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A

DIGEST

OF THE

LAW OF TRADEMARKS

AS PRESENTED IN THE

REPORTED ADJUDICATIONS

OF THE

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

TOGETHER WITH

AN APPENDIX

CONTAINING

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

BY

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NEW YORK:
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PREFACE.

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

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

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

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

States, and perhaps may suggest other reflections.

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

1805 to 1815, inclusive,	.	.	.	8
1815 " 1825, " "	.	.	.	5
1825 " 1835, " "	.	.	.	6
1835 " 1845, " "	.	.	.	13
1845 " 1855, " "	.	.	.	46
1855 " 1865, " "	.	.	.	104
1865 " 1875, " "	.	.	.	168

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

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

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

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

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

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

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

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

C. E. C.

NEW YORK, *November* 15, 1877.

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EXPLANATION OF ABBREVIATIONS.

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

EXPLANATION OF ABBREVIATIONS.

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

EXPLANATION OF ABBREVIATIONS. xv

- Huard M. de Fab....Répertoire de Législation de Doctrine et de
Jurisprudence en matière de Marques de
Fabrique, etc. Par Adrien Huard, Paris,
1865.
- Hun ... Hun's Supreme Court Reports, N. Y.
- H. V. Jo¹ 18.... H. V. Johnson's Reports, Chancery, Eng.
- I. Jurist, N. S.... Irish Jurist, New Series.
- Ill..... Illinois Reports.
- Irish Ch., or }
Ir. Ch. } Irish Chancery Reports.
- Irish Eq., or }
Ir. Eq. } Irish Reports, Equity Series.
- J. & H..... Johnson's & Hemming's Chancery Reports,
Eng.
- J. & S..... Jones & Spencer's N. Y. Superior Court
Reports.
- Jur..... Jurist, Eng.
- Jur. N. S..... Jurist, New Series, N. S.
- K. & J., or }
Kay & J. } Kay & Johnson's Reports, Chancery, Eng.
- Keen Keen's Reports, Rolls Court, Eng.
- Keyes..... Keyes' Reports, N. Y. Court of Appeals.
- L. Ch..... Lord Chancellor.
- L. J..... Law Journal, Eng.
- L. JJ..... Lords Justices.
- L. J. N. S. Ch..... Law Journal, New Series, Chancery, Eng.
- L. J. N. S. C. P.... Law Journal, New Series, Com. Pleas, Eng.
- L. J. N. S. Exch.... Law Journal, New Series, Exchequer, Eng.
- L. J. N. S. H. L.... Law Journal, New Series, House of Lords,
Eng.
- L. J. N. S. M. C.... Law Journal, New Series, Magistrates' Cases,
Eng.
- L. J. N. S. Q. B.... Law Journal, New Series, Queen's Bench,
Eng.
- L. R. Ch..... Law Reports, Chancery Appeal Cases, Eng.
- L. R. E. & I. App... Law Reports, English and Irish Appeals.
- L. R. Eq..... Law Reports, Equity Cases, Eng.
- L. T. R..... Law Times Reports, Eng.
- L. T. R. N. S..... Law Times Reports, New Series, Eng.
- La. An..... Louisiana Annual Reports.
- Lans..... Lansing's Reports, N. Y. Supreme Court.

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

EXPLANATION OF ABBREVIATIONS. xvii

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

TABLE

OF

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

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

- Abbott v. Bakers and Confectioners' Tea Association**, W. N. 1871, p. 207; S. C., *affirmed*, W. N. 1872, p. 31; *cited*, 20 W. R. 720; 26 L. T. R. (N. S.) 757.
- Ainsworth v. Walmsley**, L. R. 1 Eq. 518; S. C., 12 Jurist (N. S.) 205; S. C., 14 L. T. R. (N. S.) 220; S. C., 35 L. J. R. (N. S.) Ch. 852; S. C., 14 W. R. 363; *cited*, 35 Cal. 76; 45 Scottish Jurist, 206; 4 Am. Law Times R. (N. S.) 177.
- Allones v. Elkan**, 40 L. J. R. (N. S.) Ch. 475; S. C., L. R. 12 Eq. 140; S. C., 19 W. R. 867; *affirmed*, 20 W. R. 131; S. C., 25 L. T. R. (N. S.) 813; S. C., L. R. 7 Ch. 180; S. C., 41 L. J. R. (N. S.) Ch. 246.
- American Grocer Publishing Association v. The Grocer Publishing Company**, 51 How. Pr. 402; *cited*, Id. 220.
- Ames v. King**, 2 Gray, 879.
- Amoskeag Manufacturing Company v. Garner**, 6 Abb. Pr. (N. S.) 265; S. C., 55 Barb. 151.
- Amoskeag Manufacturing Company v. Garner**, 4 Am. Law T. R. (N. S.) 176.

Amoskeag Manufacturing Company v. Spear, 2 Sandf. 599; *cited*, 17 Barb. 609; 3 Duer, 627; 2 Abb. Pr. 322; 3 Blatchf. 448; 4 Abb. Pr. 88; 13 How. Pr. 848; 24 Barb. 164; 4 Abb. Pr. 147; 13 How. Pr. 388; 4 Abb. Pr. 161; 2 Bosw. 7; 18 How. Pr. 67; 7 Bosw. 228; 5 Phila. 465; 28 How. Pr. 123; 28 How. Pr. 207; 4 Robt. 618; 5 Am. Law Reg. (N. S.) 594; 47 Barb. 463; 2 Abb. Pr. (N. S.) 462; 1 Abb. Ct. of App. Dec. 270; 5 Abb. Pr. (N. S.) 218; 3 Trans. App. 169; 3 Keyes, 596; 35 How. Pr. 115; 49 Barb. 591; 57 Barb. 584; 36 How. Pr. 85; 2 Daly, 815; 35 Cal. 64; 35 Conn. 414; 5 Abb. Pr. (N. S.) 220; 44 Missouri, 176; 6 Abb. Pr. (N. S.) 279; 55 Barb. 167; 3 Daly, 54; 2 Brews. 318; 7 Phila. 255; 2 Brews. 325; 54 Ill. 465; 1 Dillon, 332; 1 Wilson, 63; 45 N. Y. 297; 10 Abb. Pr. (N. S.) 364; 13 Wallace, 323; 6 Lans. 160; 13 Abb. Pr. (N. S.) 309; 48 N. Y. 377; 45 Cal. 481; 15 Abb. Pr. (N. S.) 4; 1 T. & C. 629; 46 How. Pr. 159; 3 T. & C. 552; 58 N. Y. 238; 49 How. Pr. 7; 4 Am. L. T. R. (N. S.) 181.

The Apollinaris Company (Limited) v. Norrish, 33 L. T. R. (N. S.) 242.

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Ayer v. Rushton, *unreported*.

Ranks v. Gibson, 35 L. J. R. (N. S.) Ch. 592; S. C., 34 Beav. 566; S. C., 13 W. R. 1612; *cited*, 45 N. Y. 302; 10 Abb. Pr. (N. S.) 369; 26 L. T. R. (N. S.) 391; 20 W. R. 508; 2 Cin. 320.

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Beard v. Turner, 13 L. T. R. (N. S.) 747; *cited*, 4 Am. L. T. R. (N. S.) 180.

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- 609; 7 Bosw. 225; 2 Abb. Pr. (N. S.) 462; 2 Brews. 810; Dedy, 616; 6 Hun, 108.
- Bininger v. Wattles*, 28 How. Pr. 206; *cited*, 49 Barb. 592; 85 Cal. 76; 4 Abb. Pr. (N. S.) 416; 36 How. Pr. 17; 5 Abb. Pr. (N. S.) 220; 55 Barb. 167; 6 Abb. Pr. (N. S.) 279; 8 Daly, 54; 13 Abb. Pr. (N. S.) 891.
- Blackwell v. Armistead*, 5 Am. Law Times R. 85.
- Blackwell v. Crabb*, 36 L. J. R. (N. S.) Ch. 504.
- Blackwell v. Wright*, 78 N. C. 310.
- Blanchard v. Hill*, 2 Atk. 484; *cited*, 4 McLean, 517; 2 Sandf. 605; 24 L. J. R. (N. S.) Ch. 634; 1 K. & J. 514; 3 Jurist (N. S.) 930; 3 K. & J. 427; 3 K. & J. 429; 7 Bosw. 225; 1 N. R. 544; 9 Jurist (N. S.) 484; 8 L. T. R. (N. S.) 228; 32 L. J. R. (N. S.) Ch. 550; 11 W. R. 526; 29 Cal. 295; 2 Brews. 827; 61 N. Y. 231.
- Blofield v. Payne*, 4 B. & Ad. 410; S. C., 1 Nev. & M. 353; S. C., 8 L. J. R. (N. S.) 68; *cited*, 4 McLean, 520; 2 Sandf. 606; 13 Ir. Eq. 487; 7 Cush. 833; 4 L. T. R. (N. S.) 638; 7 Jurist, (N. S.) 674; 2 J. & H. 143; 30 L. J. R. (N. S.) Ch. 496; L. R. 1 Eq. 302; 6 Abb. Pr. (N. S.) 279; 55 Barb. 167.
- Bloss v. Bloomer*, 23 Barb. 604.
- Boardman v. Meriden Britannia Company*, 35 Conn. 402; *cited*, 39 Id. 461.
- Booth v. Jarrett*, 52 How. Pr. 169.
- Bowman v. Floyd*, 3 Allen, 76; *cited*, 110 Mass. 81; 111 Id. 244.
- Bradbury v. Beeton*, 30 L. J. R. (N. S.) Ch. 57; S. C., 21 L. T. R. (N. S.) 323; S. C., 18 W. R. 33; *cited*, 18 W. R. 183; 21 L. T. R. (N. S.) 547.
- Bradbury v. Dickens*, 27 Beav. 53; *cited*, 22 W. R. 454; 30 L. T. R. (N. S.) 295; 61 N. Y. 231.
- Bradley v. Norton*, 33 Conn. 157.
- Braham v. Bustard*, 11 W. R. 1061; S. C., 1 H. & M. 447; S. C., 9 L. T. R. (N. S.) 190; S. C., 2 N. R. 572; *cited*, 15 Irish Ch. 80; 4 Abb. Pr. (N. S.) 415; 36 How. Pr. 16; L. R. 7 Ch. 622; 41 L. J. R. (N. S.) Ch. 688; 27 L. T. R. (N. S.) 223; L. R. 17 Eq. 41; 43 L. J. R. (N. S.) Ch. 65; 22 W. R. 54.
- Broadhurst v. Barlow*, W. N. 1872, p. 212; L. R. 1st Eq. 38.
- Brook v. Evans*, 2 L. T. R. (N. S.) 740; *affirmed*, 29 L. J. R. (N. S.) 616.
- Brooklyn White Lead Company v. Masury*, 25 Barb. 416; *cited*,

12 Mo. L. R. 224; 18 How. Pr. 69; 7 Bosw. 220; 9 Bosw. 199; 2 Abb. Pr. (N. S.) 462; 1 Abb. Ct. of App. Dec. 270; 5 Abb. Pr. (N. S.) 217; 3 Trans. App. 169; 3 Keyes, 596; 85 How. Pr. 118; 40 Barb. 597; 57 Barb. 535; 85 Cal. 75; 5 Abb. Pr. (N. S.) 220; 55 Barb. 167; 6 Abb. Pr. (N. S.) 270; 3 Daly, 54; 2 Brews. 825; 1 Wilson, 68; 18 Wallace, 825; 24 La. An. 99; 51 N. Y. 194; 1 Holmes, 195.

Brown v. Mercer, 37 N. Y. Superior Ct. (5 J. & S.) 265.

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Burgess v. Burgess, 3 De G. M. & G. 896; S. C., 17 Jurist, 292; S. C., 22 L. J. R. (N. S.) Ch. 675; S. C., 17 Eng. L. & Eq. 257; *cited*, 18 Jurist, 10; 23 Eng. L. & Eq. 57; 23 Eng. L. & Eq. 288; 23 L. J. R. (N. S.) Ch. 255; 18 How. Pr. 67; 28 How. Pr. 207; 35 How. Pr. 118; 57 Barb. 534; *criticised*, 37 L. J. R. (N. S.) Ch. 848; *cited*, 5 Abb. Pr. (N. S.) 220; 3 Daly, 54; 1 Hun, 373; 3 T. & C. 551; 62 N. Y. 433.

Burgess v. Hately, 26 Beav. 249.

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

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Burnett v. Phalon, 12 Mo. L. R. 220; *cited*, 7 Bosw. 220; *affirmed*, 9 Bosw. 193.

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Burnett v. Phalon, 1 Abb. Ct. of App. Dec. 267; S. C., 5 Abb. Pr. (N. S.) 212; S. C., 3 Transcript Ap. 167; S. C., 3 Keyes, 594; *affirming*, S. C., 9 Bosw. 193; *cited*, 18 Abb. Pr. (N. S.) 899; 48 N. Y. 376; 13 Abb. Pr. (N. S.) 891; S. C., *before* 12 Abb. Pr. 186; S. C., 21 How. Pr. 100; S. C., *before* 11 Abb. Pr. 157; S. C., 19 How. Pr. 530.

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Bury v. Bedford, 9 Jurist (N. S.) 956; S. C., 32 L. J. R. (N. S.) Ch. 741; S. C., 11 W. R. 978; S. C., 8 L. T. R. (N. S.) 847; (S. C., *before* 1 New, 5); *cited*, 1 H. & M. 284; *reversed*, 10 L. T. R. (N. S.) 470; S. C., 33 L. J. R. (N. S.) Ch. 465; S. C., 10 Jurist, (N. S.) 503; S. C., 4 New R. 180; S. C., 12 W. R. 726; *reversal cited* 111 Mass. 242; *cited*, 61 N. Y. 231.

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

- Byron, Lord v. Johnston, 2 Mer. 20; *cited*, 12 Jurist, 149; 17 L. J. R. (N. S.) Ch. 144.
- Canal Company v. Clark. See Delaware and Hudson Canal Co. v. Clark, *infra*.
- Candee v. Deere, 54 Ill. 439; *cited*, 1 Dillon, 332; 3 T. & C. 554; 5 Daly, 287.
- Canham v. Jones, 2 V. & B. 218; *cited*, 4 McLean, 518; 2 Sand. 611; 2 R. I. 570; 9 Hare, 258; 2 Abb. Pr. 326; 4 E. D. Smith, 392; 4 Abb. Pr. 147; 13 How. Pr. 388; 4 New, 478; 5 Phila. 465; 5 Am. Law. Reg. (N. S.) 591; 54 Ill. 466; 6 Hun, 108.
- Carmichael v. Latimer, *unreported*.
- Cartier v. Carlile, 31 Beav. 292; S. C., 8 Jurist (N. S.) 183; *cited*, 37 Conn. 295.
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Spottiswoode v. Clarke, 10 Jurist, 1048; *cited*, 2 Abb. Pr. 324; 4 E. D. Smith, 390; 4 Abb. Pr. 101; 4 Phila. 141; 7 Bosw. 230; 4 Robt. 610; 2 Brews. 310; 40 Cal. 599.

Standinger v. Standinger, 19 Leg. Int. 85.

The State of Missouri v. Gibbs, 50 Mo. 133.

Stephens v. De Conto, 4 Abb. Pr. (N. S.) 47; S. C., 7 Robt. 848.

Ex parte Stephens, 24 W. R. 819; S. C., 24 W. R. 903; S. C., 46 L. J. R. (N. S.) Ch. 46; S. C., 3 Eng. L. R. Ch. Div. 659.

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

Stetson v. Winsor, 9 Phila. 513.

Stevens v. Paine, 18 L. T. R. (N. S.) 600.

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

Stokes v. Landgraff, 17 Barb. 608; *cited*, 12 Mo. L. R. 224; 18 How. Pr. 67; 7 Bosw. 220; 9 Bosw. 199; 5 Phila. 465; 5 Am. Law Reg. (N. S.) 594; 47 Barb. 463; 1 Abb. Ct. of App. Dec. 270; 5 Abb. Pr. (N. S.) 217; 3 Trans. App. 169; 3 Keyes, 596; 49 Barb. 591; 57 Barb. 534; 35 Cal. 64; 44 Missouri, 176; 2 Brews. 317; 7 Phila. 255; 2 Mich. N. P. 624; 54 Ill. 405; 6 Lans. 160; 13 Abb. Pr. (N. S.) 401; 24 La. An. 99; 45 Cal. 481; 59 N. Y. 385.

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

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

Swift v. Dey, 4 Robt. 611.

Sykes v. Sykes, 3 B. & C. 541; S. C., 5 Dowl. & Ryl. 202; *cited*, 19 Pick. 216; 2 Sand. Ch. 595; 4 McLean, 518; 13 Ir. Eq. 486; 18 Jurist, 9; 23 Eng. L. & Eq. 54; 11 Hare, 84; 24 L. J. R. (N. S.) Ch. 634; 1 K. & J. 515; 2 K. & J. 128; 3 K. & J. 431; 28 L. J. R. (N. S.) Ch. 61; 7 Bosw. 225; L. R. 1 Eq. 302; 50 Barb. 242; 2 Brews. 325; 18 W. R. 943; 2 Brews. 349; L. R. 7 Ch. 630; 41 L. J. R. (N. S.) Ch. 633; 27 L. T. R. (N. S.) 227; 1 Hun, 372; 3 T. & C. 550; 22 W. R. 766; 63 N. Y. 433; 45 L. J. R. (N. S.) Ch. 498; 34 L. T. R. (N. S.) 865.

Talcott v. Moore, 13 N. Y. Supreme Ct. (6 Hun) 100.

- Taylor v. Carpenter**, 11 Paige, 292; S. C., 2 Sand. Ch. 603; *cited*, 2 Sand. Ch. 505; S. C., *affirmed*, 2 Sand. Ch. 612; *cited*, 2 Sand. Ch. 625; 2 Barb. Ch. 101; 17 Barb. 609; 2 Abb. Pr. 322; 3 Blatch. C. C. 448; 23 Barb. 609; 2 Bosw. 1; 12 Mo. L. R. 223; 4 Phila. 141; 7 Bosw. 230; 9 Bosw. 108; 47 Barb. 463; 1 Abb. Ct. of App. Dec. 270; 5 Abb. Pr. (N. S.) 217; 3 Trans. App. 169; 3 Keyes, 596; 49 Barb. 595; 36 How. Pr. 36; 2 Daly, 315; 35 Cal. 75; Deady, 616; 13 Abb. Pr. (N. S.) 401; 56 Missouri, 134; 49 How. Pr. 7.
- Taylor v. Carpenter**, 3 Story, 458; *cited*, 2 Sand. Ch. 596; 4 Phila. 141; 7 Bosw. 230; 29 Cal. 296; 49 Barb. 596; 44 Missouri, 175.
- Taylor v. Carpenter**, 2 Wood. & M. 1; *cited*, 44 Missouri, 175; 1 Dillon, 332; 56 Missouri, 134; 4 Am. Law T. R. (N. S.) 181.
- Taylor v. Gillies**, 59 N. Y. 331; *affirming* S. C., 5 Daly, 285.
- Taylor v. Taylor**, 23 Eng. L. & Eq. 281; S. C., 23 L. J. R. (N. S.) Ch. 255; *cited*, 49 Barb. 596; 3 T. & C. 552.
- Thomson v. Winchester**, 19 Pick. 214; *cited*, 7 Bosw. 229; 5 Am. Law Reg. (N. S.) 591; 54 Ill. 466.
- Tonge v. Ward**, 21 L. T. R. (N. S.) 480.
- Town v. Stetson**, 5 Abb. Pr. (N. S.) 218; *affirmed*, 3 Daly, 53.
- Tucker v. Turpin**, 2 J. & H. 139; S. C., 30 L. J. R. (N. S.) Ch. 495; S. C., 7 Jurist N. S. 673; S. C., 4 L. T. R. (N. S.) 637; *cited*, 11 W. R. 746; 11 W. R. 933; 32 L. J. R. (N. S.) Ch. 727; 8 L. T. R. (N. S.) 831.
- The Tucker Manufacturing Company v. Boyington**, 9 Off. Gaz. (U. S. Pat. Office) 455.
- Upmann v. Elkan**, 40 L. J. R. (N. S.) Ch. 475; S. C., L. R. 12 Eq. 140; S. C., 19 W. R. 867; S. C., *affirmed*, 20 W. R. 131; S. C., 25 L. T. R. (N. S.) 813; S. C., L. R. 7 Ch. 130; S. C., 41 L. J. R. (N. S.) Ch. 246.
- Ex parte* Uzielli, 33 Beav. 642; S. C., 10 Jurist, 6; S. C., 12 W. R. 198; S. C., 33 L. J. R. (N. S.) Ch. 371.
- Walcott v. Walker**, 7 Vesey Jr. 1; *cited*, 2 Mer. 439.
- Walton v. Crowley**, 3 Blatch. C. C. 440; *cited*, 4 Abb. Pr. (N. S.) 415; 36 How. Pr. 16; 1 Dillon, 332; 61 N. Y. 235; 49 How. Pr. 7.
- Webster v. Webster**, 3 Swanst. 490; *cited*, 1 N. R. 545; 9 Jurist (N. S.) 485; 8 L. T. R. (N. S.) 228; 32 L. J. R. (N. S.) Ch. 551; 11 W. R. 523; 33 L. J. R. (N. S.) Ch. 200; 12 W. R.

- 289; 9 L. T. R. (N. S.) 559; 10 Jurist (N. S.) 81; 2 Brews. 833.
- Weed v. Peterson, 13 Abb. Pr. (N. S.) 178.
- Welch v. Knott, 4 K. & J. 747; *cited*, 33 L. J. R. (N. S.) Ch. 200; 13 W. R. 289; 9 L. T. R. (N. S.) 559; 10 Jurist (N. S.) 81.
- Weston v. Ketcham, 39 Superior Ct. R. 54; see S. C., 51 How. Pr. 455.
- The Wheeler and Wilson Manufacturing Company v. Shakespear, 39 L. J. R. (N. S.) Ch. 36; *disapproved*, 45 Scottish Jurist, 206.
- Wilder v. Wilder, *cited*, 2 Sawyer, 89.
- Williams v. Johnson, 2 Bosw. 1; *cited*, 7 Bosw. 229; 25 How. Pr. 366; 2 Abb. Pr. (N. S.) 462; 1 Abb. Ct. of App. Dec. 270; 5 Abb. Pr. (N. S.) 217; 3 Trans. App. 169; 3 Keyes, 596; 49 Barb. 595; 35 Cal. 75; 2 Brews. 329; 24 La. An. 99; 45 Cal. 481; 14 Abb. Pr. (N. S.) 212; 58 N. Y. 230; 49 How. Pr. 10.
- Williams v. Osborne, 13 L. T. R. N. S. 498.
- Williams v. Spence, 25 How. Pr. 366; *cited*, 49 Barb. 595; 49 How. Pr. 10.
- Winsor v. Clyde, 9 Phila. 513.
- Wolfe v. Barnett, 24 La. An. 97.
- Wolfe v. Burke, 7 Lans. 151; *cited*, 1 Hun, 375; 3 T. & C. 553. *reversed*, 56 N. Y. 115.
- Wolfe v. Goulard, 18 How. Pr. 64; *cited*, 12 Abb. Pr. 240; 5 Phila. 466; 28 How. Pr. 207; 47 Barb. 463; 1 Abb. Ct. of App. Dec. 270; 5 Abb. Pr. (N. S.) 217; 3 Trans. App. 169; 3 Keyes, 596; 35 How. Pr. 113; 57 Barb. 531; 4 Abb. Pr. (N. S.) 8; 35 How. Pr. 79; 35 Cal. 75; 5 Abb. Pr. (N. S.) 220; 3 Daly, 54; 13 Abb. Pr. (N. S.) 390; 5 Am. L. T. R. 91; 15 Abb. Pr. (N. S.) 2; 1 T. & C. 628; 46 How. Pr. 158; 49 How. Pr. 8.
- Woods v. Sands, *unreported*.
- Woodward v. Lazar, 21 Cal. 448; *cited*, 12 Abb. Pr. (N. S.) 98.
- Woolam v. Ratcliff, 1 H. & M. 259; *cited*, 22 W. R. 456; 30 L. T. R. (N. S.) 296.
- Wotherspoon v. Currie, 18 W. R. 562; S. C., 22 L. T. R. (N. S.) 260; *cited*, 2 Brews. 338; S. C., *reversed*, 23 L. T. R. (N. S.) 443; S. C., 18 W. R. 942; *reversal cited*, 54 Ill. 464; S. C., *affirmed*, L. R. 5 E. & I. App. 508; S. C., 42 L. J. Ch. (N. S.) 130; S. C., 27 L. T. R. (N. S.) 393; *affirmation cited*, 27 L. T. R. (N. S.) 55; 41 L. J. R. (N. S.) Ch. 756; L. R. 14 Eq. 553; 51 N. Y. 197; 15 Abb. Pr. (N. S.) 4; 1 T. & C. 629; 46 How. Pr.

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

Wotherspoon v. Gray, 36 Scottish Jurist, 24.

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

DIGEST
OF
TRADEMARK DECISIONS.*

GENERAL PRINCIPLES AND DEFINITIONS.

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

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

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

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

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

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

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

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

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

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the latter. 1849, *U. S. Circuit Court, Indiana, Coffeen v. Brunton*, 4 *McLean*, 516.

§ 9. If the article sold by the defendant is not only different from the complainant's article, but greatly inferior to it, the effect must be to destroy, in the market, the value of the plaintiff's article. And this is an injury for which a court of law can not give adequate compensation. However valuable the plaintiff's invention may be, yet if it be discredited by a worthless article it would be impossible, in any reasonable time, to restore the public confidence in the genuine article. In this consists the injury; and the fraud arises from the false representations that the article is the same. 1849, *Coffeen v. Brunton*, *ibid.*

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

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

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

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peals to the justice of the court can have a title to relief. 1849, *Amoskeag Manufacturing Co. v. Spear*, *ibid.*

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

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

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

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

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

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

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injunction. 1864, Lord Ch. WESTBURY, *Hall v. Barrows*, 10 *Jurist N. S.* 55; S. C., 12 *Weekly R.* 322; S. C., 9 *Law Times R. N. S.* 561; S. C., 33 *Law J. R. (N. S.) Ch.* 204.

§ 17. The principles applicable to trademark cases are shortly and clearly laid down by Lord KINGSDOWN in the case of the American Cloth Company where he says, "The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot therefore, in the language of Lord LANGDALE, in the case of *Perry v. Truefitt*, 'be allowed to use names, marks, letters or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.'" The same rule would apply to tradesmen not being manufacturers. 1865, Vice Ch. KINDERSLEY, *Glenny v. Smith*, 2 *Dr. and Sm.* 476; S. C., 11 *Jurist N. S.* 964; S. C., 13 *L. T. R. N. S.* 11; S. C., 6 *New R.* 363.

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

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

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

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

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

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

§ 23. The right to the use of a trademark is not an abstract right to which title can be acquired. It is only when such use is attached to or connected with some particular thing to which it is affixed as a designation of individual right in particular property, that the law will interpose to restrain its use by another. *Ibid.* And see §§ 126, 127, 148, 149, 152.

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

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

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

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

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

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

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

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

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

§ 31. A trademark is properly defined by UPTON

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

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

14 GENERAL PRINCIPLES AND DEFINITIONS.

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

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

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

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

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

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

See also TRADEMARK.

ABANDONMENT.

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

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

See also ACQUIESCENCE; LACHES; LIMITATION; LICENSE.

ABATEMENT.

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

ACCOUNT.

See DAMAGES.

ACQUIESCENCE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 66. Injunction granted to restrain the use of the plaintiff's trademark by the defendants, though the scienter was not proved, but an account of profits refused on the ground of delay by the plaintiffs in commencing the suit. 1865, *Vice Ch. Wood's Ct.*, *Harrison v. Taylor*, 11 *Jurist (N. S.)* 408; *S. C.*, 12 *Law Times (N. S.)* 939; approved and followed in *Amoskeag Manufacturing Co. v. Garner*, *infra*, § 77.

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

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

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

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

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

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

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

§ 72. An injunction, although the facts in support of it are sufficient, will not be granted unless the application is made speedily. An introductory application refused by reason of a delay of twenty months. 1871, Vice Ch. Bacon's Ct., *Isaacson v. Thompson*, 20 *Weekly R.* 193.

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

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

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

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

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

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

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

ACQUISITION OF TRADEMARKS.

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

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

ufacture, are entitled to be protected in the use of a trademark, although they do not manufacture the goods to which it is applied. 1846, LOTT, Senator, *N. Y. Ct. of Errors*, Taylor v. Carpenter, 11 *Paige*, 292; S. C., 2 *Sandf. Ch.* 603.

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

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

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

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

having adapted original words to an old American air which was re-arranged for them, gave to the song so composed the name of "Minnie," and procured it to be sung by Madame Anna Thillon, a popular singer, at M. Julian's concerts in London; and when it had by that means become a favorite song, they published it with a title page, containing a picture of the singer who had brought the song into notice, and the words "Minnie, sung by Madame Anna Thillon and Miss Dolby, at Julian's concerts, written by George Linley," &c. *Held*, that the publishers had by these means obtained a right of property in that name and description of their song which a court of equity would restrain any person from infringing. 1855, *Vice Ch. Wood's Cl.*, Chappell v. Sheard, 2 *Kay & J.* 117.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See, also, ASSIGNMENT; PARTNERSHIP.

ACTION (CAUSE OF).

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

ADMINISTRATORS AND EXECUTORS.

See §§ 50, 71, 85, 99, 601, 791, 904.

ADOPTION.

See ACQUISITION.

ADVERTISEMENTS.

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

AGENT.

See §§ 224, 472, 768, 873.

ALIENATION.

See ASSIGNMENT.

ALIENS.

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

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

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

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

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

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

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

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

APPROPRIATION.

See ACQUISITION.

ASSIGNMENT.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 132. *Semble*, per Lord CRANWORTH. — The right to a trademark is a right closely resembling, though not exactly the same as, copyright. The right which a manufacturer has in his trademark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it was affixed was manufactured. The right to a trademark may, in general, treating it as property, or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser. Difficulties, however, may arise where the trademark consists merely of the name of the manufacturer. When he dies, those who succeed him, though they may not bear the same name, yet ordinarily continue to use the original name as a trademark, and they would be protected against any infringement of the exclusive right to that mark. They would be so protected, because, according to the usages of trade, they would be understood as meaning no more by the use of their predecessor's name than that they were carrying on the manufacture formerly carried on by him. Nor would the case be necessarily different if, instead of passing into other hands by devolution of law, the manufactory were sold and assigned to a purchaser. The question in every such case must be, whether the purchaser, in continuing the use of the original trademark would, according to the ordinary usages of trade, be understood as saying more than that he was carrying on the same

business as had been formerly carried on by the person whose name constituted the trademark. In such a case there is nothing to make it improper for the purchaser to use the old trademark, as the mark would, in such a case, indicate only that the goods so marked were made at the manufactory which he had purchased. *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 153. The plaintiff had established, and acquired

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

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

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

ASSOCIATION.

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

ATTACHMENT.

See CONTEMPT.

AUCTIONEER.

See VENDOR.

BANKRUPTCY.

See §§ 121, 135, 142, 152.

BARRELS.

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

BOOKS.

See PUBLICATIONS.

BOTTLES.

Peculiar shape of, not a valid trademark.

See § 985.

BOXING.

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

BUILDINGS (NAMES OF).

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

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

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

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

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

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

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

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

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

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

BUSINESS SIGNS.

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

CAUSE OF ACTION.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See also §§ 821, 826.

CIRCULARS.

See PUBLICATIONS (ADVERTISEMENTS).

CITY—NAME OF.

When a valid trademark.

See NAME (GEOGRAPHICAL NAME).

COACHES.

Names of, when protected.

See VEHICLES.

COLORABLE INFRINGEMENT.

What constitutes a colorable infringement. See **IMITATION.**

COMMON USE.

See **WORDS ; ACQUIESCENCE.**

CONTEMPT.

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

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

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

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

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

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

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

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

See also § 611.

COPYRIGHT.

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

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

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

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

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

COSTS.

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

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

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

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

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

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

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

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

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

§ 216. Where an offer is made by the defendant

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

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

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

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

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

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

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

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

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

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

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

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

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

CRIMES.

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

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

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

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

See § 962.

DAMAGES.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 249. On an assessment of damages, by reason of an infringement of a trademark, the referee found that plaintiff's damages were equal to the profits they could have made from the manufacture and sale of the same number of articles which defendant had sold with the simulated trademark thereon. *Held*, on appeal, that there was no error in said assessment. 1875, *N. Y. Supreme Ct. G. T., First Dept.*, Dec. 30, *Faber v. Hovey*, *unreported*.

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

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

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

See also DISCOVERY.

DECEPTION.

See EVIDENCE ; INTENT ; and IMITATION.

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

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

DEFENSES.

I.—Misrepresentation on the part of the plaintiff.

See MISREPRESENTATION.

II.—Laches, license, acquiescence, limitation.

See those titles.

III.—Prior use.

See PRIOR USE.

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

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

See WORDS ; NAME.

V.—What are not good defenses.

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

See ALIENS.

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

See QUALITY.

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

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

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

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

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

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

DEFINITIONS.

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

DELAY.

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

DEMURRER.

See PLEADING.

DESCRIPTIVE NAME.

See WORDS ; NAME (DESCRIPTIVE NAME).

DEVICES.

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

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

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

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

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

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

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

DISCOVERY.

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

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

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

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

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

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

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

See also, § 224.

EMBLEM.

See DEVICES, §§ 260-269.

EQUALITY.

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

EVIDENCE.

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

§ 281. In an action on the case for the violation of a trademark it was proved that the plaintiff had informed the defendants that he considered the mark used by them to be an imitation of his own, and required them to desist from using it. The defendants, in their reply, denied that their mark either was or was intended to be an imitation of the plaintiff's, and they continued to use it. *Held*, that this was proper evidence for the jury as to the intention of the defendants in persisting to use the mark, but that it made no difference in point of law in their right to use it. 1842, *Ct. of Com. Pleas*, *Crawshay v. Thompson*, 4 *M. & Y.* 357; *S. C.*, 11 *L. J. R. C. P.* 501.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXCLUSIVE RIGHT.

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

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

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

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

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

§ 304. Although there is no exclusive ownership of the symbols which constitute a trademark apart from the use or application of them, yet the exclusive right to use such mark in connection with a vendible commodity is rightly called property, and the jurisdiction of the court to restrain the infringement of a trademark is founded upon the invasion of such property, and not upon the fraud committed upon the public. The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trademark, as in the case of the violation of any other right of property. First, the plaintiff must prove that he has an exclusive right to use some particular mark or symbol in connection with some manufacture or vendible commodity; and secondly, that this mark or symbol has been adopted, or is used by the defendant so as to prejudice the plaintiff's custom, and injure him in his trade or business.

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

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

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

§ 306. The court of chancery has taken upon itself to protect a man in the use of a certain trade-mark as applied to a particular description of article. He has no property in that mark *per se*, any more than in any other fanciful denomination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them, the court has said that no one shall be at liberty to defraud that man by using that mark and passing off goods of his manufacture as being the goods of the owner of that mark. 1866, V. C. WOOD, in *Ainsworth v. Walmsley*, *Law R.* 1 *Eq.* 518; S. C., 12 *Jurist (N. S.)* 205; S. C., 14 *Weekly R.* 363; S. C., 14 *Law Times (N. S.)* 220; S. C., 35 *Law Jour. (N. S.) Chanc.* 352.

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

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

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

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

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

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

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

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

See also, ORIGINAL OWNERSHIP, and WORDS.

EXECUTORS.

See ADMINISTRATORS.

FALSEHOOD.

See MISREPRESENTATION, §§ 530-579.

FANCY NAME.

See NAME (FANCY NAME), § 680.

FIGURES.

See NUMERALS, §§ 740-749.

FIRM NAME.

See PARTNERSHIP, §§ 780-819.

FOREIGNERS.

See ALIENS, §§ 110-116.

FOREIGN WORDS.

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

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

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

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

FRAUD.

Fraud by the owner of a trademark.

See MISREPRESENTATION, §§ 530–579.

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

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

GENERAL ASSIGNMENT.

See §§ 121, 135, 142.

GENERIC TERM.

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

GEOGRAPHICAL NAME.

See NAME, § 705, et seq.

HOTELS, NAME OF.


See BUILDINGS, § 160, et seq.

IMITATION.


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


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

by the defendant. The plaintiffs served a notice on the defendant, intimating that an injunction would be applied for, and after such notice the defendant obliterated from the back of his omnibus the word "Company," and painted on each side of his omnibus, over the words "Conveyance Company," the word "Original," and between the words "Conveyance" and "Company" the word "for" in very small and almost invisible characters. The Master of the Rolls held that the defendant intended to induce the public to believe that his omnibuses were those of the plaintiffs. That it was not to be said that the plaintiffs had any exclusive right to the words "Conveyance Company," or "London Conveyance Company," or any other words; but that plaintiffs had a right to call upon the court to restrain the defendant from fraudulently using precisely the same words and devices which they had taken for the purpose of distinguishing their property, and thereby depriving them of their profits of their business by attracting custom on the false representation that carriages, really the defendant's, belonged to the plaintiffs. The defendant was enjoined from using on his omnibus the words "London Conveyance," or "Original Conveyance for Company," or any other names painted thereon, in such manner as to be a colorable imitation of the words, devices, &c. on plaintiff's omnibuses. 1836, *Rolls Ct.*, *Knott v. Morgan*, 2 *Keen*, 213.

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

tion in the Turkish market, where the mark in question was generally known as "the comb mark." In the year 1837, the defendants received from a Turkish merchant in London, an order for a quantity of iron to be stamped W, with a little O in an

oval, thus:  and to be shipped by a certain vessel. The order was executed, but the stamp

was made W, with a dot in an oval, thus: 

The defendants, in execution of other orders, and for the Turkish market, continued to supply iron stamped with the foregoing letters, which were afterwards varied, according to or-

ders, to W, with a large O in an oval, thus: 

The plaintiff, in 1837 and 1839, remonstrated with, and complained to the defendants, but they did not discontinue the use of the stamp, but used it only in the execution of foreign orders. Other manufacturers had used somewhat similar marks, having been ordered to do so for the Turkish market. There was no evidence to show that any person had been actually deceived by the mark used by the defendants; but one witness stated that possibly, in Asia Minor, it might be taken for the plaintiff's mark. The jury found for the defendants. 1842, *Ct. Com. Pleas*, *Crawshay v. Thompson*, 4 *M. and G.* 357; S. C., 11 *Law Jour. (C. P.)* 301.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

simply colorable, and the resemblances such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance of primary importance for the court to consider, because, if the court find that there is no reason for the resemblance, except for the purpose of misleading, it will infer that the resemblance was adopted for the purpose of misleading. 1854, V. C. Wood's Court, *Taylor v. Taylor*, 23 *Eng. Law and Eq. R.* 281; S. C., 23 *Law J. R. (N. S.) Ch.* 255.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 364. The plaintiffs manufactured and sold a

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

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

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

mustard and obtained an award of "honorable mention," of which they afterwards added a notice on their labels. In May, 1863, the defendants affixed to their canisters and tins of mustard, labels containing as a trademark, the figure of an ox, in form and attitude like that used by the plaintiffs, but without the word "Durham," and with the name "Taylor," substituted for "Harrison." The defendants' label also contained the words "First Prize and Medal Ox," printed above the figure of the ox, and below it the words, "In any class exhibited 1862." The defendants deposed that they knew nothing of the plaintiffs' trademark, or of his "honorable mention" aforesaid, until 1863, and that they (the defendants) had conceived the idea of their trademark from seeing a prize ox at the cattle show at Islington. The plaintiffs proved that their mustard was asked for as the "Ox Mustard," which the court said was not contradicted by the evidence that persons in the trade relied on the name, and not on the mark. Injunction granted. 1865, before V. C. WOOD, *Harrison v. Taylor*, 11 *Jurist N. S.* 408; S. C., 12 *Law Times (N. S.)* 339.

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

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

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

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

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

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

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

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

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

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

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

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

§ 375. To entitle the owner of a trademark to an injunction to prevent its use by another person, there must be in the copy such a general resemblance of the forms, words and symbols, in the original, as to mislead the public. A sufficient distinctive individuality must be presented, so as to secure for the person himself the benefit of that deception which general resemblance is calculated to produce. The court will not interfere when ordinary attention will enable purchasers to discriminate; and it must also appear that the ordinary mass of purchasers, paying the usual attention in buying the article in question would be deceived. Where the complainant stamped the jars of his manufacture with the words "The Hero" and "The

"Hero-
Heroine," and sometimes the _____, and the de-
ine,"

fendant lettered the jars of his manufacture as follows: _____, the letters "ine" underneath the
ine,"

word "Hero" being so faint as to be practically illegible, and proposed to manufacture jars with the name "The Heroine" blown on them, it was

held that the use of the word "Heroine" or ^{"Hero-}

_{ine"}

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

quired an exclusive right to use, if the resemblance is such as not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trademark belongs. Lord CHELMSFORD, *House of Lords*, 1872, *Wotherspoon v. Currie*, 27 *Law Times R. (N. S.)* 393; S. C., *L. R. 5 Eng. & Ir. Ap.* 508; S. C., 42 *Law Jour. R. (N. S.) Ch.* 130 (containing pictures of the labels in question).

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

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

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

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

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

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

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

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

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

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

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

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

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

IMPOSITION.

See MISREPRESENTATION.

INFANCY.

See § 218.

INFRINGEMENT.

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

INITIALS.

See LETTERS.

INJUNCTION.

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

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

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

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

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

§ 414. The rule is fully settled and is recognized

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

See also NAME ; IMITATION.

INTENT.

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

son's property, and under the belief that they were mere technical terms. 1836, Lord Ch. COTTENHAM, *Millington v. Fox*, 3 *Mylne & Cr.* 338.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 467. The jurisdiction of the court of chancery in the protection of trademarks rests on property, and fraud in the defendant is not necessary for the exercise of that jurisdiction. The plaintiff is entitled to relief, even if the defendant can prove that he acted innocently and without any knowledge of the right of the defendant. *Obiter.* 1864, Lord Ch. WESTBURY, *Hall v. Barrows*, 9 *L. T. R.* (N. S.) 56; S. C., 12 *Weekly R.* 322; S. C., 10 *Jurist* (N. S.) 55; S. C., 33 *Law J. R.* (N. S.) *Ch.* 204.

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