and can, therefore, be maintained after the lapse of two years from the commission of the offence, but (in the opinion of Lush, L. J.) not after twenty years: *Robinson* v. *Currey*, 6 Q. B. D. 21; 7 *ib.* 465.

(*a*) Accordingly the following reduced standards were ordered by the Council:—

15 carats, to be marked with				15 and	625.
12	,,	,,	,,	12 ,,	500.
9	,,	,,	,,	9 ,,	375.

The crown is not placed on plate of these qualities.

(*b*) Repealed in part by the Statute Law Revision Act, 1875.

(*c*) The entire Act but §§ 59 and 60 is repealed.

(*d*) In the case of *Goldsmiths' Co.* v. *Wyatt*, (1907) 1 K. B. 95, the question was considered whether gold and silver watch-cases forming parts of finished watches imported from abroad ought to be regarded as gold and silver plate within sect. 59 of the Act of 1842, and it was held by the Court of Appeal that they must be so regarded. In order to relieve from hardship holders of existing stocks of foreign watches with unmarked cases the Assay of Imported Watch-Cases (Existing Stocks Exemption) Act, 1907 (7 Edw. 7, c. 8) was passed, by which watch-cases imported before June 1st, 1907, were exempted from assay and from the provisions of sect. 59 of 5 & 6 Vict. c. 47, and 46 & 47 Vict. c. 55. Imported articles of gold and silver decorated with enamel are within 5 & 6 Vict. c. 47, § 59: *Fabergé* v. *Goldsmiths' Co.*, Parker, J., Nov. 21st, 1910.

(*e*) The remainder of the Act is repealed by 8 & 9 Vict. c. 84, § 2.

(*f*) Repealed by 53 & 54 Vict. c. 8, § 36, and 4 Edw. 7, c. 6. See also 46 & 47 Vict. c. 55 (Revenue Act, 1883), § 10, as to foreign plate. As to foreign watch-cases, see Merchandise Marks Act, 1887, § 8, and the Orders in Council thereunder, also the tables on pp. 743 and 745. The Order of Nov. 28th, 1887, was repealed by the Order of May 7th, 1907, as from May 14th, 1907, since which date the marks prescribed by the last-mentioned Order, which are identical with those prescribed by the Order in Council of May 11th, 1906, under the Hall-Marking of Foreign Plate Act, 1904, have been in use.

HALL MARKS FOR IMPORTED PLATE SINCE 1906 (*a*), AND FOR IMPORTED WATCH-CASES SINCE 1907 (*b*).

	GOLD.						SILVER.	
	22 *Carats.*	20 *Carats.*	18 *Carats.*	15 *Carats.*	12 *Carats.*	9 *Carats.*	11 *oz.* 2 *dwt.*	11 *oz.* 10 *dwt.*
Quality Mark	22·916	20·833	18·75	15·625	12·5	9·375	·925	·9584
Date Mark	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.	Letter.
Shape of Shield	Octagon.	Octagon.	Octagon.	Octagon.	Octagon.	Octagon.	Oval.	Oval.
Assay Town Mark	On all qualities of gold and silver the special mark of the town.							

The special marks for this purpose of the assay towns are as follows:—London, sign of constellation Leo; Birmingham, equilateral triangle; Chester, acorn and two leaves; Sheffield, Libra; Edinburgh, St. Andrew's cross; Glasgow, double block letter F inverted; Dublin, Boujet.

(*a*) Prescribed by the Order in Council of May 11th, 1906. See note (*a*), p. 746.

(*b*) Prescribed by the Order in Council of May 7th, 1907, p. 690, *supra*, which adopted the same marks as the Order of 1906.

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.

4 *Edw.* 7, *c.* 6 (1904) (Hall-marking of Foreign Plate Act, 1904).

§ 1. Foreign plate imported and brought to an assay office in the United Kingdom shall be marked in such manner as may be determined by Order in Council, to denote the foreign origin (*a*).

Scotland (*b*).

13 *Geo.* 3, *c.* 59 (1773) (*c*).

§ 2, which provided penalties for counterfeiting, &c., the marks for plate, is unrepealed in Scotland.

38 *Geo.* 3, *c.* 69 (1798) (see p. 740, *supra*).

§ 7 (*d*), which provided penalties for counterfeiting, &c., the marks for plate, is unrepealed in Scotland.

6 *& 7 Will.* 4, *c.* 69 (1836).

§ 1. Gold plate not to be made, sold, or exported, under 18 carats fine, nor silver under 11 oz. 2 dwt. fine. Penalty—Fine not exceeding 100*l.*

§ 2. Scotch goldsmiths to send their names, descriptions, and marks (to consist of the initial letters of their Christian and surnames, or, in the case of a partnership, of the initial letters of the firm name) for registration to the Goldsmiths' Company of Edinburgh, or of Glasgow.

§ 3. Gold plate of 22 carats fine, and silver plate of 11 oz. 2 dwt. to be sent, marked with the maker's mark, to the assay office, and to be there marked with—

The mark of the thistle.
A distinct variable letter to denote the year.
The mark of the assaying company.

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.

(*a*) Under this Act two Orders in Council have been made—an order dated Oct. 24th, 1904, by which the marks set out in the table at p. 741 were prescribed, and a further Order dated May 11th, 1906, which revoked the former Order and substituted the marks set out in the table at p. 745, which last-mentioned marks were adopted for the purposes of foreign watch cases by the Order in Council of May 7th, 1907, under the Merchandise Marks Act. The Order of May 11th, 1906, came into operation on May 29th, 1906, except as regarded Sheffield and Glasgow, where the date was postponed till July 1st, 1906.

(*b*) 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.

(*c*) 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.

(*d*) Repealed as to England by 7 & 8 Vict. c. 22, § 1.

§§ 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.* 1, *c.* 11; 38 *Geo.* 3, *c.* 69; 5 *& 6 Vict. c.* 47; 5 *& 6 Vict. c.* 56; 17 *& 18 Vict. c.* 96; 18 *& 19 Vict. c.* 60; and 4 *Edw.* 7, *c.* 6.

IRELAND.

3 *Geo.* 2, *c.* 3 (1730) (Irish Act) (*a*).

§ 32. Gold and silver plate not to be sold until assayed, touched and marked.

§ 33. Plate to be assayed by the Dublin Company of Goldsmiths. Gold of 22 carats, and silver of 11 oz. 2 dwt., to be touched by the wardens of the company, and marked with "the marks now usual for that purpose." On payment of duty, the plate to be marked with a mark to be appointed by the Commissioners of His Majesty's Revenue (*b*).

§ 38. Penalties for counterfeiting, &c., provided.

23 *& 24 Geo.* 3, *c.* 23 (1783) (Irish Act).

§ 2. No gold plate to be made, sold, &c., except of 22 carats, 20 carats, or 18 carats fine. Penalty—forfeiture and fine of 10*l.*

§ 3. The following marks appointed for gold of 22 carats:

The mark of the maker, which is the number 22, and the first letter of the maker's Christian and surname. And,

For Dublin a harp crowned.

For New Geneva (*c*), a like harp with a bar across the strings.

§ 4. Marks for gold of 20 carats:

The number 20.

The maker's initials. And,

For Dublin, a plume with three feathers.

For New Geneva, a plume with two feathers.

§ 5. Marks for gold of 18 carats:

The number 18.

The maker's initials. And,

For Dublin, an unicorn's head.

For New Geneva, an unicorn's head with a collar round the neck.

(*a*) This Act was repealed as to gold by 23 & 24 Geo. 3, c. 23, § 1 (Irish). It fixed a standard of 22 carats for gold (§ 33).

(*b*) The figure of Hibernia was accordingly appointed.

(*c*) This was a company of Geneva watchmakers, who established themselves in co. Waterford. They carried on operations only from about 1784 to 1790.

§§ 6 contains exemptions.
11 provides for the registration of new marks.
28 provides penalties for counterfeiting, &c.

47 *Geo.* 3, *sess.* 2, *c.* 15 (1807).

§ 3. Irish gold plate of 22, 20, or 18 carats, and silver plate of 11 oz. 2 dwt., to be assayed by the Goldsmiths' Company of Dublin, touched and marked with "the marks now or hereafter to be used."

§ 6. On payment of duty, gold and silver plate to be marked with the King's head to denote that this has been done (*a*).

§§ 14, 15, and 16 provide penalties for persons selling or buying unmarked plate, or counterfeiting, &c., the marks used.

The Act also provides for the manner in which duty is to be paid, books kept. &c.

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; 4 *Edw.* 7, *c.* 6.

N.B.—For very full information on all points connected with Hall Marks, see Mr. Chaffers' book on Hall Marks, 9th ed., London, 1905.

PRINTS AND ENGRAVINGS.

8 *Geo.* 2, *c.* 13 (1735).

§ 1. Copyright for fourteen years given to "every person who shall invent and design, engrave, etch, or work, in mezzotinto or chiaro-oscuro, or from his own works and invention shall cause to be designed and engraved, etched, or worked in mezzotinto or chiaro-oscuro" any print, "to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints" (*b*). Penalties for Piracy.

(*a*) The figure of Hibernia continued to be used in addition.

(*b*) It is clearly settled law that both the date of publication and the name of the proprietor must appear with the engraving, in order to enable the proprietor to assert his statutory rights, notwithstanding *Blackwell* v. *Harper*, 2 Atk. 95; Barnard. 210; and *Roworth* v. *Wilkes*, 1 Camp. 94. See *Sayer* v. *Dicey*, 3 Wils. 60; *Harrison* v. *Hogg*, 2 Ves. jun. 323; *Thompson* v. *Symonds*, 5 T. R. 41; *Bonner* v. *Field*, 5 T. R. 44; *Macmurdo* v. *Smith*, 7 *ib.* 518; *Newton* v. *Cowie*, 4 Bing. 234; *Colnaghi* v. *Ward*, 12 L. J. Q. B. 1; *Brooks* v. *Cocks*, 3 Ad. & Ell. 138; *Graves* v. *Ashford*, L. R. 2 C. P. 410; *Rock* v. *Lazarus*, L. R. 15 Eq. 104. The requirements of 8 Geo. 2, c. 13, must be complied with in the case of engravings sought to be protected under the International Copyright Act, 1844 (7 & 8 Vict. c. 12), § 4: *Avanzo* v. *Mudie*, 10 Ex. 203.

7 *Geo.* 3, c. 38 (1766).

The former Act extended in various respects, including an extension of the term to twenty-eight years.

17 *Geo.* 3, *c.* 57 (1777).

The former Acts further extended in various respects.

6 *& 7 Will.* 4, *c.* 59 (1836).

The former Acts extended to Ireland.

SCULPTURES.

54 *Geo* 3, *c.* 56 (1814) (*a*).

§ 1. Copyright for fourteen years given to "every person or persons who shall make or cause to be made any new and original sculpture, or model, or copy, or cast," to commence from the "first putting forth or publishing the same: Provided, in all and every case, the proprietor or proprietors do cause his, her, or their name or names. with the date, to be put on all and every such new and original sculpture, model, copy, or cast, and on every such cast from nature, before the same shall be put forth or published" (*b*).

CLOCKS AND WATCHES, &c.

39 *& 40 Vict. c.* 36, § 42 (*c*), (1876).

Clocks and watches and other metal articles marked in imitation of British marks are forbidden to be imported into the United Kingdom (*d*).

METAL BUTTONS.

36 *Geo* 3, *c.* 60 (*e*) (1796).

§ 1 provides penalties for ordering metal buttons to be falsely marked in indication of quality, and for purchasing buttons so marked.

(*a*) The earlier Act, 38 Geo. 3. c. 71 (1798), was repealed by the Statute Law Revision Act, 1861 (24 & 25 Vict. c. 101).

(*b*) By the Registration of Designs Act, 1850 (13 & 14 Vict. c. 104, §§ 6, 7) sculptures, &c., were allowed to be registered under that Act, and penalties were imposed for infringement, but this was subject to the provision that every copy or cast of the sculpture, &c., must be marked with the word "registered" and the date of registration. By the Patents, &c., Act, 1883, the Act of 1850 was repealed, and sculptures, &c., within the protection of the Act of 1814, were excluded from registration for the future (see § 60). Existing registrations at the commencement of the Act were, however, preserved (§ 113). The requirements of 54 Geo. 3, c. 56, must be complied with in the case of sculptures, &c., sought to be protected under the International Copyright Act, 1844 (7 & 8 Vict. c. 12, § 4).

(*c*) This is a re-enactment, with some variations, of 16 & 17 Vict. c. 107, § 44.

(*d*) See p. 689. As to watches and watch-cases, see also §§ 7 and 8 of the Merchandise Marks Act, 1887, and the Orders in Council thereunder, p. 690.

(*e*) Repealed in part, Statute Law Revision Act, 1871.

§ 2 provides penalties for falsely marking buttons in indication of quality, and for offering them for sale so marked.

§ 3. No marks indicative of quality are to be placed upon metal buttons, except the words "gilt," or "plated," respectively.

§ 4. The words "double gilt" and "treble gilt" may be placed upon buttons gilt to a specified degree.

§ 7 declares what quality is required to constitute a "gilt" or "plated" button.

The Act also contains provisions with respect to procedure, &c.

GUN-BARRELS.

By *Royal Charter*, 1637, "The Master, Wardens and Society of the Mystery of Gunmakers of the City of London" were incorporated, proof marks assigned to them, &c.

53 *Geo.* 3, *c.* 115 (*a*) (1813).

§ 4 incorporates "The Guardians, Trustees and Wardens of the Gun-Barrel Proof House of the Town of Birmingham."

§ 7 appoints Birmingham proof marks (*b*).

18 *& 19 Vict. c. cxlviii.* (1855) (Local), "The Gun-Barrel Proof Act, 1855" (*c*).

§ 9 repeals the former Acts.

§ 12 continues the incorporation of the Birmingham Company, under the name of "The Guardians of the Birmingham Proof House."

Many provisions follow for the regulation of the Birmingham Company.

31 *& 32 Vict. c. cxiii.* (1868) (Local), "The Gun-Barrel Proof Act, 1868."

§ 9 repeals the Act of 1855.

§ 12 continues the incorporation of "the Guardians of the Birmingham Proof House." Many provisions follow for the regulation of the Birmingham Company.

§ 107. The London and Birmingham Companies to receive, prove, mark, and deliver barrels brought to them for proof.

§ 116. Barrels to be proved according to Rules, Regulations, and Scales in Schedule B to Act.

§ 117. Power given to the two companies, with approval of Secretary for War, to repeal or alter Rules, &c., and to make and alter any new Rules, &c.

§§ 121, 122. Penalties for offences with respect to proof marks.

Schedule B provides proof and other marks for the two companies.

(*a*) Repealed by 18 & 19 Vict. c. cxlviii., § 9 (Local).

(*b*) 55 Geo. 3, c. 59 (1815), further regulated the marking of gun-barrels, but was also repealed by 18 & 19 Vict. c. cxlviii., § 9 (Local).

(*c*) Repealed by 31 & 32 Vict. c. cxiii. (Local).

Rules and Regulations of December 1887 made by the two companies, with the approval of the Secretary for War, under the authority of the Act of 1868. (See *London Gazette* for January 3rd, 1888, p. 16.)

These repeal the Rules, &c., in Schedule B to the Act, and contain new Rules, Regulations, and Scales for proving and marking gun-barrels, and provide proof marks, view marks, and provisional proof marks for the two companies.

ANCHORS AND CHAIN CABLES.

57 & 58 *Vict. c.* 60 (1894), "Merchant Shipping Act, 1894."

By § 543 every manufacturer of anchors is required, under penalties, to mark every anchor made by him in two specified places with his name and initials, and also to mark it with a progressive number and the weight.

62 & 63 *Vict. c.* 23 (1899), "Anchors and Chain Cables Act, 1899" (*a*), regulates the testing, proving, and marking of anchors and chain cables, and provides penalties for falsely marking, &c.

By § 2, every contract for the sale of a chain cable or of an anchor weighing more than $1\frac{1}{2}$ cwt. implies, in the absence of an express stipulation to the contrary, a warranty that the anchor or cable has been duly proved.

(*a*) This Act replaces 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).

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 (*b*).

§ 116. Penalties for counterfeiting, &c., such wrappers.

(*b*) As to § 114, see § 286 of the Customs (Consolidation) Act, 1876 (39 & 40 Vict. c. 36).

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.* 3, *c.* 123 (*a*) (1814).

§ 1. Growers of hops are to mark the bags, in letters of specified dimensions, with their names, and the names of the parish and county in which the hops were grown, before putting the hops into the bag. Penalty for putting in the hops before marking the bag.

29 & 30 *Vict. c.* 37 (1866), "The Hop (Prevention of Frauds) Act, 1866."

§ 2. Growers of hops are to mark each bag, in addition to their own name and the names of the parish and county, with the year in which the hops were grown, the progressive number of the bag, and its weight.

Penalties are provided for not marking, falsely marking, wilfully altering marks, &c. (*b*).

(*a*) This Act is repealed in part. The former Acts, now repealed, were 14 Geo. 3, c. 68, under which the excise officer was to mark each bag of hops with the weight of hops, the name and place of abode of the grower, and the date of the year; 39 & 40 Geo. 3, c. 81, under which the grower was himself to mark his name and place of abode: the excise officer the weight, date, and progressive number of the bag; and 48 Geo. 3, c. 134, under which the owner was in addition to mark the name of the parish and county in which the hops were grown.

(*b*) See *R.* v. *Morgan*, 1 Trade Marks, 313, in which the defendant was convicted at the Wandsworth Police Court, on May 18th, 1878, of selling inferior hops in the bags and as the hops of a well-known grower, under § 6 of the above Act, and fined 10*l.*, the maximum penalty: 44*l.*, the value of the hops; and 10*l.* 10*s.* costs.

§ 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.

COFFEE AND CHICORY.

45 & 46 *Vict. c.* 41, "The Customs and Inland Revenue Act, 1882."

§ 5. A duty imposed on imitations of coffee and chicory, to be collected by means of adhesive labels provided by the Commissioners of Inland Revenue.

§ 6. Penalties for defective labelling. Packets containing coffee mixtures to have labels stating the names of the substances included.

MARGARINE, &c.

50 & 51 *Vict. c.* 29. "The Margarine Act, 1887."

§§ 6, 7. Packages of butter-substitutes to be marked "margarine" in a specified manner. Penalties for offences.

62 & 63 *Vict. c.* 51. "The Sale of Food and Drugs Act, 1899."

§§ 1, 5, 6. Further provisions as to "margarine," "margarine-cheese," "machine-skimmed milk," and "skimmed milk."

7 *Edw. 7, c.* 21, "The Butter and Margarine Act, 1907."

§§ 8—11. Further provisions as to marking margarine, &c. Penalties for offences.

TOBACCO.

26 & 27 *Vict. c.* 7, "The Manufactured Tobacco Act, 1863."

§§ 3–8. Provisions as to marking negrohead and cavendish tobacco. Penalties, &c.

LINEN.

17 *Geo.* 2, *c.* 30 (*a*) (1743):

§ 1. Penalties provided for stamping foreign linens in imitation of British or Irish, and for placing counterfeit stamps on British or Irish linens.

(*a*) Repealed as to Scotland by 4 Geo. 4, c. 40, § 1.

18 *Geo.* 2, *c.* 24 (*a*) (1744).

§ 1. Linens to be stamped must be sworn to be of the manufacture of [Scotland or] Ireland.

§ 2 (*b*). No bounty to be paid on British or Irish linens exported, but on such as are marked at both ends of every piece with the name and place of abode of the maker, the year of manufacture, the number of the piece in rotation, the name and place of abode of the exporter or seller for exportation: and unless the ends are also marked with the month and year when, and the name of the port at which, the linens are entered for exportation. The marks to be stamped with lamp black and burnt oil.

Penalties for falsely stamping, &c.

4 *Geo.* 4, *c.* 40 (1823) (Scotland).

§ 3. Every manufacturer or weaver of linen and dealer in linen in Scotland may weave his name, or fix any mark or seal, in any piece of linen of his make, to denote the length, breadth, or quality of the linen, or the maker's name. Penalties for counterfeiting.

5 & 6 *Will.* 4, *c.* 27 (1835) (Ireland).

§ 4. Across each end of every piece of linen offered for sale in open fair or market in Ireland there are to be woven two coarse threads or cords at a distance of one-fourth of an inch, and close to such threads or cords on each end are to be written the christian name, surname, and place of residence of the weaver or manufacturer, and on the outside fold of every piece its length and breadth.

§ 14. The Lord Lieutenant to appoint a committee of twelve in each county, to superintend the brown linen trade.

§ 19. The committee in each county to prescribe the form and device of the seal or stamp to be used by the county sealmaster of brown linen.

§ 21. The sealmaster shall affix to each piece of brown linen brought for the purpose, and which shall be in accordance with the Act, an impression of the seal, in black, red, or blue; and shall also mark with the same ingredients on the back of each piece its length, breadth, name of sealmaster, and the parish and county where he resides, or the name of the market town to which he is appointed.

Regulations for sales, penalties for frauds, &c.

9 *Edw.* 7, *c.* 21, "The Irish Handloom Weavers Act, 1909.

§§ 1—3. Irish hand-woven linen damask goods to be marked "Irish hand-woven linen damask." Irish hand-woven cambric or linen diaper goods to be marked "Irish hand-woven." Penalties for failure to mark, improper marking, &c.

(*a*) Repealed as to Scotland by 4 Geo. 4, *c.* 40, § 1.

(*b*) Repealed as to bounty by 6 Geo. 4, *c.* 105.

PUBLIC STORES.

38 & 39 *Vict.* c. 25 (*a*) (1875), "The Public Stores Act, 1875."

§ 4. The marks described in the First Schedule to the Act are appropriated to denote Her Majesty's property. Penalty for unauthorised use of such marks.

§ 5. Penalty provided for obliteration of marks.

§ 6. Penalty for unlawful possession of public stores (*b*).

(*a*) This Act repealed the following Acts, by which the Public Stores had previously been regulated:—9 Will. 3, c. 41 (1697): this Act provided penalties for forging the King's marks, or having in possession goods so marked; 9 Geo. 1, c. 8 (1722); this Act modified the penalties contained in the former Act; 17 Geo. 2, c. 40, § 10 (1743); this provided for the trial of offences against these Acts before any judge, justice, or justices at assizes, or justices of the peace at general quarter sessions; 39 & 40 Geo. 3, c. 89 (1800); this Act provided penalties for selling or having in possession goods marked with the marks specified, or defacing, &c., such marks; 54 Geo. 3, c. 60 (1814); this extended the provisions of the former Acts to cordage wrought with worsted threads; 54 Geo. 3, c. 159, § 10 (1814); this provided a penalty for sweeping for lost anchors, cables, &c., belonging to the King's service; 55 Geo. 3, c. 127 (1815); this extended the previous Act to include all public stores; 30 & 31 Vict. c. 128 (1867), "The War Department Stores Act, 1867"; and 32 & 33 Vict. c. 12 (1869), "The Naval Stores Act, 1869." The following Acts have also from time to time regulated Naval Stores:—25 & 26 Vict. c. 64, "The Naval and Victualling Stores Act, 1862"; 27 & 28 Vict. c. 91, "The Naval and Victualling Stores Act, 1864"; 30 & 31 Vict. c. 119, "The Naval Stores Act, 1867": all of which Acts were previously repealed.

(*b*) It has been repeatedly decided that on an indictment under 9 & 10 Will. 3, c. 41, for being unlawfully in possession of marked stores, the prisoner cannot be convicted unless he is in possession with knowledge of the marks. See *R.* v. ——, Foster, Cr. Cas. 439; *R.* v. *Banks*, 1 Esp. 144; *R.* v. *Willmett*, 3 Cox, 281; *R.* v. *Cohen*, 8 Cox, 41; *R.* v. *Sleep*, 8 Cox, 472. In *R.* v. *Banks*, it was, indeed, held by Lord Kenyon, C. J., that it was sufficient for the prosecution to prove the finding of the marked goods in the prisoner's possession, the prisoner being allowed to obtain acquittal by proving his ignorance: but it is now for the prosecution to prove the knowledge in the affirmative. See *R.* v. *Willmett*, 3 Cox, 281; *R.* v. *Cohen*, 8 Cox, 41; *R.* v. *Sleep*, *ib.* 472. Thus, in *R.* v. *O'Brien*, 15 L. T. N. S. 419, it was held that for a conviction of persons in charge of closed and fastened cases, containing marked goods, to be obtained, it must be proved that they knew that the goods in the cases were marked. Such knowledge may, however, be presumed by the jury from the circumstances attending the possession: *R.* v. *Sleep*, 8 Cox, 472. Although a specified certificate was required by 9 & 10 Will. 3, c. 41, to justify possession of marked goods, it was held that another form of certificate might be accepted (*R.* v. *Willmett*, 3 Cox, 281), or even the certificate be dispensed with altogether (*R.* v. ——, Foster, Cr. Cas. 439; *R.* v. *Banks*, 1 Esp. 144), there being no proof of knowledge.

Possession by a railway company for purpose of transfer, on behalf of the prisoner, is such a possession by the prisoner as to justify a conviction: *R.* v. *Smiley*, 8 Cox, 179. And see *R.* v. *Sleep*, 8 Cox, 472, as to the words "receive or have" in 9 & 10 Will. 3, c. 41; and *R.* v. *Cole*, 8 East, P. C. 767, as to the necessity for the marked articles to be found in the defendant's possession. In *R.* v. *Willmett*, 3 Cox, 281, it was held that a man could not be held criminally responsible for the act of his servants, who had, without his knowledge, improperly taken marked goods into his warehouse.

As to the exception in favour of contractors and contractors' servants, see *R.* v. *Silversides*, 3 Q. B. 406; and *R.* v. *Fitzgerald*, 43 C. C. C. Sess. Pap. 369.

First Schedule.

Marks appropriated for use in or on Her Majesty's Stores.

STORES.	MARKS.
Hempen cordage and wire rope.	White, black, or coloured worsted threads laid up with the yarns and the wire respectively.
Canvas, fearnought, hammocks, and seamen's bags.	A blue line in a serpentine form.
Buntin.	A double tape in the warp.
Candles.	Blue or red cotton threads in each wick or wicks of red cotton.
Timber or metal. Any stores not before enumerated, whether similar to the above or not.	The name of Her Majesty, her predecessors, her heirs or successors, or of any public department or any branch thereof, or the broad arrow, or a crown, or Her Majesty's arms, whether such broad arrow, crown, or arms be alone or be in combination with any such name as aforesaid, or with any letters denoting any such name.

APPENDIX L.

THE INTERPRETATION ACT. 1889.

52 & 53 Vict. c. 63.

An Act for consolidating enactments relating to the Construction of Acts of Parliament and for further shortening the Language used in Acts of Parliament. [30th August, 1889.]

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 :

Re-enactment of existing Rules.

Rules as to gender and number.

1.—(1.) In this Act and in every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, unless the contrary intention appears,—

(a.) words importing the masculine gender shall include females; and

(b.) words in the singular shall include the plural, and words in the plural shall include the singular.

(2.) The same rules shall be observed in the construction of every enactment relating to an offence punishable on indictment or on summary conviction, when the enactment is contained in an Act passed in or before the year one thousand eight hundred and fifty.

Application of penal Acts to bodies corporate.

2.—(1.) In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression "person" shall, unless the contrary intention appears, include a body corporate.

(2.) Where under any Act, whether passed before or after the commencement of this Act, any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where that body is the party aggrieved.

Meanings of certain words

3. In every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, the

in Acts since 1850.

following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them; namely,—

The expression "month" shall mean calendar month:

* * * * *

The expressions "oath" and "affidavit" shall, in the case of persons for the time being allowed by law to affirm or declare instead of swearing, include affirmation and declaration, and the expression "swear" shall, in the like case, include affirm and declare.

4. [Meaning of "county" in past Acts.]

5. [Meaning of "parish."]

6. [Meaning of "county court."]

7. [Meaning of "sheriff clerk," &c. in Scottish Acts.]

Sections to be substantive enactments.

8. Every section of an Act shall have effect as a substantive enactment without introductory words.

Acts to be public Acts.

9. Every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, shall be a public Act and shall be judicially noticed as such, unless the contrary is expressly provided by the Act.

Amendment or repeal of Acts in same session.

10. Any Act may be altered, amended, or repealed in the same session of Parliament.

Effect of repeal in Acts passed since 1850.

11.—(1.) Where an Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment.

(2.) Where an Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, repeals wholly or partially any former enactment and substitutes provisions for the enactment repealed, the repealed enactment shall remain in force until the substituted provisions come into operation.

New General Rules of Construction.

Official definitions in past and future Acts.

12. In this Act, and in every other Act whether passed before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1.) The expression "the Lord Chancellor" shall, except when used with reference to Ireland only, mean the Lord High Chancellor of Great Britain for the time being, and when used with reference to Ireland only, shall mean the Lord Chancellor of Ireland for the time being.

(2.) The expression "the Treasury" shall mean the Lord High Treasurer for the time being or the Commissioners for the time being of Her Majesty's Treasury.

(3.) The expression "Secretary of State" shall mean one of Her Majesty's Principal Secretaries of State for the time being.

* * * * *

(5.) The expression "the Privy Council" shall, except when used with reference to Ireland only, mean the Lords and other-

for the time being of Her Majesty's Most Honourable Privy Council, and when used with reference to Ireland only, shall mean the Privy Council of Ireland for the time being.

* * * * *

(8.) The expression "the Board of Trade" shall mean the Lords of the Committee for the time being of the Privy Council appointed for the consideration of matters relating to trade and foreign plantations.

* * * * *

(18.) The expression "the Bank of England" shall mean, as circumstances require, the Governor and Company of the Bank of England or the bank of the Governor and Company of the Bank of England.

* * * * *

13. [Judicial definitions in past and future Acts.]

Meaning of "rules of Court."

14. In every Act passed after the commencement of this Act, unless the contrary intention appears, the expression "rules of Court" when used in relation to any Court shall mean rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of such Court, and as regards Scotland shall include acts of adjournal and acts of sederunt.

The power of the said authority to make rules of Court as above defined shall include a power to make rules of Court for the purpose of any Act passed after the commencement of this Act, and directing or authorising anything to be done by rules of Court.

15. [Meaning of "borough."]

16. [Meaning of "guardians" and "union."]

17. [Definitions relating to elections.]

Geographical and colonial definitions in future Acts.

18. In this Act, and in every Act passed after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1.) The expression "British Islands" shall mean the United Kingdom, the Channel Islands, and the Isle of Man.

(2.) The expression "British possession" shall mean any part of her Majesty's dominions exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession.

(3.) The expression "colony" shall mean any part of her Majesty's dominions exclusive of the British Islands, and of British India, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony.

(4.) The expression "British India" shall mean all territories and places within her Majesty's dominions which are for the time being governed by her Majesty through the Governor-General of India or through any governor or other officer subordinate to the Governor-General of India.

(5.) The expression "India" shall mean British India together with any territories of any native prince or chief under the suzerainty of her Majesty exercised through the Governor-General of India, or through any governor or other officer subordinate to the Governor-General of India.

(6.) The expression "governor" shall, as respects Canada and India, mean the Governor-General, and include any person who for the time being has the powers of the Governor-General, and as respects any other British possession, shall include the officer for the time being administering the government of that possession.

(7.) The expression "colonial legislature" and the expression "legislature," when used with reference to a British possession, shall respectively mean the authority, other than the Imperial Parliament or her Majesty the Queen in Council, competent to make laws for a British possession.

Meaning of "person" in future Acts.

19. In this Act and in every Act passed after the commencement of this Act the expression "person" shall, unless the contrary intention appears, include any body of persons corporate or unincorporate.

Meaning of "writing" in past and future Acts.

20. In this Act and in every other Act whether passed before or after the commencement of this Act expressions referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form.

Meaning of "statutory declaration" in past and future Acts. 5 & 6 Will. 4, c. 62.

21. In this Act, and in every other Act, whether passed before or after the commencement of this Act, the expression "statutory declaration" shall, unless the contrary intention appears, mean a declaration made by virtue of the Statutory Declarations Act, 1835.

22. [Meaning of "financial year" in future Acts.]

23. [Definition of "Lands Clauses Acts."]

24. [Meaning of "Irish Valuation Acts."]

25. [Meaning of "ordnance map."]

Meaning of "service by post."

26. Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve," or the expression "give" or "send," or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

27. [Meaning of "committed for trial."]

28. [Meanings of "sheriff," "felony," and "misdemeanour" in future Scotch Acts.]

29. [Meaning of "county court" in future Irish Acts.]

References to the Crown.

30. In this Act and in every other Act, whether passed before or after the commencement of this Act, references to the Sovereign reigning at the time of the passing of the Act or to the Crown shall, unless the contrary intention appears, be construed as references to the Sovereign for the time being, and this Act shall be binding on the Crown.

Construction of statutory rules, &c.

31. Where any Act, whether passed before or after the commencement of this Act, confers power to make, grant, or issue any instru-

ment, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws, expressions used in the instrument, if it is made after the commencement of this Act, shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power.

Construction of provisions as to exercise of powers and duties.

32.—(1.) Where an Act passed after the commencement of this Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2.) Where an Act passed after the commencement of this Act confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office.

(3.) Where an Act passed after the commencement of this Act confers a power to make any rules, regulations, or byelaws, the power shall, unless the contrary intention appears, be construed as including a power, exerciseable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or byelaws.

33. [Provisions as to offences under two or more laws.]

34. [Measurement of distances.]

Citation of Acts.

35.—(1.) In any Act, instrument, or document, an Act may be cited by reference to the short title, if any, of the Act, either with or without a reference to the chapter, or by reference to the regnal year in which the Act was passed, and where there are more statutes or sessions than one in the same regnal year, by reference to the statute or the session, as the case may require, and where there are more chapters than one, by reference to the chapter, and any enactment may be cited by reference to the section or sub-section of the Act in which the enactment is contained.

(2.) Where any Act passed after the commencement of this Act contains such reference as aforesaid, the reference shall, unless a contrary intention appears, be read as referring, in the case of statutes included in any revised edition of the statutes purporting to be printed by authority, to that edition, and in the case of statutes not so included, and passed before the reign of King George the First, to the edition prepared under the direction of the Record Commission; and in other cases to the copies of the statutes purporting to be printed by the Queen's Printer, or under the superintendence or authority of Her Majesty's Stationery Office.

(3.) In any Act passed after the commencement of this Act a description or citation of a portion of another Act shall, unless the contrary intention appears, be construed as including the word, section, or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.

"Commencement."

36.—(1.) In this Act, and in every Act passed either before or after the commencement of this Act, the expression "commencement," when used with reference to an Act, shall mean the time at which the Act comes into operation.

(2.) Where an Act passed after the commencement of this Act, or any Order in Council, order, warrant, scheme, letters patent, rules,

regulations, or byelaws made, granted, or issued, under a power conferred by any such Act, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day.

Exercise of statutory powers between passing and commencement of Act.

37. Where an Act passed after the commencement of this Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation.

Effect of repeal in future Acts.

38.—(1.) Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

(2.) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—

(a.) revive anything not in force or existing at the time at which the repeal takes effect; or,

(b.) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or

(c.) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or

(d.) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e.) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Act had not been passed.

Supplemental.

Definition of "Act" in this Act.

39. In this Act the expression "Act" shall include a local and personal Act and a private Act.

Saving for past Acts

40. The provisions of this Act respecting the construction of Acts passed after the commencement of this Act shall not affect the construction of any Act passed before the commencement of this Act,

although it is continued or amended by an Act passed after such commencement.

41. The Acts described in the Schedule to this Act are hereby repealed to the extent appearing in the third column of the Schedule. Repeal.

42. This Act shall come into operation on the first day of January one thousand eight hundred and ninety. Commencement of Act.

43. This Act may be cited as the Interpretation Act, 1889. Short title.

SCHEDULE.

Enactments Repealed. Sect. 41.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
7 & 8 Geo. 4, c. 28.	An Act for further improving the administration of justice in criminal cases in England.	Section fourteen.
9 Geo. 4, c. 54.	An Act for improving the administration of justice in criminal cases in Ireland.	Section thirty-five.
7 Will. 4 & 1 Vict. c. 39.	An Act to interpret the word "sheriff," "sheriff clerk," "shire," "sheriffdom," and "county," occurring in Acts of Parliament relating to Scotland.	The whole Act.
13 & 14 Vict. c. 21.	An Act for shortening the language used in Acts of Parliament.	The whole Act.
29 & 30 Vict. c. 113.	The Poor Law Amendment Act of 1866.	Section eighteen, from the beginning to "can be appointed, and."
42 & 43 Vict. c. 49.	The Summary Jurisdiction Act, 1879..	In section twenty the subsections numbered (3) and (6). Section fifty.
47 & 48 Vict. c. 43.	The Summary Jurisdiction Act, 1884..	Section seven.
51 & 52 Vict. c. 43.	The County Courts Act, 1888.....	Section one hundred and eighty-seven, from the beginning to "is meant, and."

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